Briefing Note

The Habitual Criminals Act 1957: A Commentary on Issues Relating to Persistent and Dangerous Offenders

by

Gareth Griffith

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1. INTRODUCTION

The Issues Paper entitled, Sentencing Review 1994, released by the NSW Attorney-General's Department in June 1994 poses the question, "Should the Habitual Criminals Act 1957, and ss. 115 and 443 of the *Crimes Act 1900*, be repealed or strengthened?". The Issues Paper considers some of the arguments on both sides and seems to prefer the option of referring what it describes as the modernisation of the habitual criminals legislation to the Law Reform Commission. It further suggested that the amended legislation would be concerned solely with offenders with histories of convictions of violence. The Issues Paper went on to propose that sections 115 and 443 of the *Crimes Act 1990* should be repealed in any event.

Subsequently, in a press release of 24 June 1994 concerning the Sentencing Review Issues paper, the NSW Attorney-General foreshadowed the introduction of legislation "Imposing tougher sentences for offenders with histories of repeated crimes of violence".

The subject was elaborated upon in the press. *The Australian* reported on 23 June 1994 that changes to the habitual offenders' laws are expected to result in "three-time losers" - criminals who have been convicted three or more times - facing an additional sentence. The NSW Attorney-General was said to be investigating the *Habitual Criminals Act* to ensure "more effective use is made of that legislation to send a clear message that a life of crime is not acceptable to the community". In an article from the *Sydney Morning Herald* of 25 June 1994 headed, "Govt plan to crush habitual criminals", in which the Attorney-General is reported to have said that the Government wanted to ensure that judges had wide powers to deter repeat offenders, saying "I want to make certain that the option is there to be used...If there are serious offenders who clearly have been shown to judges as being people who are in the business of crime...I want to make certain that the business cycle is broken and to give judges the power to try".

The same article noted the opposition of the NSW Bar Association to the proposal, with the Association's Mr Peter Hidden, QC, describing the *Habitual Criminals Act* as "a throw-back to the 19th century" and stating "you cannot be sentenced for crimes you might commit in the future".

This briefing note begins with an historical overview of the legislation relating to persistent offenders, followed by a account of the main provisions of the NSW *Habitual Criminals Act 1957*. Considered next are the different approaches to the sentencing of persistent offenders, the contrasting claims of protection and proportionality, as well as the problems of definition and prediction in this area of the law. A review of the approaches adopted in other selected jurisdictions is then presented.

In this briefing note the terms habitual criminal and persistent offenders are used interchangeably with reference to the problem of recidivism.

2. HISTORICAL NOTE

(i) Habitual Criminals Act 1905 (NSW)

Legislation dealing with habitual criminals has been in operation in NSW since 1905. It was acknowledged at the time to be an innovative statute which was to influence legislative reform in other jurisdictions. Section 3 of the Act was adopted in substance by South Australia, Victoria, Queensland and Western Australia and by New Zealand.[1] The *Habitual Criminals Act 1905* (NSW) introduced a dual-track system in which a sentence of penal servitude was to be followed by detention during His Majesty's pleasure. Under section 3 of the Act, to be declared an habitual criminal a person had to be convicted of two offences of poisoning, sexual offences or abortion, or otherwise three offences of such crimes as wounding, robbery and arson. Under section 6 of the Act habitual criminals were to work at some trade or vocation and were to receive at least half of any profits deriving from this work. According to the Second Reading Speech, at the termination of his sentence the habitual criminal would "be taken to an establishment not exactly a gaol, but still far from being a place of enjoyment".[2] Males and females were to be kept apart and no liquor was to be allowed, other than for medical purposes (sections 10 and 11). The period of detention was indeterminate in nature qualified only by the Governor's power of release on determining that "an habitual criminal is sufficiently reformed, or for other good cause" (section 7). On release the former habitual criminal would be required to report his whereabouts to the police over the next two years. Introducing the legislation into Parliament, the Attorney-General of the day, the Hon. G Wade MP, first cited the need to protect society from the growing class of habitual criminals and then explained the assumptions behind the Act in these terms

> one can divide what we call habitual criminals into two classes. Over and again we find there is a certain class of offenders who apparently are of debased minds and weak in intellect. These men seem to be prone to commit a repetition of that class of offence known as sexual... Apart from them, there is another - wider and more dangerous - class of people, who are guilty of offences generally against property. These, as a rule comprise men - and sometimes women, unfortunately - who are of an

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[1] *R v White* (1968) 122 CLR 467, p 470 (Barwick CJ).

[2] NSWPD, 23.8.1905, p 1643.

> adventurous turn of mind... They begin in their early days with the reading of novelettes of the "Deadwood Dick" character, and throughout all their lives, in every stage of their careers, and in all their progress in the courts, there seems to be the same spirit of adventure, excitement and risk, which attracts them.

The first class of sexual offenders would seem to be beyond reform, with the Minister referring to the "deterioration" of their intellect and the undue development of their "lower sexual passions". On the other hand, the adventurous class of criminals were treated as "moral derelicts" who were permitted under the system of "so-called humane laws to propagate their species, to raise up children with the same criminal tendencies". Thus, said the Minister, society runs the risk of "moral contamination". Turning to the reforming purpose of the Act, the Minister then said he proposed "To treat criminal offenders of habitual tendency in the same way as moral lunatics, to put them under restraint, not necessarily for the purpose of punishment, but where they can be better treated in some systematic way until they are safe to be allowed to return to normal conditions and live with their fellows as possibly law-abiding citizens".[3]

A strong element of rehabilitation informed the Act therefore, combined with other concerns of a preventative and deterrent sort. The emphasis was not on violent crime or the violent criminal but, rather, on what was perceived to be the growing class of professional criminals, the subject of contemporary social disquiet and the object of moral reformation.

(ii) Preventive detention in England

The debate in NSW mirrored concerns elsewhere regarding the problem of persistent offenders. In England, after much debate following the report of the Gladstone Committee on prisons in 1895, the *Prevention of Crime Act* was passed in 1908.[4] This empowered a court to impose, in addition to the normal sentence for the crime, a sentence of preventive detention of between five to ten years on an offender with three previous felony convictions since the age

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[3] NSWPD, 23.8.1905, p 1642.

[4] The first habitual criminals legislation was passed in 1869 in England. This was replaced in 1871 by the *Prevention of Crimes Act*. The Gladstone Committee started work in 1894 and it seems to have had in mind "a large class of habitual criminals not of the desperate order, who live by robbery and thieving and petty larceny...". A full account of the historical background is found in L Radzinowicz and R Hood, *A History of English Criminal Law and its Administration from 1750: Vol 5 - The Emergence of Penal Policy*, Stevens & Sons 1986. The 1869 legislation is also dealt with in MW Melling, "Cleaning House in a Suddenly Closed Society: The Genesis, Brief Life and Untimely Death of the Habitual Criminals Act 1869" [1983] 21 *Osgoode Hall Law Journal* 315-362.

of sixteen.

One criticism of the Act was that its definition of an habitual criminal was too vague, leaving the door open to conflicting and arbitrary interpretations. The most notable advocate of that point of view was Winston Churchill who expressed alarm over the sentences passed under the legislation. Immediately on becoming Home Secretary in 1910 he altered the practical focus of the Act, away from persistent offenders as such, especially when these had committed a mere succession of petty offences, towards "dangerous and brutal criminals, whose passions of predatory violence or ferocious lust render them a peril and an affront to civilised society".[5] A new Home Office Circular was sent out in 1911 stressing that "the Act must not be resorted to as an easy and painless solution of the difficult problem of habitual crime, but must be regarded as an exceptional means of protecting society from the worst class of professional criminals".[6]

In fact the use of preventive detention declined markedly after Churchill's intervention. Historically, the significance of that intervention lies in its focus on violent offenders, a perspective which finds expression in the current debate. Curiously, perhaps, that focus was not found in the provisions relating to preventive detention in the *Criminal Justice Act 1948*, or in the policy that informed it. As envisaged by the Dove-Wilson Committee of 1932, the Act was designed to cover "professional criminals who deliberately make a living by preying on the public".[7] However, according to a Home Office report the new legislation was to encompass in addition "the relatively trivial [persistent] offender".[8] Andrew Ashworth comments that similar problems arose in the application and interpretation of the Act as were encountered in relation to the *Prevention of Crime Act 1908*. He adds that over time the sentence of preventive detention "virtually fell into disuse" following a 1962 Practice Direction issued by the Lord Chief Justice to restrict its use and a report in the following year by the Advisory Council on the Treatment of Offenders showing the minor nature of many of the offences committed by those

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[5] H.O. 144/10086/106362/29. Cited in L Radzinowicz and R Hood, op cit, p 285.

[6] Ibid, p 286. In fact a 1909 Circular also referred to crimes of a "serious character", but, as Radzinowicz and Hood point out, on closer investigation the Circular "could still encompass two very different categories of petty persistent offenders and professional criminals" (p 282).

[7] Dove-Wilson Committee, *Report of the Departmental Committee on Persistent Offenders*, HMSO 1932, para 42.

[8] WH Hammond and E Chayen, *Persistent Criminals: A Study of all Offenders Liable to Preventive Detention in 1956*, HMSO 1963, p 11.

subjected to preventive detention.[9] The 1948 Act provided a sentence of between five and fourteen years for persistent offenders over thirty. This sentence was instead of and not in addition to the normal sentence.[10]

The 1948 Act presented something of a backdrop for the subsequent reform of the habitual criminals legislation in NSW in the 1950s. The intention behind the *Habitual Criminals Act 1957 (NSW)* was said by the then Minister for Health, the Hon. W.F. Sheahan, to be consistent with the following memorandum issued by the Secretary of State to all courts after the English *Criminal Justice Act 1948* came into force

> The new system of preventive detention has therefore to take account of three factors, first that the sentence is in its nature preventive rather than punitive; second, that nevertheless for a majority of the prisoners so sentenced maximum security and strong disciplinary control will be essential; and third, that both on general grounds and in the light of recommendations of the Departmental Committee on Persistent Offenders as to the nature and purpose of preventive detention, it will be important to make the regime a positive rather than a negative one, and to do whatever is possible to send these men out both able and willing to live an honest life.[11]

3. HABITUAL CRIMINALS ACT 1957 (NSW)

The reason for introducing the 1957 Act was clear enough. As the Hon. W.F. Sheahan said in the Second Reading Speech the 1905 legislation had provided an "ineffective method of dealing with the problem" of recidivism. Particular criticism was levelled at the experiment adopted by the courts in the 1920s of pronouncing juvenile offenders who had not been imprisoned to be habitual criminals on the grounds that they might thereby be more readily rehabilitated. Nowhere in the Second Reading Speech is the operation of the Act or the definition of an habitual criminal confined to the violent offender. Indeed, it is said that the habitual criminal "is, theoretically, the professional burglar of the

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[9] A Ashworth, *Sentencing and Criminal Justice*, Weidenfeld and Nicolson 1992, p 142.

[10] For a detailed analysis of the 1948 Act and a detailed empirical study of its application see - WH Hammond and E Chayen, *Persistent Criminals*, op cit.

[11] NSWPD, 14.3.1957, p 4073. The bill was described as "a tuning-in to Great Britain".

community, steeped in a life of crime".[12] However, the Minister did adopt a definition of an habitual criminal incorporating three elements: (a) criminal qualities inherent or latent in the mental constitution; (b) settled practice in crime; and (c) public danger.[13] The Minister made the further point that under the old scheme habitual criminals had been confined in security prisons whereas under the new Act they would be absorbed into the ordinary prison programme.

Section 4 of the *Habitual Criminals Act 1957* provides for the circumstances in which a convicted person may be pronounced an habitual criminal. Section 4 (1) deals with the conviction on indictment of a person of or above 25 years of age. For such a person to be pronounced an habitual criminal the judge must be satisfied that the person

- has already served at least two separate terms of imprisonment
- that both terms were the result of convictions on indictable offences (not being indictable offences that were dealt with summarily without his consent)
- that the person should be imprisoned for a substantial time and that this would be expedient for the purpose either of *reforming the convicted person* or for the *prevention of crime.*

Section 4 (2) is in substantively similar terms but it applies to a summary conviction before a magistrate. In the appropriate circumstances the magistrate is directed to make an application to the District Court to have the person pronounced an habitual criminal. Where such a pronouncement is considered expedient then the judge shall pass an additional sentence of imprisonment in accordance with section 6 of the Act *"for a term of not less the five years nor more than fourteen years"*. Section 6 (2) provides for the additional sentence to be served concurrently with any sentence being served at the time the person is pronounced to be an habitual criminal.

Section 7 sets out the circumstances in which the Governor may direct the release of an habitual criminal on licence. This may occur where the Governor determines that the person is "sufficiently reformed, or for other good cause". Section 8 provides for the arrest of an habitual criminal who holds or held such a licence. Section 8 (5) empowers a judge to pass a sentence of imprisonment of up to 14 years where, for example, an habitual criminal or former habitual criminal, under section 8 (2) (a), failed to comply with a

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[12] Ibid, p 4071.

[13] The definition is based on N Morris, *The Habitual Criminal*, Longmans, Green for the LSE, 1951.

condition of the licence to be at large.

Section 9 requires any report by the Adult Probation Service to be considered by the judge before sentencing. Section 10 sets out the conditions under which a person ceases to be an habitual criminal, either in relation to a licence to be at large granted under section 7, or otherwise at the end the person's sentence as an habitual criminal.

In *R v Roberts* [1961] SR (NSW) 681 Street CJ contrasted the old *Habitual Criminals Act 1905-1952* with the amending Act of 1957. He pointed out that under the old scheme the habitual criminal did not start the reformatory period of imprisonment until he had served the sentence imposed on him and that, in light of the fact that declaration as an habitual criminal involved an indeterminate prison term which might last for years, the practice grew up of imposing a light sentence for the crime in question, thus permitting the reformatory period of detention to begin as soon as was reasonable after the sentence was imposed. Under the 1957 Act the rationale behind passing the lighter sentence for the crime in question did not apply, for here the sentence for the crime plus the sentence on the pronouncement as an habitual criminal are stated to run concurrently.

The power to pronounce a person an habitual criminal under the Act is discretionary in nature. In *R v Riley* [1973] 2 NSWLR 107 it was held that that power ought not to be exercised lightly, indeed not unless it can be predicted with reasonable confidence that the person will resume his criminal activities at the end of any term of imprisonment for which he is being sentenced. In this case the pronouncement that Riley was an habitual criminal was held to be justified: the appellant had previously been convicted of sixty-two offences and had pleaded guilty on this occasion to two charges of breaking and entering a store and stealing. Cited with approval was *R v Fahey* [1954] VLR 460, a case in which a man was pronounced to be an habitual criminal at first instance under section 514 of the *Victorian Crimes Act 1928* after pleading guilty to ten counts of receiving. The decision was reversed by the Victorian Supreme Court (Gavan Duffy J dissenting) on the ground that it could not be predicted with reasonable confidence that the man would revert to his criminal activities. Whilst the outcome was different, the principle was the same in the two cases and in both the test did not relate to the seriousness of the offence but to the likelihood of recidivism.

It was further observed in *Riley* that the courts in NSW have been "unwilling" to declare persons to be habitual criminals and that, including the appellant in the case at issue, there were at that time only twelve habitual criminals in gaol in the State. The legislation does not appear to have been used since then. The Sentencing Review Issues Paper commented on this point, "The Department of Corrective Services advises that, as far as its records disclose, the *Habitual Criminal Act 1957* has not been used since the 1970s, and ss. 115 and 443 of

the *Crimes Act* appear equally unused".[14]

4. SECTIONS 115 AND 443 OF THE CRIMES ACT 1900

Section 115 of the *Crimes Act 1900* provides

> Whosoever, having been convicted of any felony or misdemeanour, afterwards commits any offence mentioned in section 114, shall be liable to penal servitude for ten years.

Section 114 is headed, "Being armed etc. with intent to commit offence". The offences under the provision carry a penalty of seven years penal servitude. The operation of section 115 was considered by the NSW Court of Criminal Appeal in *R v Tillott* (1991) 53 A Crim R 46 where Hunt J said that the section has "been interpreted as providing an additional offence, and not merely a higher maximum penalty for the offences provided by s 114 aggravated by the existence of the prior conviction" (at 53).

Hunt J contrasted section 115 with section 443 which permits: an additional sentence of between two and ten years penal servitude to be imposed where a person convicted of a felony has previously been convicted once of an indictable offence; or an additional sentence of between three and fourteen years penal servitude where the person has previously been convicted twice or more often of such offences; or imprisonment for between six and eighteen months where the person is convicted of a misdemeanour. *R v McIvor* (1933) 50 WN (NSW) 57 is authority for the proposition that section 443 only applies in cases in which the presiding judge is of the opinion that the maximum punishment provided for an offence is insufficient in the circumstances.

5. APPROACHES TO PUNISHING PERSISTENT OFFENDERS

The following outline of the different approaches to punishing persistent offenders is based on the commentary found in Andrew Ashworth's *Sentencing and Criminal Justice*. Ashworth identifies three paradigms: (a) flat-rate sentencing; (b) the cumulative principle; and (c) progressive loss of mitigation.

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[14] For a review of the use of the habitual criminals legislation in this and other States up to the 1970s see - M W Daunton-Fear, "Sentencing Habitual Criminals" from *The Australian Criminal Justice System* ed by D Chappell and P Wilson, Butterworths 1972. It is said that there was a "remarkable drop" in the number of pronouncements after 1967 (thus, in 1966 there were eleven, in 1967-68 only two).

- **Flat-rate sentencing:** The pure "desert" theory of sentencing maintains that the sentence should be governed by the crime and not at all by the offender's prior record. Thus, what the offender deserves in terms of punishment should be measured solely by reference to the crime committed, "in terms of its harmfulness and the offender's culpability in relation to it". Previous offences can have no bearing on this, for to take them into account would be to punish the offender twice over. Ashworth comments that this view is held by only a small group and that "There are few practical examples of flat-rate sentencing schemes".[15] The example he gives is that of parking fines where the penalty does not increase according to the number of previous offences. One practical difficulty with flat-rate sentencing is that it can offer no concessions to the first offender.

- **The cumulative principle:** The basic idea is that, for each new offence, the sentence should be more severe than for the previous offence. It is explained that the usual rationale for cumulative sentencing is individual prevention or deterrence, that is, the persistent offender would either be deterred by the threat of cumulative penalties or would, in effect, "with his eyes open deliberately sentence himself". Ashworth raises several objections to this approach, citing at one stage the point made by the Dove-Wilson Committee as long ago as 1932 that prison sentences may prove counterproductive: "the inference is that present methods not only fail to check the criminal propensities of such people, but may actually cause progressive deterioration by habituating offenders to prison conditions which weaken rather than strengthen their characters". Thus, reliance on imprisonment for deterrence purposes may be self-defeating.

  More significant for the present is the observation that, stated in this form, the cumulative principle approach fails to distinguish between minor, serious and very serious offences.

- **Progressive loss of mitigation:** Ashworth starts with the comment that this approach "differs from flat-rate sentencing in that it makes some allowance for previous record, and differs from the cumulative principle in that it places limits on the account taken of previous record and defers to an overall

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[16] A Ashworth, *Sentencing and Criminal Justice*, op cit, p 143. Ashworth cites the following examples of pure desert theorists: G Fletcher, *Rethinking Criminal Law*, Little Brown & Co 1978; RG Singer, *Just Deserts: Sentencing Based on Equality and Desert*, Ballinger 1979.

concept of proportionality". It is said that the principle of progressive loss of mitigation, which is the approach characteristically adopted by desert theorists, consists of two parts. One is that a first offender should receive a reduction of sentence; the other is that with second and subsequent offences an offender should progressively lose that mitigation. In this way the desert-based view that proportionality to the seriousness of the offence should be the main determinant of the sentence is modified by factors relating to the offender's past history.[16]

In *Veen (No 2)* the Australian High Court held that the previous criminal history of an offender may be taken into account in determining a sentence, but it cannot be given such weight as to lead to a penalty which is disproportionate to the gravity of the offence. In regard to the sentencing matrix, the High Court observed in the same case: "sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions".[17]

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[16] Ibid, p 150.

Ashworth considers the application of the principle of the progressive loss of mitigation in the English courts, with special reference to *Queen* (1981) 3 Cr App R (S) 245 and *Bailey* (1988) 10 Cr App R (S) 231. What seems to emerge from such cases is the view that a complex matrix of factors operates in relation to sentencing persistent offenders which includes, within ill-defined limits, a regard for the offender's prior record. According to Ashworth, the ceiling is set by the gravity of the offence and even an appalling prior record should not take the sentence above it. He adds, "The plasticity of 'ceilings' in English sentencing practice enables the courts to declare the progressive loss of mitigation is the principle, whilst handing down sentences on recidivists which veer towards the cumulative principle". However, the principle itself is not espoused in relation to very serious crimes. For example, in delivering the guideline judgment on rape in *Billam* (1986) 82 Cr App R 347 Lord Lane CJ stated, "previous good character is of only minor relevance".

[17] (1988) 164 CLR 465, p 476 (per Mason CJ, Brennan, Dawson and Toohey JJ).

6. PROTECTION AND PROPORTIONALITY

To a large extent the contemporary discussion about persistent offenders is a debate between the claims of proportionality in sentencing, on one side, and the need to protect the community from a certain class of offenders, on the other. It is certainly the case that proportionality is a deeply entrenched principle of the common law of sentencing. In Australia its importance was affirmed by the High Court in Veen (No 1) (1979)[18] and reaffirmed in *Veen (No 2)* where the proposition was stated that "a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender".[19] That is not to say that the protection of society is not a permissible factor in the exercise of the sentencing discretion. On the contrary, Mason CJ and Brennan, Dawson and Toohey JJ held

> It is one thing to say that the principle of proportionality precludes the imposition 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.[20]

In relation to this, RG Fox comments that the protection of the community is behind all forms of sentence and is not, in the High Court's view, inconsistent with proportionate sentences.[21] Community protection remains relevant to

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[18] (1979) 143 CLR 458.

[19] (1988) 164 CLR 456, p 472 (Mason CJ, Brennan, Dawson and Toohey JJ). RG Fox comments that the principle of proportionality "commands unanimous support" within the High Court and that it has been re-affirmed in *Chester v The Queen* (1988) 165 CLR 611, *Baumer v The Queen* (1988) 166 CLR 51, *Hoare v The Queen* (1989) 167 CLR 348 and *Bugmy v The Queen* (1990) 169 CLR 525. Fox explains that the scope of the rule of proportionality is that, except where overridden by competent legislation, the common law of sentencing in Australia prohibits judges or magistrates from awarding sentences exceeding that which is commensurate to the gravity of the crime then being punished - RG Fox, "The Meaning of Proportionality in Sentencing" [1994] 19 *Melbourne University Law Review* 489-511, p 495.

[20] ibid, p 473.

[21] RG Fox, "Legislation Comment: Victoria Turns to the Right in Sentencing Reform: The Sentencing (Amendment) Act 1993 (Vic)" (1993) *Crim LJ* 394, p 402.

fixing sentence, therefore, but only within outer limits set by proportionality.[22]

Deane J, in a dissenting judgment in *Veen (No 2)*, argued on behalf of a statutory system of preventive detention in these terms:

> The protection of the community obviously warrants the introduction of some acceptable statutory system of preventive restraint to deal with the case of a person who has been convicted of violent crime and who, while not legally insane, might represent a grave threat to the safety of other people by reason of mental abnormality if he were to be released as a matter of course at the end of what represents a proper punitive sentence.[23]

That statement was cited with approval by the Victorian Attorney-General in the Second Reading Speech for the Sentencing (Amendment) Bill 1993 in support of the introduction of indefinite sentences.[24] Not cited by the Attorney-General was Deane J's rider to the statement in which he said, "Such a statutory system could, one would hope, avoid the disadvantages of indeterminate prison sentences by being based on periodic orders for continuing detention in an institution other than a gaol and provide a guarantee of regular and thorough review by psychiatric and other experts".[25] Deane J was not, therefore, advocating indeterminate prison sentences; RG Fox explains that what he had in mind was the situation of an offender who was about to be released as a matter of course at the end of a "proper punitive sentence", that is, a proportionate one. Fox concludes that it was "inappropriate" for the Victorian Attorney-General to use Deane J's observations "to buttress her plans for a new, wider, open-ended criminal sentence".[26]

The comments of Deane J are a reminder of the important role played by mental health legislation in the administration of criminal justice. This issue is

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[22] RG Fox (1994), op cit, p 502. The principles of sentencing were set out in the NSW case of *Camilleri* (CCA, unreported, 8 February 1990) where the court referred to the importance of looking to the "the gravity of the offence viewed objectively", but went on to note that the "fundamental purpose of punishment is the protection of society".

[23] (1988) 164 CLR 465, p 495.

[24] VPD (LA), 29.4.1993, p 1355.

[25] ibid.

[26] RG Fox, op cit, p 407.

not dealt with in this briefing note beyond mentioning that in NSW the procedures for dealing with "persons found not guilty by reason of mental illness" and "persons who may be unfit to plead" are set out in table form in an explanatory note at the end of the *Mental Health Act 1990.*

The High Court had the opportunity to consider further the issue of indeterminate detention in the case of *Chester* (1988) 165 CLR 611. The *Criminal Code* of Western Australia contains separate provisions for passing indeterminate sentences on habitual criminals (section 661) and passing indeterminate sentences on persons convicted of an indictable offence, whether previously convicted of any indictable offence or not (section 662). Under both the offender can be detained during the Governor's pleasure, with section 661 adding the words "in a prison". The *Chester* case involved an order under section 662 (a) against a man who had pleaded guilty to stealing a car and then $19,000 from a bank whilst armed with a knife and threatening actual violence. The order was set aside. In doing so the High Court referred to the "fundamental principle of proportionality", stating that the use of section 662 should be confined to "very exceptional cases where the exercise of the power is demonstrably necessary to protect society from physical harm. The extension of a sentence of imprisonment which would violate the principle of proportionality can scarcely be justified on the ground that it is necessary to protect society from crime which is serious but non-violent". Indeterminate sentences should be restricted to violent crimes and then only in very exceptional circumstances of demonstrable necessity; the High Court said they should not be used for crimes involving financial loss and property damage. Indeterminate detention was said to be a "stark and extraordinary" form of punishment, made more problematic by the fact that they are terminable by executive, not by judicial decision (at 619). Direct reference to the habitual criminals provision was restricted to the declaration that the power conferred by section 662 (a) did not attract the operation of section 661 of the Criminal Code.

7. ISSUES OF DEFINITION AND PREDICTION

Issues of definition and prediction have played a crucial part in the debate about habitual criminals. As to the issue of definition, the question is which class or classes of offenders are to belong to the category of "habitual criminals". Is the term to be defined in a relatively inclusive or exclusive way? Is it to extend to a large class of persistent offenders, or should it be confined to small category of offenders defined in terms of the gravity of their offence? Put another way, is persistence the key issue at stake, or is it the danger to the community inherent in certain kinds of offences? It has been suggested in this briefing note that a central problem of habitual criminal legislation is that it has cast its definitional net too wide. This takes us back to Churchill's criticism of the operation of the *Prevention of Crime Act 1908* which was

discussed in an earlier section of this briefing note. Basically, the difficulty lies in the term "habitual criminal" itself and, historically, in the perceived purpose underlying the introduction of the relevant legislative schemes. The term "habitual" suggests persistence: the implication is that the person has formed the habit of criminality, that criminal activity has become a more or less constant feature of the person's lifestyle, that the person has adopted a life of crime, or, alternatively, that criminality is somehow inherent in the person's mental make-up. Historically, these were the concerns behind the making of the habitual criminals legislation in this State. The comment can be made that, whilst such concerns may remain valid in their way, the precise terminology used to express these is outdated and inappropriate, at least to the extent that it shifts the focus away from the overriding need to protect the community from the dangerous offender. In 1905 the focus was on the moral danger posed by the growing class of professional criminals; now the emphasis seems more on the physical danger posed by the violent offender. Arguably, therefore, the focus has moved away from the *professional* criminal towards the ***dangerous*** criminal.

The case law from the different Australian jurisdictions shows that, to the extent that the habitual criminal legislation has been applied, the courts have looked at least as much to the mere number of offences as to considerations of gravity. The *Riley* and *Fahey* cases have already been discussed in this respect. By way of further example, in *R v White* (1988) 122 CLR 467 the High Court upheld an habitual criminal declaration made by the trial judge under section 319 (1) of the South Australian *Criminal Law Consolidation Act 1935-1957*; in that case the offender, who had a history of offences against property, had been convicted on three counts of larceny.[27] Typically, therefore, habitual criminals legislation in Australia has been directed towards the professional criminal. Ashworth has commented that there are no clear boundaries to the concept of professional criminal, "with the result that, as history shows, minor offenders tend to be swept into the spiral of severity".[28] Ivan Potas has argued in the same vein that "the history of recidivist provisions shows that while such laws are often approached with enthusiasm they gradually lose judicial favour as it becomes recognised that the petty offender rather than the

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[27] At issue in the case before the High Court was whether convictions on separate counts in the one information are convictions on separate "occasions" for the purposes of section 319 (1) of the South Australian Act, notwithstanding that the counts were heard in the one court at the same time. The High Court answered the question in the affirmative, thereby reversing the decision of the Supreme Court of South Australian *R v White* [1967] SASR 184.

[28] Ashworth, *Sentencing and Criminal Justice*, op cit, p 156.

so-called dangerous criminal recidivist bears the brunt of such legislation".[29]

In its way, the concept of the "dangerous" offender is equally difficult. Radzinowicz and Hood, for example, have argued that the concept of "dangerousness" is "so insidious that it should never be introduced in penal legislation".[30] The concept and its implications for the criminal law were discussed in detail in the Floud Report of 1981. The ambiguousness of the concept was noted, as were the confusions attending the subject generally: "The question of penalties for serious offences - even for the worst cases of such offences - must not be confused with the question of protecting the public from the few serious offenders who *do* present a continuing risk and who *are* likely to cause further serious harm".[31] This was based on the observation that few serious offenders repeat their serious offences, so that there is no reason, in most cases, to keep them out of circulation on that account for very long periods of time. Floud states that "dangerousness" is not an objective concept, for danger is a matter of judgment or opinion - a question of what we are prepared to put up with. Floud adds, "Dangerousness is a thoroughly ambiguous concept and we may well ask whether it has any place in the administration of criminal justice; and, if it be conceded that it has, how we are to define and identify 'dangerous' offenders for legal purposes".[32]

Of further concern were the difficulties of prediction in this context. According to Ashworth, the Floud Report's survey of the available studies revealed that no method of prediction has yet managed to do better than predicting one false positive for every true positive, i.e. a fifty per cent rate in predicting "dangerousness". Indeed, many of the prediction methods have only a one-third success rate. A Home Office study from 1981 by Brody and Tarling is also cited in this context. The study involved a group of clinicians in reviewing the records of over 800 prisoners and selecting those who might be termed

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[28] I Potas, "The Principles of Sentencing Violent Offenders - Towards a More Structured Approach", Social Development Committee, Parliament of Victoria, *Inquiry into Mental Disturbance and Community Safety*, Second Report, 1992, p 119. Potas goes on to say, "In view of the difficulty of predicting who may properly be designated as dangerous, and particularly, due to the lack of hard evidence supporting its benefits, preventive detention is a highly selective and potentially discriminatory strategy of dubious efficacy and morality. The only saving grace is that in Australia, and particularly in New South Wales, it has generally fallen into disuse" (p 120).

[30] L Radzinowicz and R Hood, "Dangerousness and Criminal Justice: A Few Reflections" (1978) *Crim L Rev*, 713-724, p 722.

[31] J Floud, "Dangerousness and Criminal Justice" (July 1982) 22 *The British Journal of Criminology*, 213-228, p 216. The article presents a concise account of the Floud Report.

[32] ibid, p 214.

"dangerous" on certain criteria. Of the seventy seven who were thus classified, forty eight had been released and their records were examined for the five years following release. It was found that nine of them committed "dangerous" offences during that period. Ashworth explains that this means that, if all of them had been detained for an additional five years on the basis of the prediction of dangerousness, there would have been nine true positives and thirty nine false positives - a "success" rate of around twenty per cent only. Further, nine of the 700 non-dangerous offenders who had been released had also committed a "dangerous" offence during the five-year period. Thus, the risk of being the victim of one of these serious offences was as great from the large number of "non-dangerous" as from the small number of "dangerous" offenders.[33]

The point is made in an Australian context that the mental health and behavioural science professions have as yet been unable to demonstrate an effective technology for distinguishing violent offenders who will recidivate from those who will not.[34] The issues of definition and prediction were reviewed in great detail in the 1992 inquiry of the Victorian Parliament's Social Development Committee on the Draft Community Protection (Violent Offenders) Bill. The Bill, which was clearly informed by the situation relating to Garry David, applied to offenders who had committed specified serious offences and were considered to be dangerous because of a severe personality disorder; its provisions would only have applied at the completion of a custodial sentence. The Committee's Second Report set out the submissions it received, many of which were from leading commentators in the field.[35] The Committee's own conclusions were then set out in its Third Report of April 1992. It found, among other things, that criminological and psychiatric research and literature did not support the provisions and premises of the Draft Bill. The major misconceptions the Committee pointed to included the assumption made in the Draft Bill that "the diagnosis of severe personality disorder had predictive power" and that "community safety will be enhanced by provisions of preventive detention".[36] However, a dissenting view was set out in the Minority Report of Mr MA Leighton MP, which in turn was based to a significant extent on the work of the Floud Report.[37]

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[33] A Ashworth, *Sentencing and Criminal Justice*,op cit, p 160.

[34] P Mals and G Grantham, "Queensland Boards a Sinking Ship: New Dangerous Offenders Legislation" (Feb 1993) 10 *Alternative LJ* 17-20, p 19.

[35] Social Development Committee, Parliament of Victoria, *Inquiry Into Mental Disturbance and Community Safety*, Second Report, 1992.

[36] Social Development Committee, Parliament of Victoria, *Inquiry Into Mental Disturbance and Community Safety, Third Report*, April 1992, pp 83-4.

[37] ibid, p 136.

Returning to the Floud Report for a moment, having cited the problems of definition and prediction, it commented

> It is worth noting that no-one dismisses the practical problem. That is, no-one denies the existence of a minority of serious offenders who present a continuing risk. The argument is all about degrees of risk, perceptions of danger and justifiable public alarm, the difficulty of deciding whether or not someone is "dangerous" and the legitimacy of confining people for what they *might* do as well as for what they have actually done.[38]

The Floud Report was informed by an ethical approach structured around two key principles: the principle of "just redistribution of risk", and the principle that the citizens of a free society have the right to be presumed free of harmful intentions. The just redistribution of risk is between a known offender and a potential victim of a predicted offence. The Report refers to the making of a moral choice between competing claims: the claim of a known individual offender not to be unnecessarily deprived of his liberty; and the claim of an innocent (unconvicted), unknown person (or persons) not to be deprived of the right to go about their business without risk of grave harm at the hands of an aggressor. Where does justice lie? the Report asks, who should bear the risk? It is argued that the committing of a serious crime negates the presumption that the person responsible is free of harmful intentions. It may therefore be justifiable to redistribute the risk of future harms by favouring the potential victims and by burdening the known offender. Thus, a just redistribution of risk could be undertaken in favour of potential victims.

On the basis of this ethical approach the Floud Report recommended that the distinction between ordinary and exceptional sentences should be made the subject of legislation. The objective was to bring protective sentencing under statutory control, while leaving ample scope for the exercise of judicial discretion in the sentencing of a very heterogeneous group of exceptional offenders. To this end, the Report formulated categories of grave harm against which the public, in certain circumstances, may claim a special outside the permitted maximum for a relevant serious offence. It was taken as axiomatic that the entitlement of the public to the protection of a special sentence only arises where there is grave harm and that no offender should be eligible for a protective sentence unless grave harm was manifested in his criminal conduct. Reliance was placed, therefore, not on a statutory test of dangerousness, but instead on the concept of *grave harm* which should be interpreted as comprising the following categories

- death

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[38] J Floud, op cit, p 216.

- serious bodily injury
- serious sexual assaults
- severe or prolonged pain or mental distress
- loss of or damage to property which results in severe personal hardship
- damage to the environment which has severe adverse effects on public health or safety
- serious damage to the security of the state.[39]

One obvious point to make is that these categories are not confined to the traditional offences against the person. A second is that the reference to property damage which causes severe personal hardship lacks the specificity required if it is to serve as a justification for additional imprisonment. The same concern has been expressed regarding the reference to the security of the state, a category which, it has been said, reveals the "slippery extension of the criteria of 'dangerousness'".[40] More generally, comment is also made about the populist tendency in the Floud Report, with Bottoms and Brownsword stating: "The spirit of the discussion seems to be that a key element in the justification for protective sentences might lie in public alarm".[41] On the ethical front, Ashworth says it might be argued that the right to be presumed free from harmful intentions should not be extinguished for ever if a person commits a grave crime. On a practical note, he suggests that the Floud arguments might be sufficient to support a form of civil detention.[42] David Wood has argued in a similar vein and goes on to state that the key to reconciling the retributivist and protectionist approaches to punishment lies in distinguishing between, on the one hand, imprisonment, understood as a penal measure and, on the other hand, forms of detention which do not constitute punishment, such as the quarantining of carriers of life-threatening diseases and the incarceration of psychopaths.[43]

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[39] ibid, p 221.

[40] ibid, p 225. Floud cites the criticisms of Radzinowicz and Hood.

[41] AE Bottoms and R Brownsword, "The Dangerousness Debate After the Floud Report", (July 1982) 22 *The British Journal of Criminology* 229-254, p 248.

[42] A Ashworth, *Sentencing and Criminal Justice*, op cit, p 162.

[43] D Wood, "Dangerous Offenders and Civil Detention" (1989) 13 *Crim LJ* 324-329, p 325.

In fact the Floud Report did not envisage that the measures it recommended would increase the level of protection from dangerous offences; the proposed measures were in essence a statutory codification of established legal practice. Two general points can be made. One is that, whilst the term "dangerousness" is fraught with difficulty in a legal context and the exact term is rarely used in legislation, courts may still apply it as a criterion for decision making. That argument is put in an English context by Estella Baker.[44] Thus, whatever the difficulties of prediction and definition may be, the problem posed by dangerous offenders remains, as does the need for the courts to assess any future risk of serious harm. Secondly, the policy of incapacitating dangerous offenders does seem to have a political attraction.

8. REVIEW OF SELECTED JURISDICTIONS

(i) Queensland

The indefinite sentence option was introduced in Queensland under Part 10 of the *Penalties and Sentences Act 1992*. The controversial nature of this reform was acknowledged in the Minister's Second Reading Speech where it was explained that such sentences would be applicable to any person convicted of a violent offence, a term which encompasses a number of serious sexual offences. "Violent offence" is defined to include an indictable offence that, in fact, involves the use, or attempted use, of violence against a person and for which an offender may be sentenced to life imprisonment. When imposing an indefinite sentence, either on its own initiative or on an application made by the prosecuting counsel, a court is required to specify a "nominal sentence", being a sentence of a fixed term which the court may have imposed had it not actually imposed an indefinite sentence (section 163 (2)). Further, certain pre-conditions must be satisfied before the sentencing power can be used. This includes the court being satisfied that "the offender is a serious danger to the community; in so determining a court must have regard to, among other things, "the risk of serious physical harm to members of the community if an indefinite sentence were not imposed" and the need to "protect members of the community" from such risk (section 163 (3)). The prosecution has the onus of proof and the standard of proof is that a court must be satisfied that the person is a serious danger (a) by acceptable, cogent evidence and (b) to a high degree of probability (sections 169 and 170). A court must give detailed reasons for imposing an indefinite sentence (section 168). Section 171 provides that the sentencing court must review the indefinite sentence within six months of the offender having served 50% of the nominal sentence.

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[44] E Baker, "Dangerousness, Rights and Criminal Justice" [July 1993] 56 *The Modern Law Review* 528-547.

Section 197 (1) of the Act repealed the habitual criminal provisions under the *Criminal Code*.[45]

(ii) South Australia

Under section 22 of the *Criminal Law (Sentencing) Act 1988* the Supreme Court, on application by the DPP, has the discretionary power to declare a defendant an habitual criminal and direct that he/she be detained in custody until further order. The power arises: on conviction for offences involving wounding, poisoning, sexual offences or abortion where the defendant has had two or more previous convictions of an offence in the same class; or, upon conviction for other specified classes of offences, where there is a previous record showing three or more convictions of an offence of the same class (e.g. robbery, arson and forgery). The section applies only to adult offenders. Of interest is the continuing influence of the NSW habitual criminals legislation on the structure and content of section 22.

Section 23 refers to offenders who are incapable of controlling their sexual instincts. Such offenders may detained in custody until further order, a power which the Supreme Court may exercise in addition to, or instead of, imposing a prison sentence (section 23 (6)).

The South Australian Office of Crime Statistics advises that section 22 (or its equivalent) has not been used since 1980, which is as far back as the records go; section 23 (or its equivalent) has not been used on more than five occasions since 1980, and not at all since 1987.

(iii) Victoria

Provision for the passing of indefinite sentences was inserted in the Victorian *Sentencing Act 1991* in 1993. Such sentences are not defined to be in addition to any other sentence. However a court is required to fix a nominal sentence equal in length to the non-parole period it would have set if it had imprisoned the offender for a fixed term (section 18A (3)). Section 18B requires a court when imposing an indefinite sentence to be satisfied that the offender is "a serious danger to the community". The test is that of a "high degree of probability" which, as the Attorney-General pointed out in her Second Reading Speech, "lies somewhere between the criminal and civil standards".[46] The burden of proof is on the prosecution. The term "serious danger" is not defined. However, the courts are offered some guidance in determining why a person is a serious danger; on this causal issue they are directed to have regard

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[45] For a critique of the legislation see - P Mals and G Grantham, op cit.

[46] VICPD (LA), 29.4.93, p 1355.

to such factors as character, past history, age, health or mental condition and the nature and gravity of the serious offence committed by the offender. Further regard must be had when passing an indefinite sentence to such matters as the risk of serious danger to the community if a sentence of that kind were not passed and the need to protect the community from such risk. Also, under section 5A, when sentencing a recidivist " serious sexual offender" or a recidivist "serious violent offender" the court is directed to regard the protection of the community as the principal purpose for which the sentence is imposed and, in order to achieve that purpose, to impose a custodial sentence "longer than that which is proportionate to the gravity of the offence considered in the light of its objective circumstances". If an indefinite sentence is being considered, sentencing must be adjourned for twenty five days to allow the convicted offender to prepare a response to the application. Reasons must be given for the indefinite sentence and these have to be entered in the records of the court. Because the order is a sentence on conviction, it is subject to appeal in the normal way. Indefinite sentences are reviewable by the courts, initially on application from the DPP after the offender has served the nominal sentence (section 18H).

Provision for the making of sentences of preventive detention in relation to persistent offenders under section 192 of the *Community Services Act 1970* (formerly the *Social Welfare Act 1970*) was repealed in 1985 by the *Penalties and Sentences Act* of that year (section 114).

(iv) Tasmania

Section 392 of the *Criminal Code* is headed "Dangerous Criminals". It provides that where a person of or over seventeen years has committed at least two crimes of violence then he may be declared a dangerous criminal "if the judge is of the opinion that such a declaration is warranted for the protection of the public". A judge is directed to have regard to such matters as the person's antecedents or character and to any medical or other opinion. A person declared a dangerous criminal is to be detained during the Governor's pleasure.

The Tasmanian Department of Justice advises that the power has been used on four occasions since 1980. At present, three dangerous criminals are in prison in Tasmania.

(v) Western Australia

Comment has already been made in relation to section 661 and 662 of the *Criminal Code* of Western Australia. Section 661 provides

> When any person apparently of the age of 18 years or upwards is convicted of any indictable offence and has been previously so

> convicted on at least 2 occasions, the court before whom such person is convicted may declare that he is an habitual criminal, and direct that on the expiration of the term of imprisonment then imposed upon him, he be detained during the Governor's pleasure in a prison.

Section 662 is more akin to a dangerous offender provision and allows for indeterminate sentences to be passed where there is no prior record of conviction on an indictable offence. The discretion here is very wide and, as the High Court observed in *Chester* (1988) 165 CLR 611, precise criteria for the exercise of the power are not specified. Following that case, the Western Australian Court of Criminal Appeal held in *Gooch v The Queen* (1989) 43 A Crim R 382 that the power under section 662 should not be exercised in the absence of a finding that the offender is a constant and continuing danger to the community.[47]

Relevant, too, is the *Crime (Serious and Repeat Offenders) Sentencing Act 1992* which was introduced as a response to the 1991 car theft "crime wave" and a series of deaths arising from high-speed police pursuits. A range of repeat offenders, juvenile and adult, are dealt with under the Act. Under section 6 a court is directed to add an indeterminate sentence of imprisonment or detention for juvenile repeat offenders found guilty of committing violent offences. Guidelines are set out in Schedule 3 for such sentences and the courts are directed to apply these in determining the initial period of imprisonment or detention under section 6 (2)(a). The repeat violent offender is defined to be a person appearing for sentence on his/her fourth "conviction appearance" in eighteen months for a listed violent offence or the seventh for a listed serious offence. The additional, indefinite sentence is subject to review by the Supreme Court. A similar provision is provided for adult repeat offenders for violent offences under section 8. Here the indeterminate sentence is to be one of imprisonment at the Governor's pleasure. It is therefore a matter of executive decision.

The Act has been criticised on several counts. For example, it is said that the Schedule 3 Guidelines focus the court's attention on retribution and incapacitation as opposed to rehabilitation.[48] Looking at the Act's "conviction appearance" requirements, Ashworth asks whether the categories of serious offenders will, in any event, receive sentences of a length which makes it

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[47] A detailed analysis of the history and operation of this provision is found in I G Campbell, "Indeterminate Sentences and Dangerousness" in *Inquiry Into Mental Disturbance and Community Safety, Second Report*, op cit, pp 90-105.

[48] M Wilkie, "Crime (Serious and Repeat Offenders) Sentencing Act 1992: A Human Rights Perspective" (1992) 22 *Univ of Western Australia Law Review* 187-196, p 189.

unlikely they will be free to be re-convicted often enough to qualify under the Act: "If that is true , then one possibility is that hardly anyone will qualify as a 'repeat offender' under the Sentencing Act. Another possibility is that some of those who do qualify will be minor offenders whose previous criminal record would mark them out as social nuisances rather than social menaces. This fate has befallen many other attempts to legislate against repeat offenders".[49] Broadhurst and Loh comment that the Act overrides established sentencing principles, including the principle prohibiting preventive detention stated in *Chester* (1988) 165 CLR 611. They go on to observe that the stated intention of the Act was to reduce the number of offences and protect the public; on the basis of their analysis of motor vehicle offences they conclude that "finding evidence for the deterrent effects of the Act is like seeking a phantom - perhaps more imaginary than substantial". Summing up, Broadhurst and Loh state, "By showing both that the Act is so technically flawed that it cannot operate effectively and that its underlying assumptions are problematic, we believe there is support for the view that little regard was had to the potential effectiveness of the Act in dealing with serious juvenile recidivists; that the principal objective of passing such legislation was to appease public concern about the perceived failings of the juvenile justice system and demonstrate the government was capable of 'getting tough' on offenders".[50] For one observer the Act is an example of "Tough laws for hard-core politicians".[51]

(vi) The Northern Territory

Of relevance are sections 397-401 of the *Criminal Code*. The power to declare a convicted person an habitual criminal under section 397 is expressed in very broad terms. The court is asked to determine whether, by reason of the number of a person's past convictions, the nature of those convictions or the manner of life they reveal, "it is likely he is an habitual criminal. If so then the court may require the person to show cause why he should not be dealt with as an habitual criminal, thus placing the onus of proof on the offender. Section 397 (3) provides: "If the person called upon to show cause does not show that he is not an habitual criminal he may be declared an habitual criminal". Habitual criminals are to be detained in prison "during the Administrator's pleasure".

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[49] A Ashworth, "Ways Out of the Abyss? Reflections on Punishment in Western Australia" (Dec 1992) 22 The *Univ of Western Australia Law Review* 257-271, p 263.

[50] R Broadhurst and N Loh, "The Phantom of Deterrence: The Crime (Serious and Repeat Offenders) Sentencing Act" (Dec 1993) 26 *Aust & NZ journal of Criminology* 251-271, p 268.

[51] R White, "Tough Laws for Hard-Core Politicians" (April 1992) 17 *Alternative Law Journal* 58-60.

In *Singh v R* (1984) 55 ALR 692 an order made under section 397 in relation to a repeat sexual offender was upheld on appeal. Commenting on the making of indeterminate sentences, the Federal Court said that no such sentence had been passed in the Northern Territory for about ten years and that no sentences of this kind had been served. There were therefore "no practices or guidelines which would indicate to the court how such an indeterminate sentence will be applied in practice" (Woodward J at 696). The Northern Territory Department of Law advises that there are currently two habitual criminals in prison in the Territory, including the offender in the *Singh* case.

(vii) England and Wales

Two aspects of the present legislative scheme in England and Wales can be noted in this context. One relates to the provisions which refer to "dangerousness" found in the *Criminal Justice Act*; the other refers to the 1993 amendments to section 29 of the Act dealing with the issue of previous convictions in sentencing.

The general philosophy of "desert" underlying the *Criminal Justice Act 1991* was discussed in the briefing note, *Sentencing Guidelines and Judicial Discretion*. However, as Ashworth explains, the Act does contain two exceptions to this rule, which allow for an element of protective sentencing. First, section 1(2)(b) permits a court to pass a custodial sentence on an offender if it is of the opinion "that only such a sentence would be adequate to protect the public from serious harm from him". Secondly, section 2(2)(b) provides that where a court is imposing imprisonment on an offender aged twenty one or more for a violent or sexual offence, the term shall be for such length (beyond what is proportionate, but within the statutory maximum) as is "necessary to protect the public from serious harm from the offender". Ashworth states that the driving force behind these provisions was "political rather than penological" and goes on to comment: "One effect of the new provisions is to place great power in the hands of individual psychiatrists - although the Act does not even require a psychiatrist's report as a precondition of exercising the powers under sections 1(2)(b) or 2(2)(b), and it is conceivable that in some cases the judge will construct a personal prediction of future dangerousness on the basis of the criminal record or the circumstances of the current offence".[52] The core of the argument seems to be that the Act does not contain the procedural safeguards envisaged in the Floud Report. Similar points are raised by Estella Baker who comments "Once more, the task of assessing the risk is laid at the judge's door with very little assistance as to how to evaluate the relevant factors". Yet, she concludes that there are powerful reasons for retaining dangerousness as a criterion of decision making despite adverse consequences for individuals; but adds that the existing

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[62] Ashworth, *Sentencing and Criminal Justice*, op cit, p 167.

safeguards of due process need to be improved.[53]

In its original form section 29 of the *Criminal Justice Act 1991* gave rise to extensive criticism and some confusion. It seemed at the outset to say that an offence is not made "more serious" either as a result of any previous convictions or the offender's response to any previous sentence. But it then said that other offences committed by the offender could be taken into account where these disclosed "any aggravating factors". The section was repealed in 1993 and section 29 now provides: "In considering the seriousness of any offence, the court may take into account any previous convictions of the offender or any failure of his to respond to previous sentences".[54] Most significant from the standpoint of the debate on habitual criminals is the phrase *"failure of his to respond to previous sentences"*. The concern of Ashworth and Gibson is that the phrase, which introduces the idea of recidivism into the legislative scheme, may be treated by the courts as an invitation to sentence offenders on their record, thereby undermining the desert based doctrine of proportionality which otherwise informs the legislation. They ask, what counts as a "sentence" for the purposes of section 29? Also, what may be regarded as a "response" to previous sentences?[55] A different perspective on the prospective operation of the section is gained from Wasik and von Hirsch. For them, the troublesome phrase "does not constitute any general, open-ended invitation to inflate the sentences of recidivists"; the phrase is relevant only, in the words of the subsection, "in considering the seriousness of the offence".[56] Wasik and von Hirsch maintain that the new section 29 only permits an adjustment of sentence on account of the criminal record in four situations. The first two were recognised by the old section 29 as well as by the earlier law: progressive loss of mitigation and culpability-enhancing factors specifically disclosed by the record. The other two are: crimes committed on bail and crime committed in breach of penal orders.

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[53] E Baker, op cit, p 546.

[54] Section 29 was amended by section 66 (6) of the *Criminal Justice Act 1993*. The amended section also directs courts to treat the fact that an offence was committed while the offender was on bail as a factor aggravating its seriousness (section 29 (2)). Section 66 (1) of the 1993 Act removes the restriction in the original section 2 (2) (a) which allowed courts to take into account only one other associated offence for the purpose of assessing seriousness - see N Lacey, "Government as Manager, Citizen as Consumer: The Case of the Criminal Justice Act 1991" [July 1994] 57 *The Modern Law Review* 534-554, p 536.

[55] A Ashworth and B Gibson, "Altering the Sentencing Framework" [1994] *Crim LR* 101-109, p 105.

[56] M Wasik and A von Hirsch, "Section 29 Revised: Previous Convictions in Sentencing" [1994] *Crim LR* 409-418, p 414.

(viii) United States

Statutes relating to repeat or recidivist offenders have been (and remain) commonplace in the United States. In 1979 recidivist statutes were in force in forty four States. In 1982 at least three States required mandatory life sentences upon a third felony conviction (Texas, Washington and West Virginia); four other States imposed mandatory life sentences upon the fourth felony conviction (Colorado, Nevada, South Dakota and Wyoming).[57] In the same year section 667 was inserted in the California Penal Code: it enhanced by five years the sentence of an offender convicted of a "serious felony" for each prior conviction of such felony. These offences range from burglary of the inhabited portion of a non-residential building to first-degree murder.[58] The term "three strikes and you're out" has been used in recent years to describe recidivist statutes in the US.

Much of the legal and academic debate in relation to these recidivists statutes has concentrated on the concept of proportionality, in particular as this has been applied in the context of the eighth amendment to the US Constitution which provides against the infliction of cruel and unusual punishments. The US Supreme Court adopted the proportionality doctrine in *Weems v United States*.[59] The decision went unchallenged till the case of *Rummel v Estelle*[60] in 1980 in which the Court, by a majority of five to four, held that the imposition of a mandatory life sentence under the Texas recidivist statute did not violate the eighth amendment. Specifically, the Court held that life imprisonment was not disproportionate for a three-time non violent offender, each offence involving the fraudulent acquisition of small amounts of property with an aggregate value of $230. The majority suggested that judicial review of State recidivist statutes was generally appropriate only in regard to capital punishment (owing to its finality). A comparative approach to sentencing was also set aside, with the majority maintaining that the life sentence could not be compared with the typical sentence that would be imposed for the fraudulent acquisition of property: this was because a State had a valid interest in imposing harsh sentences on offenders who, by repeatedly breaking the law, had demonstrated an inability to conform to society's norms (at 276). Informing the decision were considerations of legislative deference and a

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[57] "Selective Incapacitation: Reducing Crime Through Predictions of Recidivism", [1982] 96 *Harvard Law Review* 511-533, p 511. It seems Tennessee can also be added to this list - SW Feldman, "The Habitual Offender Laws of Tennessee" [1984] 14 *Memphis State University Law Review* 293-335.

[58] MD Dubber, "The Unprincipled Punishment of Repeat Offenders: A Critique of California's Habitual Crime Statute" [1990] 43 *Stanford Law Review* 193-240.

[59] 217 US 349 (1910)

[60] 445 US 263 (1980)

regard for federalism.

Often contrasted with *Rummel* is the subsequent 1983 decision, again by a five to four majority, in *Solem v Helm*.[61] Here the offender had been sentenced under the South Dakota statute to life imprisonment without possibility of parole for issuing a "no account" cheque. The maximum penalty for a first time offender was five years imprisonment and a fine of $5,000. Helm, however, had been previously convicted of six other felonies and was, therefore, subject to the State's recidivist statute. The US Supreme Court reversed that decision, thus reasserting the centrality of the proportionality doctrine together with the comparative methodology it implies. The following three part test was outlined: (a) a comparison of the gravity of the offence with the harshness of the penalty; (b) a comparison of sentences imposed for other crimes in the same jurisdiction; and (c) a comparison of sentences imposed for the same crime in other jurisdictions. In fact, *Rummel* was not overruled. Instead, it was distinguished, apparently on the basis of eligibility for parole.

The result seems to have been that Federal and State jurisdictions have generally applied the *Helm* reasoning to decide proportionality issues, treating *Rummel* as something of an aberration. However, exceptions can arise. For example, in a 1987 case, *State v Davis*,[62] the Maryland Court of Appeals held that it was constitutionally permissible for the legislature to mandate a sentence of life imprisonment without parole for a fourth conviction of daytime housebreaking, notwithstanding the fact that the defendant's crimes lacked any element of actual violence. The relevant statute targeted crimes of violence, but these were defined to include daytime housebreaking. Karen Bayley commented that both the court and the legislature "justified their position by assuming that the recidivist is unresponsive to rehabilitation and therefore in need of segregation from the community".[63]

As in Australia, the focus of debate now in the US is predominantly on the repeat violent offender. Drug related offences are of further concern in the US in this context. This is certainly true of the new Federal Crime Bill, which was signed by President Clinton on 13 September 1994. It provides for a mandatory sentence of life imprisonment for violent offenders if the person has been convicted before on separate occasions of "2 or more serious violent felonies" or "one or more serious violent felonies and one or more serious drug offenses". The term "serious violent felony" is defined to include murder, assault with intent to commit rape, aggravated sexual abuse and sexual abuse,

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[61] 103 S Ct 3001 (1983)

[62] 310 Md 611, 530 A 2d 1223 (1987)

[63] KD Bayley, "State v Davis: A Proportionality Challenge to Maryland's Recidivist Statute" [1989] 48 *Maryland Law Review* 520-536, p 529.

kidnapping and certain categories of arson and robbery. Cases of robbery are excluded if the defendant can show that no firearm or other dangerous weapon was used and that the offence did not result in death or serious bodily injury.

9. END NOTE

What emerges from the above discussion is the extent to which the debate has shifted away from a concern with habitual criminals per se towards a concern about dangerousness, looked at in terms of an individual's "propensity to cause serious physical injury or lasting psychological harm".[64] This change is reflected in the statutory developments in certain jurisdictions, notably Queensland, Victoria, Western Australia and in England and Wales. One formulation of the contemporary approach is found in the 1988 Victorian Sentencing Committee's report

> Research evidence simply does not support the view that by pursuing a policy of incapacitating groups of offenders, there will be any discernible drop in crime rates. So the old notion of extended or enhanced sentences for recidivists or sex offenders or the like, with the sole aim of reducing crime by incapacitating those offenders have now fallen into disrepute in most jurisdictions. They have tended to be replaced by an approach of selected incapacitation which aims at a very small group of offenders who are chosen on the basis of their particular characteristics.[65]

Indeed, the terms of the debate in a general sense have changed since the enactment of the NSW habitual criminals legislation. A significant concern of that legislation is with the rehabilitation of the persistent offender. To that extent it belongs to what may be called the social engineering model of law in which terms of imprisonment, definite or otherwise, are supposed to serve the purpose of moral reform or rehabilitation. In contrast the focus of debate seems now to be far more on deterrence, protection and retribution. If this is right, then the contemporary relevance and viability of the NSW *Habitual Criminals Act 1957* can be questioned at a number of levels. The basic question, however, is whether the Act would serve as an appropriate vehicle to address the contemporary concern with the persistent violent offender? That issue bears on the proposal to either modernise or repeal the 1957 Act. If it were repealed and special legislative provision were still thought to be needed

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[64] Home Office/DHSS, *Report of the Committee on Mentally Disordered Offenders* (the Butler Committee) Cmnd 6244, para 4.10.

[65] Victorian Sentencing Committee, *Sentencing: Report of the Victorian Sentencing Committee*, Vol 1, 1988, para 3.13.9.

for violently dangerous offenders, then that object could be achieved by means of a newly titled piece of legislation or by amendment of the crimes or sentencing statutes. In any event, regard would need to be had in these circumstances to the range of sentences already available to the courts, as well as to the policy which informs their use. Also, the problems of definition and prediction noted in this briefing note would remain. So much would depend of course on the purpose for which any legislation was introduced. Taking our cue from the Sentencing Review Issues Paper, it can be assumed that the focus would be on "offenders with histories of repeated crimes of violence".

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