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by

**Talina Drabsch**

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# **Reducing the Risk of Recidivism**

**by**

**Talina Drabsch**

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## EXECUTIVE SUMMARY

Determining the proper response to the reoffending behaviour of criminals has plagued governments, criminologists, the judiciary and the community for some time. A precise figure for the rate of recidivism cannot be ascertained, as much crime goes unreported and the courts do not convict all offenders for various reasons including lack of evidence. Rates of recidivism also depend on what measures are used in terms of the time frame considered and whether one is concerned about particular offences, rearrest rates or reimprisonment. Nonetheless, approximately 60% of those in custody in Australia have previously served a period of imprisonment. Recidivism is accordingly an important subject for study.

Section two (pp 3-14) notes the findings of a number of recent Australian studies of recidivism. A number of predictors of recidivism emerge from these studies, with reoffending rates seemingly influenced by age, gender, the number of prior custodial episodes and Indigenous status. The studies examined vary in terms of their scope from the reoffending behaviour of parolees and sex offenders to a more general analysis of those serving a custodial sentence. The results of studies specific to the reoffending behaviour of juveniles are also reviewed.

There are many factors that contribute to the reoffending behaviour of an individual. Section three (pp 15-17) discusses, amongst other things, the effect education, employment, housing and family networks have on the risk of recidivism. Many prisoners have poor education and employment histories, experience greater rates of mental illness and bad physical health, and have issues associated with drug and alcohol misuse.

Various responses are possible to the issue of recidivism. Section four (pp 18-21) discusses some of the approaches taken in the past. Legislation targeting habitual criminals that provided for their detention and control was passed in New South Wales at the start of the twentieth century. The *Habitual Criminals Act 1957* (NSW) is still in force in NSW despite the recommendation of the NSW Law Reform Commission that it be repealed. Until recently, its provisions had not been utilised for some time. However, a matter concerning its application came before the High Court in 2005. Section four also discusses the various phases through which the control of crime has passed, from growth in the use of prisons, emphasis on rehabilitation, to a growing dependence on the use of incapacitation for serious offenders. This appears to have established a climate for an increase in the use of preventive detention techniques.

Many strategies have been developed with the aim of reducing recidivism. Section five (pp 22-60) provides information on just a sample of the options available. It notes the purposes of sentencing as expressed in the *Crimes (Sentencing Procedure) Act 1999* (NSW) and how various initiatives fit within this framework. Information is provided on the approach taken by the Department of Corrective Services and the Department of Juvenile Justice in New South Wales. Examples of strategies that attempt to physically prevent offenders from reoffending as well as deter them from criminal behaviour are included. Diversionary interventions and rehabilitative schemes are discussed, including information on responses to juvenile offenders, drug issues, and sex offenders. Some of these schemes operate before matters reach court or trial; other strategies are designed for those currently in prison.

In some circumstances, incapacitation is used as a means of preventing an offender from reoffending. A particular issue that has emerged is what to do with serious offenders once their sentence has concluded. Some believe that the risk posed to the community by the possibility of these offenders reoffending is sufficient to warrant their continued detention. Others stress the difficulty of accurately predicting the likelihood of reoffending and warn against unnecessarily impinging on an offender's liberty. The legislative reactions to this and judicial responses to preventive detention legislation are analysed in section five.

There are a number of benefits to having offenders serve at least part of their sentence in the community. Community corrections schemes, notably the role of parole, are also discussed in section five. The need to assist ex-prisoners with reintegration, thus enabling many to become productive members of the community for the first time, is highlighted.



## 1 INTRODUCTION

The most effective means of preventing crime is something that is hotly debated by politicians, legal professionals, criminologists and the general public. Within that framework, however, is a particular concern with reducing crime by known offenders – what is the most effective way of stopping an offender from reoffending?

Various terms are used to describe recidivists or repeat offenders including habitual offenders, and professional or career criminals.<sup>1</sup> Recidivism can be defined in many ways. It can be as simple as reoffending at the basic level, that is, a person commits a crime and some time later he or she commits another crime; it does not matter if he or she is caught, arrested, convicted or imprisoned. Nonetheless, many studies of recidivism are concerned with measuring the reoffending rates of prisoners once released into the community. The Productivity Commission in its *Report on Government Services 2006* found that more than 38% of Australian prisoners who were released in 2002-03 returned to prison within two years.<sup>2</sup> In NSW, 47% of prisoners return to some form of corrective services within two years of being released, with 44% subjected to a further term of imprisonment.<sup>3</sup> The figures are even higher when the time frame is not limited. As at 30 June 2005, 60% of prisoners in custody in Australia had previously served a sentence in an adult prison.<sup>4</sup> The rate at which offenders return to prison can be influenced by a number of factors including: increases in the number of police; changes in sentencing legislation; improved monitoring and supervision of offenders on parole; and the quality of interactions and integration between offenders and the community.<sup>5</sup> These factors need to be considered when the reoffending rates of different years are compared.

Other studies measure the rate of recidivism associated with particular types of crime and accordingly measure the period between the first criminal act and the second time a similar crime was committed. However, the point at which the second crime is noted can vary. The measure used thus needs to be clear in discussions of recidivism – is it rearrest, reconviction, reimprisonment or something else? The time frame considered is also important in any examination of recidivism. Obviously, the longer the time frame, the greater the likelihood of a person having reoffended. It should also be borne in mind that the majority of crime is not reported. There may thus be many more recidivists in the community than estimated – unless they are caught for the crime, they are unlikely to appear in the statistics. Consequently, particular caution needs to be exercised when

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<sup>1</sup> Simon J, 'Criminology and the recidivist', in Shichor D and Sechrest D (eds), *Three Strikes and You're Out: Vengeance as Public Policy*, Sage Publications, Thousand Oaks, 1996, p 26.

<sup>2</sup> Steering Committee for the Review of Government Service Provision, *Report on Government Services 2006*, Productivity Commission, 2006, p C 12.

<sup>3</sup> NSW Audit Office, *Performance Audit: Prisoner Rehabilitation – Department of Corrective Services*, 2006, p 14.

<sup>4</sup> Australian Bureau of Statistics, *Prisoners in Australia, 2005*, 4517.0.

<sup>5</sup> NSW Audit Office, above n 3, p 7.

considering the various statistics on recidivism; an awareness of the period of time studied and what criminal acts are counted is necessary.

This paper notes the results of recent Australian studies of recidivism and what they reveal about rates of reoffending amongst adult and juvenile offenders. Some of the common predictors of recidivism are highlighted. The factors that contribute to reoffending as well as the various ways in which the criminal justice system has responded, both at present and in the past, are examined. Finally, an overview is provided of a number of the strategies that have been developed in an effort to reduce reoffending. This overview is not intended to be exhaustive; rather it is illustrative of the numerous initiatives that exist as part of the effort to reduce the risk of recidivism.

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## 2 WHAT HAVE STUDIES OF RECIDIVISM FOUND?

Numerous studies have examined reoffending behaviour, both in Australia and internationally. A number of predictors of future offending behaviour emerge from these studies. A correlation has generally been found between the risk of reoffending and: the number of prior custodial episodes; age (the younger the offender, the more likely he or she is to reoffend); Indigenous status; and gender (the risk of recidivism is generally greater with males). However, the findings of the studies are not unanimous and some differ on these points. This section provides an overview of the results and findings of a sample of recent Australian studies and reports regarding recidivism.

The following table is reproduced from the 2004/2005 Statistical Report by the NSW Department of Corrective Services. It shows the recidivism of inmates convicted of any offence within two years of being discharged in 2002/2003 resulting in a full time custodial sentence to be served in a NSW correctional centre. It demonstrates the difference in reoffending behaviour between those for whom the sentence for which they were discharged in 2002/03 was their first term of imprisonment and those who had been in prison on at least two occasions. Overall, 27% of those discharged in 2002/03 with no previous period of incarceration were reimprisoned. However, for those who had served time previously, the proportion was 53%. The table also shows that rates of recidivism can substantially differ between offences. Reoffending was particularly high amongst those who had originally been imprisoned for breach of a drug court order or parole, as well as for stealing/property offences and assault. Overall, recidivism was lower amongst those who had been imprisoned for making or importing drugs, sexual offences and homicide.

Most serious offence in focal episode	No prior imprisonment		Prior imprisonment		Total inmates	
	Recidivism %	Number in discharge group	Recidivism %	Number in discharge group	Recidivism %	Number in discharge group
Homicide	10%	29	35%	17	20%	46
Assault	32%	546	49%	864	43%	1410
Sexual offences	7%	123	35%	37	14%	160
Robbery	31%	288	55%	239	42%	527
Fraud	16%	108	47%	124	32%	232
Stealing/Property	40%	506	60%	1311	54%	1817
Arson/Malicious damage	22%	37	42%	43	33%	80
Driving/Traffic offences	15%	293	39%	374	29%	667
Breach of parole	n/a	n/a	59%	519	59%	519
Cancelled periodic detention	33%	9	26%	54	27%	63
Cancelled home detention	33%	12	38%	39	37%	51
Breach of CSO/Bond	20%	15	29%	28	26%	43
Breach of AVO	30%	43	50%	50	41%	93
Breach of drug court order	71%	17	83%	175	82%	192
Use/Possess drugs	7%	14	32%	22	22%	36
Sell drugs	14%	184	34%	127	22%	311
Make/Import drugs	5%	40	11%	9	6%	49
Other offences	24%	97	40%	104	32%	201
<b>Total</b>	<b>27%</b>	<b>2361</b>	<b>53%</b>	<b>4136</b>	<b>43%</b>	<b>6497</b>

Source: Corben S, *Statistical Report 2004/2005*, NSW Department of Corrective Services, November 2005, p 31.

## 2.1 General studies

### 2.1.1 Jones et al (2006)

Jones et al recently published the findings of the joint study by the NSW Bureau of Crime Statistics and Research and the Research Division of the NSW Department of Corrective Services of the risk of reoffending among parolees.<sup>6</sup> The report defined recidivism as the 're-appearance in a court for an offence that was allegedly committed subsequent to release on parole'. They found that: 23% reoffended within three months of release; 52% reoffended within a year; and 64% reoffended within two years. By 27 to 39 months after being released on parole:<sup>7</sup>

<sup>6</sup> Jones C et al, 'Risk of re-offending among parolees', *Crime and Justice Bulletin*, No 91, January 2006, p 3.

<sup>7</sup> Jones et al, above n 6.

- 68% had a finalised court appearance for committing one or more offences;
- 64% were reconvicted for committing an offence; and
- 41% were reimprisoned for offending;

However, it is not known whether these offences occurred within the parole period or subsequent to it, a point highlighted by the Hon J Spigelman, Chief Justice of the Supreme Court of New South Wales.<sup>8</sup>

Prior custodial episodes were found to influence the rate of reoffending. Whilst 43% of those with no prior custodial episodes made it through two years without reoffending, 79% of those with four or more custody episodes reoffended after 12 months. Only 9% of these offenders made it through two years without reoffending. The Bureau and the Department concluded that the following were the strongest predictors of reoffending:

- having a greater number of prior custodial episodes in the eight years prior to release.
- being younger at the time of release.
- identifying as Indigenous – whilst there is evidence that Indigenous people are more likely to be arrested for some categories of offending, the authors also pointed to ‘good evidence that the higher imprisonment rates of Indigenous offenders are not just an artefact of biases in the exercise of police discretion or the operation of the criminal justice system’.<sup>9</sup>
- having a most serious offence for robbery or another violent offence, property/deception or for breaching a justice order.
- having been issued with a parole order from a court – the authors commented that ‘prima facie it could appear that the Parole Authority is better placed than sentencing courts to assess re-offending risk’. However:

there could be something about the nature of Parole Authority-issued parole orders that makes them more effective in preventing recidivism than court-issued parole orders. For example, the length and intensity of parole supervision is likely to be much greater among parolees who receive their parole orders from the Parole Authority, given that their crimes were of sufficient seriousness to result in prison sentences greater than three years in length.<sup>10</sup>

- having one or more prior offences for using or possessing heroin, amphetamine or

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<sup>8</sup> Spigelman J, ‘Address to Parole Authorities Conference 2006’, *The Judicial Review*, 8(1) September 2006, p 15.

<sup>9</sup> Jones et al, above n 6, p 9.

<sup>10</sup> Jones et al, above 6, p 10.

cocaine in the previous eight years.

- having spent less time in custody during the custody episode.

### 2.1.2 *Lievore (2004)*

Lievore's study of recidivism amongst sexual assault offenders included a survey of international literature which indicated that rates of sexual recidivism are low compared to other types of offences, as most offenders are not reconvicted or reimprisoned for sex crimes.<sup>11</sup> It also seems clear from international literature that there is: continuity between sexual and violent offending with many having lengthy criminal histories; sex offenders reoffend at different rates according to the type of offence – incest offenders are least likely to reoffend whilst extra-familial child molesters are most likely to be reconvicted; reoffenders usually specialise in a type of victim or behaviour which influences the risk of recidivism; and most sex offenders reoffend within three years of release from custody yet the risk remains for much longer.<sup>12</sup>

Australian studies have varied in their estimation of the rate of sexual recidivism – from 2% to 16%. However, many sexual offences are not reported, with the number of offences accordingly underestimated in statistics. Nonetheless, a sizeable group continues a general criminal career. In terms of the profile of sex offenders, Lievore commented:

Overall, sex offenders are similar to the general offender population in terms of sociodemographic, psychosocial and criminal history variables. Most are young, single, white males, although Indigenous Australian men are over-represented among visible sex offenders. Sex offenders come from all sociodemographic backgrounds, but rapists are often socially, economically, educationally and occupationally disadvantaged. It is possible that the disproportionate representation of socially marginalised groups reflects their higher probability of arrest and incarceration.<sup>13</sup>

A separate profile was identified for juvenile sex offenders, of whom the following are characteristic despite the general diversity of the group:<sup>14</sup>

- tend to be males;
- overrepresentation of Aboriginals;

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<sup>11</sup> Lievore D, *Recidivism of sexual assault offenders: rates, risk factors and treatment efficacy*, A report prepared for the Office of the Status of Women by the Australian Institute of Criminology, May 2004.

<sup>12</sup> Lievore, above n 11, p 37.

<sup>13</sup> Lievore, above n 11, p 107.

<sup>14</sup> Lievore, above n 11, p 55.

- previous convictions for sexual offences;
- repeat sexual offending tends to be similar in nature; and
- substantial numbers are convicted of violent and general offences prior to, concurrent with, or subsequent to the index offence.

In terms of the risk of recidivism, Lievore identified the following as some of the risk factors:

Specific risk factors for sexual recidivism include sexual deviance, cognitive distortions, psychological maladjustment, psychopathy, antisociality, early onset of offending and, in some cases, childhood sexual and physical victimisation. A prior generalist history of offending also points to the likelihood of sexual recidivism, while a specific history of sex offending substantially increases the risk. Many rapists have versatile criminal careers and their rates of violent and general recidivism are often considerably higher than sexual recidivism. Sexual deviance is less salient than aggression for this group, which leads some authors to conclude that rapists are predominantly violent offenders who also offend sexually.<sup>15</sup>

However, she distinguishes between those risk factors deemed static (such as sex, race/ethnicity, age, marital status, criminal history, relationship to victim, and parental instability) and those factors seen as dynamic, and thus open to change with appropriate intervention.<sup>16</sup> Dynamic risk factors include: substance use and abuse; financial management skills; motivation; procriminal/antisocial attitudes; quality of personal relationships; social environment and social networks; sexual arousal patterns; and general social skills.

### **2.1.3 Ross and Guarnieri (1996)**

Ross and Guarnieri examined the recidivism patterns of 838 offenders for 7.5 years following their release from Victorian prisons between May 1985 and December 1986.<sup>17</sup> They defined a 'recidivist' as 'an offender who has previously been convicted of an offence'.<sup>18</sup> However, they noted that this definition could be broadened or narrowed depending on whether only serious offences were taken into account or whether a violation of a parole order would suffice. Ross and Guarnieri found:

- 74% were reconvicted of at least one offence.

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<sup>15</sup> Lievore, above n 11, p 107.

<sup>16</sup> Lievore, above n 11, pp 39-40.

<sup>17</sup> Ross S and Guarnieri T, *Recidivism rates in a custodial population: the influence of criminal history, offence and gender factors*, February 1996.

<sup>18</sup> Ross and Guarnieri, above n 17.

- More than a quarter were reconvicted of a further offence within three months of release, one-third were reconvicted within five months, and one half were reconvicted within one year.
- 54% were reimprisoned at least once over the seven year period.
- Male and female releasees were equally likely to be reconvicted and reimprisoned.
- Releasees who committed their first offence when aged 14 years or younger were much more likely to be reconvicted and reimprisoned than those whose criminal careers started after they were 18.
- Releasees with many prior offences were much more likely to be reconvicted and reimprisoned than those who had only a few prior convictions.
- Offenders convicted of property offences were much more likely to be reconvicted and reimprisoned than those who had been convicted of homicide.

#### **2.1.4 Thompson (1995)**

Thompson in a study for the NSW Department of Corrective Services measured the recidivism rate of those discharged in 1990/91 from a fulltime custodial episode.<sup>19</sup> Recidivists were defined as those with a conviction leading to a sentence of fulltime custody in NSW within two years of being discharged from the previous sentence. She found that overall the rate of recidivism was 35% for males and 38% for females. Recidivism was higher for:

- those with a history of imprisonment – more than three quarters of those serving a custodial sentence for the first time did not receive another custodial sentence for at least two years;
- younger people;
- those discharged at higher security classifications; and
- those who returned to custody quickly after their previous term of imprisonment.

Thompson also examined the rate of recidivism amongst different types of offences. Recidivism was relatively high for those whose most serious offence was either assault or property-related.

## **2.2 Studies of juveniles**

The criminal trajectories of juvenile offenders have been the specific subject of a number of

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<sup>19</sup>

Thompson B, *Recidivism in NSW: General Study*, NSW Department of Corrective Services, Research Publication No 31, May 1995.



studies, possibly as a result of the concern to prevent offending behaviour continuing into adult life. Whilst some have concluded that the majority of juvenile crime is of a mostly transitory or adolescent nature,<sup>20</sup> there is still a concern that for a number of juvenile offenders their first criminal act simply represents the start of a lengthy criminal career. This section outlines the main findings of some of the studies regarding the risk of recidivism amongst juvenile offenders.

### 2.2.1 *Chen et al (2005)*

Chen et al examined the transition from juvenile to adult criminal careers by investigating the reoffending behaviour of almost 5500 juveniles between the ages of 10 and 18 who appeared in the NSW Children's Court for the first time in 1995.<sup>21</sup> The criminal history of the subjects was traced until 31 December 2003. The study found:

- 68% of those who appeared in the Children's Court for the first time in 1995 reappeared in a NSW Criminal Court at least once within the next eight years. However, whilst most juveniles appearing in court reoffend, the authors stressed that a substantial minority do not.
- 43% reappeared at least once in the Children's Court and 57% reappeared at least once in an adult court.
- 23% of those that had an adult court appearance received an adult prison sentence at some stage in the eight year period – 13% of those who appeared for the first time in a Children's Court in 1995 ended up in an adult prison within eight years.
- The number of reappearances in court was significantly related to the age at which the juvenile first appeared in court. Youths aged 10 to 14 at their first appearance had significantly more court appearances over eight years.
- Males and Indigenous juveniles were more likely to appear in an adult court than females and/or non-Indigenous defendants.
- The risk of receiving a prison sentence from an adult court was higher for: male defendants; defendants whose first court appearance occurred when they were young; and defendants who appeared in the Children's Court a number of times before appearing in an adult court.
- Average number of court appearances was 3.5 over the eight year period.
- Court appearance rates were significantly higher for males, Indigenous defendants

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<sup>20</sup> See, for example, O'Connor I and Cameron M, 'Juvenile justice in Australia', in Graycar A and Grabosky P (eds) *The Cambridge Handbook of Australian Criminology*, Cambridge University Press, Cambridge, 2002, p 223.

<sup>21</sup> Chen S et al, 'The transition from juvenile to adult criminal careers', *Crime and Justice Bulletin*, No 86, May 2005.

and those whose first court appearance occurred when they were relatively young.

- Indigenous males aged between 10 and 14 at their first court appearance accumulated an average of 12 appearances over the eight years.

Chen et al have highlighted that efforts to reduce the risk of recidivism should not be postponed due to a belief that most youths whose first appearance is in the Children's Court will never reappear in court.<sup>22</sup> This is particularly important where the offender is Indigenous, male and/or relatively young, as 'It is safe to assume that virtually all Indigenous males and a large majority of Indigenous females will reoffend and reappear in court unless something is done to assist them'.<sup>23</sup>

### 2.2.2 *Lynch et al (2003)*

The study by Lynch et al investigated 1503 offenders between the ages of 10 and 17 who were ordered to serve a supervised juvenile justice order from 1 July 1994 to 30 June 1995 in Queensland.<sup>24</sup> The study found that by September 2002:<sup>25</sup>

- 79% of those juveniles on supervised orders in 1994-95 had progressed to the adult corrections system and 49% had been imprisoned at least once. The rate was higher for male Indigenous juveniles – 89% progressed to the adult corrections system and 71% served at least one prison term.
- 91% of the juveniles who had been subject to a care and protection order, as well as a supervised justice order, had progressed to the adult corrections system and 67% served at least one term of imprisonment.
- Over time, the probability of those juveniles on supervised orders in 1994-95 and subject to multiple risk factors (male, Indigenous status, presence of a care and protection order) progressing to the adult corrections system closely approaches 100%.

Lynch et al argued that 'The very high rate of progression from juvenile supervised orders to the adult corrections system means it is reasonable to question the adequacy and appropriateness of our current responses to juvenile offending'.<sup>26</sup>

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<sup>22</sup> Chen et al, above n 21.

<sup>23</sup> Chen et al, above n 21, p 11.

<sup>24</sup> Lynch M et al, 'Youth justice: criminal trajectories', *Trends and Issues in Crime and Criminal Justice*, No 265, Australian Institute of Criminology, September 2003.

<sup>25</sup> Lynch et al, above n 24, p 2.

<sup>26</sup> Lynch et al, above n 24, p 5.

### 2.2.3 *Carcach and Leverett (1999)*

The study by Carcach and Leverett examined 5509 individuals who recorded a proven court appearance in NSW between 1 July 1992 and 30 June 1993 whilst under the age of 18.<sup>27</sup> The individuals were followed until 30 June 1997. The main findings of the study were:

- 37.3% of juvenile offenders recorded a subsequent proven court appearance during the period under observation.
- The average time between consecutive court appearances for the offenders in the cohort was 17.9 months.
- The intensity of offending among juvenile offenders reaches its maximum at ages between 15 and 17 years. Young offenders in this bracket have the highest risk of contact with the juvenile justice system.
- Programs which target young offenders who reappear relatively soon after their first court appearance may contribute to a reduction in recidivism and rates of juvenile crime generally.

The study found that the age at which juveniles experienced their first proven court appearance impacted on the amount of time that would pass until the juvenile offender appeared in court again for another offence for which they were found guilty. The amount of time between proven court appearances was shown to increase until the age of 14 after which it declined; intensity of offending achieved a maximum between the ages of 15 and 17.

### 2.2.4 *Cain (1996)*

The Cain study examined 52,935 juvenile offenders who appeared before the NSW Children's Court between January 1986 and December 1994.<sup>28</sup> The major findings of the study were:

- The average age of juveniles at the time of their first proven criminal appearance was a little over 16 years.
- Juvenile recidivism is not a problem of epidemic proportion as 70% did not reappear before the court on a second proven criminal matter. Of the 30% who did reoffend, about half returned to court only once.
- A small number of persistent offenders are responsible for a disproportionately

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<sup>27</sup> Carcach C and Leverett S, *Recidivism Among Juvenile Offenders: An Analysis of Times to Reappearance in Court*, Australian Institute of Criminology, Canberra, 1999.

<sup>28</sup> Cain M, *Recidivism of Juvenile Offenders in New South Wales*, Department of Juvenile Justice, Sydney, 1996.

large number of proven criminal appearances – 9% of juvenile offenders were responsible for 31% of all proven criminal appearances. Persistence in juvenile crime is marked by progressively shorter periods to the next offence.

- 40% of juvenile recidivists were in the juvenile justice system for less than one year before either desisting from further offending or leaving the system due to age.
- 86% of offences for which juveniles appear before the NSW Children’s Court are non-violent crimes. Escalation to more serious and violent crimes is not typical of juvenile recidivism – only 10% of juveniles who did reoffend graduated from a non-violent offence to an offence against the person.
- The penalty a juvenile receives at first court appearance is associated with future recidivism and therefore is most useful as a factor for predicting juvenile reoffending.

In summary:

Socio-economic disadvantage, poor educational attainment, family breakdown, high unemployment, marginalisation in the community, and discriminatory treatment by criminal justice agencies all feature strongly in accounting for juvenile crime. Juvenile justice programs and, in particular, the introduction of new and tougher penalties for juvenile offenders, are likely to be largely ineffective in reducing the level of juvenile offending and juvenile re-offending unless the social conditions underlying juvenile crime are also addressed.<sup>29</sup>

Cain stressed the need to maintain perspective as:

juvenile crime is not a problem of epidemic proportions, and most juvenile offenders who appear before the NSW Children’s Court are characterised by non violent offending and desistance from criminal activity after their first court appearance. Only three out of every ten juvenile offenders will re-offend, and fewer still will become persistent or chronic offenders.<sup>30</sup>

### 2.2.5 *Coumarelos (1994)*

Coumarelos examined 33,900 juveniles in NSW who had first been convicted of one or more criminal charges in the NSW Children’s Court between the beginning of 1982 and the end of 1986 and who had reached the age of 18 by the end of June 1992.<sup>31</sup> The study found that 70% of juveniles did not reappear in the Children’s Court after their first proven

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<sup>29</sup> Cain, above n 28, p 66.

<sup>30</sup> Cain, above n 28, p 64.

<sup>31</sup> Coumarelos C, *Juvenile Offending: Predicting Persistence and Determining the Cost-effectiveness of Interventions*, NSW Bureau of Crime Statistics and Research, Sydney, 1994.

appearance and almost half of the juveniles who did reappear in the Children's Court tended to reappear primarily for theft offences. 45% of the appearances in the Children's Court were accounted for by the 15% of juveniles who each had more than two appearances. About 80% had criminal careers of less than one year duration. However, Coumarelos noted that this might underestimate the actual duration as some may have started offending some time before their first proven appearance and some may have continued offending after their last appearance in the Children's Court and before turning 18. The most serious offence for approximately two-thirds of all criminal appearances was either a theft offence (involving stealing/theft, break and enter, or motor vehicle theft) or an offence against good order. The three factors that predicted reappearance in the Children's Court were:

- i. age at first proven appearance;
- ii. the most serious offence at first proven appearance; and
- iii. the number of appearances to date.

### 2.3 In summary

Various predictors of reoffending have been highlighted in the above studies. Common factors appear to be gender, Indigenous status, the number of prior convictions/custodial episodes and age. Nonetheless, the findings are not unanimous, especially in terms of rates of recidivism and who is likely to reoffend. Whilst the majority of studies conclude that reoffending is greater amongst males, some do not find any difference between males and females. Changes in policing methods and resources, as well as legislative developments, may also contribute to some of the differences between studies. For example, the introduction of the *Young Offenders Act* is likely to have influenced the rate at which juvenile offenders appear before the Children's Court.

A number of other factors may also influence reoffending rates and should be borne in mind. For example, to what extent has overpolicing and a greater likelihood of arrest and imprisonment also contributed to the risk of recidivism amongst Indigenous Australians?<sup>32</sup> It does seem clear that rates of recidivism vary between types of offences – reoffending is low in relation to homicide and sex offences, whilst property/stealing offences and assault generally have much higher levels of reoffending. There are various explanations for the

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<sup>32</sup> In NSW, Indigenous Australians appear in court on criminal charges at 13 times the rate of non-Indigenous Australians, and Indigenous Australians in NSW are imprisoned at 10 times the rate of non-Indigenous Australians: Weatherburn D et al, 'The economic and social factors underpinning Indigenous contact with the justice system: Results from the 2002 NATSISS survey', *Crime and Justice Bulletin*, No 104, October 2006, p 1. The Bureau of Crime Statistics and Research found no evidence of racial bias on the part of the sentencing court. The main factors thus thought to contribute to the higher rate of imprisonment of Indigenous Australians are their generally much longer criminal records and their higher rate of reoffending, especially after being sentenced to an alternative to full time imprisonment: Snowball L and Weatherburn D, 'Indigenous over-representation in prison: The role of offender characteristics', *Crime and Justice Bulletin*, No 99, September 2006. These issues of the *Crime and Justice Bulletin* assess the role of economic and social factors in the offending behaviour of Indigenous Australians and examine the factors thought to contribute to the higher rate of imprisonment amongst Indigenous Australians.

differences in rates between offences but an important consideration in the interpretation of these differences, particularly in relation to sex offences, is the level of underreporting.

It is important to note that although the findings of these studies show a high rate of reoffending, despite the predictors in many of the cases a substantial minority of offenders (or the majority in some instances) do not reoffend.

### 3 WHY DO PEOPLE REOFFEND?

A number of factors are thought to influence the risk of recidivism including:<sup>33</sup>

- education;
- employment;
- drug and alcohol misuse;
- mental and physical health, intellectual disability;
- attitudes and self-control;
- institutionalisation and life skills, poor social and communication skills;
- housing;
- financial support and debt, poverty; and
- family networks.

60% of inmates are not functionally literate or numerate and 60% did not complete year 10 schooling.<sup>34</sup> Many education programs have accordingly been developed for those in prison, with about 38% of eligible prisoners participating in accredited education and training courses in 2004-05.<sup>35</sup> The Select Committee on the Increase in Prisoner Population recommended that the Department of Corrective Services 'include in future research programs a long term study on the impact of its education programs on recidivism'.<sup>36</sup> The NSW Government, in its response to the final report, noted that the Department of Corrective Services was developing a recidivism database to enable the calculation of recidivism rates two years after discharge from full time imprisonment.<sup>37</sup>

Many prisoners have a poor employment history (44% are long term unemployed)<sup>38</sup> and

<sup>33</sup> United Kingdom, Social Exclusion Unit, *Reducing Re-offending by Ex-prisoners*, Report, July 2002; Borzycki M and Baldry E, 'Promoting integration: the provision of prisoner post-release services', *Trends and Issues in Crime and Criminal Justice*, No 262, September 2003.

<sup>34</sup> NSW Legislative Council, Select Committee on the Increase in Prisoner Population, *Final Report*, November 2001, p 88.

<sup>35</sup> Steering Committee for the Review of Government Service Provision, above n 2, p 7.17.

<sup>36</sup> Select Committee on the Increase in Prisoner Population, above n 34, recommendation 11.

<sup>37</sup> NSW Government, *Final Report of the Legislative Council Select Committee Inquiry on the Increase in Prisoner Population: NSW Government Response*, August 2002.

<sup>38</sup> Select Committee on the Increase in Prisoner Population, above n 34, p 88.

have limited vocational skills. This is acknowledged as contributing to the risk of recidivism and has led to the development of various employment programs in prisons as a result. More than three-quarters of eligible prisoners were employed in 2004-05.<sup>39</sup>

The 2001 Inmate Health Survey<sup>40</sup> found that 29% of female and 48% of male prisoners consumed alcohol at a hazardous and harmful level in the 12 months prior to their imprisonment. Lifetime illicit drug use was reported by 84% of female and 80% of male prisoners, with cannabis, amphetamines and heroin being the most common. However, for many, illicit drug use did not cease following imprisonment – 49% of women and 48% of men had used illicit drugs whilst in custody. Drug and alcohol use also featured in offending behaviour with more than 60% of prisoners being under the influence of drugs or alcohol at the time of the offence for which they had been imprisoned. The self-reported health status of 37% of women in prison was poor or fair; the proportion for men was 28%. Prisoners are also more likely to have a psychotic illness, suffer major depression, and/or have a personality disorder compared to the general public. When screened for intellectual disability, 18% of women and 27% of men scored below the pass rate.

Baldry et al investigated the relationship between ex-prisoner housing (and associated social factors) and ex-prisoner integration in NSW and Victoria.<sup>41</sup> The authors highlighted that high recidivism rates were indicative of the failure of many ex-prisoners to successfully reintegrate into the community following their release from prison. They noted that the majority of fulltime prisoners in NSW and Victoria serve a sentence of less than 12 months duration and are therefore unlikely to be subject to supervised parole. This is particularly important in terms of the possible lack of established contact and available support in the community for the prisoner following his or her release. Baldry et al found a significant link between ex-prisoners 'moving often' and deterioration in their circumstances, most notably a return to prison. Other factors associated with poor housing and a return to prison included: previous incarceration; lack of family support or professional assistance deemed to be helpful by the ex-prisoner; lack of employment or study opportunities; concentration in disadvantaged communities; and worsening drug use.

Stability, not having to move and staying out of prison were found to be associated with staying with parents and other close family. Women generally experienced more difficulty in obtaining suitable accommodation and were more likely to return to prison than men. It is interesting to note that the female subjects of the study by Baldry et al experienced greater social disadvantage than the men, as opposed to being caught up in more serious crime, yet it was the women who were more likely to return to prison.

Housing stability appears to be a particular issue for Indigenous ex-prisoners. Baldry et al

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<sup>39</sup> Steering Committee for the Review of Government Service Provision, above n 2.

<sup>40</sup> Butler T and Milner L, *The 2001 New South Wales Inmate Health Survey*, Corrections Health Service, Sydney, 2003. The results of this survey are the source of the statistics quoted in this paragraph.

<sup>41</sup> Baldry E et al, 'Ex-prisoners, homelessness and the State in Australia', *The Australian and New Zealand Journal of Criminology*, 39(1) April 2006, pp 20-33.



found that 51% of the study's subjects who were Indigenous had returned to prison within nine months compared to 31% of the non-Indigenous subjects (for Indigenous women the rate was 68% compared to 36% of Indigenous men). Especially striking was the housing situation of the Indigenous subjects:

None of the Indigenous participants had lived in a stable family home postrelease and there was reliance on public and publicly assisted housing. Most women were unable to secure public housing upon release due to debt and being in poor standing with the Housing Authority.... Half of those Indigenous participants out of prison at 9 months were homeless.<sup>42</sup>

The UK Social Exclusion Unit has highlighted that serving a prison sentence may be counter-productive and actually exacerbate the factors associated with reoffending – many prisoners lose their house and job, financial problems may worsen, relationships with family members may deteriorate, mental and physical health may decline, life skills often fade, and there may be increased exposure to drugs. This led the Unit to conclude, 'By aggravating the factors associated with re-offending, prison sentences can prove counter-productive as a contribution to crime reduction and public safety'.<sup>43</sup> This is thought to particularly be an issue with those serving short sentences.<sup>44</sup> Those who serve short terms of imprisonment are likely to receive less assistance both during their time in prison and subsequent to their release, which may exacerbate the impact of a term of imprisonment.<sup>45</sup> In NSW, a court that sentences an offender to imprisonment for six months or less must record its reasons for deciding that no penalty other than imprisonment is appropriate.<sup>46</sup> It must also indicate its reasons for declining to make an order that the offender participate in an intervention, treatment or rehabilitation program.

A number of the strategies that have been developed in response to identification of the factors that contribute to an increased risk of recidivism are discussed in section five.

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<sup>42</sup> Baldry et al, above n 41, p 27.

<sup>43</sup> Social Exclusion Unit, above n 33, p 7.

<sup>44</sup> In the UK, those over the age of 21 and sentenced to less than 12 months do not have to be supervised by the Probation Service; little is done in preparation for release and nothing on release. This is despite short-term prisoners (those serving sentences of less than 12 months) having the highest reoffending rates in the UK (61% of short term male prisoners are reconvicted within two years compared to 56% of those serving between one and four years; 56% of short term female prisoners are reconvicted within two years compared to 35% of those serving between one and four years): Social Exclusion Unit, above n 33. See also Borzycki and Baldry, above n 33.

<sup>45</sup> Borzycki and Baldry, above n 33.

<sup>46</sup> Section 5(2) *Crimes (Sentencing Procedure) Act 1999* (NSW)

## 4 HOW HAS REOFFENDING BEEN DEALT WITH IN THE PAST?

### 4.1 Habitual criminals legislation

Legislation specifically targeting habitual criminals emerged in the UK in the latter half of the nineteenth century and in the early twentieth century in NSW. The *Prevention of Crimes Act 1871* (UK) was enacted to enable habitual criminals to receive additional punishment to deter them from reoffending and to protect the public. It formed part of the response to the perceived existence of an identifiable criminal class.<sup>47</sup> At the turn of the century, the NSW Parliament passed the *Habitual Criminals Act 1905* (NSW) to protect the public and provide the habitual criminal with an opportunity to reform his or her behaviour.<sup>48</sup>

The *Habitual Criminals Act 1905* was subsequently repealed and replaced by the *Habitual Criminals Act 1957* (NSW) which provides for the pronouncement, detention and control of habitual criminals. Section 4 enables a judge to declare a person an habitual criminal if he or she: is at least 25 years old; is convicted on indictment; and has previously served at least two separate terms of imprisonment for indictable offences (not indictable offences dealt with summarily without consent). The judge may accordingly pass a further sentence if he or she believes it to be expedient in relation to the person's reformation or for the prevention of crime. The term of imprisonment to be so ordered must be between five and 14 years.<sup>49</sup>

The NSW Law Reform Commission, in its 1996 report on sentencing, recommended that the *Habitual Criminals Act 1957* be repealed.<sup>50</sup> It emphasised that the beliefs underpinning the Act were no longer appropriate as it had originally been passed with the understanding that there was a class of offenders who possessed 'criminal qualities inherent or latent in [their] mental constitution'.<sup>51</sup> It was also noted that the procedures under the Act were archaic and did not correspond with current practice. The Law Reform Commission identified that not only had little use been made of the Act in recent years but there was also an unwillingness to make pronouncements under the Act. The last reported case dealing with a pronouncement under the Act at the time was from 1973.<sup>52</sup>

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<sup>47</sup> *Strong v R* (2005) 216 ALR 219 at 233 (per Kirby J).

<sup>48</sup> For further information on the history of habitual criminal legislation see: *The Habitual Criminals Act 1957: A Commentary on Issues Relating to Persistent and Dangerous Offenders* by Gareth Griffith, NSW Parliamentary Library Briefing Paper No 19/94.

<sup>49</sup> Section 6.

<sup>50</sup> NSW Law Reform Commission, *Sentencing*, Report 79, December 1996, recommendation 52.

<sup>51</sup> NSWLRC, above n 50, p 234.

<sup>52</sup> *R v Riley* [1973] 2 NSWLR 107. Kirby J in *Strong v R* (2005) 216 ALR 219 at 235 noted that there is not a case involving the application of the *Habitual Criminals Act* in the Australian Criminal Reports series which commenced in 1979.

Nonetheless, the *Habitual Criminals Act* was not repealed. A matter concerning its application recently came before the High Court in *Strong v R*.<sup>53</sup>

#### 4.1.1 *Strong v R*

Strong had been sentenced to four years imprisonment for intimidation and five years for stalking and was given a total non-parole period of six years. He was also pronounced a habitual criminal under the *Habitual Criminals Act 1957* (NSW) and sentenced to 14 years imprisonment under this legislation. Strong successfully appealed against the length of his sentence for stalking and imprisonment. He also appealed against the pronouncement that he was a habitual criminal. The Court of Criminal Appeal dismissed that part of the appeal but altered the sentence to eight years. Strong subsequently appealed to the High Court, arguing that the Court had erred by failing to consider anew whether the pronouncement was in fact required. The appeal was dismissed (Gleeson CJ, Callinan and Heydon JJ; McHugh and Kirby JJ dissenting).

Kirby J highlighted in *Strong v R* that the last decade had seen a revival in preventive detention (discussed in section 5.3.2) for the purpose of protecting the public – demonstrated by the introduction of mandatory imprisonment for repeat offenders; additional sentences of indefinite detention; and specific legislation for certain long term offenders such as the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).<sup>54</sup> Alex Steel, a senior lecturer at UNSW, commented on the use of the habitual criminals legislation after such a long period:

...now that it's been used and it's been upheld by the High Court, then if you have a situation where you've got somebody who poses a danger to the community, it's probably part of a prosecutor's duty to try to seek to have this person declared a habitual criminal, and that's in a sense, the worry, because if we have these forms of legislation on the books, but the legislation doesn't have proper safeguards, then it's unclear in any individual case whether it's going to be applied justly.<sup>55</sup>

## 4.2 Phases in the control of crime

Simon sees the history of the relationship between criminology and laws targeting recidivists as passing through three main phases.<sup>56</sup> Whilst Simon considers this history in the context of the US and UK, similarities can be seen with developments in Australia. The three phases are:

<sup>53</sup> (2005) 216 ALR 219

<sup>54</sup> *Strong v R* (2005) 216 ALR 219 at 235 (per Kirby J)

<sup>55</sup> 'Habitual criminals, Job References and Litigation in the Playground', *The Law Report*, ABC Radio National, 21/6/05. The transcript is available from [www.abc.net.au](http://www.abc.net.au)

<sup>56</sup> Simon, above n 1.

1. **Jacksonian penalty** – in the first half of the nineteenth century the penitentiary prison emerged as the major means of punishing crime as opposed to transportation and corporal punishment. The emergence of prisons is particularly important when considering recidivism as ‘Without extensive use of prisons, the whole problem of what to do about the released prisoner, let along the recidivist, never came up’.<sup>57</sup>
2. **Progressive penalty** – at the turn of the nineteenth century new penal techniques emerged that were aimed at specific populations such as juvenile delinquents, ‘inebriates’, ‘defectives’ and ‘the insane’. Use of the indeterminate sentence, parole, probation and juvenile justice became increasingly common.
3. **New penalty** – since the late 1960s there has been a movement away from an explicit reliance on normalisation to a focus on incapacitating dangerous offenders. The recidivist has grown in significance, with limits placed on a judge’s discretion. Simon concludes:

The new penalty with its emphasis identifying and tracking high-risk offenders has helped to prepare the ground for three-strikes laws by reinforcing the belief that little can be done to prevent or correct an offender’s criminality and undermining the belief that individual strategies of corrections can help reduce crime.<sup>58</sup>

Simon discusses the criminal careers paradigm and how this has been used by supporters of three strikes legislation (see below). He argues that data has often been misused for this purpose, notably old research that found a small number of chronic offenders were responsible for a large amount of reported crime and therefore that intervention aimed at this group could be highly efficient:

That there is a special subpopulation of dangerous offenders whose identification and neutralization would result in dramatic reductions in the overall crime rate without resulting in a massive increase in the portion of that population undergoing incarceration is a solution that is deeply compatible with the ambitions of modern governments. Its reproduction in a number of different legislative programs, deploying different technologies and shaped by a variety of different theoretical enterprises, reflects this compatibility. The failure of particular efforts has not dulled it because whenever one attempts to think penal strategies within the rationality of governing through science all roads lead to the recidivist.<sup>59</sup>

Three strikes legislation was introduced to California in 1994, after having been passed in Washington in 1993. These laws mandate terms of imprisonment for repeat offenders. However, the philosophy behind the legislation was not entirely new, with aggravated penalties having been applied to recidivist offenders throughout England and the US in the

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<sup>57</sup> Simon, above n 1, p 30.

<sup>58</sup> Simon, above n 1, p 47.

<sup>59</sup> Simon, above n 1, p 26.

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twentieth century. For an overview of mandatory sentencing in the Australian context see *Sentencing Law: A Review of Developments in 1999-2001* by Rowena Johns, NSW Parliamentary Library Briefing Paper No 2/02.

Garland has identified a movement away from a period where the interests of an offender and society could be said to coincide to the current belief of many that the interests of the offender and the public are frequently at odds. Recidivists are increasingly seen as ‘other’ or belonging to the underclass.<sup>60</sup> This is similar to the notions that led to the original habitual criminals legislation. Garland notes:

Rehabilitating offenders, reforming prisons, dealing with the roots of crime – these were in the interests of everyone. Money spent on treating the offender and improving social conditions would be repaid by falling rates of crime and a better-integrated citizenry. The treatment of offenders was a positive sum game. Today the interests of convicted offenders, insofar as they are considered at all, are viewed as fundamentally opposed to those of the public. If the choice is between subjecting offenders to greater restriction or else exposing the public to increased risk, today’s common sense recommends the safe choice every time.<sup>61</sup>

The section on preventive detention discusses these ideas in the current Australian legal and political climate.

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<sup>60</sup> Garland D, *The Culture of Control*, Oxford University Press, Oxford, 2001, p 182.

<sup>61</sup> Garland, above n 60, p 180.

## 5 STRATEGIES TO REDUCE RECIDIVISM

The criminal justice system can respond to an offender in a myriad of ways. They range from a police officer deciding whether to arrest or caution a person, to an assortment of diversionary schemes and the various sentences a court may impose. White contrasts three approaches that may be adopted toward offending behaviour:<sup>62</sup>

1. The **justice model** where justice is something that is done *to* you.
2. The **welfare model** where justice is something that is done *for* you with the aim of rehabilitation.
3. **Restorative justice** where justice is something that is done *by* you.

When a court convicts an offender of a crime, there is a range of sentences it can impose, from fines, community service orders and good behaviour bonds, to a term of imprisonment if no other penalty is considered appropriate.<sup>63</sup> Sentencing can serve a number of purposes including: protection of the community; deterrence; rehabilitation; retribution; and denunciation. Section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) sets out the purposes for which a court may impose a sentence on an offender in NSW, some of which may influence the risk of recidivism. For example, the likelihood of recidivism may be reduced through deterrence, the incapacitation of the offender, or as a result of his or her rehabilitation. The purposes as stated by section 3A are to:

- (a) ensure that the offender is adequately punished for the offence,
- (b) prevent crime by deterring the offender and other persons from committing similar offences,
- (c) protect the community from the offender,
- (d) promote the rehabilitation of the offender,
- (e) make the offender accountable for his or her actions,
- (f) denounce the conduct of the offender,
- (g) recognise the harm done to the victim of the crime and the community.

Section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) sets out the various aggravating, mitigating and other factors that may be taken into account when determining

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<sup>62</sup> White R, 'Community corrections and restorative justice', *Current Issues in Criminal Justice*, 16(1) July 2004.

<sup>63</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW). Section 5 specifies that a court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.

an appropriate sentence. A record of previous convictions is deemed an aggravating factor. Some of the relevant mitigating factors include the offender being unlikely to reoffend, or having good prospects of rehabilitation.

A variety of strategies have been developed in an effort to reduce recidivism. A decrease in reoffending rates would see a corresponding reduction in crime, as well as providing past offenders with the opportunity to contribute in a positive way to the community. White has argued that:

*we need to spend more (on programmes and expertise), in order to spend less (on prisons and escalating punishments)... that we need to take more time now (to re-make community networks and to nest offenders in supportive community contexts), so that we don't repeat the time later (due to offender recidivism).<sup>64</sup>*

[original emphasis]

There are various ways in which initiatives targeting recidivism can be grouped. MacKenzie has identified six categories into which crime reduction strategies in the US can be sorted:<sup>65</sup>

1. **Incapacitation** – the offender is deprived of the capacity to commit crime.
2. **Deterrence** – one of the major purposes of sentencing is deterrence, both general and specific. By punishing a person for a crime, other members of the community may be deterred from committing an offence, as the likely repercussions are made clear (general deterrence). Specific deterrence aims to prevent a particular offender from committing a crime again.
3. **Community restraints** – offenders are supervised in the community to reduce their capacity and opportunity to commit crime.
4. **Structure, discipline and challenge programs** – the experience is designed to change offenders in a positive way so they will not commit crime in future.
5. **Rehabilitation** – treatment is directed toward changing the behaviour of the offender.
6. **Combining rehabilitation and restraint** – offenders are coerced into rehabilitation and treatment.

The following table summarises the findings of Mackenzie as to the effectiveness of

<sup>64</sup> White, above n 62, p 42.

<sup>65</sup> MacKenzie D, 'Reducing the criminal activities of known offenders and delinquents: crime prevention in the courts and corrections' in Sherman L et al (eds) *Evidence-Based Crime Prevention*, Routledge, London, 2002, p 330.

various approaches to controlling crime in the US.<sup>66</sup> She found that rehabilitation and certain therapeutic treatments that targeted specific characteristics and problems of offenders could be valuable in reducing recidivism. Programs that addressed issues relating to employment and education were also seen as worthwhile.

What works	What is promising	What does not work
Rehabilitation programs with particular characteristics	Drug courts combining both rehabilitation and criminal justice control	Specific deterrence interventions, such as shock probation and 'Scared Straight' <sup>67</sup>
Prison-based therapeutic community treatment of drug-involved offenders	Fines	Rehabilitation programs that use vague, nondirective, unstructured counselling
In-prison therapeutic communities with follow-up community treatment	Juvenile aftercare	Intensive supervised probation or parole
Cognitive behavioural therapy	Drug treatment combined with urine testing	Home confinement
Non-prison based sex offender treatment programs	Prison-based sex offender treatment	Community residential programs
Vocational education programs	Adult basic education	Urine testing
Multi-component correctional industry programs	Transitional programs providing individualised employment preparation and services for high-risk offenders	Increased referral, monitoring and management in the community
Community employment programs		Correctional boot camps using the old-style military model
Incapacitating offenders who continue to commit crimes at high rates		Juvenile wilderness programs

### *NSW Department of Corrective Services*

The NSW Department of Corrective Services provides custodial and community-based correctional services in NSW. Its mission is to reduce 're-offending through secure, safe and humane management of offenders'.<sup>68</sup> It aims to achieve this by:

<sup>66</sup> MacKenzie D, 'Reducing the criminal activities of known offenders and delinquents: crime prevention in the courts and corrections' in Sherman L et al (eds) *Evidence-Based Crime Prevention*, Routledge, London, 2002, pp 330-404.

<sup>67</sup> 'Scared straight' programs involve young offenders being taken to maximum security prisons where inmates alert them to the realities of life in prison.

<sup>68</sup> NSW Department of Corrective Services, *Corporate Plan 2004-2007*.



- establishing whole-of-sentence planning and case management based on standardised risk and needs assessments;
- providing programs which are proven to be effective in reducing recidivism across community and custodial settings; and
- improving offender motivation to participate in offence related, transitional and re-settlement programs.

It believes that the risk of recidivism can decrease when:

offence related programs are provided at an intensity which matches the level of risk. In addition, individual motivation and ability to participate in such programs is improved when differences in cultural backgrounds, learning styles and literacy levels are taken into account.

Reduced rates of re-offending can be achieved by effectively managing offenders from their first point of contact with the Department to the completion of their legal orders and their transition to law-abiding community living. Relapse prevention strategies must be incorporated in all major programs.<sup>69</sup>

The approach adopted by the Department to offenders from their first point of contact to their reintegration with the community is known as Throughcare. One of the central tenets of Throughcare is that ‘offenders access appropriate community services while under the supervision of the Department and transitional support on completing their sentences in regard to income, employment, housing, health care and family connections’.

The Department of Corrective Services has progressively introduced the Level of Service Inventory – Revised (LSI-R) since 2002/03.<sup>70</sup> The LSI-R is designed to identify an offender’s level of risk and needs so resources can be effectively allocated in order to reduce recidivism. It forms part of case planning which involves: the construction of a profile of the offender’s criminal and social history; rating of the risk of reoffending and the dynamic factors associated with that risk; listing strengths, assets and protective factors; and case plan strategies.

The 2006 *Report on Government Services* published by the Productivity Commission noted the following comments by the NSW Government in terms of the services provided in NSW:

NSW has fully implemented the standardised assessment risk of re-offending with community based offenders. During 2004-05, NSW made a significant advancement in the implementation of the ‘Throughcare model’ incorporation whole of sentence planning, integrated case management and assessment of risk of

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<sup>69</sup> NSW Department of Corrective Services, above n 68, p 5.

<sup>70</sup> NSW Department of Corrective Services, *Annual Report 2004/05*, p 42.

re-offending. NSW has also established E Case Management based on the standardised risk needs assessment within COS and extended into correctional centres. A new Mental Health Screening Unit has been established within the Metropolitan Remand and Reception Centre at the Silverwater Correctional Complex. This unit assesses and manages inmates with mental illness. NSW is also establishing a Compulsory Drug Treatment Correctional Centre which will target drug affected offenders for participation in a custodial diversion program through the use of multi-staged intensive intervention regimes.

Accredited offender-based programs such as ‘ThinkFirst’ and ‘Sober Drivers’ have been implemented throughout the State. Other programs such as the Drug and Alcohol Program and Relapse Prevention Program also form part of a larger strategy which is currently being rolled out for offenders serving a community based sentence in NSW.<sup>71</sup>

### *NSW Department of Juvenile Justice*

The NSW Department of Juvenile Justice is responsible for the supervision and care of young offenders both in the community and in detention centres. Its vision is to break the crime cycle of juveniles so they lead a life free of further offending. The Department has taken note of a number of principles found to be an integral part of interventions that are effective in reducing reoffending namely:<sup>72</sup>

- **Risk principle:** there is a match between an offender’s risk of reoffending and the level of intervention services provided.
- **Need principle:** services focus on client problems that contribute to, or are supportive of, offending. These relate to the attitudes, values and beliefs supporting antisocial behaviour.
- **Responsivity principle:** effective services are geared to the learning styles of clients, particularly using active, participatory methods that teach new behaviours and skills.

The Department subsequently introduced the Youth Level of Service/Case Management Inventory – Australian Adaptation (YLS/CMI-AA), an instrument for measuring the risks of reoffending. Once the risk is assessed, appropriate interventions can be developed, and their effectiveness measured.

Interventions delivered in a community as opposed to custodial setting are believed to generally be the most effective in reducing the risk of recidivism amongst juvenile offenders.<sup>73</sup> The Department of Juvenile Justice may supervise juvenile offenders in the

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<sup>71</sup> Steering Committee for the Review of Government Service Provision, above n 2, p 7.29.

<sup>72</sup> NSW Department of Juvenile Justice, *Annual Report 2004/2005*, p 25.

<sup>73</sup> NSW Department of Juvenile Justice, above n 72, p 25.

community who are the subject of good behaviour bonds, probation orders, community service work orders, parole orders and suspended sentences.

There are various programs supportive of the aim of reducing reoffending amongst juveniles. Funding is allocated to various programs run by community agencies including.<sup>74</sup>

- **Post Release Support Programs** – address barriers to reintegration in the community.
- **Accommodation Support Programs** – provide assistance with securing and maintaining appropriate accommodation and the development of living skills.
- **Local Offender Programs** – assist with accessing educational and vocational pathways.
- **Alcohol and Other Drug Programs** – increase capacity of clients to manage their lives and achieve a sustained reduction in substance use.
- **Employment Skilling Program** – provide access to relevant education, vocational training and employment pathways as well as the establishment and maintenance of positive links with the community.
- **Children’s Visiting Legal Service (Legal Aid Commission)** – provision of legal assistance to detainees.

The Department is also responsible for juvenile offenders in detention centres. Custodial services provide educational, recreational, vocational, specialised counselling and personal development programs, as well as individual case management to plan for release and reintegration into the community.<sup>75</sup> A structured 12 week Post-Release Support Program aims to facilitate integration into the community by addressing any barriers that would hinder successful reintegration. 1406 people were enrolled in the Education and Training Units in juvenile justice centres in 2004, and 612 participated in TAFE courses.<sup>76</sup>

The remainder of section five provides an overview of some of the strategies and programs that have been developed and/or implemented in NSW in an attempt to reduce recidivism. These include strategies that: seek to deter offenders from reoffending; divert offenders to prevent them moving deeper into the criminal justice system; rehabilitate offenders; incapacitate offenders, including through the use of preventive detention; correct offenders in the community; and assist offenders to successfully reintegrate into the community following their release from custody. Some of the programs identified do not fit neatly within one of the above categories, as they may embrace principles from a number of these groups. Several of the programs could have thus been included under various headings.

<sup>74</sup> NSW Department of Juvenile Justice, above n 72, pp 26-27.

<sup>75</sup> NSW Department of Juvenile Justice, above n 72, p 31.

<sup>76</sup> NSW Department of Juvenile Justice, above n 72, p 33.

## 5.1 Crime prevention and deterrence

One of the purposes of sentencing is to prevent crime by deterring both the offender and other persons from committing similar offences (specific and general deterrence).<sup>77</sup> One strategy that has often been used to in an attempt to reduce recidivism is the increasing of penalties associated with an offence in an effort to deter potential offenders. However, this particular approach assumes that prospective offenders engage in a form of cost-benefit analysis before committing a crime, ie if the risk of getting caught is high, the associated penalty severe and the likely benefit low in comparison, the offender will deem that it is not worth engaging in the criminal behaviour. This section discusses, as an example, some of the initiatives that target repeat drink drivers.

### 5.1.1 Drink driving

About 16% of drink drivers are repeat drink drivers.<sup>78</sup> The *Traffic Amendment (Penalties and Disqualifications) Act 1998* (NSW) raised the amount for which fines could be issued by the courts for alcohol-related traffic offences and increased the applicable licence disqualification periods as part of an effort to deter people from committing serious driving offences.<sup>79</sup> Briscoe studied the impact of the penalties for drink driving being increased in 1998.<sup>80</sup> Whilst the study did show some evidence of a beneficial effect on recidivism:

it needs to be noted that the overall effect of the increased penalties on recidivism rates was relatively small, with the probability of a drink-driver reoffending being reduced by just three percentage points in non-Sydney locations. Given such a small effect size from what was essentially a doubling of the statutory penalties for all drink-driving offences, and keeping in mind the associated costs with administering the new penalty regime, the efficiency of this strategy in controlling crime remains questionable. In comparison, strategies that have increased the perceived risk of apprehension, such as RBT, have had substantial and enduring influences on offending rates.<sup>81</sup>

Briscoe suggested that greater systematic application of licence disqualification (as opposed to use of section 10 dismissals<sup>82</sup>) for drink driving would have heightened the

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<sup>77</sup> Section 3A *Crimes (Sentencing Procedure) Act 1999* (NSW)

<sup>78</sup> *The NSW Sober Driver Program* brochure available from Motor Accidents Authority [www.maa.nsw.gov.au](http://www.maa.nsw.gov.au)

<sup>79</sup> See the Second Reading speech: Hon C Scully MP, *NSWPD*, 21/5/98, pp 5047-5049.

<sup>80</sup> Briscoe S, 'The impact of increased drink-driving penalties on recidivism rates in NSW', *Alcohol Studies Bulletin*, No 5, May 2004.

<sup>81</sup> Briscoe, above n 80, pp 8-9.

<sup>82</sup> Section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) enables a court, without proceeding to a conviction, to find a person guilty of an offence but dismiss the charge, or discharge the person on condition that they enter into a good behaviour bond or an

impact of the legislative changes.

Other strategies seek to more directly prevent a potential offender from committing a criminal act. For example, Division 2 of Part 5.4 of the *Road Transport (General) Act 2005* (NSW) allows for the use of interlock devices as an alternative to licence disqualification for an alcohol-related offence. The disqualification period is subsequently suspended to allow the offender to participate in the alcohol interlock program. An interlock device requires a driver to provide a breath sample before the motor vehicle can be activated. If more than a set concentration of alcohol is detected, the vehicle will not start. It is thus designed to prevent drink driving and to alter the behaviour of drink driving offenders. However, a person cannot participate in the interlock program if they are deemed to be habitual traffic offenders.<sup>83</sup> A habitual traffic offender is a person who has been convicted of three relevant offences committed on different occasions within a five year period.<sup>84</sup>

For further information on drink driving see *Drink Driving and Drug Driving* by Rowena Johns, NSW Parliamentary Library Briefing Paper No 15/04.

## 5.2 Diversionary interventions and rehabilitation

A number of strategies seek to reduce recidivism by diverting offenders from moving further into the criminal justice system and thus minimising their contact with other offenders and preventing deterioration of their links with the community. Other strategies aim to rehabilitate offenders and prevent future offending by altering their behaviour. Quite a few strategies embody elements of both diversion and rehabilitation, and thus seek to break cycles of offending behaviour. Diversionary options can be employed both pre-court and pre-trial.

One of the purposes of sentencing in NSW is to promote the rehabilitation of an offender.<sup>85</sup> Vignaendra and Hazlitt have drawn a distinction between active and passive rehabilitation – passive rehabilitation is something applied to a person to facilitate his or her rehabilitation whereas active rehabilitation requires the offender to demonstrate that he or she is working towards rehabilitation, for example, the Youth Drug Court program.<sup>86</sup> International research has shown that rehabilitative programs can be effective in reducing recidivism.<sup>87</sup>

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intervention program.

<sup>83</sup> Section 191 *Road Transport (General) Act 2005* (NSW)

<sup>84</sup> Section 199 *Road Transport (General) Act 2005* (NSW)

<sup>85</sup> Section 3A *Crimes (Sentencing Procedure) Act 1999* (NSW)

<sup>86</sup> Vignaendra S and Hazlitt G, *The nexus between sentencing and rehabilitation in the Children's Court of NSW*, Judicial Commission of New South Wales, Sydney, June 2005.

<sup>87</sup> Howells K et al, *Correctional Offender Rehabilitation Programs: The National Picture in Australia*, Report for Criminology Research Council, University of South Australia, May 2004.

In Australia, strategies have also been developed in line with the principles of restorative justice. Restorative justice involves both the offender and the victim of the crime in the resolution of the matter. It aims to assist the offender with taking responsibility for his or her actions as well as providing the victims with an opportunity to express the impact the crime has had on them. In doing so, it is hoped that harms are repaired and social links restored. Restorative justice embraces a range of initiatives, such as youth justice conferencing and circle sentencing. According to the Department of Corrective Services, restorative justice can reduce the risk of recidivism, as offenders are encouraged to acknowledge the consequences of their offending.<sup>88</sup>

### 5.2.1 *Juvenile offenders*

Lynch et al examined the criminal trajectories of young offenders and stressed the importance of developmental and early intervention:

One of the not unexpected but less welcome implications of our findings is that by the time young people come to the attention of the juvenile justice system, it is difficult to modify a trajectory whose ‘direction’ has already been substantially determined by a very wide range of precursor factors that can no longer be effectively addressed by a single government agency.

What this fact points to is the crucial importance of targeted early interventions that address the precursors to juvenile offending before they give rise to attitudes and behaviours that will ultimately bring individuals into conflict with the criminal justice system.<sup>89</sup>

To be effective, Lynch et al argued that crime prevention strategies should involve a broad range of government agencies including: housing; health; education; police; families; treasury; public amenities; and transport.

The importance of continuity in education, employment and family ties is particularly recognised in relation to children. For example, section 6 of the *Children (Criminal Proceedings) Act 1987* (NSW) establishes that ‘A court, in exercising criminal jurisdiction with respect to children, shall have regard to the following principles... that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption... that it is desirable, wherever possible, to allow a child to reside in his or her own home’.

The Intensive Court Supervision Pilot Program conducted at Bourke and Brewarrina attempts to take a holistic view of offending behaviour.<sup>90</sup> A Children’s Court magistrate

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<sup>88</sup> NSW Department of Corrective Services, above n 70, p 51.

<sup>89</sup> Lynch et al, above n 24, p 5.

<sup>90</sup> NSW Parliament, General Purpose Standing Committee No 3, Examination of proposed expenditure for the portfolio area: Attorney General, 8/9/06, Hearing Transcript, p 14.

works with the Department of Juvenile Justice and local Aboriginal community justice groups in an attempt to reduce recidivism by addressing the health and social issues of offenders that come before the Court and thus help them to more fully integrate into a productive life in the community.

### *Young Offenders Act 1997*

The *Young Offenders Act 1997* (NSW) seeks to divert juvenile offenders from the court process through the use of warnings (ss13-17), cautions (ss 18-33) and youth justice conferences (34-61). Section 8 of the Act sets out the offences that can be dealt with under the Act. It is hoped that this will prevent both contact with more serious offenders and stigmatisation, and will preclude offenders moving further into the juvenile justice system.<sup>91</sup> Section 7 of the *Young Offenders Act* sets out the principles that are to govern the operation of the Act:

- a. the least restrictive form of sanction is to be applied against a child who is alleged to have committed an offence.
- b. children who are alleged to have committed an offence are entitled to be informed about their right to obtain legal advice and to have an opportunity to obtain that advice.
- c. criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter.
- d. criminal proceedings are not to be instituted against a child solely in order to provide any assistance or services needed to advance the welfare of the child or his or her family or family group.
- e. if it is appropriate in the circumstances, children who are alleged to have committed an offence should be dealt with in their communities in order to assist their reintegration and to sustain family and community ties.
- f. parents are to be recognised and included in justice processes involving children and that parents are to be recognised as being primarily responsible for the development of children.
- g. victims are entitled to receive information about their potential involvement in, and the progress of, action taken under this Act.

A youth justice conference may be held where it is deemed inappropriate in the circumstances to deal with the offence by giving a caution. Youth justice conferences are designed in such a way as to: encourage a child to accept responsibility for his or her behaviour; strengthen the family group; assist the child to overcome the offending

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<sup>91</sup> Vignaendra and Hazlitt, above n 86.

behaviour; and provide a forum and place for the rights and interests of victims.<sup>92</sup> Conferences may be utilised for specific offences where the child has admitted to the offence and has consented to a conference.<sup>93</sup> Determination of whether a conference is appropriate in the circumstances is to involve consideration of: the seriousness of the offence; the degree of violence involved; the harm caused to any victim; and the number and nature of offences committed by the child as well as the number of times he or she has been dealt with under the Act.<sup>94</sup> Attendance at the conference may include the child, the conference convenor, a person responsible for the child and members of the family, an adult chosen by the child, a legal practitioner advising the child, the investigating official, a specialist youth officer; any victim and his or her or support people.<sup>95</sup> The conference is conducted in such a way as to reach agreement about an outcome plan in relation to the child. An outcome plan may include: the making of an apology to the victim; reparation to the victim or community; participation in an appropriate program (counselling, drug and alcohol rehabilitation, educational); and actions designed to reintegrate the child into the community.<sup>96</sup> The outcomes must not be more severe than what a court would have imposed.

Luke and Lind have examined the impact of youth justice conferencing on reoffending by comparing rates of recidivism for those who participated in a conference with those who attended court.<sup>97</sup> They found that conferencing reduced reoffending and the rate of reappearances per year by 15% to 20% across different offence types, irrespective of gender, criminal history, age and Aboriginality. However, Vignaendra and Hazlitt note that:

The minimal use of convictions, the destruction of unfavourable documents and the minimal use of arrest each removes obstacles to the young offender's rehabilitation. These measures are necessary but they are not sufficient on their own to bring about the young offender's rehabilitation.<sup>98</sup>

Nonetheless, the *Young Offenders Act* remains controversial, with some viewing it as too lenient. Andrew Stoner MP introduced the Young Offenders Amendment (Reform of Cautioning and Warning) Bill as a private member's bill in the NSW Parliament on 25 May 2006. The Bill provides that only one warning and one caution may be given to a young offender. Mr Stoner argued that young offenders were getting too many chances as a result

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<sup>92</sup> Section 34 *Young Offenders Act 1997* (NSW)

<sup>93</sup> Section 36 *Young Offenders Act 1997* (NSW)

<sup>94</sup> Section 37 *Young Offenders Act 1997* (NSW)

<sup>95</sup> Section 47 *Young Offenders Act 1997* (NSW)

<sup>96</sup> Section 52 *Young Offenders Act 1997* (NSW)

<sup>97</sup> Luke G and Lind B, 'Reducing juvenile crime: conferencing versus court', *Crime and Justice Bulletin*, No 69, April 2002.

<sup>98</sup> Vignaendra and Hazlitt, above n 86, p 41.



of the unlimited number of warnings that may currently be given.<sup>99</sup> According to Mr Stoner, hardened repeat offenders:

feign contrition while the conference facilitator and victim are present but they go away laughing. There must be prevention before these young people become hardened repeat offenders. For many who are currently in that category who thumb their noses at authority and laugh at the system, including police and elders, it is too late to them; they will end up in gaol and may even die too young, and that is a great tragedy, brought about, in part, by the Young Offenders Act 1997.<sup>100</sup>

The NSW Coalition has promised to ‘legislate to reduce to one warning and one caution for young offenders’ should they win government following the 2007 state election.<sup>101</sup>

#### *NSW Youth Drug and Alcohol Court*

The Youth Drug and Alcohol Court<sup>102</sup> is administered by the Children’s Court and aims to reduce reoffending by helping young people overcome their drug or alcohol problem and thus break the drug and crime cycle. Young offenders whose offending behaviour is related to drug use generally have higher rates of recidivism, and may also have personal, educational and family problems (physical and sexual abuse, family substance abuse, and mental health issues).<sup>103</sup> The Youth Drug and Alcohol Court offers offenders the opportunity to participate in an intensive rehabilitation program prior to sentencing. The program includes elements of detoxification and rehabilitation, as well as educational and vocational courses. Young offenders can be referred to the Youth Drug and Alcohol Court if they:

- plead guilty;
- are charged with an offence the Children’s Court can deal with;
- have a serious drug or alcohol problem;
- live in the program catchment area;
- are not eligible for a Young Offenders Act caution or youth justice conference;
- are suitable for treatment and rehabilitation; and

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<sup>99</sup> Andrew Stoner MP, *NSWPD*, 25/5/06, p 420.

<sup>100</sup> Andrew Stoner MP, *NSWPD*, 25/5/06, p 421.

<sup>101</sup> NSW Liberals, ‘Re-empowering Police: Supporting our police on the front line’, [www.nsw.liberal.org.au](http://www.nsw.liberal.org.au) Accessed 1/11/06.

<sup>102</sup> See ‘Youth Drug and Alcohol Court’ [www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au) for further information. Much of the information on the Youth Drug and Alcohol Court is sourced from this website.

<sup>103</sup> Vignaendra and Hazlitt, above n 86.

- agree to participate in the program while on bail.

80 juvenile offenders were referred to the Court in 2004/05 with 45 entering the program.<sup>104</sup> An evaluation of the operation of the pilot program in its first two years found that the program had a positive impact on many of the participants, with 39% successfully completing the program and a reported decrease in drug use and improvement in mental health. Nonetheless, 65% of participants in the pilot program appeared on fresh charges, and 40% served custodial sentences either for the charges that led to their participation in the program or for fresh charges.<sup>105</sup>

For further information on the *Young Offenders Act 1997* and the Youth Drug Court see: *Young Offenders and Diversionary Options* by Rowena Johns, NSW Parliamentary Library Briefing Paper No 7/03.

### **5.2.2 Magistrates Early Referral Into Treatment (MERIT)**

MERIT is a diversionary program based in the NSW Local Courts designed for adult defendants who have a problem with drug use.<sup>106</sup> The following criteria determine eligibility for MERIT:

- suitable for release on bail;
- an adult with a demonstrable illicit drug problem (excluding alcohol);
- willing to consent to a drug treatment program;
- not involved in offences related to physical violence or sexual assault, or matters that will be heard in the District Court;
- not involved in pending matters of a violent or sexual assault nature;
- deemed suitable for drug treatment and have a treatable problem; and
- approved to participate in the program by the Magistrate.

Those defendants deemed suitable can undertake supervised drug treatment as part of their conditions of bail. Detoxification, methadone and other pharmacotherapies, residential rehabilitation, individual and group counselling, and case management and other forms of welfare support and assistance are available.

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<sup>104</sup> NSW Department of Juvenile Justice, above n 72, p 27.

<sup>105</sup> 'Youth Drug and Alcohol Court' [www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au)

<sup>106</sup> Information on MERIT is sourced from 'Magistrates Early Referral Into Treatment: New South Wales', [www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au) Accessed 21/9/06.

Unlike the Drug Court (discussed below), the defendant does not need to enter a guilty plea before he or she may participate in the program. The program usually lasts for three months and aims to break the drug-crime cycle. At the completion of treatment, the Magistrate will be provided with a report that discusses the defendant's participation in drug treatment and any further treatment recommendations. The report may also provide a detailed aftercare program designed to further the defendant's drug rehabilitation.

According to Barnes and Poletti, MERIT has resulted in a 'diverse area of cost savings, including savings in prisoner numbers, court and police time and, in addition, community savings by a reduction in reoffending and an increase in community protection'.<sup>107</sup>

### 5.2.3 NSW Drug Court

The NSW Drug Court deals with offenders who are drug-dependant and aims to: reduce the drug dependency of eligible persons; promote the reintegration of drug dependent persons into the community; and reduce the need for drug dependent persons to resort to criminal activity to support their drug dependencies.<sup>108</sup> Persons eligible for the Drug Court must:<sup>109</sup>

- be highly likely to be sentenced to full time imprisonment if convicted;
- have indicated that he or she will plead guilty to the offence;
- be dependent on the use of prohibited drugs;
- reside within the catchment area (specified areas of Western Sydney);
- be referred from a court in the catchment area;
- be 18 years of age or over;
- be willing to participate;
- not be charged with an offence involving violent conduct;
- not be charged with a sexual offence or an offence punishable under Division 2 of Part 2 of the *Drug Misuse and Trafficking Act 1985*; and
- not suffer from a mental condition that could prevent or restrict participation in the program.

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<sup>107</sup> Barnes L and Poletti P, *MERIT: Magistrates Early Referral into Treatment Program: a survey of magistrates*, Judicial Commission of NSW, Sydney, 2004, p 12.

<sup>108</sup> Section 3 *Drug Court Act 1998* (NSW)

<sup>109</sup> Drug Court, 'About the Drug Court of New South Wales', [www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au) Accessed 15/9/06.

The offender is remanded with bail refused for detoxification and assessment. After assessment, the offender enters a guilty plea before the Drug Court, receives a suspended sentence, and undertakes to abide by the program conditions.

A study by Freeman and Donnelly investigated Drug Court participants who commenced on the program between 1 January 2001 and 30 June 2002.<sup>110</sup> Reoffending was measured by Drug Court participants who were convicted of an offence alleged to have occurred subsequent to their placement on the program. The study found that 23% of participants still on the program after six months had committed at least one proven offence between months four to six of the program. Of these offences, 31% were for theft, 27% for driving, 9.5% for break and enter and less than 6% were drug-related. The study found that missed program appointments and having tested positive to both stimulants and opiates during the baseline period were predictive of subsequent offending.

#### **5.2.4 Circle sentencing**

Circle sentencing commenced in Nowra, NSW in 2002 and has since expanded to various areas of NSW including Dubbo, Brewarrina, Walgett, Kempsey, Bourke, Armidale, Lismore and Mount Druitt. Schedule 4 of the Criminal Procedure Regulation 2005 provides details of the circle sentencing intervention program, the objectives of which are:

- (a) to include members of Aboriginal communities in the sentencing process;
- (b) to increase the confidence of Aboriginal communities in the sentencing process;
- (c) to reduce barriers between Aboriginal communities and the courts;
- (d) to provide more appropriate sentencing options for Aboriginal offenders;
- (e) to provide effective support to victims of offences by Aboriginal offenders;
- (f) to provide for the greater participation of Aboriginal offenders and their victims in the sentencing process;
- (g) to increase the awareness of Aboriginal offenders of the consequences of their offences on their victims and the Aboriginal communities to which they belong;
- (h) *to reduce recidivism in Aboriginal communities.*

[emphasis added]

Circle sentencing is available to Aboriginal offenders who are deemed suitable participants and who also agree to participate. Where an offender is regarded as suitable (after

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<sup>110</sup> Freeman K and Donnelly N, 'Early-phase predictors of subsequent program compliance and offending among NSW Adult Drug Court participants', *Crime and Justice Bulletin*, No 88, October 2005.

considering the nature and impacts of the offence, links to the Aboriginal community, and potential benefits to be gained from circle sentencing), a circle sentencing group is convened to recommend an appropriate sentence and to develop a treatment and rehabilitation plan for the offender. The plan may require the: conduct and good behaviour of the offender; attendance for counselling or other treatment; the supervision of the offender for the duration of the plan; residence, association with other persons or attendance at specified locations; involvement in activities, courses, training or employment for the purpose of promoting the reintegration of the offender into the community; or such other matters as the group considers would promote the treatment or rehabilitation of the offender. A Magistrate presides over the group, which also consists of the offender and his/her legal representative, the prosecutor, the Project Officer, and at least three Aboriginal persons who belong to the Aboriginal community of which the offender is part or has a close association or kinship. The victim may also participate should they wish. The referring court may impose a sentence on the offender in the terms recommended by the group following the conclusion of the circle if it agrees with the consensus of the group.

A review of the first 12 months of the trial circle sentencing program in Nowra found, amongst other things, that it helped break the cycle of recidivism.<sup>111</sup> This is thought to be due to: consideration of the social dimensions of the offending behaviour; greater community awareness and support of the offender due to the presence of family and community members in the circle; and increased accountability whilst serving the sentence.<sup>112</sup> It was reported in October 2005 that 10 of the 37 participants in Nowra had reoffended as had four of the 50 participants in Dubbo, a significant decrease in recidivism.<sup>113</sup>

### **5.2.5 Rehabilitation programs for prisoners**

Howells et al identified nine different types of correctional offender rehabilitation programs that are currently offered to offenders in Australia including programs that target areas of: cognitive skills; drugs and alcohol; anger management; violence; domestic violence; sex offending (discussed in the following section); and programs for specific populations (special needs, females, Indigenous).<sup>114</sup> Female offenders are thought to have particular needs in relation to: multiple and co-occurring mental health problems; family relationships and parenting; victimisation; communication and assertiveness programs; reintegration and skills training.

The Department of Corrective Services aims to establish programs that address the dynamic risk factors for reoffending. In 2004-05, 353 offender management programs were

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<sup>111</sup> Potas I et al, *Circle Sentencing in New South Wales: A review and evaluation*, Judicial Commission of New South Wales, Sydney, 2003.

<sup>112</sup> Potas et al, above n 111, p 52.

<sup>113</sup> 'Court circle of shame helps beat black crime', *The Sun-Herald*, 16/10/05, p 32.

<sup>114</sup> Howells et al, above n 87.

presented and over 2800 community-based offenders attended.<sup>115</sup> Programs included Think First – which aims to improve cognitive skills and address criminal attitudes and behaviour; Alcohol and Other Drugs programs; SMART (Self Management and Recovery Training) Recovery Program; planning and recruitment for a Compulsory Drug Treatment Correctional Centre at Parklea; the trial of drug free wings at Parklea and Emu Plains Correctional Centres; Ngara Nura – a residential therapeutic community program located at Long Bay Correctional Complex; and the NSW Sober Driver Program<sup>116</sup> which targets repeat drink driving offenders. More than 1440 offenders were enrolled in 112 programs in 2004/05. A Violent Offenders Therapeutic Program also operates to target dynamic risk factors of violent reoffending: anger/hostility; impulsivity; cognitive distortions, aggressive beliefs and hostile attributions; pro-criminal attitudes and endorsement of anti-social attitudes; social skills development; interpersonal and problem solving skills deficits; and criminal peer associations.

The NSW Audit Office in its performance audit of the NSW Department of Corrective Services noted that rehabilitation programs could not always be accessed or completed. Some of the reasons identified include:<sup>117</sup>

- refusal to participate and/or denial of any wrongdoing;
- the prisoner is appealing the conviction;
- the prisoner is not of the correct classification or reoffending risk level;
- limited places available;
- being transferred to another prison as a result of accommodation pressures or behavioural problems;
- a need to attend court for other offences;
- the sentence is too short for completion of a program;
- the program or service may not be available at the particular facility; and

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<sup>115</sup> NSW Department of Corrective Services, above n 70, p 44.

<sup>116</sup> The Sober Driver Program targets problems caused by adult offenders convicted of more than one drink driving offence within a five year period. It is a nine week educational and therapeutic program that addresses: the consequences of drink driving; effects of alcohol on driving; managing drinking situations; alternatives to drinking and driving; relapse prevention; and stress management. The court may order an offender to participate in the program. It aims to: reduce drink drive offending; educate participants on the effects of drink driving on themselves and the community; and assist participants to build skills, strategies and knowledge to apply in future situations to ensure they do not reoffend: *The NSW Sober Driver Program* brochure available from the website for the Motor Accidents Authority [www.maa.nsw.gov.au](http://www.maa.nsw.gov.au)

<sup>117</sup> NSW Audit Office, above n 3, p 27.

- the majority of the prisoner's time was spent on remand.

The Audit Office noted that whilst prisoners serving sentences of six months or less constitute more than half of the prisoners released each year, they do not have access to offence-based programs. In response to the Report, the Department of Corrective Services explained that not all short-term offenders were placed in treatment programs or offered an abridged form as international literature has revealed that low intensity programs of limited duration are ineffective in reducing the risk of reoffending by moderate to high risk offenders.<sup>118</sup> It was accordingly viewed as an inefficient use of resources. The demand for rehabilitation programs is also in excess of their availability. For example, whilst there were 900 sex offenders in prison in 2004-05, only 10 completed sex offence programs; and although 50% of prisoners had been convicted of a violent offence, 43% of these completed an intensive violence program.<sup>119</sup> It should be noted, however, that not all offenders would be suitable for placement on the various programs even if places were available.

### 5.2.6 *Sex offender programs*

In NSW, there are three custodial treatment programs that target sex offenders:<sup>120</sup>

1. CUBIT (Custody Based Intensive Treatment) residential program – treats moderate and high risk sexual offenders.
2. CORE (CUBIT Outreach) – a non-residential program that treats lower risk/needs sexual offenders.
3. Custodial maintenance programs – for offenders who complete either of the above programs.

Also in 2004/05, psychologists from the Forensic Psychology Service ran four community treatment groups and four community maintenance groups.<sup>121</sup>

Lievore has identified some of the core issues that are common to sex offender programs.<sup>122</sup> These include:

1. **Challenging the beliefs that support offending** – with offenders required to identify and challenge cognitive distortions and affective factors associated with offending as well as acknowledging and taking responsibility for the offending

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<sup>118</sup> NSW Audit Office, above n 3, p 6.

<sup>119</sup> NSW Audit Office, above n 3, p 28.

<sup>120</sup> NSW Department of Corrective Services, above n 70, p 47.

<sup>121</sup> NSW Department of Corrective Services, above n 70, p 47.

<sup>122</sup> Lievore, above n 11, p 78.

behaviour.

2. **Developing empathy** – so that offenders understand the impact of sexual offending and its consequences for victims, offenders and the community and develop victim empathy.
3. **Relapse prevention** – offenders learn to manage inappropriate sexual fantasies, thoughts and arousal patterns and develop relapse prevention plans to manage the risk of future offending.

Various factors can influence the effectiveness of interventions such as their timing, an awareness of the integrity of the program, and an acceptance that not all offenders are amenable to treatment (especially those whose offending behaviour is both serious and well-established or who suffer from psychological disturbances).<sup>123</sup> Lievore notes:

While evaluation studies of treatment efficacy increasingly point to small but significant treatment gains for some sex offenders, the evidence is inconsistent and it is not clear whether all sex offenders require treatment, which components of treatment programs are effective, or whether current best practice interventions are appropriate for all subgroups of offenders. Despite this variability, a number of findings are consistent, particularly in relation to the general profile and risk factors for sexual recidivism. However, it is important to reiterate that current knowledge is primarily based on those sex offenders who have been convicted and incarcerated. It is not clear whether or how hidden sex offenders resemble or differ from visible sex offenders.<sup>124</sup>

There are additional options designed to prevent serious sex offenders from reoffending in NSW. The *Child Protection (Offenders Registration) Act 2000* (NSW) created a scheme for the registration of sex offenders and the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) provided for court orders that prohibit certain offenders, who pose a risk to the lives or sexual safety of children, from engaging in specified conduct. There are currently more than 2000 offenders listed on the Sex Offender Register. According to NSW Police, one in seven offenders have been charged with a new offence since being registered. However, it is uncertain ‘whether the rate at which offending has been detected equates to a demonstration of police pro-activity or recidivism’.<sup>125</sup>

### *Cedar Cottage*

A Pre-Trial Diversion Program for certain categories of child sexual assault offenders operates at Cedar Cottage in Westmead.<sup>126</sup> The Program is a non-custodial, non-residential

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<sup>123</sup> Lievore, above n 11, p 103.

<sup>124</sup> Lievore, above n 11, p 107.

<sup>125</sup> NSW Police in NSW Ombudsman, *Review of the Child Protection Register*, May 2005, p 155.

<sup>126</sup> The sources for information on Cedar Cottage are Sydney West Area Health Service,



treatment service operated by the NSW Department of Health which enables offenders who plead guilty to be diverted from the criminal justice system into a two year treatment program after the filing of charges but before the matter proceeds to conviction or entry of judgment. However, a conviction is recorded once the offender is deemed suitable and has entered an undertaking to participate at the District Court. Offenders must attend individual, small group or large group therapy at least once a week.

The eligibility criteria for admission to the program are as follows:

- the victim is under the age of 18 when the matter is first brought before the Court;
- the offender is the child's parent, step-parent or the defacto spouse of the parent;
- the child sexual assault offence was not accompanied by acts of violence to the victim or a third party;
- the offender is over 18;
- the offender does not have a previous conviction for a sexual assault offence;
- the offender has not been offered the Treatment Program before; and
- a vacancy exists in the Treatment Program.

Whether participation in the program is in the best interests of the child and whether the offender accepts responsibility for his or her behaviour and demonstrates some understanding of its impact are also considered.

The Program aims to:

- help child victims and their families resolve the emotional and psychological trauma they have suffered;
- help other members of the offender's family avoid blaming themselves for the offender's actions and to change the power balance within their family so the offender is less able to repeat the sexual assault; and
- stop child sexual assault offenders from repeating their offences.

The advantages of the program are thus thought to be:

First that there is early acknowledgement and validation of a complaint made by a

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'Cedar Cottage', [www.wsahs.nsw.gov.au](http://www.wsahs.nsw.gov.au) Accessed 4/10/06; Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward*, Attorney General's Department of NSW, December 2005, p 172; and NSW Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report 22, November 2002, pp 222-225.

child. That child is not required to give evidence in court and be subject to cross-examination. As a result of the validation of the complaint appropriate supports can be put in place for the child. The conduct of the offender can be assessed and reviewed and, where appropriate, restricted in relation to all children, not just the complainant. The offending parent is given an opportunity to substantially address his offending behaviour, including its impact on all family members, including the child victim.<sup>127</sup>

40 offenders completed the program between 1998 and 2002, with only two having subsequently reoffended.<sup>128</sup>

### *Juvenile sex offenders*

A sex offender program is available to juvenile sex offenders.<sup>129</sup> A specialist sex offender counsellor assesses the risk the offender presents to the community as well as that person's suitability for treatment. The program addresses the following issues:

- understanding and taking responsibility for offending behaviour;
- personal strategies for controlling offending behaviour;
- education in human sexuality;
- development of social, coping and relapse prevention skills and victim empathy; and
- individual casework.

### *Criminal Justice Sexual Offences Taskforce*

The NSW Attorney General, the Hon Bob Debus, established the Criminal Justice Sexual Offences Taskforce in December 2004. Its terms of reference included, amongst other things, the examination of other jurisdictions to see whether methods used to prosecute sexual assault offences would reduce recidivism. The Taskforce published its report in December 2005.<sup>130</sup> One of the things considered by the Taskforce was the role of specialist 'sexual assault' courts – a court dedicated to a specific set of sex offences, such as exist in South Africa. A member of the Taskforce, Dr Anne Cossins, argued that a specialist court could aim to rehabilitate sexual assault offenders and thus reduce the risk of recidivism,

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<sup>127</sup> Dale Holliday, Programs Director for Cedar Cottage in Standing Committee on Law and Justice, above n 126, p 222.

<sup>128</sup> Standing Committee on Law and Justice, above n 126, p 224.

<sup>129</sup> Kelly T, *NSWPD*, 20/9/06, p 1878.

<sup>130</sup> Criminal Justice Sexual Offences Taskforce, *Responding to sexual assault: the way forward*, Attorney General's Department of NSW, December 2005.

possibly through the inclusion of a sex offender treatment program.<sup>131</sup>

### 5.3 Incapacitation

Imprisonment can be used to physically prevent an offender from committing another crime in the general community, at least in the period served, thus serving the goal of incapacitation. It has often been a popular tool for reducing recidivism but its effectiveness in this regard can be questionable particularly if the opportunity to address some of the factors that led to the offending behaviour is not maximised. Some of the rehabilitative programs offered to those in custody were discussed in section 5.2.

#### 5.3.1 Bail

Section 37 of the *Bail Act 1978* (NSW) provides that bail is generally to be granted unconditionally. However, there are some exceptions, including where the authorised officer or court is of the opinion that a condition should be imposed for the purpose of ‘reducing the likelihood of future offences being committed by promoting the treatment or rehabilitation of an accused person’ (section 37(1)(d)).

The *Bail Amendment (Repeat Offenders) Act 2002* received assent on 24 June 2002. It was described as ‘part of a package of reforms designed to target repeat offenders at the bail stage’.<sup>132</sup> Information on the history and context of the Act may be found in *Bail Law and Practice: Recent Developments* by Rowena Johns, NSW Parliamentary Library Briefing Paper No 15/02, pp 28-43. The Amendment Act inserted section 9B (additional exceptions to presumption in favour of bail) into the *Bail Act 1978* (NSW). Accordingly, the presumption in favour of bail does not apply to a person who at the time the offence is alleged to have been committed was: on bail; on parole; serving a sentence but was not in custody; was subject to a good behaviour bond or an intervention program order; or was in custody. The presumption also does not apply to those previously convicted of an offence against section 51 (failing to appear before a court in accordance with a bail undertaking) or to a person accused of an indictable offence if the person has previously been convicted of one or more indictable offences.

Fitzgerald and Weatherburn examined the impact of the *Bail Amendment (Repeat Offenders) Act 2002* (NSW).<sup>133</sup> Their study found that in the 18 months subsequent to the commencement of the Act the proportion of defendants in custody at their final court appearance had increased from 8% to 8.5% (a percentage change of 6.7%). The proportion for those accused of an indictable offence who also had a conviction for a previous indictable offence increased from 23.9% to 25.7% (a percentage change of 7.3%). The authors noted a significant increase in the proportion of defendants with a prior conviction who were in custody at finalisation – from 13% to 14.3% (a percentage change of 10.3%).

<sup>131</sup> Criminal Justice Sexual Offences Taskforce, above n 130, p 163.

<sup>132</sup> Hon Bob Debus MP, *NSWPD*, 20/3/02, p 818.

<sup>133</sup> Fitzgerald J and Weatherburn D, ‘The impact of the Bail Amendment (Repeat Offenders) Act 2002’, *Crime and Justice Bulletin*, No 83, August 2004.

Fitzgerald and Weatherburn concluded that the bail refusal rate had increased amongst those who had a prior criminal record and amongst those who had a prior record of absconding. One of the impacts of the Act highlighted by the authors was that adult Indigenous defendants were now more likely to be refused bail despite the intention of the Act to make it easier for Indigenous defendants to obtain bail. This was due to the greater likelihood of them appearing with a prior criminal record.

### 5.3.2 Preventive detention

A continuing issue is how to best protect the community from serious offenders. Protection of the community is one of the purposes of sentencing specified in section 3A of the *Crimes (Sentencing Procedure) Act 1999*. At times, a desire to protect the community and potential victims may conflict with the rights of offenders who have completed their term of imprisonment. Prisoners have a right to be punished only once for an offence and are entitled to their liberty at the conclusion of their sentence. It must be remembered that generally predictions as to the likelihood of future offending remain at best an educated guess and punishment is for past behaviour, not for what someone may or may not do in the future. Whilst courts may consider protection of the community as a factor when sentencing, sentences must not be disproportionate to the crime committed solely to protect the community from the risk of recidivism.<sup>134</sup> The issue of proportionality was considered by the High Court in *Veen v R (No 2)*.<sup>135</sup>

#### *Veen v R (No 2) (1988)*

In 1975, Robert Veen was charged with murder but was convicted of manslaughter on the basis of diminished responsibility. He was sentenced to 12 years imprisonment but was released on licence on 20 January 1983. On 27 October 1983, he killed Paul Hoson and was charged with murder but pleaded guilty to manslaughter on grounds of diminished responsibility. Veen was sentenced to life imprisonment with Hunt J noting:

I am satisfied that the prisoner is... a continuing danger to society when released, in that he is likely to kill again or to inflict serious injury upon his release by reason of his brain damage should he be under the influence of alcohol and find himself in a situation of stress. I therefore feel unable to mitigate the severity of a life sentence by reason of the prisoner's abnormal mental condition.<sup>136</sup>

Veen appealed, with the matter eventually coming before the High Court. The appeal was unsuccessful. Mason CJ, Brennan, Dawson and Toohey JJ, in reference to the principle of proportionality, noted:

It is one thing to say that the principle of proportionality precludes the imposition

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<sup>134</sup> *Chester v R* (1988) 165 CLR 611, *Veen v R* (1979) 143 CLR 458 and *Veen v R (No 2)* (1988) 164 CLR 465.

<sup>135</sup> (1988) 164 CLR 465

<sup>136</sup> Quoted at 470.

of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.<sup>137</sup>

According to Mason CJ, Brennan, Dawson and Toohey JJ:

...the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences... The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence, a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted.<sup>138</sup>

The likelihood of a prisoner reoffending does not need to be established beyond reasonable doubt before the protection of the community may be considered at the time of sentencing.<sup>139</sup> However, difficulties have arisen when an offender has completed his or her sentence, yet there are concerns that he or she will reoffend upon leaving prison. This has led to the increasing popularity of preventive detention legislation in recent years. Preventive detention is ‘the incarceration of a person for a fixed or indefinite period for the sole purpose of removing that person from the community for some specified reason’ usually fear of an instance or course of criminal conduct.<sup>140</sup> Preventive detention legislation ‘enables an offender to be detained *after the expiration of the offender’s sentence* for the prevention of harm to members of the community’.<sup>141</sup> It differs from indefinite detention legislation which ‘enables an order to be made *at the time of sentence* for an offender to be detained indefinitely’ [original emphasis].<sup>142</sup>

#### *Community Protection Act 1994*

The NSW Parliament enacted the *Community Protection Act 1994* (NSW) to ‘protect the community by providing for the preventive detention of persons who are, in the opinion of

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<sup>137</sup> At 473.

<sup>138</sup> At 477.

<sup>139</sup> *R v Harrison* (1997) 93 A Crim R 314 at 319.

<sup>140</sup> NSWLRC, above n 50, p 235.

<sup>141</sup> McSherry B, ‘Indefinite and preventive detention legislation: From caution to an open door’, *Criminal Law Journal*, 29(2) April 2005, p 94.

<sup>142</sup> McSherry, above n 141, p 94.

the Supreme Court, more likely than not to commit serious acts of violence'. Protection of the community was deemed to be the paramount consideration and the objects of the Act specifically directed the application of the Act to a particular offender, Gregory Wayne Kable. Section 3 of the Act states:

1. The object of this Act is to protect the community by providing for the preventive detention (by order of the Supreme Court made on the application of the Director of Public Prosecutions) of Gregory Wayne Kable.
2. In the construction of this Act, the need to protect the community is to be given paramount consideration.
3. This Act authorises the making of a detention order against Gregory Wayne Kable and does not authorise the making of a detention order against any other person.
4. For the purposes of this section, Gregory Wayne Kable is the person of that name who was convicted in New South Wales on 1 August 1990 of the manslaughter of his wife, Hilary Kable.

Section 5 of the Act empowered the NSW Supreme Court to order that a specified person be detained for a set period (not longer than six months) if satisfied on reasonable grounds:

- a. that the person is more likely than not to commit a serious act of violence; and
- b. that it is appropriate, for the protection of a particular person or persons or the community generally, that the person be held in custody.

The validity of the *Community Protection Act* was considered by the High Court in *Kable v Director of Public Prosecutions (NSW)*.<sup>143</sup>

*Kable v Director of Public Prosecutions (NSW)*

Gregory Wayne Kable was convicted of the manslaughter of his wife on 1 August 1990 and sentenced to a minimum term of imprisonment of four years with an additional term of one year and four months. Whilst serving his sentence, Kable sent a number of threatening letters, notably to the relatives of his deceased wife. The *Community Protection Act* was enacted prior to his release with the Director of Public Prosecutions subsequently applying for a detention order. On 23 September 1995, Levine J ordered that Kable be detained for six months. Kable appealed, the matter eventually reaching the High Court.

The majority of the High Court (Brennan CJ and Dawson J dissenting) held in *Kable v Director of Public Prosecutions (NSW)* that the *Community Protection Act* was invalid as the NSW Supreme Court was seen as having to act in a matter incompatible with Chapter III of the Australian Constitution. According to Gaudron J, the Act attempted to 'dress up'

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<sup>143</sup>

(1996) 189 CLR 51.

the proceedings envisaged by it as legal proceedings.<sup>144</sup> Amongst other things, it did not involve the resolution of a dispute between parties as to their respective legal rights and obligations. Nor was the appellant on trial for any offence against the criminal law. It required a guess to be made, on the basis of evidence that would normally be inadmissible, as to whether the appellant would commit a serious act of violence. She concluded that the power conferred was the antithesis of the legal process and compromised the integrity of the NSW Supreme Court, which ‘has the effect of compromising the integrity of the judicial system brought into existence by Ch III of the Constitution’.<sup>145</sup> McHugh J emphasised that the Act effectively made the NSW Supreme Court ‘the instrument of a legislative plan, initiated by the executive government, to imprison the appellant by a process that is far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person’.<sup>146</sup> The Act was accordingly viewed as compromising the institutional impartiality of the Supreme Court.

For further discussion of *Kable* see *The Kable Case: Implications for New South Wales* by Gareth Griffith, NSW Parliamentary Library Briefing Paper No 27/96.

#### *Fardon v Attorney-General (Qld)*

Preventive detention legislation has also been implemented in Queensland with passage of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). Its objects are:<sup>147</sup>

- a. to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and
- b. to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation.

Section 13 allows the Supreme Court of Queensland to order that a prisoner be detained in custody for an indefinite term for control, care or treatment (continuing detention order) or that the prisoner be released from custody subject to the conditions it considers appropriate (supervision order) if it is satisfied by acceptable, cogent evidence and to a high degree of probability that the prisoner is a serious danger to the community in the absence of such an order. A prisoner is considered a serious danger to the community if there is an unacceptable risk that the prisoner will commit a serious sexual offence if released from custody or released from custody without a supervision order.

The validity of this legislation was considered by the High Court in *Fardon v Attorney-General (Qld)*.<sup>148</sup> Robert Fardon was sentenced to 13 years imprisonment on 8 October

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<sup>144</sup> At 106.

<sup>145</sup> At 107, per Gaudron J.

<sup>146</sup> At 122.

<sup>147</sup> Section 3.

<sup>148</sup> (2004) 210 ALR 50.

1980 for rape. He was subsequently released on parole after serving eight years. Twenty days later he committed further offences of rape, sodomy and assault occasioning actual bodily harm. For this he was sentenced to 14 years imprisonment which expired around 30 June 2003. The *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) came into force on 6 June 2003. Fardon was to be so detained. He appealed, arguing that parts of the Act were constitutionally invalid.

The appeal came before the High Court in 2004. The main issue before the Court was whether the Act was contrary to the Constitution in that the Supreme Court was to decide whether serious sexual offenders should be the subject of continuing detention orders on the ground that they are a serious danger to the community – is this a function which is incompatible with the constitutional position of the Supreme Court as a potential repository of federal jurisdiction and thus repugnant to the institutional integrity of the Court?

The High Court by a majority of 6:1 (Kirby J dissenting) held that the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) was valid. It was not seen as having conferred upon the Supreme Court a function that compromised its constitutional integrity, nor was it incompatible with the Court's role as a repository of federal jurisdiction. The Court distinguished its previous decision in *Kable* and held that the capacity of state legislation to undermine public confidence in the state judiciary is not of itself a criterion of its constitutional validity in the context of *Kable*.

Unlike the Queensland Act, *Kable* was concerned with legislation that provided for the detention of one person, Gregory Wayne Kable. The majority of the High Court in *Kable*:

considered that the appearance of institutional impartiality of the Supreme Court was seriously damaged by a statute which drew it into what was, in substance, a political exercise.<sup>149</sup>

Gleeson CJ noted in *Fardon* that the Queensland Act 'does not confer functions which are incompatible with the proper discharge of judicial responsibilities or with the exercise of judicial power'.<sup>150</sup> The Queensland Act did not require the court to make an order for continued detention in custody and accordingly did not 'impose punishment for guilt declared by the legislature'.<sup>151</sup> The Court was still able to consider evidence and exercise its discretion. Nonetheless, Kirby J, in his dissent, was critical of the Queensland Act, stressing that:

Even with the procedures and criteria adopted, the Act ultimately deprives people such as the appellant of personal liberty, a most fundamental human right, on a prediction of dangerousness, based largely on the opinions of psychiatrists which can only be, at best, an educated or informed "guess".<sup>152</sup>

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<sup>149</sup> *Fardon* at 56, per Gleeson CJ.

<sup>150</sup> At 57.

<sup>151</sup> At 82, per Gummow J.

<sup>152</sup> At 83.



He emphasised that it is not the role of judges to punish people for their beliefs nor for future crimes that people fear they will commit but have not actually been committed:

In our system of criminal justice, prisons are therefore a place of punishment for *past* wrong-doing. By a sentence that includes imprisonment, a judge communicates the censure of society deserved by the prisoner for proved *past* crimes. Imprisonment is not used as punishment *in advance* for crimes feared, anticipated or predicted in the future. To introduce such a notion of punishment, and to require courts to impose a prison sentence in respect of perceived *future* risks, is a new development. It is one fraught with dangers and “inconsistent with traditional judicial process”.<sup>153</sup>

[original emphasis]

In contrast, Callinan and Heydon JJ characterised the Act as protective rather than punitive. They cited a number of other situations invoking non-punitive, involuntary detention including: mental infirmity; public safety in relation to chemical, biological and radiological emergencies; migration; indefinite sentencing; contagious diseases; and drug treatment.<sup>154</sup> They concluded:

The Act does not offend against the principles for which *Kable* stands. It is designed to achieve a legitimate, preventative, non-punitive purpose in the public interest, and to achieve it with due regard to a full and conventional judicial process, and in making a decision as part of it, the Supreme Court did not exercise power inconsistent with its function as a court which exercises judicial power pursuant to Chapter III of the Constitution.<sup>155</sup>

#### *Crimes (Serious Sex Offenders) Act 2006*

Other legislation has since been introduced in NSW for the purpose of protecting the community against serious sex offenders. The *Crimes (Serious Sex Offenders) Act 2006* (NSW) was enacted in 2006 with the object to ‘provide for the extended supervision and continuing detention of serious sex offenders so as: (a) to ensure the safety and protection of the community, and (b) to facilitate the rehabilitation of serious sex offenders’.<sup>156</sup> It enables the Attorney General to make an application to the Supreme Court for an extended supervision order against certain sex offenders.<sup>157</sup> Some of the conditions that may be

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<sup>153</sup> At 95.

<sup>154</sup> At 109.

<sup>155</sup> At 113.

<sup>156</sup> Section 3.

<sup>157</sup> Section 6.

imposed on a supervision order include:<sup>158</sup>

- accepting home visits by a corrective services officer;
- making periodic reports to a corrective services officer;
- notifying a corrective services officer of any change in address;
- participation in treatment and rehabilitation programs;
- wearing electronic monitoring equipment;
- not residing in or resorting to specified locations or classes of locations;
- not associating or making contact with specified persons or classes of persons;
- not engaging in specified conduct or classes of conduct;
- not engaging in specified employment or classes of employment; or
- not changing his or her name.

An extended supervision order can only be made if the Supreme Court is satisfied to a high degree of probability that the offender is likely to commit a further serious sex offence if not kept under supervision.<sup>159</sup>

The Attorney General may also apply to the Supreme Court for a continuing detention order against a sex offender.<sup>160</sup> A continuing detention order can only be made if the Supreme Court is satisfied to a high degree of probability that the offender is likely to commit a further serious sex offence if not kept under supervision and that adequate supervision will not be provided by an extended supervision order.

The Supreme Court, when determining whether or not to make a continuing detention order or extended supervision order, must have regard to the following:<sup>161</sup>

- the safety of the community;
- certain psychiatric reports;
- the results of any assessments by a psychiatrist, psychologist or medical

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<sup>158</sup> Section 11.

<sup>159</sup> Section 17(2).

<sup>160</sup> Section 14.

<sup>161</sup> Section 17.

practitioner as to the likelihood of the offender committing a further serious sex offence;

- the results of any statistical or other assessment as to the likelihood of persons with histories and characteristics similar to those of the offender committing a further serious sex offence;
- any treatment or rehabilitation programs in which the offender has participated, or had opportunity to;
- the level of compliance with various obligations on the offender;
- the offender's criminal history and pattern of offending behaviour; and
- any other available information regarding the likelihood that the offender will in future commit offences of a sexual nature.

Schemes for the extended supervision of serious sex offenders also exist in Victoria, Western Australia and Queensland, with Queensland and Western Australia permitting their continued detention in particular circumstances. However, there are slight differences between the schemes in terms of the breadth of offences that come within the Act.<sup>162</sup> Victoria is currently considering the possibility of introducing a continued detention scheme, with the Attorney General, the Hon Rob Hulls, having requested the Sentencing Advisory Council on 19 May 2006 to advise on its merits. The Council published an issues paper in August 2006.<sup>163</sup>

#### *Opinions regarding preventive detention*

There are various views on preventive detention. It appears to be popular both politically and with the public as it targets those criminals particularly disliked by the community, notably violent sex offenders or sex offenders that target children. Some see preventive detention as sometimes necessary in order to adequately protect the community and potential victims against future violent acts of crime. For example, the *Crimes (Serious Sex Offenders) Act 2006* (NSW) was described as:

another demonstration of the Government's dedication to ensuring the safety of the community from offenders who already have demonstrated their capacity to commit horrendous and unacceptable crimes, and where there is compelling and cogent evidence that there are likely to do so again.<sup>164</sup>

The NSW Opposition has argued, in relation to serious sex offenders, that the 'interest of

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<sup>162</sup> McSherry B, *High-Risk Offenders: Continued Detention and Supervision Options*, Community Issues Paper, Sentencing Advisory Council, August 2006, pp 24 and 28.

<sup>163</sup> See McSherry, above n 162.

<sup>164</sup> The Hon Carl Scully MP, *NSWPD*, 29/3/06, p 21732.

potential victims and victims must be placed well above the interests of sex offenders to be released and enjoy some freedom<sup>165</sup> and that ‘it is more important to protect the children of this State than to be concerned about the rights of convicted paedophiles’.<sup>166</sup> In high risk situations, preventive detention may be thus seen as necessarily erring on the side of caution.

However, some have concerns with the principles of preventive detention and how it fits with an historical understanding of the place of law and imprisonment. Some scholars have stressed that it conflicts with the rule against double jeopardy (although recent events have demonstrated that this rule is not immune to change)<sup>167</sup> as well as highlighting the difficulties inherent in the prediction of whether or not someone will reoffend. McSherry argues that:

while preventive detention legislation may not confer upon a Supreme Court a function repugnant to its role as a repository of federal jurisdiction, from the policy perspective, it breaches a number of well-established principles of law. These principles include the principle of legality, the principle against double punishment and the principle that criminal detention should only follow a finding of guilt. Both indefinite and preventive legislation regimes are also problematic in being based on assessments of risk by mental health professionals.<sup>168</sup>

McSherry emphasises that one of the difficulties faced by mental health professionals when considering the relevant risk factors is that the person in question has usually not reoffended for some time as he or she has been in prison.<sup>169</sup> It is thus the person’s behaviour prior to imprisonment that will be considered.

Warner has also voiced her concerns with preventive detention, particularly in relation to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld):

Not only does the new Queensland law offend the principle of proportionality, it is contrary to the principle of finality of sentence. An offender should be released at the end of his or her sentence without the sentence being subsequently extended (other than by appeal). An application to extend the sentence within six months of release amounts to exposing the offender to additional punishment for the same crime. It offends the double jeopardy rule. Moreover, an obstacle to preventive detention is the difficulty of prediction. Psychiatrists notoriously overpredict. Predictions of dangerousness have been shown to have only a one-third to 50%

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<sup>165</sup> Andrew Humpherson MP, *NSWPD*, 29/3/06, p 21732.

<sup>166</sup> Chris Hartcher MP, *NSWPD*, 29/3/06, p 21735.

<sup>167</sup> For discussion of the reform of the double jeopardy rule see: *DNA Evidence, Wrongful Convictions and Wrongful Acquittals* by Gareth Griffith and Lenny Roth, NSW Parliamentary Library Briefing Paper No 11/06, p 45ff.

<sup>168</sup> McSherry, above n 141, p 105.

<sup>169</sup> McSherry, above n 141, p 107.

success rate.<sup>170</sup>

Allan and Dawson have stressed the importance of accurately determining the risk of reoffending as overestimating the risk can contribute both to a waste of expensive resources as well as the potential infringement of human rights.<sup>171</sup> There is a concern that a standard of proof lower than beyond reasonable doubt is insufficient in the context of depriving someone of his or her liberty, a fundamental human right.<sup>172</sup> On the other hand, underestimating the risk of recidivism can mean that some offenders do not receive appropriate treatment or supervision as well as the community being put at risk.<sup>173</sup>

#### 5.4 Community corrections

There is evidence that quality correctional programs based in the community can maximise the reduction in recidivism.<sup>174</sup> After referring to studies in the UK and Canada, White concluded:

having offenders complete at least part of their sentence in a community setting is useful and allows them to participate more fully in rehabilitative and restorative types of programmes. From the point of view of programming, therefore, it is increasingly recognised that there be better provision of an integrated transition from one part of the corrective system to another.<sup>175</sup>

He stresses that ‘to stop re-offending requires a major commitment to changing the life circumstances of offenders. Simultaneously, this also generally means that we need to address the communal relationships and social problems that serve as the launching pad for criminal and anti-social activity’.<sup>176</sup> He therefore advocates a restorative justice approach to community corrections.

Community Offender Services within the NSW Department of Corrective Services delivers the following programs, amongst others:

- **Probation supervision** – may be a condition of a Good Behaviour Bond; the Probation and Parole Officer has regular contact with the offender and monitors

<sup>170</sup> Warner K, ‘Sentencing review 2002-2003’, *Criminal Law Journal*, 27(6), December 2003, p 338.

<sup>171</sup> Allan A and Dawson D, ‘Assessment of the risk of reoffending by Indigenous male violent and sexual offenders’, *Trends and Issues in Crime and Criminal Justice*, No 280, July 2004.

<sup>172</sup> NSWLRC, above n 50, p 236.

<sup>173</sup> Lievore, above n 11, p 39.

<sup>174</sup> NSW Department of Corrective Services, above n 68, p 8; White, above n 64, p 50.

<sup>175</sup> White, above n 64, p 50.

<sup>176</sup> White, above n 64, p 50.

compliance with conditions of the bond.

- **Parole supervision** – see next section.
- **Intensive supervision** – this may form part of a home detention or drug court order. A case management plan is developed for those subject to home detention to allow staged access to out of home activities.
- **Community service orders** – offenders are sentenced to perform unpaid work in the community.
- **Biyani Cottage** – established in March 2004 to divert female offenders with a mental health disorder and/or mild intellectual disability and co-existing alcohol and drug problems from a custodial sentence.<sup>177</sup> It aims to stabilise mental health and drug and alcohol issues as well as help the women access long-term residential rehabilitation programs or community rehabilitation facilities.
- **Periodic detention** – the offender generally spends a set number of days each week in custody; this enables the offender to maintain ties with employment, family and the community.

#### 5.4.1 Parole

Parole is ‘the discharge of prisoners from custody prior to the expiry of the maximum term of imprisonment imposed by the sentencing court, provided that they agree to abide by certain conditions, with the intention that they serve some portion of their sentence under supervision in the community, subject to recall for misconduct’.<sup>178</sup> The NSW Law Reform Commission has highlighted the competing risks that form an inherent part of the concept of parole, that is, the risk of recidivism versus the risk of releasing an offender unconditionally and without support at the end of sentence.<sup>179</sup>

Parole is governed by the *Crimes (Sentencing Procedure) Act 1999* (NSW) and part 6 of the *Crimes (Administration of Sentences) Act 1999* (NSW). The court at the time of sentencing an offender to imprisonment will generally set a non-parole period, the balance of which is not to be more than one-third of the non-parole period. Sentences of six months or less do not have a parole component.<sup>180</sup> Where a sentence of imprisonment is for three years or less, the court will make a parole order for the end of the non-parole period.<sup>181</sup> Parole orders for sentences of more than three years are issued by the Parole Authority. The Parole Authority will only make a parole order for the release of an offender if it is deemed

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<sup>177</sup> NSW Department of Corrective Services, above n 70, p 50.

<sup>178</sup> NSWLRC, above n 50, p 240.

<sup>179</sup> NSWLRC, above n 50, p 241.

<sup>180</sup> Section 46 *Crimes (Sentencing Procedure) Act 1999* (NSW)

<sup>181</sup> Section 50 *Crimes (Sentencing Procedure) Act 1999* (NSW)

appropriate in the public interest.<sup>182</sup> It is to have regard to the following when determining whether or not the release of an offender is appropriate in the public interest:<sup>183</sup>

- a. the need to protect the safety of the community;
- b. the need to maintain public confidence in the administration of justice;
- c. the nature and circumstances of the offence to which the offender's sentence relates;
- d. any relevant comments made by the sentencing court;
- e. the offender's criminal history;
- f. the likelihood of the offender being able to adapt to normal lawful community life;
- g. the likely effect on any victim of the offender, and on any such victim's family, of the offender being released on parole;
- h. any report in relation to the granting of parole to the offender that has been prepared by or on behalf of the Probation and Parole Service – such a report must address: the likelihood of the offender being able to adapt to normal lawful community life; the risk of the offender reoffending while on release on parole and the measures to be taken to reduce that risk; the measures to be taken to assist the offender while on release on parole as set out in a post-release plan prepared by the Probation and Parole Service; the offender's attitude to the offence to which his or her sentence relates; the offender's willingness to participate in rehabilitation programs and the success or otherwise of his or her participation in such programs; the offender's attitude to any victim of the offence to which his or her sentence relates and to the family of any such victim; any offences committed by the offender while in custody including in particular any correctional centre offences and any offence involving an escape or attempted escape; and the likelihood of the offender complying with any conditions to which his or her parole may be made subject;
- i. any other report in relation to the granting of parole to the offender that has been prepared by or on behalf of the Review Council, the Commissioner or any other Authority of the State;
- j. such guidelines as are in force under section 185A of the *Crimes (Administration of Sentences) Act 1999* (NSW); and
- k. such other matters as the Parole Authority considers relevant.

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<sup>182</sup> Section 135 *Crimes (Administration of Sentences) Act 1999* (NSW)

<sup>183</sup> Section 135(2) *Crimes (Administration of Sentences) Act 1999* (NSW)

The Parole Authority is generally not to make a parole order for a serious offender unless the Review Council advises that it is appropriate.<sup>184</sup>

The standard parole conditions are found in clause 215 of the Crimes (Administration of Sentences) Regulation 2001 (NSW):

- the offender must be of good behaviour and must not, while on release on parole, commit any offence,
- the relevant parole order may be revoked if the offender contravenes any of the terms and conditions of the order,
- the relevant parole order may be revoked if the Parole Authority determines that it has sufficient reason to believe that the offender, having been released from custody, has not adapted to normal lawful community life.

The Sentencing Court and the Parole Authority may impose additional conditions.<sup>185</sup> These conditions may include a prohibition or restriction on the offender from associating with a specified person and/or from frequenting or visiting a specified place or district.<sup>186</sup>

Parole has been found to result in lower reconviction and reoffending rates than for those released without supervision at the end of their custodial sentence.<sup>187</sup> For the parolees who did reoffend, it took much longer for them to do so than those who were simply released straight into the community.

## 5.5 Reintegration of ex-prisoners into the community

An important factor in the risk of ex-prisoners reoffending is the extent to which they are able to resettle in the community once released from prison. The UK Social Exclusion Unit has noted that ‘In many cases, the task is not to resettle prisoners in society, but *settle* them for the first time’.<sup>188</sup> There are various ways in which an offender may be released back into the community: on parole; under intensive supervision; on temporary release; or unconditionally.<sup>189</sup> Access to appropriate services whilst in prison as well as after release

<sup>184</sup> Section 135(3) *Crimes (Administration of Sentences) Act 1999* (NSW)

<sup>185</sup> Section 128 *Crimes (Administration of Sentences) Act 1999* (NSW)

<sup>186</sup> Section 51A *Crimes (Sentencing Procedure) Act 1999* (NSW); section 128A *Crimes (Administration of Sentences) Act 1999* (NSW).

<sup>187</sup> Ellis T and Marshall P, ‘Does parole work? A post-release comparison of reconviction rates for paroled and non-paroled prisoners’, *The Australian and New Zealand Journal of Criminology*, 33(3) December 2000, pp 300-317.

<sup>188</sup> Social Exclusion Unit, above n 33, p 8.

<sup>189</sup> Borzycki and Baldry, above n 33.



can reduce the likelihood of reoffending as it may assist with reintegration into the community, with public safety increasing as a result.<sup>190</sup>

Walsh has identified a number of the features of best practice in terms of prisoner rehabilitation and the reintegration of prisoners into the community:<sup>191</sup>

- programs that promote **employability** – prisoners to have access to prison work and vocational training, as well as access to job search and job-matching services;
- access to **educational programs** to maximise post-release employment opportunities;
- maintenance of **relationships with families** throughout incarceration;<sup>192</sup>
- **facilitation of partnerships** between prisons and government and non-government community organisations;
- meeting the **immediate welfare needs** of prisoners at the time of their release (money for clothes, food, household items, medication, telephone calls, and transportation home) as the immediate period following a prisoner's release is thought to be critical with prisoners at a high risk of reoffending in this time;
- provision of **aftercare services**, whether through a drop-in centre, halfway house or other option; and
- **gradual reintegration** of prisoners into the community through methods of gradual release such as parole, home detention and furlough, and/or release to community residential facilities such as halfway houses.

The NSW Department of Corrective Services has recognised the opportunity offered by a term of imprisonment to provide programs that address deficits in motivation, living skills and personal and social development.<sup>193</sup> Community Offender Services funding was allocated from 2003 to 2007 to provide emergency accommodation to parolees with a high risk of drug relapse following their release. The Supported Offender Accommodation Program (SOAP) provides supported accommodation for offenders participating in the

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<sup>190</sup> Borzycki and Baldry, above n 33.

<sup>191</sup> Walsh T, 'Is corrections correcting? An examination of prisoner rehabilitation policy and practice in Queensland', *The Australian and New Zealand Journal of Criminology*, 39(1) April 2006, pp 109-133.

<sup>192</sup> Correctional and transitional centres with female offenders in NSW have a relationship with the NSW Department of Community Services so that women with children in care are able to have regular contact and visits: NSW Department of Corrective Services, above n 70, p 56.

<sup>193</sup> The source for information in this paragraph is: NSW Department of Corrective Services, above n 70, p 48.

Drug Court Program and Home Detention. It also provides financial and life skills support. The Adult Education and Vocational Training Institute provides accredited courses and qualifications and aims to improve literacy, language and numeracy skills to Year 10 level. It also provides further education and vocational training to increase opportunities for post-release employment.<sup>194</sup> The Pathways to Employment, Education and Training program provides medium to high-risk community based offenders with skills and links to access employment and vocational education within NSW TAFE.

The NSW Department of Corrective Services Community Funding Program provides funding to non-profit organisations based in the community that provide a range of support services to offenders and their families whilst in custody as well as in the community.<sup>195</sup> These services assisted about 8000 offenders, ex-offenders and their families in 2004-05 and provide a key role in the Throughcare Strategy. The following is a list of agencies that received funding in 2004-05:

- Glebe House and Judge Rainbow Memorial Fund – provides supported accommodation services for recently released male offenders.
- Guthrie House – provides supported accommodation services for female offenders and ex-offenders.
- Prisoners Aid Association – provides property minding and financial services to inmates.
- Community Restorative Centre Justice Support – provides services (including a family transport service to correctional centres) to offenders, ex-offenders and their families.
- Yulawirri Nurai Aboriginal Corporation – provides post-release services for Indigenous women.
- Link-Up (NSW) Aboriginal Corporation – assists Aboriginal and Torres Strait Islander inmates to establish and strengthen family ties.
- SHINE for Kids – provides services to the children of offenders.
- Bundjalung Tribal Society Ltd – operates a residential-based rehabilitation project for male Indigenous offenders with alcohol and other drug dependencies on the NSW north coast.
- New Horizons Enterprises Ltd – operates a supported accommodation project in the

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<sup>194</sup> 3286 inmates were enrolled in education courses in 2004/05: 23% in adult basic education courses, 21% in vocational education and training courses, and 1.5% in higher education. An average of 40% of offenders participated in education courses each month.

<sup>195</sup> The source for information on the Community Funding Program is NSW Department of Corrective Services, above n 70, p 55.

Sydney metropolitan area for male offenders with a mental illness.

These agencies were also provided with funding for the 2005-06 financial year.<sup>196</sup>

However, Corrective Services staff have reported experiencing difficulties with accessing the various services, particularly in the areas of housing, employment, mental health, and drug use.<sup>197</sup> There are also difficulties in that post-release support is only provided to those released on parole and not to those released at the conclusion of a fixed sentence.<sup>198</sup>

### 5.5.1 UK Social Exclusion Unit

One strategy proposed in the UK to reduce recidivism is the use of a 'Going Straight' contract. In September 2000, the Social Exclusion Unit of the UK Cabinet Office was asked by Prime Minister Tony Blair to work with various government departments to reduce the rate of reoffending.<sup>199</sup> In particular, the Unit was to consider the possibility of increasing employment and reducing homelessness as well as reflect on the impact of more effective supervision after release. The Social Exclusion Unit published its report *Reducing Re-offending by Ex-prisoners* in July 2002.

One option suggested in the Report was the development of a Going Straight Contract.<sup>200</sup> This Contract would be tailored to the circumstances of the individual prisoner both in and out of custody and would seek to address all of the factors associated with their offending and their risk of reoffending. It would adopt a multi-agency approach and involve sanctions and rewards, as well as participation in various programs and activities to reduce their risk of reoffending. The Social Exclusion Unit also recommended that measures be introduced to address financial and housing needs among recently released prisoners, as well as the development of effective reception and resettlement procedures in all prisons.

The UK Government subsequently published its National Action Plan on the reduction of reoffending in July 2004.<sup>201</sup> The National Action Plan aimed to address some of the concerns that had been raised in various reports, including that of the Social Exclusion Unit, by establishing the right framework for reducing reoffending. Amongst other things, a National Offender Management Service was established (responsible for reducing reoffending and managing the budget for offender services). Implementation of the *Criminal Justice Act 2003* was also deemed to be important with its emphasis on the

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<sup>196</sup> NSW Department of Corrective Services, 'Community Funding Program', [www.dcs.nsw.gov.au](http://www.dcs.nsw.gov.au) Accessed 3/10/06.

<sup>197</sup> NSW Audit Office, above n 3, p 34.

<sup>198</sup> NSW Audit Office, above n 3, p 33.

<sup>199</sup> Blair T, 'Social Exclusion Unit to tackle reoffending by ex-prisoners', *Media Release*, 4/9/00.

<sup>200</sup> Social Exclusion Unit, above n 33.

<sup>201</sup> UK Home Office, *Reducing Re-offending: National Action Plan*, Home Office Communication Directorate, July 2004.

rehabilitation of the offender and reparation to the community. A 'Going Straight' contract is to be designed and piloted by the south west region.

## 6 CONCLUSION

Some offenders appear to be at greater risk of reoffending than others. Recidivism rates are generally influenced by gender, Indigenous status, age, and the number of prior offences. The risk of recidivism is also shaped by a number of other factors such as education, employment, housing stability, links with family, physical and mental health, and drug and alcohol issues. However, as Chen et al has observed:

there is little point knowing who is most likely to reoffend if we cannot do anything to reduce the risk of reoffending. There is, accordingly, a clear need for more Australian research into which programs and interventions are effective in reducing the risk of involvement in crime.<sup>202</sup>

Society has responded to recidivism in various ways throughout history. The increasing use of prisons as a response to crime since the nineteenth century has meant that recidivism has received particular attention as concern has surrounded the implications of releasing ex-prisoners. If someone is known to have offended in the past, what is to stop him or her from offending again? According to Simon:

The survival of the recidivist as an object of concern for criminology over more than a century and through three important revolutions in penalty demonstrates its importance in the relationship between crime and the task of governing modern society. From the dangerous classes to the habitual offender to the career criminal, there has been a consistent search for a selected target through which the challenge of crime might be mastered.<sup>203</sup>

Various strategies have been developed in an effort to reduce the risk of recidivism. These range from the diversion of offenders from the criminal justice system, to rehabilitative schemes, incapacitating offenders where necessary, and assisting ex-prisoners with fully integrating into the community following their release. Preventive detention schemes in Australia are growing in number, particularly in relation to a concern for protecting the community from serious sex offenders. The increasing popularity of incapacitation in many ways signals a return to past responses to the challenges of recidivism.

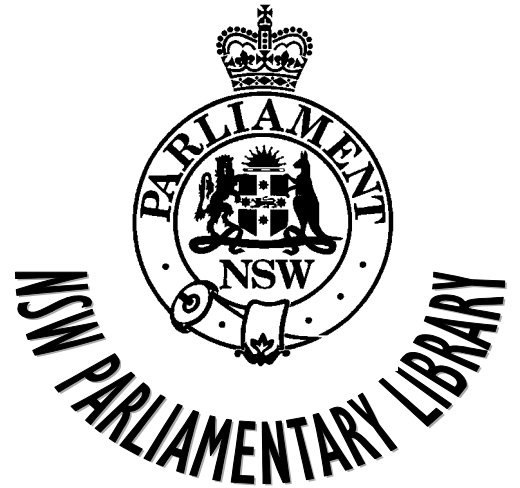
There are a number of risks associated with determining a proper response to recidivism – the risk of future harm to potential victims should the offender reoffend, as well as the risk of overestimating the likelihood that an offender will reoffend and thus unnecessarily impinging on his or her rights. The correct balance between these competing risks can be difficult to determine and it is the desire for this balance that lies at the core of a number of debates on recidivism. The issue of how best to respond to reoffending is likely to continue into the future as key stakeholders persist with seeking new ways of effectively reducing the risk of recidivism.

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<sup>202</sup> Chen et al, above n 21, p 11.

<sup>203</sup> Simon, above n 1, p 44.

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