



Further copies of this report are available priced £5.00. Cheques should be made payable to The Stationery Office and addressed to:

The Stationery Office  
71 Lothian Road  
Edinburgh  
EH3 9AZ

Order line and General Enquiries  
0870 606 5566

**The views expressed in this report are those of the researchers and do not necessarily represent those of the Department or Scottish Ministers.**

© Crown Copyright 2000

Limited extracts from the text may be produced provided the source is acknowledged. For more extensive reproduction, please write to the Chief Research Officer at the Central Research Unit, Saughton House, Broomhouse Drive, Edinburgh EH11 3XA.

## **ACKNOWLEDGEMENTS**

The authors would like to acknowledge the assistance of the following individuals who provided information on the legislative provisions in their particular jurisdiction: Mary Campbell, Director, Corrections Policy, Department of Justice, Canada; Roxanne Leib, Washington State Institute for Public Policy; Ed Leuw, Hans van Netburg and Janine Plaisier, Ministry of Justice, The Netherlands; Fiona David, Anna Grant and Toni Makki, Australian Institute of Criminology, Beverely Lee, Attorney General's Department, Victoria, Australia and Dee Bourke, Home Office. Thanks are also due to Drs John Baird and John Crichton for their help in respect of psychiatric terminology and diagnosis and treatment of severe personality disordered offenders. Final thanks are due to Dr. Lachlan Bell for assistance with formatting and proofreading.

# CONTENTS

<b><i>SUMMARY</i></b>	<b><i>1</i></b>
<b><i>CHAPTER ONE - INTRODUCTION</i></b>	<b><i>4</i></b>
BACKGROUND	4
RESEARCH AIMS AND OBJECTIVES	4
METHODOLOGY	5
<b><i>CHAPTER TWO - THE COMMUNITY PROTECTION MODEL IN THE USA</i></b>	<b><i>13</i></b>
INTRODUCTION	13
CIVIL COMMITMENT OF SEXUAL OFFENDERS	13
THE CONSTITUTIONAL ISSUES	22
MORAL AND PRAGMATIC ISSUES	26
CIVIL COMMITMENT, PSYCHIATRY AND THE LAW	27
THE FUTURE OF SEXUAL PREDATOR STATUTES	28
CRIMINAL SENTENCING OF DANGEROUS OFFENDERS	29
CASTRATION AND DRUG TREATMENT OF SEXUAL OFFENDERS	31
<b><i>CHAPTER THREE - THE COMMUNITY PROTECTION MODEL II</i></b>	<b><i>34</i></b>
INTRODUCTION	34
CANADA	34
AUSTRALIA	48
NEW ZEALAND	63
<b><i>CHAPTER FOUR - THE CLINICAL MODEL</i></b>	<b><i>69</i></b>
INTRODUCTION	69
THE NETHERLANDS	69
GERMANY	75
SWITZERLAND	80
DENMARK	82
ENGLAND AND WALES	85
<b><i>CHAPTER FIVE - OTHER JURISDICTIONS</i></b>	<b><i>99</i></b>
INTRODUCTION	99
BELGIUM	99
NORWAY	99
ITALY	100
SPAIN, ICELAND, FINLAND, FRANCE, HUNGARY, POLAND	100
<b><i>CHAPTER SIX - CONCLUSION</i></b>	<b><i>101</i></b>

INTRODUCTION	101
CURRENT SCOTTISH PROVISIONS	101
THE EUROPEAN CONVENTION ON HUMAN RIGHTS	103

<b><i>BIBLIOGRAPHY</i></b>	<b><i>105</i></b>
----------------------------	-------------------

## 1. SUMMARY

### 1.1 Chapter One: Introduction

- 1 In March 1999, the government established a committee chaired by the Honourable Lord MacLean, to review the sentencing and treatment of serious violent and sexual offenders, including those with severe personality disorders. This literature review examines the current and recent UK and international literature on the sentencing of dangerous offenders and the subsequent management of these offenders. The foregoing is examined in the context of 'models' adopted within and across jurisdictions.
- 2 The research objectives and the methodology employed in providing the literature review are outlined. The terms serious violent and sexual offender and severe personality disorder are examined in this chapter. The models to be used in presenting the literature are outlined and explained.

### 1.2 Chapter Two: The Community Protection Model I – The USA

- 3 The first generation of legislation for the civil commitment of sexual psychopathic offenders together with its successor of determinate sentences are examined as a background to the second generation of current sexual predator statutes which provide for indeterminate sentencing in the form of civil commitment laws.
- 4 The indeterminate sentencing statutes, called sexual predator statutes, which were initially enacted in Washington are examined. The civil commitment of such offenders is decided at the end of the determinate sentence passed when the offender was convicted. The characteristics of offenders who fall within the ambit of the legislation and the review, treatment and release provisions that typically apply to offenders detained under sexual predator legislation are examined.
- 5 The use of similar legislation in other states is discussed together with the constitutional issues which have arisen and been addressed by the courts in respect of these provisions. Other provisions available in respect of offenders, namely the three strikes provisions, other enhanced sentencing provisions and castration and drug treatments for sexual offenders are reviewed.

### 1.3 Chapter Three: The Community Protection Model II – Other Countries

- 6 The second community protection model is found in Canada, Australia and New Zealand. The development of provisions leading to the implementation of the current

laws in each of these jurisdictions is reviewed. It is notable that these provisions for sentencing differ from the USA, as the indeterminate sentence is a criminal sentence applied at the time of the initial sentencing.

- 7 The role of psychiatric evidence in passing indeterminate sentences, the review process and the constitutional issues arising from these provisions in Canada are discussed. Two alternative Canadian provisions, namely, long term offender provisions and recognisance to keep the peace, are outlined.
- 8 Sentencing varies in Australia between States and territories. Where dangerous offender provisions have been enacted, they are generally in the form of indeterminate sentencing. The history and current provisions of this legislation are outlined.
- 9 The New Zealand provisions are discussed in the context of human rights implications, together with research that suggests they are ineffective in preventing violent offending and protecting the public.

#### 1.4 Chapter Four: The Clinical Model

- 10 The Netherlands, Germany, Switzerland, Denmark and England and Wales have been included within this model. The title of this model reflects the fact that the emphasis in these jurisdictions is on treatment rather than merely public protection. In the Netherlands preventative detention for dangerous offenders is provided by TBS legislation in the criminal code. These provisions and also the evaluation of their effectiveness are outlined. Within other jurisdictions, however, the system is not purely 'clinical'.
- 11 In Germany disposal to a psychiatric hospital is available for those offenders who have diminished responsibility or incapacity. Offenders with capacity, however, will receive preventative detention if they are deemed to be a dangerous recidivist. In addition civil commitment following the service of a prison sentence is possible but in practice psychiatric detention immediately follows the trial rather than a sentence. The management and treatment of sex offenders and the use of castration is discussed.
- 12 In Switzerland preventative detention is available only where there is evidence of a deep-seated personality disorder. In Denmark, where an offender is designated 'dangerous', the court can make a 'dangerous offender order' for a fixed period which

is renewable. In respect of sexual offenders, the management and treatment of this group and the studies on recidivism are reviewed.

- 13 The English and Welsh provisions are best described as 'hybrid'. These provisions that include both treatment orientated hospital disposals and the more recently implemented public protection disposals for 'dangerous' and 'sexual' offenders are reviewed, together with existing evaluation studies.

#### 1.5 Chapter Five: Other Jurisdictions

- 14 This chapter includes those jurisdictions where limited information was published in English, namely, Belgium, Norway, Italy, Spain, Iceland, Finland, France, Hungary and Poland. The information gathered did not facilitate the inclusion of these jurisdictions within one of the models outlined above.

#### 1.6 Chapter Six: Conclusion

- 15 The concluding chapter addresses the issue of compliance with the provisions of the European Convention on Human Rights that is now essential in any Scottish legislation.
- 16 The current Scottish provisions that relate to serious sexual and violent offenders are summarised. The significant articles of the convention are article 3 that protects against inhumane or degrading punishment and articles 5(1) and 5(4), that protect against unlawful detention and safeguard review of detention. These provisions are discussed while reflecting on some judgements of the European Court.

## 2. CHAPTER ONE: INTRODUCTION

### 2.1 BACKGROUND

1.1 In March 1999, The MacLean Committee on serious violent and sexual offenders was established “*to consider experience in Scotland and elsewhere and to make proposals for the sentencing disposals for, and the future management and treatment of, serious violent and sexual offenders who may present a continuing danger to the public...*” To assist in its work the committee requested a review of current literature on how dangerous offenders are sentenced and managed. Issues of diagnosis and treatment of offenders within this category were not to be included within the review as this information was readily available to the committee.

### 2.2 THE RESEARCH AIMS AND OBJECTIVES

1.2 This review of research was conducted from 5 July until 30 September 1999. The main aim of the research was to provide a summary of current and recent UK and international literature on the sentencing of dangerous offenders and the subsequent management of these offenders, whether in hospital or prison settings, and upon release into the community. The key objectives of the research were to:

- review UK and international literature on dangerous offender legislation, identifying those jurisdictions which have specific legislation in place governing the sentencing of dangerous offenders, and outlining how the legislation operates and what sentences are used;
- Review the literature on reviewable and/or renewable sentences, identifying which offenders such sentences apply to, how offenders are assessed as being eligible for such a sentence, how the sentence operates (e.g. whether a proportion of the sentence is specified as the offender’s punishment for the crime committed), and how decisions on whether the offender is safe to be released are made;
- Review the literature on the effectiveness of dangerous offender legislation or reviewable sentences, focusing in particular on whether the provisions are felt to have afforded additional protection to the public, whether practitioners believe the legislation allows appropriate release decisions to be made and on re-offending by people released from such sentences;
- Review the current and recent UK and international literature on the management of severe personality disordered offenders and offenders sentenced under dangerous offender legislation, focussing on the settings in which such offenders serve their

sentences, the regimes they are managed under, the types of treatment made available for such offenders and whether active participation in treatment regimes is mandatory or necessary to secure release.

## 2.3 METHODOLOGY

1.3 A literature search was conducted utilising available electronic, CD-ROM, and online databases. Unless otherwise indicated, the searches were restricted by the year 1990 to the present as earlier material has been comprehensively summarised by Dolon and Coid (1993). BIDS IBSS, OCLC First Search World Cat, Index of Legal Journals and Periodicals, Medline, Medline Mental Health Collection (available from 1995), Article 1, JUSTIS CD-ROM and Legal Journals Index CD-ROM were utilised. Web searches were conducted utilising various search engines. Web sites of jurisdictions identified as having relevant legislation were accessed to both download provisions and ascertain if provisions were still in force. Contact was made with individuals who have expertise relevant to the present review.

### 2.3.1 Limitations of literature search

1.4 The literature search was conducted for references published in the English language and for those with an abstract in the English language. Literature published in languages other than English were excluded from the present review. Whilst this does not seriously affect the quality of the review, it does present a bias towards English speaking countries in the review of literature. The jurisdiction where the language barrier may have had most affect is the Netherlands, where most relevant literature and the Ministry of Justice web site are in Dutch. Literature was found that outlines the legislation in jurisdictions that do not have English as a first language. Information from personal contacts in the Netherlands supplemented the literature available on this jurisdiction. A small number of references identified as potentially relevant were unavailable from the British Library within the research period.

### 2.3.2 Definitions

1.5 When conducting the literature search, particularly when utilising the electronic, CD-ROM and online databases, the widest terminology was used to encapture dangerous offender literature. It became apparent that jurisdictions might have broad labels to define the literature that we were interested in examining. For example, in the USA sexual predator statutes is a broad label sometimes applied to provisions for sentencing sexual offenders. In respect of serious sexual or violent offenders, the terminology used was relatively unproblematic as the inclusion of an individual within this category of offender was usually

triggered by their offending behaviour. The categories of offending behaviour that fell within this broad label were specified in the legislative provisions and, therefore, easily defined.

1.6 Problems around terminology did arise, however, in respect of severe personality disordered offenders. It became apparent that this label did not define a discrete group and therefore, some exploration of definition and how this corresponded to treatment or disposal following offending was required. The review of the literature in this area follows.

#### *Severe personality disordered offenders*

1.7 The medical classifications of personality disorder draw on two major international classifications that are now very similar. The International Classification of Diseases, 10<sup>th</sup> revision (ICD-10; World Health Organisation, 1992)<sup>1</sup> and the Diagnostic and Statistical Manual of Mental Disorders (DSM –IV; American Psychiatric Association, 1994) have now adopted a common approach in these two major classifications. There is now an internationally agreed definition of personality disorder together with agreed categories for classification, however, due to continued overlap between individual diagnostic categories, the subject has been described as remaining *‘in a state of flux’* (Bailey et. al., 1999: 1). In addition, problems are perceived in the continued use of the term ‘psychopathic disorder’ and the increasing use of ‘severe personality disorder’.

---

<sup>1</sup> The definition given is *‘Deeply ingrained and enduring patterns, manifesting themselves as inflexible responses to a broad range of personal and social situations. They represent either extreme or significant deviations from the way the average individual or a given culture perceives, thinks, feels and particularly relates to others. Such behaviour patterns tend to be stable and to encompass multiple domains of behaviour and psychological functioning. They are frequently, but not always, associated with various degrees of subjective distress and problems in social functioning and performance’*, (Bailey et. al., 1999 pp1-2).

1.8 The term ‘psychopathic disorder’ has at least four contemporary meanings, (Bailey et. al., 1999). It is popularly used as a pejorative term; legally it is retained in England and Wales as a category of mental disorder in the 1983 Mental Health Act<sup>2</sup>; in the past it was used as a single diagnostic label and continues to be used as a research measure of psychopathy using Hare’s Psychopathy Checklist (PCL-R; Hare, 1991); and, it is used in a broad generic sense to include a poorly defined psychopathology exhibited by individuals with severe personality disorder who exhibit anti-social or other dysfunctional behaviour (Bailey et. al., 1999). Further problems with this term include that it does not appear in either the ICD-10 or DSM-IV classifications and its use as a legal category has attracted criticism both in England and Wales (Bailey et al., 1999; Holmes, 1991) and in South Africa (Hansson, 1990). Despite these difficulties, the term is still used in both forensic psychiatric and legal research.

1.9 Bailey et al., (1999) suggest that criticism of the term ‘psychopathic’ is evidenced in the increasing use of the term ‘severe personality disorder’ in respect of offenders who demonstrate ‘personality psychopathology’. They suggest that ‘severe personality disorder’ should be adequately defined before it is recommended for general use. The classification of ‘severity’ has been identified as problematic and recent work suggests that overlap of personality disorder is taken as a measure of severity (Oldham et. al., 1992; Dolan et. al., 1995). Bailey et al., (1999), suggest that current diagnostic classifications do not allow for decisions to be made on whether one personality disorder category is more ‘severe’ than another. The inclusion of additional diagnostic criteria in the measurement of severity is suggested.

1.10 The use of the term ‘psychopath’ has been described as a ‘*hopeless terminological muddle*’ (Cavadino, 1998: 6). Cavadino (1998) notes that this term is used in a number of different ways, including as a synonym for the wider category of ‘personality disorder’, for ‘antisocial’ or ‘dissocial personality disorder’ and also as a legal category the meaning of which is ascribed by the Mental Health Act, 1983. Eastman and Peay (1998), suggest that psychopathic personality disorder has a position at the heart of both forensic psychiatry and psychiatric criminal jurisprudence. *This is because “psychopaths” lie at the intersection*

---

<sup>2</sup> This inclusion of the psychopathy as a category of mental disorder was unique to England and Wales and in other jurisdictions it was excluded. A recent Scottish legislative initiative in the form of the Mental Health (Public Safety and Appeals) (Scotland) Act 1999, however, extends the definition of mental disorder in Scotland to include personality disorder.

*between the so-called “mad” and “bad”; that is, between those who clearly warrant treatment (the seriously mentally ill or handicapped) and those who should properly receive punishment.”* (Eastman and Peay, 1998: 93).

### *Management of severe personality disordered offenders*

1.11 Most literature focussing on severe personality disordered offenders is written from a treatment perspective (Bailey et. al., 1999, Dolan and Coid, 1993), where treatment approaches are outlined and evaluated for effectiveness. This literature focuses primarily on the treatment regimes used and their relative success. This research has been carried out, in the most part, in in-patient settings and in prisons.

1.12 There appear to be three possible routes through the criminal justice process for severe personality disordered offenders. These will be examined under the headings of ‘mental health disposals’, ‘dangerous offender legislation’ and ‘prison and other disposals’.

### *Mental health disposals*

1.13 Individual’s suffering from a personality disorder may be processed using mentally disordered offender legislation if personality disorder is included within the definition of mental disorder within the local legislation, as is the case in Scotland and England and Wales. In these jurisdictions, the Hospital Order and Hospital Direction disposals are available to the courts in respect of mentally disordered offenders following conviction. These disposals are considered in Chapter Four.

1.14 In those other jurisdictions that do not include personality disorder within the relevant mental health legislation, the individual may suffer from a combination of illnesses. This comorbidity may mean that the accused’s mental state includes a category of mental illness that is within the definition of mental disorder. This may result in the accused being processed as a mentally disordered offender, however, it is important to note that this would be as a result of a mental disorder other than a personality disorder.

### *Dangerous offender legislation*

1.15 The jurisdictions that have employed forms of ‘dangerous offender’ legislation are the main focus of this review. This legislation is generally applied to individual’s who have been convicted in the court process and allows for reviewable or renewable detention. A review of the international legislation in this area is contained within the following chapters.

This review is presented within the two approaches to sentencing this category of offenders that have been described as the ‘clinical model’ and ‘the public protection model’. It is worthy of note that in most jurisdictions it is the offending behaviour of the accused rather than their mental state that brings them within the ambit of these legislative provisions.

### *Prison and other disposals*

1.16 It is clear that a number of personality disordered offenders pass through the criminal justice process and are sentenced under ‘regular’ legislation with their personality disorder never emerging as a criterion that requires a special disposal. The 1999 Department of Health consultation paper, ‘Managing Dangerous People with Severe Personality Disorders’, notes that the majority of offenders in this category are in prison. It states that few receive long-term help in managing and addressing the symptoms of their disorder either while they are detained or after release due to the difficulties in identifying suitable ‘interventions’.

1.17 Surveys of the prevalence of personality disorder in prison populations have been carried out, however, these are not unproblematic. Bailey et. al., (1999) note that a particular problem with such surveys is the sampling. Most surveys have been carried out in prisons or penitentiaries which have a concentration of ‘professional and hardened criminals’ where the incidence of personality disorder will be disproportionate (Bland et. al., 1990; Cote and Hodgins, 1990; Hobson and Shine 1998), and research diagnostic instruments have rarely been used. Cross-cultural comparisons e.g., Cooke (1995) who compares psychopathic disturbance in the prison populations of Scotland and North America, has highlighted that variations in use and application of research instruments or techniques can affect results.

1.18 The survey conducted by Singleton, of psychiatric morbidity among prisoners in England and Wales, was a two-stage survey carried out in all prisons in England and Wales (Singleton et. al., 1998). The methodology of this study employed better sampling than those noted above and the methodology employed provides a representative picture of a full range of Axis II disorders<sup>3</sup>. The most prevalent personality disorder was antisocial personality disorder which was found in 63% of male remand prisoners, 49% of sentenced prisoners and 31% of female prisoners. Paranoid personality was the second most prevalent condition and was found in 29% of male remand prisoners, 20% of male sentenced prisoners and 16% of female prisoners.

---

<sup>3</sup> The Axis II personality disorders represented within this survey’s findings are Antisocial; Borderline; Narcissistic; Histrionic; Paranoid; Schizoid; Schizotypal; Avoidant; Dependent and Compulsive.

### 2.3.3 Treatment

1.19 The debate around the treatability or otherwise of personality disorders and psychopathic disorders has a well-established history particularly in psychiatric literature. This debate will not be rehearsed here, however, it is worth noting that the approach commonly adopted 20 years ago was that in relation to psychopaths, *“no demonstrably effective treatment has been found”* (Suedfeld and Landon, 1978).

1.20 Recent literature, e.g., Blackburn (1993), accepts that psychopaths have been shown to respond poorly to some traditional therapeutic interventions but state that *“it has yet to be established that “nothing works” with this group... some offenders with personality disorders do appear to change with psychological treatment”*<sup>4</sup>. Other authors agree that the early pessimism around the issue of treatability is not entirely justified but are cautious and suggest that realistic expectations should be maintained in respect of ‘successful’ therapeutic interventions with this group (Dolan and Coid, 1993; Losel, 1998; Bailey et. al., 1999).

1.21 Treatment regimes are summarised and evaluated by Dolan and Coid (1993) and Bailey et. al., (1999). These include pharmacological, physical and psychotherapy treatments. A number of studies have reviewed therapeutic communities in both prison (Cullen, 1994; Genders and Player, 1995) and hospital settings (Ogloff, Wong and Greenwood, 1990; Dolan 1996). The literature that evaluates the success of such communities often does so from the perspective of recidivism. While studies have suggested that therapeutic communities are successful for some personality disorders (Copas et. al., 1984), others suggest that those classified as ‘psychopaths’ had higher levels of recidivism especially in relation to violent offending (Rice, Harris and Cormier, 1992). McMurrin, Egan and Ahmandi (1998) review studies on therapeutic communities and conclude that there is evidence that ‘psychopaths’ actually deteriorate after treatment.

1.22 What is evident from the literature is that the issue of ‘treatability’ and suitability or success of particular treatment regimes for severe personality disordered offenders and, within that category, psychopaths, is not yet settled. Bailey et. al., (1999) suggest that research findings on the question of ‘treatability’ and the successful treatment of personality disordered offenders have limited value due to the methodology employed. The use of criminal recidivism to measure ‘success’ of treatment is deemed contentious, as this is not viewed as a primary goal of psychiatric services. Such a shift in priorities is viewed as

necessitating the focus of services moving from community care to surveillance and social control.

#### 2.3.4 The model approach

1.23 The review findings are presented in the following four chapters under model headings. This approach has been adopted to allow broad groupings of approach to take place. The models used are Community Protection in the USA (chapter 1), Community Protection in Non-US countries (chapter 2) and the Clinical Model (chapter 3). In chapter 4 the provisions of those countries where limited information was available are reviewed.

1.24 The community protection models (chapters 2 and 3) share the characteristic that public protection is uppermost in sentencing policies. This type of legislative model has tended to emerge following a horrific offence committed by a recently released 'dangerous' offender. The treatment or management of offenders within this category is deemed as being secondary to public safety. Within this model sentencing decisions are often based not only on the current but the predicted future offending of an individual. This approach to sentencing is the most recent of the models. The USA is separated from other jurisdictions within this review due to the volume of literature on this country and also due to the fact that the indeterminate detention of dangerous offenders takes place following the service of a determinate sentence. In other jurisdictions, the decision on whether indeterminate detention should follow a determinate sentence, is made at the point of sentencing for the index offence.

1.25 The clinical model adopts a treatment focus where deviant behaviour is viewed as a product of illness. This approach is still evident in The Netherlands and England and Wales however, recent legislative changes in the latter country indicate a shift towards community protection. The management of offenders within this model tends to have more of a therapeutic emphasis.

1.26 Another approach to serious violent or sexual offenders in the form of the justice model, did exist in the past. This approach is reflected on in chapter 2, in the context of the development of the US approach. This model viewed the offender as a rational self-determining actor who deserved punishment. This punishment was calculated on the basis of proportionality and just desserts and focussed on retribution and deterrence. The deterrence factor was not, however, interpreted to allow the indeterminate sentencing that is now available under the community protection model.

---

<sup>4</sup> Blackburn, R. (1993), 'Clinical Programs with psychopaths', in Howells, K., and Hollin, C.R. (Eds.), 'Clinical approaches to mentally disordered offenders' (Chichester: Wiley).

### 3. CHAPTER TWO : THE COMMUNITY PROTECTION MODEL IN THE USA

#### 3.1 INTRODUCTION

2.1 Most areas of criminal law in the United States fall under the jurisdiction of State legislatures, and there is variation in the measures taken against dangerous offenders. Legislation aimed at protecting the community against dangerous offenders has, however, followed a trend in many states, focussing on the civil commitment of sexual offenders and enhanced sentencing for serious repeat offenders. Sexual offences appear to be a significant focus of public attention and political agenda. Media reporting of serious incidents, studies showing the prevalence of sexual abuse of women and children and a growing awareness of the enduring impact of sexual violation on the victim have galvanised attention to sexual offending (Wilson, 1998). The United States is an extreme example of the community protection model and is an area of rapid development in the dialogue between the rights of the community and of the convicted criminal. This chapter will review the development and content of the legislative provisions that exist in respect of serious violent and sexual offenders in the USA. Where possible, the literature evaluating these provisions and issues of treatment and management will be reflected on together with questions of constitutionality and legality

#### 3.2 CIVIL COMMITMENT OF SEXUAL OFFENDERS

##### 3.2.1 Sexual psychopath statutes: the first generation

2.2 Legislation for the civil commitment of sexual offenders has occurred in 2 generations. Beginning in the late 1930s, many states enacted 'Sexual Psychopath' statutes providing for the involuntary civil commitment of sexual offenders variously described as 'psychopathic personalities', 'sexually dangerous persons', 'psychopathic offenders' and most usually 'sexual psychopaths'. Aimed at sexual offenders thought to be at a high risk of recidivism but also thought to be amenable to treatment, the statutes purported to provide protection for the public and rehabilitation for offenders who were regarded as having somewhere in-between responsibility and irresponsibility for their offending (Lieb et. al., 1998; Lieb and Matson, 1998; Horwitz, 1995; American Psychiatric Association, 1999; Wilson, 1998). This legislation can be described as within the clinical model.

2.3 Although there was wide variation between states in the application and operation of the statutes, they were all characterised by the selection of a certain class of offender defined by a combination of psychopathic and deviant sexual behaviour and by a therapeutic optimism that thought them to be treatable. As such, sexual psychopath statutes usually

provided for civil commitment in lieu of a criminal sentence and provided for the release into the community of offenders that had been 'cured' of their sexual psychopathy (Lieb et. al., 1998; Lieb and Matson, 1998; Horwitz, 1995; American Psychiatric Association, 1999; Wilson, 1998).

2.4 The operation of sexual psychopath statutes was problematic for a number of reasons, including, the fact that the selection of sexual psychopaths was imprecise and wide-ranging. While psychopathy was ill defined and diagnosed, sexual deviancy was value laden. The result was that sexual psychopath statutes were applied inconsistently. This occurred in cases of offenders who deviated from sexual norms, but did not present a threat of sexual violence. In addition, psychiatrists and criminologists became sceptical about the existence of the sexual psychopath as a particular class of offender that could, or that should, be defined and treated differently from other classes of offender. Finally, it was the failure of sexual psychopath statutes to rehabilitate offenders and to protect the public that fated the statutes to their eventual end (Lieb et. al., 1998; Lieb and Matson, 1998; Horwitz, 1995; American Psychiatric Association, 1999; Wilson, 1998).

2.5 By the 1960s, more than half of the states had enacted sexual psychopath statutes, but during the 1970s and 1980s, many of these statutes were repealed or disused. Although the application of the statutes had latterly been restricted to violent sexual offenders consistent with the liberalisation of sexual norms and the stricter perception of dangerousness as a threat of personal violence, the clinical model was nevertheless under review. The therapeutic optimism that underpinned the clinical model was part of a wider social conceptualisation of deviancy as illness that both psychiatrists and the community became disillusioned with. In practical terms, while it was often the commission of a brutal sexual crime that inspired the enactment of sexual psychopath statutes, it was ironically the commission of a brutal sexual crime by an apparently cured sexual psychopath released into the community that inspired the repeal of the statutes. Recidivism rates for sexual psychopaths 'cured' and released into the community were shown to be comparable to sexual offenders who had not been committed for treatment (Horwitz, 1995; Lieb et. al., 1998; Wilson, 1998).

2.6 The near complete abandonment of a generation of sexual psychopath statutes was followed by the emergence of the justice model in the management of dangerous offenders. Under the clinical model sexual psychopaths were ill and amenable to treatment. Under the emergent justice model, sexual psychopaths were re-conceptualised as seriously dangerous criminals who were rational and self-determining and deserving of severe penalties from the

justice system. The ideological shift from the rehabilitative to the retributive management of sexual offenders was consistent with a sweeping climate of law and order reform in the United States (La Fond, 1992a). Stricter penalties, determinate sentencing, and in some cases the elimination of discretionary parole, served the new justice model. Despite the strict sentences that were applied in this period, it soon became apparent that the justice model failed to provide for the disposal of those offenders who had served strict sentences but still posed a serious threat to the safety of the community (Lieb et. al., 1998; Wilson, 1995).

2.7 The need for indeterminate sentencing for some offenders who posed a continuing risk to the community, was part of a consistent rise in crime rates despite the emergence of the justice model, and increasing public fear of rising crime (La Fond, 1992a). It was also, however, highlighted by an event in Washington in May 1989. The horrific sexual assault of a young boy and the ensuing public campaign started the second generation of statutes for the civil commitment of sexual offenders and with it, the emergence of a comprehensive community protection model for the management of sexual offenders in the United States (Petrunick, 1994).

2.8 Although there is a clear and defined break that separates the ideology of the first generation of statutes from the second, the break has not been entirely complete. While most states abandoned their statutes, Illinois' sexual psychopath statute enacted in 1938 and renamed the Sexually Dangerous Persons Act in 1955 remained effective until 1997 (Wilson, 1998). It retained an anomalous clinical model during the emergence of the community protection model in the 1990s (Petrunick, 1994). Illinois has, however, recently adopted the community protection model with the enactment of a Sexually Violent Person Act modelled on Washington's statute, effective as of January 1998 (Lieb and Matson, 1998).

### 3.2.2 Sexual predator statutes: the second generation

#### *Washington State*

2.9 In 1990 Washington State enacted the first sexual predator statute. The impetus for the statute was largely the acts of Earl K. Shriner, a mentally retarded offender with a 24-year history of murder and violent and sexual assaults (Boerner, 1992; La Fond, 1992a; Maleng, 1992; Fujimoto, 1992). In 1987 Shriner completed a 10-year sentence for kidnapping and assaulting 2 teenage girls. Before his release from prison, officials learned that he had devised further plans to torture children. Attempts to detain him through the mental health system failed and 2 years later he kidnapped and violently and sexually

assaulted a 7-year-old boy. Public outcry prompted the establishment of the Governor's Task Force on Community Protection which reported in 1990 and led to the passage of the Community Protection Act 1990 (Boerner, 1992). The Act provided for increased penalties and stricter post release supervision of sexual offenders as well as containing the Sexually Violent Predator Statute, a novel law for the civil commitment of offenders found to be sexually violent predators.

2.10 The purpose of the new civil commitment law was to enable the state to contain a small group of very dangerous sexual offenders who did not have the requisite mental disease or defect that would render them subject to the existing involuntary civil commitment statute. The rationale for the new law was based on principles of community protection, but it was closely formatted on the idea of civil commitment (Boerner, 1992). Unlike the previous generation of sexual psychopath statute the sexual predator statute provided for the civil commitment of an offender after they had served a prison sentence, and not in lieu of it. Sexual psychopath statutes that engaged a clinical model usually provided for civil commitment in lieu of a prison sentence and for the purposes of treatment and rehabilitation. The sexual predator statute was not premised on the therapeutic ideal but it provided for civil commitment as a means to detain an offender indefinitely until the safety of the community could be assured (La Fond, 1992a; La Fond, 1992b).

2.11 While similar tragedies preceded both the emergence of the first generation and the second generation, the generations are ideologically opposed (Lieb et al, 1998; La Fond, 1992a). The decline of the therapeutic ideal may account for much of this, but it is not insignificant that there was not a large number of psychiatrists on the Governor's Task Force and that 'victims' were represented (Scheingold et al, 1992). The mother of the 7-year old boy (who has never been named) and 2 other victims/activists were appointed members. Instead of a general social movement, one of the statute's principal drafters has reflected that it was just a practical response to a heinous act (Boerner, 1992) and another commentator has attributed it to the power of the narrative of the frightening events in Washington in 1989 (Rideout, 1992).

2.12 Washington's statute provides for the civil commitment of sexually violent predators on release from prison until their mental abnormality has changed so that they are no longer likely to engage in further predatory acts of sexual violence. A sexually violent predator (SVP) is a person convicted or charged with one or more sexually violent crimes, who is deemed to have a mental abnormality or personality disorder which makes them likely to

engage in predatory acts of sexual violence if not confined to a secure facility. Mental abnormality is defined as a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts. Personality disorder is not defined (Lieb, 1996; Lieb and Matson, 1998). The predatory requirement of the statute directs attention at stranger violence and specifically excludes offences against family members and acquaintances, unless the relationships were formed primarily for the purposes of victimisation (Gunn, 1994).

2.13 Civil commitment proceedings are initiated by a local prosecutor or the attorney general by filing a petition alleging that a prison inmate is a SVP. This occurs at the completion of the inmate's prison sentence. A court hearing is held to determine if probable cause exists to believe that the inmate is a SVP, and if the hearing is affirmative, the person is taken into custody for a professional evaluation. A trial is then held to determine if the person is a SVP (Lieb, 1996; Lieb and Matson, 1998).

2.14 The trial mirrors a criminal trial, with extensive procedural safeguards provided to the detainee. The detainee has a right to be represented by counsel, the right to a jury trial, the right to an expert witness, paid for by the state if necessary, the right to an independent evaluation and the right to give evidence at the trial. The prosecution bears the burden of proving beyond reasonable doubt that the detainee is a sexually violent predator (Lieb, 1996; Lieb and Matson, 1998).

2.15 If found to be a SVP, the detainee will be committed to the custody of the Department of Social and Health Services in a secure facility for control, care and treatment until such time as their mental abnormality or personality disorder has so changed that they are safe to be discharged (Lieb, 1996; Lieb and Matson, 1998).

2.16 The SVP is evaluated on a yearly basis once committed. After the evaluation, there will be a 'show cause' hearing for the purpose of determining whether discharge can occur. This hearing focuses on whether there is probable cause that the SVP's mental abnormality or personality disorder has so changed that discharge is safe and is not likely to result in recidivist predatory acts of sexual violence. The SVP has a right to be represented at this hearing but has no right to be present at it. If probable cause exists, a trial will be held at which the SVP has a right to be present, a right to have an expert witness, and a right to a jury. At this trial, the state bears the burden of proving beyond reasonable doubt that the SVP's mental abnormality or personality disorder remains such that they are not safe to be

discharged and that there is a threat of recidivist predatory acts of sexual violence should release be secured. This trial may also be held if the Department of Social and Health Services authorises a petition for the SVP's release. If the state fails to prove their case then the SVP will be released. If the state does prove their case, the SVP will continue to be detained (Lieb, 1996; Lieb and Matson, 1998).

2.17 According to the Act the state may choose to have the SVP evaluated by an expert, and the SVP may choose to be evaluated by an expert of choice. Although the literature did not provide case analysis from which examples of types of evidence used could be identified, it is clear that both psychiatric and psychological assessment, as well as the continuing observation of custody and treatment personnel would be used. Indeed, Wettstein, 1992 questions the accuracy of evaluating the behaviour and treatment response of SVP's who are in custody, because of the lack of potential victims while in custody.

### *The emerging issues of debate*

2.18 Washington's law was predictably controversial. Although the intensity of debate might have sent a warning to other states considering enacting similar legislation, the focus of initial debate is still current in the second generation of commitment statutes. Initial debate focussed sharply on the legal and ethical concomitants of commitment. While pragmatists poignantly argued that the legislation was the best solution to a very real risk to the community (Boerner, 1992; Brooks, 1992; Maleng, 1992), others challenged the legislation. The constitutionality of the statute was questioned primarily on the basis that the statute was criminal in nature and thus unconstitutionally punitive (Fujimoto, 1992) and that civil commitment was only constitutional where there was evidence of a mental disease (Ellis, 1992; La Fond, 1992b). The constitutionality of the statute was, of course, defended by those who conceptualised the statute as civil in nature and, therefore, not punitive (Blood, 1992) and by those who considered that the definition of a SVP was within a reasonable interpretation of the type of person that could be liable to civil commitment (Brooks, 1992).

2.19 The practical implications of the statute were also contested. It was argued that there was no clear evidence that sexual offenders posed a higher risk of recidivism than other offenders and thus warranted special commitment (Scheingold et al, 1992). It was also argued that the strengthening of measures of community safety through selective incapacitation of certain offenders produced a false security, because increasing incapacitation of offenders had not been accompanied by decreasing crime. Instead it was

argued that increasing community protection diverted attention away from the cultural components of offender construction and the elements of the community that created violence and the attitudes that accepted it, especially against women and children (Shapiro, 1992).

2.20 Another significant debate that emerged from the Washington statute was about the relationship between psychiatry and the new commitment statute. While a therapeutic model is assumed in civil commitment and psychiatry is the basis for that commitment, it was not clear that the new statute adhered to the therapeutic model or psychiatric expertise. While it used the therapeutic model and psychiatry as a justification for commitment, some psychiatrists saw it instead as an abuse of psychiatric concepts and the use of psychiatry as an instrument of social control and not of therapy. It was argued fundamentally that SVP's were not mentally ill and thus persons whose commitment ought to be predicated on the use of psychiatric concepts and justification (Wettstein, 1992; Reardon, 1992). Others debated the issue of risk prediction, some emphasising the significance of false positives (Boruchowitz, 1992), with others diminishing the importance of false positives and emphasising instead the significance to society of false negatives (Brooks, 1992). Another significant comment questioned the therapeutic impact of the statute, and whether it targeted a treatable class of offender, and whether the possibility of post-prison commitment would lead to a denial of sexual violence and a reluctance by offenders to seek therapy while in prison (Klotz et al., 1992).

### *Other states*

2.21 Despite its potential problems, and indeed unwittingly (Boerner, 1992), Washington provided a model for the enactment of similar legislation in other states. To date, 12 states have enacted sexual predator statutes or statutes similar in purpose: Arizona, California, Florida, Illinois, Iowa, Kansas, Minnesota, New Jersey, North Dakota, South Carolina, Washington and Wisconsin. At least 21 other states have introduced legislation for the civil commitment of sexual predators (Lieb and Matson, 1998). The passage of legislation in other states has made varying degrees of progress, but additional legislation has yet to be enacted (Lieb, 1999).

#### 3.2.3 Sexual predator statutes: main features

2.22 Sexual predator statutes in the 12 states share the following characteristics:

- Civil commitment is instituted following the completion of a criminal sentence

- Civil commitment is targeted at sexual recidivists
- Civil commitment relies heavily on evidence of the likelihood of future violence committed by an offender (Lieb and Matson, 1998).

2.23 Sexual predator statutes in the 12 states sometimes differ in the following ways:

- In most cases the state bears the burden of proof ‘beyond reasonable doubt’, but in some cases the state bears the burden of proof by ‘clear and convincing evidence’<sup>5</sup>;
- In many states civil commitment may only be applied to persons who are at least 18 years of age, while in some states civil commitment may be applied to juveniles<sup>6</sup>;
- In all states except one, civil commitment is indeterminate in duration. In California civil commitment is limited to 2 years duration, although it may be extended thereafter with the state bearing the burden of proving that additional commitment is required (Lieb and Matson, 1998).

2.24 Sexual Predator Statutes typically follow a similar procedure:

- An offender who has at least one conviction for a sexually violent offence is due to be released from custody, having served a prison sentence. North Dakota does not, however, require a prior conviction, as it is a general civil commitment statute
- If the offender is found to fulfil the criteria for being a SVP an assessment of the offender is prepared by the Department of Corrections Mental Health Staff or an assessment team and forwarded to the relevant prosecutor;
- If there is sufficient evidence, the case will be filed and a court will determine whether there is probable cause that the offender is a SVP. If so, the offender is detained and undergoes a mental health evaluation
- Within 30-60 days of the probable cause hearing, a trial is held to determine if the offender is a SVP. The trial bears resemblance to a criminal trial, with typical rights and protections afforded to the offender. The offender typically has a right to be represented, a right to be tried by a jury and a right to an independent examination by a mental health expert of choice;

---

<sup>5</sup> Florida, Minnesota, New Jersey and North Dakota.

<sup>6</sup> Arizona and Florida state explicitly that offenders must be at least 18 years of age, while Illinois, Washington and Wisconsin state explicitly that juveniles may be subject to commitment.

- Minnesota, New Jersey and North Dakota do not require a trial by jury. If found to be a SVP, the offender is committed to a facility for control, care and treatment until such time as their mental abnormality or personality disorder has so changed that they are safe to be released (Lieb and Matson, 1998).

2.25 Treatment, review and release typically is determined as follows:

- The SVP is typically committed to a hospital, secure facility or a mental health facility of the department of corrections;
- The SVP is reviewed annually, and is entitled to be assessed by an expert of their choice. A report is prepared for the court that considers if the SVP has changed so that they are no longer likely to engage in predatory acts of sexual violence. If this is the conclusion a hearing is set to determine its accuracy. An SVP may apply for a hearing of their own accord, but the court may refuse it if it is frivolous and without reasonable cause;
  - The SVP is released on the authority of the court, except in Minnesota where release is on the authority of the Commissioner of Human Services and in New Jersey where release is on the authority of the Parole Board. Release may be conditional or unconditional discharge, with or without continued supervision. There is the possibility of recall in the case of conditional discharge (Lieb and Matson, 1998).

2.26 As of 1998 a total of 523 SVPs were committed in the 12 states. As this legislation has only been in force during the 1990's there is a dearth of follow up information about SVPs. It is known that 2 SVPs have been released to a less restrictive alternative in Washington and one has been released in Minnesota. In Wisconsin 2 have been released and 7 have been placed on supervised release (Lieb and Matson, 1998).

2.27 As a consequence of the few releases that have occurred the success of sexual predator statutes, in terms of preventing recidivism and promoting public protection, is not yet known. It is worth noting that in future studies, significant factors may militate against any 'success' being revealed. Sexual offences are notoriously under-reported, and the discretion involved in bringing a charge, plea-bargaining a charge and making an application for a SVP commitment may serve to undermine the statistics. Many statutes, however, provide that a sexually violent offence may include any offence where it is demonstrated beyond a reasonable doubt to have been sexually motivated (Wilson, 1998).

### 3.3 THE CONSTITUTIONAL ISSUES OF SEXUAL PSYCHOPATH/PREDATOR COMMITMENTS

#### 3.4 SEXUAL PSYCHOPATH STATUTES

2.28 While sexual psychopath statutes saw a practical and political demise, they were nevertheless seen as constitutionally sound. The statutes had been subject to constitutional challenge. Opponents of the laws argued that the laws violated the requirement for due process in that they were unconstitutionally vague and that they did not afford the sexual psychopath equal protection under the law. Nevertheless, the United States Supreme Court upheld the Minnesota statute in *Minnesota ex rel. Pearson v Probate Court*<sup>7</sup> (1940). The court rejected a due process challenge on the basis that the state had a rational justification for the commitment of persons with a psychopathic personality (Lieb et al, 1998), but it did require that the offender did have an utter lack of power to control sexual impulses (Prettyman, 1998).

2.29 Adjudication of the statutes was complicated by the fact that they were legal hybrids. Although initially seen as civil in nature, their criminal character emerged in the protective and confining aspects of their operation. In *Specht v Patterson*<sup>8</sup> (1967), the United States Supreme Court deemed that the indeterminate confinement of offenders required to provide significant procedural protections for the offender under the law. Offenders had to be afforded the right to counsel, the right to be present, to be heard, confront witnesses, cross-examine witnesses and give evidence. In addition, the findings of the court were required to be adequate enough to allow the offender an appeal (Lieb et al, 1998).

2.30 Sexual psychopath statutes survived constitutional challenge but *Specht* and later legal rulings increasingly required the offender to be afforded significant procedural protections. As a result, many states adopted the criminal standard of proof, 'beyond a reasonable doubt', highlighting again, the hybrid quality (in respect of bridging civil and criminal laws), of the statutes (Lieb et al, 1998).

#### 3.5 SEXUAL PREDATOR STATUTES

2.31 As sexual psychopath statutes were constitutionally controversial, it is reasonable to expect that sexual predator statutes would be more so. With the clinical model of management being displaced by a model of community protection, the potential constitutional violations were prolific. The United States Supreme Court addressed the

---

<sup>7</sup> 309 U.S. 270, 1940, cited in Lieb et al, 1998 and Prettyman, 1998.

<sup>8</sup> 386 U.S. 605, 1967, cited in Lieb et al, 1998.

constitutional issues in *Kansas v Hendricks*<sup>9</sup> in 1997. In this case the court upheld the constitutionality of the Kansas statute, which was modelled on Washington's, by a 5-4 majority (Elco, 1998; Rollman, 1998; Janus, 1998; Gordon, 1998; Weeks, 1998; Falk, 1999; Gould, 1998).

2.32 This case involved Leroy Hendricks who was a persistent paedophile with a long history of committing severe child abuse and molestation. After finishing a 10-year sentence for taking indecent liberties with 2 young boys, Kansas State sought to have him civilly committed. The Supreme Court of Kansas had reversed his commitment on the basis that the mental abnormality standard required by the Act did not meet the constitutional requirement for commitment, namely mental illness combined with dangerousness, thus violating the due process requirement in the constitution (Prettyman, 1998). The court made a strict distinction between mental abnormality and mental illness, relied on the absence of mental abnormality in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) and was sceptical of the purpose of the statute which did not show a commitment to treatment of the offender (Teir and Coy, 1997).

2.33 Kansas State appealed the decision to the United States Supreme Court. Hendricks filed a cross appeal asserting claims of double jeopardy and ex post facto lawmaking which had not been addressed by the Kansas Court. All 9 Justices in the Supreme Court agreed that the statute's requirement for mental abnormality combined with dangerousness passed the test of substantive due process required by a commitment case. The court reasoned that although mental abnormality may not be medically defined, it was not restricted to relying on terms of a medical nature only if, and within the limits of, the definition recognised by the medical community. The court was divided on the question of whether the statute was punitive and therefore violated the constitutional prohibition against double jeopardy and ex post facto lawmaking (Elco, 1998; Rollman, 1998; Janus, 1998; Gordon, 1998; Weeks, 1998; Falk, 1999; Gould, 1998).

2.34 The majority of the Justices reasoned that the statute was not punitive and called on Hendricks to prove that the statute was so punitive in purpose and effect that it negated the state's clear intention that it be civil in nature. The finding by the majority was that Hendricks had failed to prove this. The decision of the majority was justified on the following grounds: the statute's placement in the Probate Code and its wording connoted a

---

<sup>9</sup> 117 S. Ct. 2072 (1997).

civil measure; its purpose was not retributive or deterrent; incapacitation even if indefinite was not automatically punishment; and the use of criminal procedure in commitment did not necessarily connote criminal punishment. This majority decision also addressed the issue of treatment under the statute, and declared that the minimum treatment required under the constitution was provided and that treatment need not be effective in any case (Elco, 1998; Rollman, 1998; Janus, 1998; Gordon, 1998; Weeks, 1998; Falk, 1999; Gould, 1998).

2.35 The dissenting minority, however, focused on the lack of treatment in finding that the statute was punitive and thus violated the constitutional prohibition against double jeopardy and ex post facto lawmaking. Their dissent was justified by noting the following: diagnosis, evaluation and commitment proceedings commenced only just before release and not at the start of criminal sentence; at the time of the application for commitment there were virtually no treatment programs designed for Hendricks; there was no mandatory treatment program; and that there was not a less restrictive alternative (Elco, 1998; Rollman, 1998; Janus, 1998; Gordon, 1998; Weeks, 1998; Falk, 1999; Gould, 1998).

### 3.6 FUTURE CONSTITUTIONAL CHALLENGE

2.36 Although *Kansas v Hendricks* sent a clear message to other states that they could feel confident in applying or enacting sexual predator statutes, constitutional challenge may still be possible. Specific attention may be focussed on the court's acceptance of mental abnormality, on its requirement that the statutes must not be punitive, and on the majority's failure to address the issue of equal protection.

2.37 The court in *Hendricks*, assumed that mental abnormality was sufficiently understood by the law to justify commitment proceedings, and found that the statute did not violate the prohibition against double jeopardy or ex post facto lawmaking because it was not punitive. Justice Kennedy, delivering the tiebreaker in favour of the majority, is especially relevant to the possibility of further challenge. He said that if:

*"...civil commitment were to become a mechanism for retribution and general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedent would not suffice to validate"* (Gould, 1998: 873-4).

Although effective treatment was not required, this Justice did also warn that treatment must not be a sham or pretext for punishment, and in the case that it was, the law may be challenged (Gould, 1998; Fitch, 1998; Janus, 1998).

2.38 In addition, the majority of Justices in the *Hendricks* case did not address the issue of equal protection, although other courts and justices have disposed of the issue (Wilson, 1998). Equal protection requires that there be a relevant purpose for the treatment of one class of persons differently to another. The argument that sexually violent predators should be treated different to other sexual offenders (who are only imprisoned) or indeed to other civilly committed persons (who are required to have a mental illness for commitment) is yet to be addressed by a majority of the United States Supreme Court.

### 3.7 MORAL AND PRAGMATIC ISSUES

#### 3.7.1 Treatment efficacy

2.39 In an early review by Quinsey (1992)<sup>10</sup> of the Washington State Special Commitment Centre Program for Sexually Violent Predators, significant problems were highlighted. The structure of the legislation was not conducive to motivating treatment in offenders, who were resentful and who saw litigation and not treatment as a means of securing release. Moreover, the detention of those already committed with those awaiting a hearing, resulted in the latter group developing resentment towards members of staff before they were even committed. The lack of an interim measure of supervision before release into the community meant that there was no meaningful measure of the rehabilitation of the offender and consequently that the decision in respect of release would err on the side of caution. Finally, for those who did not progress with treatment, there should be a less restrictive alternative that would respect their dignity and afford them the opportunity to engage in personal development activities. Similar observations were made by Petrunik (1994) following a visit to a Washington Special Commitment Centre in 1993 in Monroe, Washington.

#### *Criticism that the statutes are pragmatic and not based on principle*

2.40 The passage of commitment laws often follows strong political pressure. It has been observed that the perception of risk associated with certain offenders has made the passage of the laws intensely political (Scheingold et al, 1992) and that the integrity of the law has been compromised by a 'jurisprudence of prevention' that has supplanted the principled incapacitation of sexual offenders (Janus, 1996; Janus, 1998) .

2.41 The juxtaposition of responsibility and irresponsibility is similarly problematic. There is significant conflict in the characterisation of sexual predators as mentally abnormal with an impaired capacity for control, while at the same time viewing this group as criminally responsible for the consequences of that lack of control (Falk, 1999; Weeks, 1998). The

reliance on mental abnormality may also associate other mentally disadvantaged individuals with sexually deviant behaviour (Gould, 1998). It is also not clear that commitment offers the best solution to the problem of offending. It is expensive and it does not target treatment when it may be most effective to the offender, namely, during the prison sentence for the index offence (AMA, 1999).

2.42 While traditional civil commitment requires the presence of mental illness, the extension of civil commitment to those with a mental abnormality opens the possibility of commitment to a broad range of people who may also be classified as 'mentally abnormal' (Falk, 1999). Despite the *Kansas v Hendricks* ruling that found that the Kansas statute was not punitive, commentators continue to question the juxtaposition of criminal and civil sanctions in the laws (Rollman, 1998; Weeks, 1998; Janus, 1998).

### 3.8 CIVIL COMMITMENT, PSYCHIATRY AND THE LAW

2.43 The first generation of statutes for the civil commitment of sexual offenders thrived with the support of the psychiatric community, while their demise coincided with its opposition (Lieb et al, 1998). The psychiatric community is again expressing concern with commitment laws for sexual offenders. Unlike the first, the second generation has not been inspired by the therapeutic optimism of psychiatry, but is in spite of its pessimism and suspicion concerning the operation and applicability of these laws (Fitch, 1998). Not only are psychiatric professionals virtually disenfranchised in the development of the second generation, as is demonstrated in the consideration of their evidential role in the following paragraph, but they have also, as a professional body, expressed their opposition to these laws and to the terms of the decision in *Kansas v Hendricks* (American Psychiatric Association, 1998a, American Psychiatric Association, 1996, American Psychiatric Association, 1999).

2.44 While psychiatrists have enjoyed a significant degree of control in the implementation of traditional civil commitment statutes, they are uncomfortable with their role in the sexual predator statutes. Sexual predator commitment statutes require that psychiatrists adhere to a legal definition of mental disorder or personality disorder that is associated with sexual violence, and that is not recognised as a mental illness in the DSM-IV. Not only is the legal definition a false construct in the psychiatric milieu, it does not necessarily correlate to psychiatric treatment modalities. Although committed to psychiatric hospitals, the law pays little attention to the treatment needs of this class of sexual offender

---

<sup>10</sup> Cited and outlined in Lieb, 1996 and La Fond, 1992a.

and whether psychiatrists believe that they constitute a treatable class of patient (American Psychiatric Association, 1999).

2.45 Civil commitment of sexual offenders also implicates psychiatry in social control and blurs the distinction between treatment and punishment. In practice, the civil commitment of sexual predators may place a burden on mental health services and without significantly increased resources, divert psychiatric services away from traditional psychiatric treatment institutions. From a psychiatric perspective it may be more expedient to treat offenders during their period of incarceration rather than committing them after incarceration (Zonana and Norko, 1999).

2.46 In addition, the post-detention commitment of SVPs may be deleterious to successful treatment of SVPs. The conflation of punishment and therapy in the regime of civil commitment may create a disincentive to therapy in the offender and may create anger, resentment and distrust of therapists. Combined with the failure of the statutes to provide for treatment during incarceration the statutes may exacerbate problems presented by the offender and doom the post-detention treatment regime to extreme difficulty (Horwitz, 1995).

2.47 The American Psychiatric Association (1999) has concluded that laws for the civil commitment of sexual offenders is a misuse of psychiatry and recommends that other sentencing alternative are the most appropriate means of disposing with sexual offenders. By contrast, the New Jersey Psychiatric Association has supported that state's sexual predator statute. Despite reservations, this Association has concluded that on a pragmatic basis psychiatrists must play an important role in the diagnosis and treatment of sexual predators because as a professional group they are at least in the best position to do so (American Psychiatric Association, 1998b).

### 3.9 THE FUTURE OF THE SECOND GENERATION: SEXUAL PREDATOR STATUTES

2.48 There is significant unease with the second generation of statutes for the civil commitment of sexual offenders. The current trend towards the implementation of statutes, calls for the uniform nation-wide implementation of the statutes and for the use of every available measure, including civil commitment, to protect the public, indicate that use of the second generation of statutes is set to expand (Lieb and Matson, 1998; Lieb, 1999; Wilson, 1998; Teir and Coy, 1997). Although the statutes are modelled on civil commitment procedures, they are not accompanied by the therapeutic optimism of the first generation. In many ways they are invidious to the psychiatric community that is central to their

administration, and they compromise a valuable distinction between punishment and treatment in the law. Unless the model of community protection that is quickly emerging is combined with a strong rehabilitative ideal, civil commitment of sexual offenders risks becoming a spiralling short term solution to the problem of how to dispose of sexual offenders in the law (Fitch, 1998).

2.49 Even at these early stages, there are advocates of the abandonment of SVP statutes in their current manifestation. The disingenuous characterisation of the statutes as a form of civil commitment belies their failure to adhere to a serious rehabilitative ideal. While the therapeutic state may in some cases be justified, it is not when used for social control and not treatment (La Fond, 1992a). Legal candour requires that unless accompanied by a real commitment to treatment, it should be the justice system and not civil commitment that is used to counter the risk posed by sexual offenders. In recognition of this, and of the reality of dangerous sexual offenders, enhanced sentencing has been proposed as a model for the sentencing of dangerous sexual offenders (Horwitz, 1995; Falk, 1999).

### 3.10 CRIMINAL SENTENCING OF DANGEROUS OFFENDERS

2.50 While the civil commitment of sexual predators dominates the debate about community protection and the disposal of the dangerous offender, the disposal of the non-sexual dangerous offender and the majority of sexual offenders are provided for by more conventional measures of criminal sentence. In response to the growing prevalence of violence, these measures have become more severe, and are primarily in the form of 3-Strikes and enhanced sentencing for dangerous offenders.

### 3.11 REPEAT OFFENDERS: 3-STRIKES AND 2-STRIKES

2.51 3-Strikes legislation is a current trend in the sentencing of dangerous offenders. Many states and the Federal Government have enacted statutes aimed at repeat felony offenders. While there are many variations, 3-Strikes statutes typically impose a mandatory life sentence on offenders convicted for the third time of a serious felony (indictable) offence. In some states, there is no eligibility for parole following the third strike while in others there are extended periods of parole ineligibility. In some states the final strike must be a violent felony while in others it need not be. Some states impose time limits between strikes while others do not (Grant, 1998; Lieb et al, 1998).

2.52 Three strikes legislation is a community protection model based on incapacitation and deterrence. There is no requirement for dangerousness to be established, and the sentence is passed simply on criminal record and not on criminal character. The application of the

legislation is typically broad, and covers property as well as violent crimes. These laws have increased the prison population and have proved expensive (Reske, 1994; Kopel, 1995).

2.53 Three strikes legislation is also criticised in a cost/benefit analysis. Without a benefit ratio based on predictions of dangerousness or future offending, the risk is taken of incarcerating those who would not re-offend or incarcerating some offenders beyond a period that they would re-offend. It has been suggested that resources would be better spent in preventative strategies. It has also been suggested that three strikes laws provide a deterrent to property offenders rather than violent offenders (Grant, 1998). In addition, it is felt that 'Three Strikes' legislation does not currently distinguish between violent and non-violent offenders (Franklin, 1994).

2.54 As a sentence, three strikes legislation is contrary to the principle of proportionality that the sentence fit the crime committed. Although there may be many criticisms of three strikes legislation, it must be seen in the context of American concern with crime rates and political pressure to get tough on crime (Reske, 1994).

### 3.12 ENHANCED SENTENCING

2.55 Some states have enacted enhanced sentencing provisions specifically for sex offenders. In 1996, Washington State provided 'Two Strikes' legislation for those convicted of two violent sexual offences and those convicted of two child rapes (Lieb, 1996). Seven other states have implemented 'Two Strikes' enhanced sentencing and others have provided for longer and life sentences for those with a history of sexual offending. Lifetime parole is another option taken in some states (Lieb et al, 1998).

2.56 Mandatory life sentences or indeterminate sentences for sexual offenders have also been enacted. The onus is then placed on Parole Boards to decide whether an offender has been rehabilitated. Examples of the application of this approach can be found in Missouri which mandated life sentences for sexual offenders in 1998, Colorado where, in 1998, indefinite sentencing and life parole was proposed and Nebraska which has proposed life sentences for sexual offenders (Falk, 1999).

### 3.13 CASTRATION AND DRUG TREATMENT OF SEXUAL OFFENDERS

2.57 Current treatment of sexual offenders employs a variety of techniques, including behavioural modification therapy, cognitive reconditioning, skills training and psychoeducation, relapse prevention and pharmacological interventions (Zonana and Noriko, 1999). In the state of Iowa, hormone therapy is a condition of parole for sexual offenders whose victims are 12 years of age or less (Lieb, 1999). Five states require or authorise courts

to order repeat sexual offenders to take injections of Depo-Provera, a drug that inhibits sexual drive.

2.58 Some states, led by California, have authorised castration for sexual offenders. California passed a mandatory castration bill in 1996, in the spirit of treating those deviants who are unable to control their sexual behaviour. Concern about castration includes potential side effects, constitutional issues such as violation of privacy, right to have a family and the right to control one's body, and questions of effectiveness. For example, chemical castration is not considered to be effective in the long term, and even surgical castration may not be effective in those cases where sexual offending is not related to sexual drive but to other issues, for example, power, patriarchy and personal humiliation. Other states that have castration legislation include Texas, Montana, Florida and Colorado. In 1999, the American Medical Association opposed the mandatory chemical castration of offenders or castration as a condition of parole release (AMA, 1999).

2.59 Carpenter (1998) reports that many states have adopted measures for the treatment of sexual offenders in prison, employing a variety of individual, family and behavioural therapies. Discouraging results and high rates of recidivism have led to disillusionment with sex offender therapy treatment. The implementation of castration laws is a reflection of the desire for a more effective solution to the problem of sexual offender recidivism.

2.60 In California, a law was passed that mandated chemical castration for offenders convicted for a second time of a sexual offence against a child younger than 13 years of age. The law includes sodomy, oral sex, insertion of a foreign object or lewd and lascivious conduct with minors, but surprisingly does not include rape. The law required that offenders be chemically castrated one week prior to their release from prison and the continuation of the treatment during the duration of parole. The treatment that is used is Depo-Provera, similar to Decapetyl. Surgical castration is offered as an alternative to chemical castration. Therapy to complement the chemical castration is not available due to the large numbers of sexual offenders and limited resources of the prisons (Carpenter, 1998). Californian law also allows the court to impose chemical castration for an offender convicted for the first time of a sexual offence at its discretion (Russell, 1997).

2.61 Montana has legislated for chemical castration for repeat rapist or incest offenders. The treatment commences one week prior to their release from prison and can be continued indefinitely. Hawaii, New Mexico and Washington have proposed bills for mandatory

chemical castration of sexual offenders who commit rape and sexual assault, and Texas, Massachusetts and Wisconsin are also contemplating treatment with Depo-Provera (Carpenter, 1998).

2.62 Hicks (1993) posits that chemical castration could be distinguished from surgical castration and that it does not involve a manifestly cruel or severe punishment. It may also be said that it is not excessive as it aims to stop serious re-offending and is not arbitrary in that it may be voluntary. In addition, castration may be more humane than excessive imprisonment. He notes that the medical community may oppose castration for reasons of punishment, may think that unless combined with therapy it does not work, and say that the effect of treatment could be reversed by obtaining hormones illegally. There is also the issue of whether consent is truly informed when it is offered in exchange for an offender's liberty.

2.63 Lombardo (1997) reports that studies have shown that Depo-Provera may have good effect with paraphiliacs<sup>11</sup>, in conjunction with counselling. Studies may be flawed, and in any case there are different classes of sexual offender, who offend due to different motivations. It is also significant that California does not offer comprehensive counselling. Fitzgerald (1990) says that MPA treatment (administration of medroxyprogesterone acetate, a synthetic progesterone, under the trade name DP) has been used for offenders known as paraphiliacs. MPA is an antiandrogenic drug that reduces the production and effects of testosterone and therefore diminishes sexual fantasy. He advocates the use of MPA for paraphiliacs, but notes that it is a treatment, not a cure and must be accompanied by psychotherapy.

---

<sup>11</sup>Those who are compelled to commit sex crimes to realise a specific sexual fantasy.

*The Constitutional issues of castration and drug treatment of sexual offenders*

2.64 Legal and constitutional issues arising from the treatment and castration of sexual offenders are identified by Fitzgerald (1990). The constitutional protections against intrusion in freedom of thought protected by the 1<sup>st</sup> Amendment, cruel and unusual punishment provided by the 8<sup>th</sup> Amendment and the right to procreate and refuse medical treatment, which are protected by the right to privacy and liberty in the 14<sup>th</sup> Amendment, potentially effect the legality of such a treatment. Mandatory castration may violate the 8<sup>th</sup> Amendment protection against cruel and unusual punishment and the 14<sup>th</sup> Amendment that protects privacy and thus potentially childbearing and the refusal of medical treatment. Even voluntary castration as an alternative to imprisonment may present as too coercive a choice to be in any means a choice (Carpenter, 1998). From a different perspective the question of whether there is a right to MPA treatment should be considered.

2.65 Possible constitutional answers are that castration may be proven to be the least restrictive means, and the only measure that will stop sexual re-offending. The American Civil Liberties Union is likely to challenge castration laws and argue that they violate the right to protection against cruel and unusual punishment, as well as a violation of privacy and that they cause negative side effects. In Michigan and Montana, the State Supreme Courts have held chemical castration as a condition of probation unconstitutional because Depo-Provera is only in experimental stages of use (Carpenter, 1998).

2.66 Lombardo (1997) notes that while studies speak of Depo-Provera as treatment, constitutional challenges to its use will commonly cite in support that it is a breach of the 8<sup>th</sup> Amendment which provides against cruel and unusual punishment. The classification of Depo-Provera as treatment or punishment is thus central to analysis. If it is treatment it would have to have therapeutic value, be recognised as acceptable medical practice, be part of an ongoing psychotherapeutic program and have side effects minimal to the benefits. He concludes, primarily on the basis of an 8<sup>th</sup> Amendment analysis, that the statute is unconstitutional.

## 4. CHAPTER THREE: THE COMMUNITY PROTECTION MODEL II

### 4.1 INTRODUCTION

3.1 The Community Protection Model II is found in Canada, Australia and New Zealand. Like the Community Protection Model I used in the United States (chapter 2), this model is characterised by a rejection of the clinical and justice models for the management of dangerous offenders and is predicated on measures designed to maximise public protection. While Model I concentrated on sexual offenders and to a lesser extent repeat offenders and innovated a scheme of post-imprisonment civil commitment, Model II does not make a sharp distinction between sexual and non-sexual dangerous offenders. It adheres to a more conventional type of preventative detention by way of indeterminate sentencing applied at the time of conviction. Ironically, measures under Model I aspire to be civil, but are strongly reminiscent of criminal procedure, whereas measures under Model II claim to be criminal but may have less procedural protections than those measures located in Model I.

3.2 In Canada, a mandatory indeterminate sentence is provided for an offender who is designated a 'dangerous offender'. Post detention supervision is provided to those designated 'long term offenders' and a recognisance to keep the peace can be used when there are reasonable grounds to suspect that a person will commit an offence.

3.3 In Australia sentencing varies between states and territories. Indeterminate sentencing is available in most jurisdictions, with Victoria and Queensland most recently enacting specific legislation for dangerous offenders. No legislation has been identified in the Australian Capital Territory.

3.4 The sentence of preventative detention is available for dangerous offenders in New Zealand.

### 4.2 CANADA

#### 4.2.1 Dangerous offender legislation

3.5 Dangerous Offender Legislation in Canada has occurred in 3 phases (Campbell, 1999). This generally reflects a continuum from the clinical model, through the justice model, and a culmination in the community protection model (Petrunik, 1994).

#### *1947-1977*

3.6 In the period 1947 – 1977, the Criminal Code provided for the indeterminate detention of 'habitual offenders' and for 'criminal sexual psychopaths' (later described as 'dangerous sexual offenders') (Campbell, 1999; Jackson, 1997; Grant, 1998; Petrunik, 1994).

3.7 Habitual Offender Legislation was derived from the English Prevention of Crime Act 1908 and is reminiscent of the current 3-Strikes legislation featured in Model I (Jackson, 1997). The Canadian version provided that an offender who, since the age of 18, had been 3 times convicted of an indictable offence and liable to at least 5 years imprisonment thereunder, and who led a persistently criminal life could, if expedient for public protection, be sentenced to life imprisonment. The habitual offender was entitled to an annual review of the detention (CCC, 1960-61).

3.8 Sexual Psychopath Legislation employed the definition of a criminal sexual psychopath from a Massachusetts statute, but did not follow its scheme of civil commitment (Jackson, 1997). It did, however, engage a clinical model and was part of the movement that inspired the first generation of sexual psychopath laws located in Model I. It provided that those whose sexual misconduct evidenced a lack of power to control sexual impulses and was likely to attack or cause injury, loss, pain, or other evil to other persons, be sentenced to a punitive measure of at least 2 years imprisonment and an indeterminate measure that was reviewed not less than every 3 years (Petrunik, 1994).

3.9 The designation of 'Dangerous Sexual Offenders' replaced that of sexual psychopaths in 1961. The relevant definition was changed by requiring a failure and not a lack of power to control sexual impulses, and by requiring that the offender be likely to cause rather than to inflict injury. In addition, the sentence imposed on the dangerous sexual offender was no longer a determinate one combined with an indeterminate one. The sentence that replaced it was an entirely determinate one that required to be reviewed at least every year (Petrunik, 1994).

3.10 Criticism of the provisions for habitual offenders and dangerous sexual offenders intensified in the late 1960's and continued throughout the 1970's. This criticism took the form that habitual offender provisions were applied mainly to property offenders while the dangerous sexual offender provisions did not include non-sexual violent offenders. The latter provisions had been applied to some sexual but non-violent offenders. In addition the legislation was applied inconsistently throughout Canada (Petrunik, 1994; Jackson, 1997; Campbell, 1999). Calls for reform reflected the reality that neither provision adequately addressed the concerns for public safety. This concern was further articulated in the emergent justice model.

### *1977-1997 The Justice Model*

3.11 In the period 1977 – 1997, dangerous offender provisions replaced the ‘habitual offender’ and the ‘dangerous sexual offender’ provisions in the Criminal Code. A dangerous offender was a person who had been convicted of a serious personal injury offence defined according to whether the offence was sexual or non-sexual. A dangerous offender application could be made after conviction but before sentencing, and the evidence of at least 2 psychiatrists (one chosen by the prosecutor, one chosen by the offender) was required. Any relevant evidence could be heard by the court. If found to be a dangerous offender, the court had discretion whether to impose an indeterminate or determinate sentence. Where an indeterminate sentence was imposed it was required to be reviewed by the National Parole Board 3 years after sentencing and every 2 years thereafter. An offender sentenced to an indeterminate period had a right of appeal based on a question of law or fact or both (Petrunik, 1994; Jackson, 1997; Campbell, 1999).

3.12 In the period leading up to 1997, a number of notable sexual offences ignited public attention and resulted in further measures to strengthen the sentencing and the supervision of sexual offenders. In 1988 a horrific sexual attack on a young boy caused events that were to initiate stricter provisions in the dangerous offender legislation.

3.13 In 1988, 11 year old Christopher Stephenson was kidnapped, sexually assaulted and murdered by Joseph Fredericks, a psychopath and homosexual paedophile who was on statutory release following serving 2/3 of a 5 year sentence for the sexual assault of another boy. A dangerous offender order had been sought but not pursued because the victim’s family wanted to spare the child the ordeal of giving evidence. Fredericks had not served his entire sentence because of confusion over the recent changes in the law. An inquest followed that entailed 71 recommendations, the first of which was the introduction of legislation to permit the continued detention of sexually violent predators beyond the expiry of their sentence, modelled on Washington State (Grant, 1998).

3.14 This case combined with increasing interest in the civil commitment schemes in the USA, led to a community protection model emerging in the management of dangerous offenders (Petrunik, 1994; Grant, 1998; Jackson, 1997).

3.15 A report of the Federal/Provincial/Territorial Task Force in 1995 on ‘high-risk violent offenders’ (hereinafter Task Force) recommended key changes to the dangerous offender provisions. The American model was rejected. The recommendations of the Task Force

were accepted and enshrined in Bill C-55, which made 5 significant changes to the dangerous offender provisions:

- A multi-disciplinary assessment of the offender replaced the requirement for ‘duelling psychiatrists’;
- The discretion of the court to make a dangerous offender designation but not impose an indeterminate sentence was removed, making an indeterminate sentence mandatory following the designation
- Eligibility for the first full parole review was extended from 3 years to 7 years following sentence;
- A new ‘long term offender’ designation and post-custodial supervision of up to 10 years was created for sex offenders who did not quite fulfil the criteria for being designated a ‘dangerous offender’;
- An ancillary provision for the supervision of those persons who had not offended but were thought to be at a high risk of doing so was created. In addition a new ‘window of opportunity’ was created allowing for a small delay in the application process.

#### *1997-present - The Community Protection Model*

3.16 The 1997 Canadian Criminal Code enacted the provisions for the treatment of ‘dangerous offenders’. Following conviction for a serious personal injury offence,<sup>12</sup> the Crown may apply to the court for a finding that the offender is a dangerous offender.

3.17 Serious personal injury offences in respect of non-sexual offences are defined as those that attract a sentence of at least 10 years imprisonment. In addition, they involve the actual or attempted use of violence against another person or conduct endangering or likely to endanger the life or safety of another person or inflict or likely to inflict severe psychological damage upon another person. The court must be satisfied that the offender constituted a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing:

- A pattern of repetitive behaviour of which the offence forms a part, showing a failure to restrain behaviour and a likelihood of causing death or injury to other persons

---

<sup>12</sup> Murder is excluded from the definition of a ‘serious personal injury offence’ because parole ineligibility is greater than that set for the indeterminate sentence.

or inflicting severe psychological damage on other persons, through a failure in the future to restrain behaviour;

- A pattern of persistent aggressive behaviour of which the offence forms a part, showing a substantial degree of indifference respecting the reasonably foreseeable consequences to other persons;
- Any behaviour associated with the offence that is of such a brutal nature as to compel the conclusion that future behaviour is unlikely to be inhibited by normal standards of behavioural restraint.

3.18 Serious personal injury offences in respect of sexual offences are defined as sexual assault, aggravated sexual assault, or sexual assault with a weapon. In addition, the court must be satisfied that the conduct of the offender in any sexual matter including the offence, has shown a failure to control sexual impulses and that there is a likelihood of causing injury, pain or other evil to persons through a failure to control sexual impulses.

3.19 Although the circumstances of the index offence (the serious personal injury offence) may evince dangerousness, it need not do so as long as the dangerousness of the offender may be established in some other way (*R v Currie, 1997*)<sup>13</sup>.

3.20 The application by the Crown for a finding by the court to designate an offender as a 'dangerous offender' should be made before sentencing. The Crown can, however, give notice before sentencing that it may make application for a dangerous offender designation within 6 months of sentencing. If such a delayed application is made, the Crown must establish at the time of the application that relevant evidence, now available, had not reasonably been available to them at the time of sentencing. If an offender is designated a 'dangerous offender', i.e., the application is successful, the court must impose a mandatory indeterminate sentence. This sentence is reviewed 7 years after sentencing and every 2 years thereafter. Full rights of appeal against the sentence are afforded to the offender, on matters of fact, law or a combination of both.

3.21 Although the sentence does not distinguish a penalty and protective measure, the 7-year period of parole ineligibility correlates to the period of parole ineligibility for the most serious index offence. It is not clear that parole ineligibility should not be set at the least serious index offence, to reduce the harm caused by potential false positive predictions of

---

<sup>13</sup> 115 CCC (3d) 1997.

dangerousness (Grant, 1998). For the purposes of review, the Parole Board must consider the condition, history, and circumstances of the offender to determine whether parole should be granted and under what conditions, if any.

#### 4.2.2 Constitutional and practical issues in dangerous offender legislation

##### *Charter rights*

3.22 The Canadian Charter of Rights and Freedoms (1982) provides some possible challenges to the legislation. The Supreme Court of Canada declared that the 1977 law was constitutional (*R v Lyons*, 1987)<sup>14</sup>, but the 1997 changes provide the possibility of further challenge. Section 7 of the Canadian Charter of Rights and Freedoms protects the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Section 9 prohibits arbitrary detention or imprisonment, and protection against cruel and unusual treatment or punishment is contained within section 12.

##### *Mandatory indeterminate sentence*

3.23 Since 1997, an indeterminate sentence must be passed on an offender designated 'a dangerous offender'. The Task Force (1995) had recommended the abolition of the pre-existing judicial discretion in this respect, saying that there was no logical reason for a designation to be made if it were not in order to impose an indeterminate sentence. This discretion was, however, one of the significant procedural safeguards for the offender. Although rarely used, it was utilised in cases where to do otherwise would have effectively warehoused an offender whose prognosis meant that they were unlikely to receive treatment or rehabilitation (Grant, 1998).

3.24 The mandatory indeterminate sentence provisions may violate section 7 of the Charter (1982) that militates against provisions that have broader than necessary effect and requires that laws are not sweeping to fulfil their purpose. It could be argued that the removal of the discretion results in the provisions catching people for whom the sentence is inappropriate. It could also violate Section 9 if it were argued that the mandatory nature of the provisions made them arbitrary and not conditioned to the circumstances of the offender's case (Soward, 1998).

---

<sup>14</sup> 37 CCC (3d) 1 1987

### *Parole review*

3.25 In *R v Lyons*, the Court stressed parole review and described it was the ‘sole protection of the offender’s liberty interest.’ It is possible that the increase in parole ineligibility from 3 years may violate Section 9 of the Charter (1982). Another effect of the increases in parole ineligibility is that it removes one of the safeguards that minimise the effect of false positives in the prediction of dangerousness. Moreover the increase may delay the offender’s access to treatment and rehabilitation. Where treatment resources are scarce, they are directed at those who will be released sooner, and thus the 7 year parole ineligibility means that an offender may be denied treatment that may, ironically be beneficial to them in their review of sentence (Grant, 1998).

3.26 Although parole review is provided, it may not necessarily protect the offender’s liberty interest as was demonstrated in the case of *Warden of Mountain Institution v Steele* in 1990.<sup>15</sup> Steele pled guilty to a charge of attempted rape in 1953 when he was 18 years old and was designated a criminal sexual psychopath. He was sentenced to indeterminate detention, and remained there for 37 years, during which time numerous medical recommendations were made for his release but the Parole Board repeatedly refused. The Supreme Court of Canada held that there was no further justification based on the dangerousness of the offender, for continued detention and thus it was a violation of section 12 of the Charter that prohibits cruel and unusual punishment. It should be noted, however, that the prohibition on cruel and unusual punishment in Section 12 of the Charter has been strictly interpreted and requires that the punishment be ‘grossly disproportionate’ and not merely excessive (Soward, 1998).

### *Removal of ‘duelling’ psychiatrists*

3.27 The removal of the offender’s right to nominate a psychiatrist of choice and the replacement of the adversarial determination of dangerousness with a multi-disciplinary approach may minimise the opportunity for the offender to present their case. It was intended that the multi-disciplinary approach was a more neutral and objective means of deciding dangerousness (Task Force, 1995). This may be so, however, it is likely that it will be difficult for any offender to challenge an assessment made of them (Jackson, 1997). In addition, the apparent objectivity and neutrality of the multi-disciplinary approach may give the false impression that risk prediction is an exact instrument (Grant, 1998). Moreover,

---

<sup>15</sup> [1990] 2 SCR

prosecutors had considered that the adversarial process was a significant and necessary safeguard for the offender (Bonta et al., 1996).

### *Inconsistent application*

3.28 Inconsistent application has been highlighted as a problem in the operation of the dangerous offender provisions. The inconsistent application may be illustrated by certain case studies provided by Soward, (1998) and by statistics compiled by Bonta et. al., (1996).

3.29 Soward (1998) highlights the inconsistent operation of the provisions with particular reference to 2 cases (R v Neve, 1995 and R v Goudry, 1996)<sup>16</sup> where she doubts that the provisions were intended to apply. She asserts that it has been possible for the court to apply a dangerous offender designation in a wide variety of appropriate and non-appropriate cases. In the first case, a 22-year-old female was designated a dangerous offender following a conviction for aggravated assault. She had been previously charged with offences including breaking and entering, uttering threats and assault with a weapon, but there were never any serious personal injury offences committed as defined under the dangerous offender provisions. She was nevertheless characterised as a psychopath and ‘a male lust murderer’ despite never having been convicted or charged with murder. Soward hypothesises that the court, utilising its discretion, may have lowered its threshold of dangerousness because Neve was a woman and women are not as likely to commit serious violent crimes as are men. Thus Neve may have been dangerous relative to her gender but not to men. In the second case the discretion of the court was used to sentence a man with a long history of violent behaviour and 37 convictions for domestic violence since 1981. Although arguably desirable, it is not clear that the provisions were intended to be applied to cases of domestic violence.

### *The use and effectiveness of dangerous offender legislation*

3.30 Petrunik (1994) identified that Ontario and British Columbia together accounted for approximately 75% of all dangerous offender designations. Quebec was notable in its scarcity of dangerous offender orders. Bonta et. al., (1996) also noted the anomalies and figures provided by Campbell (1999) identified Ontario and British Columbia as still imposing a majority of dangerous offender orders. Such figures have led some to fear that there is too much prosecutorial discretion involved in the application procedure, undermining the success of the provisions in providing for community protection (Petrunik, 1994; Grant,

---

<sup>16</sup> 160 A.R. 255 (Q.B.0 and 186 A.R. 91 (Prov. Ct) cited in Soward, 1998.

1998). In *R v Lyons* (1987)<sup>17</sup> the Supreme Court had rejected the contention that prosecutorial discretion rendered the provisions arbitrary and said that it would be a lack of discretion that might render them arbitrary.

3.31 While earlier laws concentrated on sexual offenders, the reform of the dangerous offender provisions was intended to expand the range of index offences beyond sexual offences. Few research studies have been completed but those which have suggest that the designation of 'dangerous offender' is still predominately applied to sex offenders (Grant, 1998). In 1992, 90% of dangerous offenders were reported as having a history of sexual offending (Pepino, 1993)<sup>18</sup>.

3.32 On May 3, 1995 there were 146 dangerous offenders in Canada, all male, with 67 in Ontario and 37 in British Columbia. As Quebec had only one dangerous offender, it is clear that the provisions may not be uniformly applied. Bonta et. al., (1996) studied the penitentiary and court files of 64 of the dangerous offenders in these two provinces and compared them to 34 'detention failures'<sup>19</sup>.

3.33 The research findings indicate that 92.2% of dangerous offenders were sexual offenders. In 72.9% there was a psychiatric diagnosis of antisocial personality disorder. When the file information was matched to the DSM-IV<sup>20</sup> criteria for antisocial personality disorder (which depends on behavioural evidence) the rate fell to 54%, which is similar to the incidence reported in forensic or correctional institutions. When Hare's Psychopathy Checklist (1991), was applied information was sufficient in 48 files to find that 39.6% were psychopaths. This percentage is almost twice as high as typical offender populations Bonta et. al., 1996).

3.34 Dangerous offenders were compared to 'detention failures' to establish if dangerous offenders were indeed high-risk violent offenders. The groups were similar except that dangerous offenders incorporated 92.2% sexual offenders whereas only 35.3% of 'detention failures' were sexual offenders. The sexual offences of the dangerous offenders and the detention failures were, however, similar. Similar prevalence levels of antisocial personality disorder and psychiatric diagnosis were found in the two groups. Likewise, similar numbers in each group of offenders fell within the DSM-IV classification of personality disorder and

---

<sup>17</sup> 37 CCC (3d)1at 23

<sup>18</sup> Cited in Lieb et al, 1998: 86

<sup>19</sup> These are defined as high risk violent offenders who had not been designated dangerous, had been detained until the expiry of their determinate sentence and had re-offended with a violent offence after release.

<sup>20</sup> 1994 American Psychiatric Association classification of mental disorders.

Hare's Psychopathy Checklist. The authors conclude that these similarities strongly suggest that the dangerous offenders comprise a high risk violent group.

#### *Psychiatry and the dangerous offender*

3.35 The study by Bonta et. al., (1996) revealed the prominence of psychiatric diagnosis in the designation of a dangerous offender: 72.9% were diagnosed with antisocial personality disorder and 39.6% could be diagnosed as psychopathic.

3.36 Rogers and Lynett (1991) reviewed the clinical and legal basis for psychiatrists and psychologists in dangerous offender hearings and advise against their participation in them. Although psychiatric testimony is necessary for the dangerous offender hearing, they contend that the estimation of future dangerousness is predicated on concepts that are not legally defined and have no basis in psychiatry. They criticise the diagnosis of antisocial personality disorder as an indication of dangerousness, and question the ability of psychiatrists to make the distinction between controlled and uncontrolled sexual instincts that is required of them by the law. They note that the American Psychiatric Association has suggested that this distinction is equivalent to the difference between twilight and dusk.

3.37 Criticism of experts' ability to predict repeat sexual offending has also been expressed by Coles and Grant (1991), who suggest that psychiatrists are concerned with diagnosis, prognosis and treatment, and have a very limited role to play in community protection. Lohrasbe (1992) and Hill (1992) refute Coles and Grant (1991) and assert that psychiatrists have a legitimate role in dangerous offender hearings and are professionally capable of making the types of judgement necessary to determine dangerousness.

#### *Criticism of dangerous offender provisions*

3.38 Critics say that attention to dangerous offenders ignores more frequent forms of violence. Attention to stranger violence, which is a hallmark of dangerous offender legislation, ignores the reality that victims of violent and sexual offences are often known to their offender. Specifically, it ignores intra-familial violence and sexual abuse, simply on the basis that such offending does not put the general public at risk. Dangerous offenders constitute a small proportion of the offender population yet they may divert resources away from combating other forms of violence (Grant, 1998).

3.39 One major criticism of the dangerous offender provisions is that the designation of dangerous offender is damning (Campbell, 1999). This label makes it difficult for the

offender to obtain treatment and difficult for the offender to get parole. The stigma attached to the designation makes the Parole Board reluctant to grant a dangerous offender parole. In addition, there is some circularity in the treatment of dangerous offenders and their difficulty of getting parole. It is difficult for an offender to obtain treatment because treatment is targeted at those near the completion of their sentence. In this way the dangerous offender will be ignored. Even when the 7-year parole review comes around, they will be unlikely to be granted parole, as they have not been rehabilitated, i.e. they have not been treated. In this way the designation as a dangerous offender is an impediment to obtaining treatment, which is itself an impediment to being granted parole (Grant, 1998).

#### *The dangerous offender population*

3.40 In 1998 there were a total of 219 dangerous offenders in Canada. They come from every province but the majority are from Ontario and British Columbia, reflecting the aggressive approach of prosecutors in the provinces (Campbell, 1999).

3.41 Campbell (1999) notes that on 3 May 1998, the Correctional Services Canada had 265 dangerous offenders under their jurisdiction. This group included one habitual criminal, 21 dangerous sex offenders, 184 dangerous offenders, and 16 dangerous offenders (classified after 1997). Of these, 222 were still incarcerated, 184 of whom were eligible for conditional release. Twenty four of those who were incarcerated had been released and re-incarcerated; in 9 cases for a new offence and the others as a result of revocation or termination of their conditional release by the National Parole Board. Thirty two were on conditional release, with 2 on day parole and 30 on full parole. Twelve of this group have already been the object of revocations and terminations by the National Parole Board.

3.42 Information on the length of detention of offenders who have ever been conditionally released was as follows:

- Habitual criminals - 7.5 years after full parole expiry date;
- Dangerous sexual offenders - 13.25 years after full parole expiry date;
- Dangerous offenders: 7 years after full parole expiry date (Campbell 1999).

#### *Management of dangerous offenders*

3.43 The types of interventions employed include the following, although Campbell (1999), noted that these categories were being examined for better definition:

- Awareness, social skills building, orientation, aboriginal balanced lifestyle
- Education;
- Employment;
- Crafts, chaplaincy, etc;
- Relapse prevention and follow up;
- Treatment programmes e.g., sex offender programs and counselling, anger and emotion management, Aboriginal programs, substance abuse and mental health.

#### *Long term offender provisions*

3.44 The designation of 'long term offender' was recommended by the Inquiry into the murder of Christopher Stephenson in order to target paedophiles at a high risk of re-offending but who did not fulfil the dangerous offender criteria. It provides for a 10-year period of community supervision following release (Grant, 1998; Jackson, 1998, Campbell, 1999). In February 1999, there were 12 long-term offenders. Some are plea bargains from dangerous offender applications and some are pursued as long term offenders (Campbell, 1999; Bonta et. al., 1996).

3.45 A long term offender designation is made at the time of initial sentencing, either as an alternative if the offender in a dangerous offender application does not qualify for that designation, or as a distinct application in its own right. The 6 month window for dangerous offender applications applies to long term offender applications.

3.46 In order to qualify for a long-term offender designation it must be appropriate to impose a sentence of 2 years or more for the index offence. There must be a substantial risk that the offender will re-offend and a reasonable possibility of eventual control of that risk in the community. The designation is available to anyone convicted of sexual interference, invitation to sexual touching, sexual exploitation, exposure, or any level of sexual assault. It is also available to anyone who has engaged in serious conduct of a sexual nature in the commission of another offence. The long term offender, like the dangerous offender, must demonstrate either a pattern of repetitive behaviour indicating the likelihood of causing death or injury or of inflicting severe psychological damage on others, or sexual conduct showing a likelihood of causing injury, pain or other evil to people in the future.

3.47 Once a long term offender designation is made, the offender will be sentenced for a minimum of 2 years for the substantive offence, and a period of 10 years supervision under parole provisions. This period of supervision begins after the expiry of the sentence and any period of existing parole under it.

3.48 The long-term offender is subject to usual parole conditions. In addition the Parole Board has the power to impose any other conditions that it considers reasonable and necessary to protect society or to further the offender's re-integration into society. The offender may apply to have the period of supervision shortened or terminated. The offender, a member of the Parole Board or the parole supervisor, may apply to the court to reduce or terminate the supervision on the basis that the offender is no longer a substantial risk of re-offending. The onus of proof is on the applicant. Grant (1998) has commented that it is doubtful that provincial legal aid will be available for this application, thus minimising the protection for the long-term offender.

3.49 Breach of the conditions of supervision is an offence punishable by up to 10 years in prison, whether or not a new offence is committed. A member of the Parole Board or a designate, may suspend the supervision order if the member is satisfied that it is necessary to prevent a breach of any condition imposed under the order or to protect society, in which case a hearing is held to determine whether to stop the suspension and resume supervision, or, if a breach of conditions has occurred, to impose the 10 year penalty on the offender. If the long term offender is incarcerated for another offence the supervision is suspended and is resumed after the sentence and parole are completed, unless a judge determines otherwise (Grant, 1998).

3.50 The long term offender provisions have been criticised as risk assessment is made well in advance of release, and there will probably be a tendency to impose a longer term of supervision in order to err on the side of safety. In addition resources are critical. Unless there are sufficient resources to provide supervision and treatment needed for reintegration, the long term offender order will be of limited success. It is also not clear why the long term offender provisions were targeted at sex offenders, unless as a response to appease concern about the sensationalist crimes of paedophiles.

#### *Recognisance to keep the peace*

3.51 Any person fearing, on reasonable grounds, that another person will commit a serious personal injury offence, may lay information before a provincial court judge. The consent of

the Attorney General to the application is required. If satisfied, the judge may order that the defendant enter into a recognisance to keep the peace and be of good behaviour for any period up to 12 months and comply with reasonable conditions necessary to secure the good conduct of the defendant. Up to 12 months imprisonment may follow failure or refusal to enter into the recognisance. The provision may be invoked repeatedly for the same person. An existing section had provided for peace bonds for certain sex offenders.

3.52 The purpose of these peace bonds was apparently to accommodate sex offenders sentenced prior to enactment of the long-term offender provisions. It has been said that these provisions were enacted as an acceptable alternative to calls for a post-detention commitment regime that may have more obviously violated the Charter. The provisions are still however, thought to be a possible violation of the Charter.

3.53 Jackson (1997) has indicated that judicial recognisance to keep the peace has been available but expanded significantly after 1997. Prior to 1997, the Criminal Code already contained provisions for the application of a peace bond or recognisance to those whose behaviour was thought to threaten society. In 1997, Bill C-55 provided that a judge may impose a peace bond or recognisance based on a reasonable fear that a person might commit a serious personal injury offence. Reasonable conditions can be imposed for up to 12 months. Unlike previously, the risk need not be linked to a particular individual. Jackson sees this as possibly the most significant step in the expansion of the law's power to protect the public through strategies based on preventative detention.

#### *Civil commitment*

3.54 The post-detention civil commitment of sex offenders was advocated by the Inquest into the Death of Christopher Stephenson (Grant, 1998). The favour for civil commitment in some American states has provided a proximate model for Canada in this respect. In America, civil commitment and criminal law are state matters. In Canada, civil commitment is a provincial matter while the criminal law is a federal matter. This makes it difficult for the possibility of a uniform approach or for federal legislation on the matter. There is some evidence that civil commitment of sex offenders is finding favour in Canada.

3.55 Civil commitment in Canadian provinces requires a finding of mental illness and a danger to self or to others. Because some courts have been willing to recognise paedophilia as a mental illness, civil commitment has been available for some sex offenders who are considered likely to cause serious bodily harm to another after the completion of their

criminal sentence (Grant, 1998). The extended use of civil commitment will be problematic unless the definition of mental illness is expanded. The current definition would exclude most dangerous and sexual offenders. Moreover, for those small numbers that may be classified as mentally ill, psychiatric institutions may not be the most appropriate or secure facility for them (Grant, 1998).

#### 4.3 AUSTRALIA

##### 4.3.1 Generally

3.56 Most States and Territories in Australia provide for the preventative detention of dangerous or repeat offenders. Preventative detention is affected through indeterminate or enhanced sentencing. Some of the provisions are older and have been used infrequently in recent years, but there is a current trend towards the introduction of new provisions targeted especially at the contemporary paradigm of dangerous offender. This trend finds particular force in Victoria and Queensland where 'one-man' dangerous offender legislation has been introduced for the preventative detention of individual but highly invidious violent offenders.

##### 4.3.2 Queensland (Svensson, 1991)

3.57 In Queensland, indeterminate detention is provided for habitual criminals and dangerous offenders by the Criminal Code 1901 (Svensson, 1991) and the Penalties and Sentences Act 1992 (Parke and Mason, 1995; Mason, 1995; Mals and Grantham, 1993).

##### *The Criminal Code 1901*

3.58 Section 659 of the Code permits the Court to declare that an offender is a habitual criminal if the offender has been convicted of a designated offence and has been convicted of a designated offence on at least 2 or 3 previous occasions (depending on the offence).

An offender declared a habitual criminal must be detained at Her Majesty's Pleasure. The offender is entitled to apply to the Supreme Court to be released. The Court may recommend to the Governor that an offender be released if it is satisfied that the offender is sufficiently reformed or that there is some other sufficient reason to warrant a discharge (Svensson, 1991).

##### *The Penalties And Sentences Act 1992*

3.59 Part 10 of the Act provides for the indeterminate detention of dangerous offenders. It provides that the court may impose an indeterminate sentence on an offender on the application of the Director of Public Prosecutions with the consent of the Attorney General or on its own initiative if the following conditions are satisfied:

- The offender has been convicted of a violent offence (murder, attempted murder, manslaughter, aiding suicide, killing an unborn child, unlawful anal intercourse, carnal knowledge of girls under 16, indecent assaults, carnal knowledge of an intellectually impaired person where the victim is not the lineal descendent of the offender but the offender is the guardian or for the time being has that person in care, or rape);
- The court is satisfied that mental health legislation does not apply
- The court is satisfied that the offender is a serious danger to the community (Parke and Mason, 1995; The Penalties and Sentences Act 1992).

3.60 In the determination that the offender is a serious danger to the community the court must have regard to:

- Whether the nature of the offence is exceptional;
- The offender's antecedents, age and character;
- Any medical, psychiatric, prison or other relevant report in relation to the offender;
- 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 the risk mentioned above.

These considerations are not exhaustive (Parke and Mason, 1995; The Penalties and Sentences Act 1992)

3.61 The burden of proving the issues raised in the hearing lies with the Director of Prosecutions who must satisfy the court by acceptable, cogent evidence and to a high degree of probability that the evidence is of sufficient weight to justify the findings. This standard appears to be somewhere in between the standard required in civil proceedings, of 'on the balance of probabilities' and the standard required in criminal proceedings of 'beyond a reasonable doubt' (Parke and Mason, 1995).

3.62 An offender who is subject to an application for an indeterminate sentence has the right to give or call evidence in respect of their condition. In the case where an offender chooses to provide such evidence an adversarial approach to the determination of dangerousness is likely to ensue (The Penalties and Sentences Act 1992)

3.63 If the Court imposes an indeterminate sentence it must provide detailed reasons for this at the time of the sentence. It is not, however, required to make particular statements about the risk assessment of the offender (The Penalties and Sentences Act 1992).

3.64 When the Court imposes an indeterminate sentence it must specify the nominal sentence that it would have imposed if the sentence had been a finite one. The nominal sentence determines the timing of the review of the sentence. The sentence must be reviewed for the first time within 6 months after the offender has served one half of the nominal sentence, or if the nominal sentence is life imprisonment, within 6 months after the offender has served 13 years imprisonment. Subsequent reviews must occur within 2 years of the date of the last review. An offender may apply for leave from the court for a review of the indefinite sentence at any time following the first review. The review will only be granted if there are exceptional circumstances that relate to the offender (The Penalties and Sentences Act 1992).

3.65 Although not expressly contemplated in the Act, it appears to be the intention of the Queensland Government to use the provisions of the Act to specifically target sexual offenders. Soon after the passage of the Act the Attorney General announced the repeal of the Criminal Law Amendment Act 1945. The 1945 Act effectively provided for the indeterminate confinement of sexual offenders against children who were incapable of controlling their instincts. Because many offenders avoided such confinement by demonstrating that they could control their sexual instincts, the Attorney General announced that they would not be able to avoid indeterminate detention under the provisions of the 1992 Act and that this Act would be employed to sentence them. The abolition of the requirement that these offenders were incapable of controlling their sexual instincts and their sentencing under the 1992 Act represents a more general shift from the therapeutic to the protective model of sentencing sexual offenders in Queensland (Parke and Mason, 1995).

3.66 This sentencing measure has been criticised for its reliance on assessments of dangerousness and its concomitant uncertainty (Mals and Grantham, 1993). It has also been criticised for its avowed utilitarian focus, whereby the benefit of the majority is paramount to the rights and liberty of the individual. During the passage of the Act, the Attorney General made repeated declarations about the utilitarian philosophy that required that the liberty of some be restricted for the protection of others. The passage of the Act has been interpreted by some as a shift away from the principle of just desserts and proportionality towards a protective utilitarian model of sentencing (Mason, 1995; Parke and Mason, 1995).

### 4.3.3 New South Wales

#### *The Habitual Criminals Act 1957*

3.67 There is limited use of legislation to confine habitual criminals in New South Wales. Although the Habitual Criminals Act 1905 provided for the indeterminate detention of habitual criminals, this provision was repealed by the Habitual Criminals Act 1957. It was replaced by a provision that allowed for the imposition of an additional sentence, of at least 5 years and no longer than 14 years, to that given for the index offence for an offender designated a habitual criminal. This additional sentence was imposed at the point of sentencing for the index offence (Svensson, 1991).

3.68 The Habitual Criminals Act 1957 (NSW) authorises a judge to declare that an offender is a habitual criminal under the following conditions:

- The offender is at least 25 years of age;
- The offender has served, on at least 2 previous occasions, separate terms of imprisonment for indictable offences
- The judge considers that detention is expedient with a view to such person's reformation or the prevention of crime (Svensson, 1991).

3.69 Although there is provision for early release at the discretion of the Governor, there is no process of review of the additional sentence. Because the sentence is an enhanced sentence and not a reviewable sentence, the offender is required to serve the duration of the sentence and may not be released before or detained beyond the expiry of the sentence. The additional sentence is inconsistent with contemporary dangerous offender legislation in this respect and is in disuse (Svensson, 1991).

#### *Recent Developments*

3.70 The operation of the Habitual Criminals Act 1957 (NSW) and the Crimes Act 1900 (NSW) has been subject to discussion in an Issues Paper prepared for the Attorney General's review of sentencing laws in New South Wales in June 1994. The Attorney General also announced a review of the Habitual Criminals Act 1957 (NSW) in June 1994 with a view to strengthening the operation of the Act and its deterrent effect (New South Wales Law Reform Commission 1994).

3.71 The enactment of the Community Protection Act 1994 in December of that year is the most interesting development to date. Consistent with the spirit of reform expressed by the Attorney General in June and with developments elsewhere in Victoria, the emergence of the Act reflects the current trend of dangerous offender legislation and the emergence of a specific model of community protection in New South Wales. The Act is a ‘one man’ piece of legislation in that it authorises the making of a detention order *only* against Gregory Wayne Kable. Kable was convicted of the manslaughter of his wife in New South Wales in 1990. Although the Act is a ‘one-man’ piece of dangerous offender legislation, it could provide a model of reviewable sentencing for more general dangerous offender legislation in the State because although the Act states that it applies only to Kable, its provisions are framed with regard to ‘persons’.

#### *The Community Protection Act 1994*

3.72 The legislation is defined as ‘An Act to protect the community by providing for the preventative detention of persons who are, in the opinion of the Supreme Court, more likely than not to commit serious acts of violence.’ It states that the need to protect the community is the paramount consideration. Proceedings under the Act are civil in character and findings under the Act are based on the ‘balance of probabilities’. Persons detained under the Act are described as prisoners and are held in corrective institutions (The Community Protection Act 1994).

3.73 The Act provides that the Supreme Court on application of the Director of Public Prosecutions, may order the preventative detention of a specified person if it is satisfied on reasonable grounds of the following:

- That the person is more likely than not to commit a serious act of violence (an act that has a real likelihood of causing death or serious injury to another person or an act that involves serious sexual assault);
- That it is appropriate, for the protection of a particular person or persons or the community generally, that the person be held in custody.

An order may not be made against a person under 16 years of age (The Community Protection Act 1994).

3.74 During the proceedings the Court may order the production of any documents relating to the behaviour and condition of the defendant. It may order a medical, psychiatric or

psychological examination of the defendant and a report to be prepared regarding the defendant's condition and progress. If the latter occurs it must have regard to that report. The defendant has the right to be represented during the proceedings, a right to appear and give evidence, a right to cross examine any witness and a right to make submissions to the court regarding any relevant matter (The Community Protection Act 1994).

3.75 A preventative detention order may be made for a maximum period of 6 months, but an application for a detention order against the same person may be made on more than one occasion under the Act. The Court may amend (reduce the period of detention) or revoke the detention order on application of the Director of Public Prosecutions or the detainee, having regard to the most recent reports prepared during the period of detention (The Community Protection Act 1994).

3.78 Following the making of a detention order the Court must make a further order appointing one or more doctors, psychiatrists or psychologists as assessors to observe and report on the detainee during the duration of the order. The Court may also make an order directing that medical, psychiatric or psychological treatment is made available to the detainee. At least one report on the detainee must be made during the currency of the detention order. This report should focus on the offender's behaviour and potential dangerousness, the appropriateness of the detention order and the place of detention. A report made by an assessor must also contain information about the medical, psychiatric condition of the detainee, and details of any treatment undertaken or required by the detainee (The Community Protection Act 1994).

3.79 A right of appeal against the making of a preventative detention order or the refusal of an application for such an order lies on a question of fact or law, or both fact and law (The Community Protection Act 1994).

## **Northern Territory**

### *The Criminal Code Act 1983*

3.80 In the Northern Territory, the Criminal Code Act 1983 provided for the indeterminate detention of habitual criminals or sexual offenders. Sections 397-398 of the Act provided for the indeterminate detention of a person declared to be a habitual criminal. In designating an offender as a habitual criminal, the court would consider the offence convicted of and whether from both the existence and nature of previous convictions that the person's lifestyle was that of a habitual criminal.

3.81 Section 401 of the Code provided for the indeterminate detention of a person who is incapable of controlling their sexual instincts where the subject offence is a sexual offence and where there is a history of previous offences of a sexual nature. Where these requirements are met, the Court could sentence the offender and ask the offender to show cause for not being sentenced as a habitual offender. If the offender failed to show cause then the Court required the offender to be detained in prison during the Administrator's Pleasure.

3.82 Absolute or conditional discharge of the sentence was available following an application to the Supreme Court, who may recommend to the Administrator that the offender be discharged if it was satisfied that the offender had sufficiently reformed or that there is some other sufficient reason to warrant a discharge (Svensson, 1991). These provisions have now been repealed and replaced by the provisions in the Sentencing Act 1995.

#### *The Sentencing Act 1995*

3.83 The 1995 provisions introduced by the Sentencing Act are very similar to those introduced in Queensland in 1992 (see above). Sections 65-78 of the Sentencing Act 1995 provide for the indefinite detention of offenders convicted of a violent offence who are deemed to be 'a serious danger to the community'. A 'violent offence' is one that involves the use or attempted use of violence against a person and for which the offender may be sentenced to imprisonment for life. When such a sentence is passed the court shall not fix a non-parole period, however, it shall specify a nominal sentence of a period that is equal to the determinate sentence it could have passed. It is possible, where there is more than one index offence, for the court to pass more than one indeterminate sentence. If this occurs then one nominal sentence will be passed in respect of all the indeterminate sentences.

3.84 The granting of such a sentence can be made on the initiative of the Supreme Court or the prosecutor. In the case of the latter the prosecutor must inform the court of the intention to make such an application after the offender has been convicted but prior to sentencing. The application must be made within 14 days of conviction. A hearing to decide on the imposition of an indefinite sentence is conducted where the prosecution and the offender can present evidence. The onus of proving that the offender is a 'serious danger to the community' rests with the prosecution. This must be proven to 'a high degree of probability', which appears to be between the civil standard of 'on the balance of probabilities' and the criminal standard of 'beyond reasonable doubt'.

3.85 The Act provides that the Supreme Court should not impose an indefinite sentence unless it is satisfied, to ‘a high degree of probability’, that the offender is a ‘serious danger to the community’. When considering this question the Court shall have regard to:

- Whether the nature of the index offence is exceptional
- The offender’s characteristics e.g., age, health and mental condition;
- Any medical, psychiatric, prison or other reports that are available;
- The risk of serious physical harm to members of the community if an indefinite sentence was not imposed and/or ;
- The need to protect members of the community from the risk referred to above.

3.86 Where an indefinite sentence is imposed, it is reviewed not later than 6 months after the offender has served 50% of the nominal sentence or if the sentence is for life, after 13 years. Subsequent reviews must be held within two years of the last review. In addition, to the foregoing, an offender may apply for the review of the indefinite sentence at any time after the first review. A review is granted, on leave from the court, if there are exceptional circumstances that relate to the offender.

3.87 When a review takes place, unless the court is satisfied ‘to a high degree of probability’ that the offender is still a serious danger to the community, it shall discharge the indefinite sentence and substitute this with a determinate sentence. This determinate sentence is taken to have started on the day the indefinite sentence was originally imposed, replaces the indefinite sentence and shall not be less than the nominal sentence. When such a determinate sentence is substituted, the offender can apply to be released to a prescribed programme of not less than 5 years duration, that is designed to assist rehabilitation into the community. If the offender has less than 5 years of the determinate sentence outstanding it will be extended to cover the duration of the programme.

3.88 The decision of the court following a review can be appealed by both the offender and the prosecution. The court of Criminal Appeal is empowered to confirm or change the decision of the lower court. There are not explicit provisions, however, relating to a right of appeal in respect of the imposition or otherwise of an indefinite sentence. It is not clear if ‘normal’ methods of appeal against sentence would automatically apply in respect of this disposal.

#### 4.3.4 South Australia

3.89 In South Australia, the Criminal Law (Sentencing) Act 1988 provides for the indeterminate detention of habitual criminals and sexual offenders. Appeal against a decision relating to indeterminate detention lies to the Full Court.

#### *Section 22 habitual criminals*

3.90 Section 22 of the Act provides for the indeterminate detention of habitual criminals, where there is evidence of repeat convictions for certain offences. This applies where an offender is convicted of a specified violent offence and has at least 2 previous convictions for a specified violent offence, or where an offender is convicted of a specified offence (e.g., robbery, forgery or arson) and has at least 3 previous convictions for the specified offence. In these circumstances, the Supreme Court may, on application of the Director of Public Prosecutions, declare that the offender is a dangerous criminal and order their indeterminate detention in addition to any other sentence imposed.

3.91 Detention under section 22 begins after the expiry of any other sentence an offender is liable to serve, and is continued until the Supreme Court, on application of the Director of Public Prosecutions or the detainee, discharges the detention order.

#### *Section 23 sexual offenders*

3.92 Section 23 of the Act provides for the indeterminate detention of offenders convicted of certain sexual offences or an offence that suggests that the offender may be incapable of controlling their sexual instincts. At least 2 legally qualified medical practitioners must conduct an examination of the offender and determine whether the offender is capable of controlling their sexual instincts.

3.93 An order for detention in prison may be made in addition, or in lieu of a sentence for the index offence. The detention will continue until further order. Review of the progress and circumstances of the detainee must take place at least every 6 months and a report must follow the review and be furnished to the detainee and the Parole Board.

3.94 The detention order may be discharged by the Supreme Court on application by the Director of Public Prosecutions or the offender, but only after it has considered a report prepared by at least 2 legally qualified medical practitioners and after it has considered the interests of the detainee and the interests of the community.

#### 4.3.5 Tasmania

3.95 In Tasmania, section 329 of the Criminal Code 1924 provided for the indeterminate detention of a person found to be a ‘dangerous criminal’ (Svensson 1991). The Sentencing Act 1997 reformulated this section but retained its main features.

3.96 The Code now provides that a person may be declared a dangerous criminal where that person:

- Has been convicted of an offence ‘involving an element of violence’ on at least 2 occasions;
- Appears to be at least 17 years of age;
- Where the Court is of the opinion that such a declaration is warranted for the protection of the public.

The declaration must be made by the Court having regard to:

- The nature and circumstances of the crime;
- The antecedents or the character of the person;
- Medical or other opinions
- Any other matter relevant to the determination.

3.97 If a person is declared to be a dangerous criminal, they will be sentenced to an indeterminate period in prison until a declaration for discharge is made. A dangerous criminal is entitled to apply to the Supreme Court for discharge after the expiry of the non-parole period applicable to the offender’s sentence. Discharge will be granted if the Court is satisfied that continued detention is no longer warranted for the protection of the public. If unsuccessful, the offender may apply in another 2 years time. If discharge is granted it may be delayed by the Court if it considers that the offender must undergo a pre-release program. Although there is a right of appeal from an adverse decision, the court appears to have a great amount of discretion in the decision making process.

#### 4.3.6 Victoria

3.98 In Victoria, Section 192 of the Community Welfare Services Act 1970, which permitted the courts to order preventative detention on grounds of public protection, was repealed by the Penalties and Sentences Act 1985. A ‘one-man’ Community Protection Act in 1990 revived detention providing for the indeterminate detention of Gary David.

Provisions for the detention of dangerous offenders were later generalised and inserted into the Sentencing Act 1991.

#### *The Community Protection Act 1990*

3.99 The genesis of current Victorian sentencing for dangerous offenders is found in the Community Protection Act 1990. This piece of legislation was designed for just one man, Gary David, who was seen to pose a special risk to the community. Gary David was a violent repeat offender who was due to be released from sentence in 1990. In response the Victorian government enacted the Community Protection Act 1990 which empowered a Supreme Court judge to order the preventative detention of Gary David, if it was shown that he presented a serious risk to the community (Greig, 1991; Ray and Craze, 1991; Svensson, 1991; Merkel, 1991; Williams, 1991; Keon-Cohen, 1991; Zalewski, 1992; Craze and Moynihan, 1994; Wood, 1990; Fairall, 1993).

3.100 This Act was said to be in specific response to the threat posed by Gary David and was to be a temporary measure until such time as general legislation for the preventative detention of dangerous offenders could be enacted. It was the only piece of legislation in Australia to provide for the post-sentence detention of an individual based on dangerousness to the community, based on a reviewable sentence model.

3.101 Considerable controversy surrounded proposals for the generalisation of the Act. The provisions for detention of dangerous offenders that emerged were significantly different from those anticipated in early drafts of the Community Protection (Violent Offenders) Bill 1992. The Bill was criticised by 4 Reports of the Inquiry into Mental Health and Community Safety (1992). In its original form the Bill provided for evidence of an anti-social personality disorder as a requirement for the sentence.

#### *The Sentencing Act 1991*

3.102 Section 18A-P of the Sentencing Act 1991 was inserted by the Sentencing (Amendment) Act 1993 as a substitute for the Community Protection Act 1990. Section 18A-P provides for the indeterminate sentence of an offender convicted of a serious offence on application of the Director of Public Prosecutions or on its own initiative (Sentencing Act 1991).

3.103 In determining whether to impose an indeterminate sentence the Court must be satisfied, to a high degree of probability, that the offender is a serious danger to the community because of the following:

- The offender's character, past history, age, health or mental condition;
- The nature and gravity of the serious offence;
- Any special circumstances.

In determining whether the offender is a serious danger to the community the court must have regard to the following:

- Whether the nature of the serious offence is exceptional;
- Anything relevant to determination that may be contained in a transcript of any proceeding against the offender;
- Any medical, psychiatric or other relevant report received by the Court
- The risk of serious danger to members of the community if an indeterminate sentence were not imposed;
- The need to protect members of the community from the risk referred to above
- anything else that the Court deems appropriate.

In addition, when considering if the offender is a 'serious offender' the court must have regard to a conviction or convictions for a relevant offence, i.e., violence, sexual, drugs or arson, irrespective of whether it is the index offence or a previous conviction.

3.104 During the hearing, the offender has the right to give evidence and to lead evidence, and the Director of Public Prosecutions bears the burden of proving the circumstances for the detention. If the Court imposes an indeterminate sentence it must specify a nominal sentence at least equal to the non-parole period that it would have imposed if the sentence had been finite and reasons for that decision.

3.105 Review of the sentence must take place on application of the Director of Public Prosecutions as soon as practicable after the expiry of the nominal sentence, or on application of the offender at any time after 3 years from the date of the first review. Subsequent reviews take place at intervals of 3 years after that. Discharge of the indefinite sentence

occurs unless the court is satisfied, to a high degree of probability that the offender remains a serious danger to the community.

#### 4.3.7 Western Australia

##### *The Criminal Code 1913*

3.106 In Western Australia, the Criminal Code 1913, sections 661-662, provide for the indeterminate detention of habitual criminals or dangerous offenders. Section 661 of the Code provides that an offender presently convicted of an indictable offence who was convicted on at least 2 previous occasions of an indictable offence may be declared a habitual criminal. On expiry of the term of imprisonment for the present offence, the habitual criminal may be detained at the Governor's Pleasure. Section 662 of the Code provides that where an offender is presently convicted of an indictable offence, the Court may order that the offender be detained at the Governor's Pleasure either at the expiry of a finite sentence or in lieu of a finite sentence (Svensson, 1991; Campbell, 1991; Criminal Code, 1913).

3.107 Both sections of the Code were inserted into the Code in 1918 in the spirit of reformative optimism. In 1898 the Royal Commission into the Penal System of Western Australia had recommended that decisions regarding the release of prisoners be vested in a board of medical jurists. Although this recommendation was never adopted, this reformative spirit influenced the inclusion of sections 661 and 662 in 1918. The aim of the legislature in 1918 was to enable judges to order imprisonment in a reformatory prison. Although the provisions reflected this intent, the establishment of a reformatory prison has never been accomplished and the historical intent of the sections is belied by their present protective application. (Campbell, 1991).

##### ***Section 662***

3.108 Section 662 is the primary dangerous offender provision. It provides for the indeterminate detention of an offender where the dangerousness of the offender is evidenced from the antecedents, character, age, health, mental condition, the nature of the offence and any special circumstances. The otherwise wide application of section 662, was limited by the High Court in *R v Chester*<sup>21</sup> in 1988, where it was held that indeterminate detention was not appropriate in the case of an offender who did not pose a constant violent danger to the community.

---

<sup>21</sup> 36 A Crim R 382, cited in Svensson, 1991 and Campbell, 1991.

In *R v Chester* the Court said that a judge must be

*“satisfied by acceptable evidence that the convicted person is...so likely to commit further crimes of violence (including sexual offences) that he constitutes a constant danger to the community...[This]...requires that the sentencing judge be clearly satisfied by cogent evidence...” (Campbell, 1991:86-7)*

It does not appear to be clear from this statement whether the standard of proof required is on the balance of probabilities, beyond a reasonable doubt, or somewhere in-between.

3.109 Review and release decisions regarding the detention are made according to the Offenders Community Corrections Act 1962, sections 34 and 40. The Act requires that the Parole Board of Western Australia make a report on the detention within one year of its commencement, and each year thereafter, or at any time as requested by the Minister of Corrective Services. The Act also provides for release from detention on recommendation by the Parole Board to the Governor. The Parole Board does not review hospital patients, so where a detainee becomes a hospital patient they will miss review by the Parole Board. (Campbell, 1991).

3.110 Section 662 has been reviewed by a number of Government Committees. The Murray Report 1983, the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders 1989 and the Law Reform Commission of Western Australia 1991 considered section 662 but did not recommend its abolition. The Law Commission did note the considerable difficulties and injustices generated by the section and made recommendations. It advised that the detention be described as an indeterminate sentence instead of a sentence at the Governor’s Pleasure, that the Parole Board should have the power to order release of the detainee instead of recommending release to the Governor, and that the sentencing court should have the power to review the sentence on the application of the offender. The Crown Law Department of Western Australia 1991 reviewed the section and recommended its abolition (Campbell, 1991).

3.111 Data on the application of the section is limited. Data reviewed by Campbell (1991) indicates that the section is infrequently used, inconsistent, and probably inconclusive. The data showed that the number of section 662 detainees currently in prison in 1988, 1990, and 1991 amounted to 16, 16 and 15. In the month of inquiry, this amounted to less than 1% of the State’s daily average muster. In the period 1982-87, there were a total of 18 each of section 662 offenders sentenced to a finite sentence and sentenced in lieu of a finite sentence.

In 1989-1991, no new detainees were sentenced. Campbell (1991) indicates that sexual offenders are prominent among section 662 detainees. In 1990, 8 of the 16 detainees had been convicted of rape or sexual assault as their most serious offence and all but one detainee had been convicted of multiple offences. The data indicates that section 662 tends to be applied only to those sexual offences accompanied by violence except in the case of sexual violation.

3.112 In the period 1982-87, the periods of detention served under the section were inconsistent. Detainees served varying lengths of finite and indefinite sentences, with the Governor's Pleasure period ranging from 14 days to 185 months. This variation is difficult to explain but may be reflective of the gravity of the index offence. At its smallest extreme 14 days detention seems to have very little, if any, effect on public safety (Campbell, 1991).

3.113 Psychiatric treatment under section 662 is scarce. Although a reformatory purpose was envisaged by the early enactment of the section, and despite the fact that the mental condition of the offender may be taken into account in sentencing, there is no specific treatment provision for detainees. Campbell (1991) indicates that where appropriate, detainees may be transferred to Graylands Hospital in Perth, and in 1989, it was recommended to the Department of Health, and accepted by them, that 5 beds be available at any given time for these detainees. In reality, however, transfers for any prisoner, including detainees tend to be short stay, usually for a maximum of 6 weeks.

3.114 Non-psychiatric treatment, such as sexual offender rehabilitation is equally scarce. Although a Sexual Offenders Treatment Program was established in Fremantle Gaol in 1987, it is not confined to detainees and it may not be appropriate for them. Because the program operates as a therapeutic community based on behaviourist-cognitive principles, it may not be appropriate or the choice for section 662 detainees who are usually violent sexual offenders that characteristically refuse to participate in behaviour modifying therapy (Campbell, 1991).

#### 4.4 NEW ZEALAND

##### 4.4.1 Legislative background

3.115 Preventative detention was first introduced in New Zealand by the Criminal Justice Act 1954. The Act was part of a general reform of penal policy, and the sentence of preventative detention was intended to replace existing provisions in the Habitual Offenders and Criminals Act 1906. The 1906 Act provided for the post nominal sentence indeterminate detention of habitual offenders (minor crimes) and habitual criminals (serious crimes).

Detention under the 1906 Act was not widely used, it was unpredictable, and the anticipated deterrent effect of the Act was seen as minimal. In 1954, the Criminal Justice Act addressed these difficulties by introducing preventative detention and providing for a more structured framework for the detention of persistent offenders (New Zealand, 1994; Pratt, 1995; Meek, 1995).

3.116 Under the Criminal Justice Act 1954, preventative detention was available for offenders over the age of 25 where the court was satisfied that it was expedient for the protection of the public that a person should be detained in custody for a substantial period. Preventative detention was available for:

- Those convicted of a specified sexual offence against children if they had been convicted of a similar offence at least once since the age of 17;
- Those convicted of an offence punishable by at least 3 years imprisonment if they had been convicted of similar offences on at least 3 previous occasions and had received custodial sentences of at least one year on at least 2 of these occasions;
- Those convicted of an offence punishable by more than 3 months imprisonment if they had been previously convicted of an offence on at least 7 occasions and had received custodial sentences on at least 4 of these occasions.

3.117 Parole eligibility was available after 3 years, with a maximum period of detention of 14 years for offenders in the last two of the categories above. Sexual offenders in the first category could be detained indefinitely with no statutory minimum (Meek, 1995).

3.118 Preventative detention under the 1954 Act was infrequently used. When used it was primarily applied to property offenders. The high level of parole recall and recidivism indicated that its deterrent effect was minimal. The Criminal Justice Amendment Act 1967 retained preventative detention for sexual offenders only, and increased the minimum term of detention to 7 years. Release was available only where the Parole Board determined that the offender was unlikely to commit further sexual offences (Meek, 1995).

3.119 Preventative detention under the 1967 Act was also infrequently used, and the Royal Policy Review Commission recommended its abolition in 1981. The Commission saw it as 'arbitrary, selective and inequitable' and could not rationalise its restriction to sexual offenders only. It thought that lengthy finite sentences would be better in the circumstances. Preventative detention was, however, retained by the Criminal Justice Act 1985 with

amendments. These amendments allowed the Parole Board to approve the release of offenders rather than merely recommend release to the Minister. The release requirement that the Parole Board believe the offender was unlikely to commit further sexual offences upon release, was removed (Meek, 1995).

3.120 In 1987, a further amendment reduced the age eligibility for preventative detention from 25 years to 21 years, extended the list of qualifying offences to include a number of serious violent offences, and increased the period of parole ineligibility from 7 years to 10 years. Use of the sentence of preventative detention increased following these amendments, although the emphasis remained on sexual offenders and not violent offenders (Meek, 1995).

3.121 In 1993 the Criminal Justice Act made further amendments. Preventative detention was made available for those convicted of sexual violation, whether or not they had committed a qualifying offence, and High Court judges were empowered to impose a minimum term of imprisonment in excess of 10 years. The changes that led up to the modern enactment of the law culminated in a period of increasing violent crime and political pressure to counter it. Although preventative detention has seen a revival in recent years, it is still thought to be under-used and indiscriminate in its application (Meek, 1995; Pratt, 1995).

#### *Current legislation provisions*

3.122 As it now exists, preventative detention is available to offenders who are at least 21 years old, and who have a history of violent or sexual offending since the age of 17, or have been convicted of sexual violation. It may be imposed where the sentencing judge is satisfied that it is expedient for the protection of the public that the offender should be detained for a substantial period (Meek, 1995; New Zealand Ministry of Justice, 1997; Brown, 1996).

3.123 Although there is a non-parole period of 10 years, the sentencing judge also has the discretion to impose a non-parole period in excess of 10 years 'in exceptional cases'. Even if the offender is released, the sentence continues to run, indefinitely, so that the 'detainee', although released, may be recalled to prison at any time if his or her behaviour gives cause for concern. (New Zealand Ministry of Justice, 1997)

3.124 In the case of a first time offender convicted of sexual violation additional conditions are imposed. The judge is required to obtain a psychiatric report on the offender, and having regard to that and any other report, must be satisfied that there is a 'substantial risk that the offender will commit a specified offence upon release.' There is, therefore, a higher degree

of risk required for the preventative detention of a first time offender. Although there is no formal requirement that psychiatric reports be obtained for repeat offenders it is the practice of the court to obtain such reports (New Zealand Ministry of Justice, 1997).

### *Effectiveness of the legislation*

3.125 Brown (1996) assessed the effectiveness of what he called the 'twin-track' provisions contained within the Criminal Justice Act 1985. The term 'twin-track' is used to describe the system of sentencing whereby offenders determined to be 'serious' or 'dangerous' receive different disposals from other 'ordinary' offenders. The classification of offenders is based on the index offence and not other factors e.g., previous convictions.

3.126 Data gathered as part of a previous study on the effectiveness of parole release was used to assess the 'usefulness' of the New Zealand twin-track provisions. This data set of 613 offenders contained 43 who, under the current provisions, would now be classified as 'serious offenders'. Examining post-release behaviour Brown (1996) found that those who would now be classified as 'serious' were significantly less likely to be re-imprisoned within two and a half years of release. When first post-release offending was classified for the whole group, the vast majority (92%) of 'serious offences', as defined by the legislation, were found to have been committed by offenders originally imprisoned for so called 'ordinary' offences. When the offence that had triggered the most severe post-release penalty was examined, 86% of serious offences were committed by the 'ordinary' offence group.

3.127 These results, he suggests, show a failure of the New Zealand legislation to adequately define and capture that group of offenders who presented the greatest threat to public safety. Alternatives to the current provisions are considered (Brown, 1998). First, the application of mandatory sentence extensions to the data set described above reveals that only 3 of the offenders whose offence fell within the definition of 'serious offence' went on to commit a further serious offence within the two and half year follow-up period. If the detention period of these individuals had been extended in 2 cases by 6 months and in the third by 12 months the further serious offences would have been avoided.

3.128 Secondly, he considers the effect of widening the definition of serious offending. This can be seen to have two important features: the number of offenders it encompasses or captures at the point of sentencing and the proportion of all post-release serious offences that are committed by this group. He suggests that:

*”An ideal seriousness definition would draw in few offenders at sentencing, but this group would account for most of the serious offences committed by the sample as a whole in the follow-up period” (Brown, 1998: 716).*

3.129 When a wider definition of serious offending was applied to the sample he found that even when construing seriousness in the most liberal way it did not capture the group of offenders who went on to commit serious offences. He suggests that if public protection is the objective of this type of sentencing, then sentencing policies that more accurately predict and thus capture future serious offenders must be found (Brown, 1998).

3.130 The third alternative is the use of a statistical application to predict future serious offending. When this was applied to the data set it was inaccurate, however, it was significantly more accurate than the ‘offence based system’ that was being used. Brown (1998) concludes that the results of inaccurate predictions of ‘dangerousness’ are increased prison populations while the amount of violent and serious offending remains almost the same.

#### 4.4.2 Human rights implications and future reform

3.131 The New Zealand Bill of Rights Act 1990 provides for protection against disproportionately severe treatment or punishment, arbitrary arrest and detention and violations against natural justice. These rights are however, limited to acts that may be justified in a free and democratic society, such as preventive detention (New Zealand Ministry of Justice, 1997). Any reform of the law would be required to be consistent with these provisions.

3.132 The New Zealand Ministry of Justice (1997) in a paper on Sentencing Policy and Guidance was optimistic about the use of preventative detention as a sentence of the last resort, relying on the court to determine whether a finite or an indefinite sentence was appropriate. Meeks (1995) is, however, less optimistic and cites cases where judges have not applied preventative detention as a sentence of the last resort, highlighting both inconsistencies in application and apparent judicial ignorance of the availability of preventative detention in suitable cases. He advocates the reform of the sentence in line with the Danish model (outlined below, Chapter 4).

3.133 In 1994 the New Zealand Law Commission reported on preventative detention and recommended the introduction of a form of reviewable sentence, modelled on the type of sentence (but not the offender types) as is used in Washington in the USA (Pratt, 1996).

## 5. CHAPTER FOUR: THE CLINICAL MODEL

### 5.1 INTRODUCTION

4.1 The Clinical Model, which has a therapeutic emphasis is used in the Netherlands, Germany, Switzerland, Denmark and England and Wales. In the Netherlands preventative detention for dangerous offenders is provided by TBS legislation in the Criminal Code. It is available to the court at the time of sentencing and may be inpatient or outpatient. German sentencing laws provide measures of rehabilitation and security for dangerous recidivists in the form of an incapacitative sentence for offenders with capacity, admission to a psychiatric hospital for offenders with diminished responsibility or incapacity and admission to a treatment centre for drug addicts or alcoholics.

4.2 Preventative detention for habitual offenders is only available in Switzerland where there is evidence of a deep-seated personality disorder. In Denmark, the court can make a dangerous offender order in respect of an offender designated 'dangerous'. Although the order is initially for a fixed period of time it is renewable. The recent legislative changes in England and Wales result in a hybrid system that incorporates both a clinical and public protection approach. All of these provisions and those for sexual offenders are considered in this chapter.

### 5.2 THE NETHERLANDS

#### 5.2.1 Legislative background

4.3 The 1881 Dutch Criminal Code did not contain provisions for the management of dangerous offenders other than those of unsound mind who would be committed to a psychiatric institution. It was soon evident that additional protection and rehabilitation was required for offenders who did not lack total responsibility. In 1911 additional legislation was drafted, and in the period 1925-1928 the TBR (*terbeschikkingstelling van de Regering* - detention at the Government's Pleasure) was implemented. The TBR applied to offenders with responsibility, but who were otherwise lacking in development or were psychologically disturbed, at the time of the offence. The TBR enabled the court, in addition to a penalty, to order that the offender be placed in the care of the state initially for a period of at least 2 years, and renewable indefinitely thereafter. (Kinzig, 1997)

4.4 In 1988 the TBR was replaced with the TBS (*terbeschikkingstelling*). The reform made the conditions under which an order could be made stricter, it further specified the application of the order, and it extended the rights of the offenders subject to the order. (Kinzig, 1997)

#### 5.2.2 The TBS order

4.45 A TBS order is contingent on an assessment of the offender's criminal responsibility. A TBS order may be made either where there is no responsibility or where there is only partial responsibility. If an offender is found to have no responsibility for the crime committed e.g., insane at the time of commission, a TBS order may be made on its own. If an offender is found to have partial responsibility, a TBS order may be made in addition to a normal sentence. In this case the TBS order would come into effect if a severe crime (e.g., physical abuse, rape, child molestation, homicide) was seen as being related to a mental disorder or illness and if the specific combination of crime and disorder was considered to produce serious risk of future crimes. The TBS order, in these circumstances would come into effect after the sentence had been served (M.H. van IJzendoorn et. al.,1997).

### ***5.2.3 Conditions for TBS in cases of partial responsibility***

4.46 The TBS order requires that the following criteria exist:

- That the offender suffered from a lack of development or a mental disorder at the time of committing the offence;
- That the offence or the series of offences attract a minimum sentence of 4 years
- That the order is required for the safety of others or for the safety of the public or property. Although the 4-year minimum need not actually be imposed, it must be available. A prior conviction is not required for the order (Kinzig, 1997).

#### *Protections*

4.47 A personality report is required for the TBS order. A multidisciplinary team consisting of at least 2 behavioural scientists, one of which must be a psychiatrist, and the other usually being a psychologist, must examine the offender. The offender is examined in order to determine the degree of criminal responsibility, the level of dangerousness, the type of disorder and to establish the most appropriate intervention for the offender. The TBR order required that an offender submit to this examination, while the TBS order gives the partially responsible offender the right to refuse this examination. If the examination is refused, the offender will be sentenced under regular sentencing laws (Petrunick, 1994).

#### *Duration and renewals*

4.48 A TBS order may be imposed for a maximum period of 2 years. After 2 years it is reviewed and may be extended by periods of one or 2 years. In the case of non-violent offenders the order may only be extended by a maximum of 4 years. The TBS order may be

extended indefinitely, where it is made pursuant to an offence directed against or causing danger to the bodily integrity of one or more persons and the extension is required in the interests of safety of others. The average duration of confinement in a forensic mental hospital under an order is four years, and it is followed by a period of supervised community treatment. Among the diagnosed disorders in this population of criminal offenders, personality and developmental disorders prevail, (M.H. van IJzendoorn et. al., 1997). Since 1988 an additional assessment by a psychiatrist and a psychologist is required for each renewal of the TBS.

#### *The role of expert opinion: psychiatry/psychology*

4.49 The role of the psychiatrist/psychologist is important in the TBS, as the order is contingent on mental abnormality and has a strong therapeutic content. There is some evidence, however, of a recent tendency to ignore expert opinion. There are a growing number of cases where offenders were released contrary to expert opinion (Kinzig, 1997). Petrunik, (1994) identified an increase from 20% to 70% in the rejection of expert opinion in the period 1979-1989. Leuw, (1995) identified this contradictory discharge in almost 50% of cases in the period 1980-1995.

4.50 The rise in the rejection of expert opinion and subsequent contradictory discharge is interpreted in different ways. Some see it as evidence, that in practice, the order is used as a type of sentence, others as evidence that public safety is being compromised, and for some it is a reasonable response to perceptions that expert opinion tends to overestimate dangerousness anyway (Kinzig, 1997). However, it may also suggest the re-emergence of the justice model in the management of dangerous offenders (Petrunik, 1994). Whatever the interpretation, this rise is problematic as contradictory discharge usually means there is no period of re-socialisation (Leuw, 1995).

#### *Treatment under TBS*

4.51 Prior to admission to an institution for treatment, a TBS patient will undergo a clinical examination. Since 1952 the examination has taken place at the F. S. Meijers-Instituut in Utrecht. The examination determines the needs of the patient and which institution would fulfil those needs. The examination considers personality disorder, type of offence committed, risk of the offender escaping, risk of the offender to public safety and the treatment that is necessary for the patient. The most important consideration in placing the offender is the treatment that is necessary for them (Kinzig, 1997).

4.52 The 'psychiatric treatment' that is available includes psychotherapy, medical and physical treatment, social treatment and other therapies like non-verbal, creative and expressive and movement therapy. Patients live in home groups unless security or special treatment reasons indicate otherwise (Kinzig, 1997).

4.53 TBS treatment usually begins with incarceration and considerable restrictions and moves towards decreasing restrictions, with eventual release into the community, if an offender's therapy is successful. Release into the community occurs provisionally for increasing periods of time and may be followed by probationary leave under the supervision of specialised staff. Finally, the offender may have the probation terminated and be returned to the community without supervision (Petrunik, 1994).

#### *TBS population characteristics and length of stay*

4.54 Over 90% of TBS patients were serious violent offenders and about 33% were sexual offenders. Few property offenders are found in the TBS population (Petrunik, 1994). Personality disordered TBS patients are reported to amount to between 40% (Petrunik, 1994) and 60% (Kinzig, 1997) in 1990 and 1993. The average length of stay for TBS patients is 6 years and 8.5 years for sexual offenders. Sexual offenders are deemed to have the poorest prospect of treatment (Petrunik, 1994).

4.55 Leuw (1995) reports that during the preceding 15 years the TBS population has increasingly consisted of violent and especially sexual offenders. The average offender is aged 25 with a 6-year history of crime. Duration of treatment is on average 5 years. Treatment ideally ends with a period of conditional discharge focussing on resocialisation. During this period the offender will leave the clinic and enter the community or will enter a residential facility, like a half way house. This phase of conditional discharge lasts, on average, 1 year.

#### *Recidivism and the success of TBS*

4.56 Recidivism of sexual or violent offences has remained at approximately 20% (Kinzig, 1997). TBS officials estimate that offenders released against expert advice re-offend at a rate of 27%, while those released on expert advice re-offend at a rate of 8% (Petrunik, 1994).

While TBS officials consider the provision to be effective, there is a body of literature that suggests that it is not. One such argument is that very dangerous offenders receive longer sentences in addition to the TBS order (Kinzig, 1997).

4.57 Leuw (1995) reports that recidivism has stabilised over the past 15 years. More than 60% have offended after release, with 20% seriously offending. He estimates that 10-20% are 'high risk' in terms of recidivism. Other variables affect recidivism rates. Young offenders with a long criminal past show higher rates of recidivism after TBS and there is a significant relationship between behaviour, like violation of rules while in TBS, and recidivism. More re-offending occurs in cases of contradictory discharge and where no conditional discharge in the community occurs.

#### *Management of TBS population*

4.58 Those who are detained under TBS are managed in nine maximum-security forensic hospitals. Each hospital has an average population of 85-90 patients, but some of those will consist of non-responsible offenders as well as partially responsible offenders (Frenken et al., 1999). The clinics have recently suffered from much overcrowding, with some patients having to wait up to 2 years in prison for transfer and treatment. New clinics have been built, and others have increased their admission numbers to solve this problem (vanZeist, 1997).

4.59 When the final result of treatment is reached with a patient, they are discharged, but some patients may not yet be independent. There are current discussions around the establishment of additional forensic-psychiatric polyclinics, halfway houses and other facilities to be centred around the TBS clinics (vanZeist, 1997).

4.60 A significant problem that is being addressed in the management of the TBS population concerns those for whom treatment has been optimally provided but where it has not been successful. Many of these offenders are personality-disordered, who may or may not suffer comorbidity (van Zeist, 1997). In response to this problem, there are current plans for the establishment of new hospitals, which will house very long-term patients, who are deemed to be untreatable and who are likely never to be released into the community (Leuw, 1999).

#### *Management of sexual offenders*

4.61 Frenken et. al., (1999) reviewed sexual offender research and treatment in the Netherlands. There are no specific treatment programs for sexual offenders who are in prison but since the 1980s an increasing number of outpatient facilities have been made available for the treatment of sexual offenders. The inpatient treatment of sexual offenders is limited to offenders detained under TBS in maximum-security forensic psychiatric hospitals.

4.62 Sexual offenders amount to 30% of those detained in TBS hospitals. They have typically committed sexual offences accompanied by violence other than that of the sexual violation. Sexual offenders detained in TBS hospitals form a minority of all sexual offenders in the Netherlands.

4.63 The management of these offenders occurs at the Dr. S. van Mesdag Clinic at Groningen, the Veldzicht Clinic at Balkbrug, the Dr. Henri van der Hoeven Clinic at Utrecht, the Professor Pompe Clinic at Nijmegen and the hospital Oldenkotte at Rekken. There is variation in the treatment of sexual offenders at each clinic but there has been a recent tendency towards an eclectic approach, adopting a wide variety of therapies.

4.64 Inpatient treatment for sexual offenders is an average of 6 years duration, 2 years longer than non-sexual offender patients. Most sexual offenders have been diagnosed as personality disordered, commonly anti-social personality disorder.

#### *Management trends*

4.65 In the Netherlands, psychodynamic schools of thought that focus on treating underlying personality disorders, have influenced the treatment of sexual offenders. In addition, there has been a marked aversion to the significance of sexuality in offending behaviour, such as the measurement and treatment of deviant sexual arousal. Apparent successes in the management of sexual offenders in North America are beginning to influence the management of sexual offenders in the Netherlands. In North America cognitive behavioural methods that focus on the offence behaviour and the context of the offending, stress that there is no cure but that self-control may be learned. These techniques are beginning to be employed at Utrecht and at Rekken, and at other clinics, to a lesser extent. In addition the specificity of treatment directed at the sexual offence has also been reflected in increasing attention to sexuality, especially in Utrecht and Rekken. Whereas the Netherlands has historically regarded the North American attention to sexuality as inhumane and too technological, it has started to employ group programs that encourage the discussion of sexuality and the identification of offence related sexual behaviours.

### *Sexual offender recidivism*

4.66 Frenken et al. (1999) report 2 studies that included sexual offenders that were conducted by Van Emmerik<sup>22</sup> in 1989 and Leuw (1995). Van Emmerik conducted a 5-year follow-up of 138 violent sexual offenders who were discharged from these hospitals in the period 1970-83. During the follow-up period, 64% were charged with at least one offence, 49% were convicted at least once of an offence, 32% received a prison sentence for an offence, and 25% were convicted of another sexual offence. These figures did not differ significantly from figures obtained on non-sexual offender patients. Leuw conducted a similar study of 91 sexual offenders discharged in the period 1984-88, and reported like results. Frenken, however, notes that as sexual recidivism may actually be 3 times higher than official figures the results of VanEmmerik andLeuw are probably underestimates.

## 5.3 GERMANY

### 5.3.1 Preventative detention

4.67 In Germany sentencing laws are guided by the principle of proportionality. This principle limits the quantum of sentence to the guilt established in the offender. The law does, however, provide measures of rehabilitation and security for dangerous recidivists. §§66 StGB (The German Criminal Code) provides an incapacitative sentence for offenders with capacity. §§63 StGB provides for admission to a psychiatric hospital for offenders with diminished responsibility or incapacity and §§64 provides for admission to a treatment centre for drug addicts or alcoholics (Kinzig, 1997; Albrecht, 1997).

## **§§ 66 StGB**

### *Background*

4.68 Preventative detention (*sicherungsverwahrung*) for dangerous recidivists with capacity was first introduced in Germany in 1933 as part of measures aimed at the prevention of crime and the rehabilitation of offenders. It had a varied history, but studies demonstrate that preventative detention was mostly applied to persistent property offenders and reform in 1970 made the criteria for preventative detention more stringent (Kinzig, 1997). The current provisions are contained in §§66 of the Criminal Code.

---

<sup>22</sup> Van Emmerick, J. L. (1989) Het Delictgedrag van ter Beschikking Gestelde Seksuele Delinquenten Ten. Enkele Kwantitatieve Gegevens. (Offence Behaviour of Committed Sexual Delinquents) Justitiele Verkenningen **15**: 20-33.

### *Eligibility*

4.69 Mandatory preventative detention is provided if an offender:

- Has previously received 2 prison sentences of at least one year's duration each
- Has served at least 2 years in prison during these sentences
- Is being sentenced to at least 2 years in prison in the present case
- Poses a danger to the general public as a result of a tendency towards serious crime
- If the present case involves at least 3 separate offences, each with a minimum sentence of one year in prison.

4.70 A dangerous recidivist is deemed to be a repeat offender, who poses a serious danger to the community, through the infliction of severe physical or psychological harm to a victim or severe damage to property (Kinzig, 1997; Albrecht, 1997).

### *Timing*

4.71 Preventative detention must be served after the penalty is served. The sequence of penalty followed by a preventative measure is intended to distinguish the retributive and the protectionist aspirations of the law. There is some doubt that offenders understand the sequence of penalty and preventative measure and it is thought that the rehabilitation of the offender may be undermined in this respect (Kinzig, 1997). There is also evidence that the separation of penalty and prevention may not be being made by the courts. In one study that assessed the relationship between the length of the prison sentence and the preventative detention, it was shown that shorter prison sentences were often followed by longer periods of detention and that longer prison sentences were often followed by shorter periods of detention. It may be possible to conclude from this, that in practice penalty and prevention are the same thing and that after a certain period of time has passed the court is under pressure to release offenders, regardless of whether they are serving a penalty or a preventative sentence (Kinzig, 1997).

### *Duration*

4.72 Detention is limited to a maximum of 10 years for the first sentence of preventative detention and is without limit of time for any subsequent sentence of preventative detention.

### **5.3.2 Review, release and parole**

4.73 Preventative detention is reviewed every two years. As it is contingent on the establishment of dangerousness, an offender must be granted parole if dangerousness can no longer be established. A special court is responsible for determining whether it would be reasonable and responsible to suspend the preventative detention.

#### *Treatment and management of offenders*

4.74 Preventive detention of dangerous recidivists is part of the set of criminal sanctions entitled 'Measures of Rehabilitation and Security'. In the 1970's and 80's, special socio-therapeutic prisons were established for the rehabilitation of recidivists, today providing up to 1500 prison places, 2% of all of those in Germany. Recidivists are required to apply for a place in a socio-therapeutic prison and if accepted, undertake therapy. The decision to accept an offender into such a prison lies with therapists who must judge whether treatment would be beneficial to that particular offender. It is, however, doubtful whether treatment in socio-therapeutic prisons has a significant effect on offender recidivism (Albrecht, 1997).

#### *Preventative detention, sex offenders and psychopathy*

4.75 Consistent with other jurisdictions, sex offenders are a significant group within preventative detention. They serve longer periods of preventative detention than other categories of offenders and a significant proportion suffer from some degree of personality disorder. In one study of offenders sentenced to preventative detention, more than 50% were classified in the approximate category of persons suffering from personality disorder (Kinzig, 1997).

#### *Preventative detention population*

4.76 Since the 1970's, less than 30 offenders each year have been sentenced to preventative detention. Since the end of the 1980's there are approximately 200 offenders detained at any given time. Offenders usually serve an average of 4 years in preventative detention and are, on average, 40 years old (Albrecht, 1997) It is thought that this average age coincides with declining offending, thus limiting the effectiveness of preventative detention in reducing recidivism.

4.77 Consistent with the evolution of habitual offender legislation in other jurisdictions, violent offending, especially sexual offending has overtaken property offending as the focus of preventative detention in Germany. In the 1950's and 1960's, property offenders

represented a large proportion of those detained. In the 1980's and throughout the 1990's, violent and sexual offenders clearly represent the majority of detainees (Albrecht, 1997).

4.78 Kinzig (1997) assessed 318 orders for preventative detention, mainly in the period 1981-1990. Sex offenders detained increased to 34%, robbery to 26.7% and manslaughter to 12.9% since the preceding period. Thieves and fraudsters made up 22.9%, much less than the preceding period. Even if property offenders were not dangerous, they were classified as such following their criminal record. Sentenced offenders had committed the index offence at an average age of 37.6 years and were sentenced on average at just under 40 years of age. Seven and a half years was the average prison sentence in addition to detention. Almost three fifths (59.4%) were classified in the approximate category of personality disordered, while a defect in personality development was detected in most cases.

4.79 Kinzig (1997) also examined 103 detainees in 1993-94. They had been detained for an average of 56.3 months; 8 were detained for over 10 years, mostly with interruptions. Thirty two were successfully released, but all had been detained for longer than the average of 67.2 months. Sex offenders were detained for the longest period, an average of 86.2 months. These results indicate that shorter prison sentences were followed by longer detention and vice versa. The average age at the time of evaluation was 49.6 years, which is beyond the peak of criminality, usually judged as 20 years (Kinzig 1997).

#### *Criticism of preventative detention*

4.80 Criticism of preventative detention in Germany focuses on issues of practice and principle. It has been suggested that the average age of offenders detained is too old to prevent serious recidivism; and that the distinction between penalty and prevention is not clearly maintained and consequently, the rehabilitative ideal may be lost. Preventative detention is still being used on some property offenders who pose a threat to the public which is inconsistent with the prevailing concept of dangerousness, based on severe psychological or physical damage.

#### 5.3.3 Sex offender provisions

##### *Natalie's law*

4.81 In 1997 the German Federal Government introduced a draft bill dealing with the dangerous sexual offender. The bill honours the memory of a 7-year-old girl named Natalie who was raped and murdered by a paroled sexual offender in a small Bavarian village. The

bill provides for increased minimum and maximum sentences for some sexual offenders. It also changes the incapacitative sentence (Albrecht, 1997).

4.82 The Bill introduced 3 significant changes to the incapacitative sentence. It abolishes the maximum limit of 10 years detention for a first sentence of preventative detention and makes it unlimited. It reduces the requirement of 2 previous convictions to one. It makes the treatment of dangerous sexual offenders compulsory, in socio-therapeutic institutions, if their prison sentence is more than 2 years long. The court may also make treatment or therapy a condition of, or as part of, a suspended prison sentence or parole (Albrecht, 1997).

#### 5.3.4 Castration

4.83 In Germany castration of sexual offenders dates from Nazi legislation in 1933 that mandated the surgical castration of certain sexual offenders who were at least 21 years of age. It was abolished in 1945 after which castration laws became more lenient (Carpenter, 1998).

4.84 In 1970 the 'Law on Voluntary Castration' provided that voluntary castration be available in respect of men at least 25 years of age. This would be available where medically indicated, or in the case of seriously disturbed and dangerous sexual offenders, where the offender exhibits serious sexual abnormalities. In the latter case, a board of experts is required to review the request in order to establish that castration is necessary, for the prevention of further sexual offences (Albrecht, 1997).

4.85 The incidence of surgical castration in Germany is small, with a diminution after 1970 from 400 cases to 5 cases per year, although available data indicate that sexual recidivism in castrated offenders is 3%. Chemical castration has yet to be contemplated by German legislation, although the murder of Natalie has prompted consideration of such measures (Carpenter, 1998).

#### 5.3.5 Civil commitment

4.86 §63 StGB provides for the indeterminate detention in a psychiatric facility of offenders who are dangerous and insane. Civil commitment is also provided where there is a danger to self or others and where there is evidence of mental illness or psychological/psychiatric disturbance. The current trend is for psychiatric detention of offenders following trial rather than civil commitment. It is in theory possible for civil commitment to follow a prison sentence. The *ne bis in idem* (rule against double jeopardy) would not apply, as civil commitment is not considered to be a criminal penalty. Courts have not yet ordered psychiatric detention following imprisonment, and there is no legislative

guidance on the possibility of civil commitment following a prison sentence (Albrecht, 1997).

## 5.4 SWITZERLAND

### 5.4.1 Legislative background

4.87 In Switzerland Article 42 of the Swiss Criminal Code 1937 provided for the detention of habitual offenders, similar to preventative detention in Germany. Detention was for an indefinite time and was served instead of a penalty. The problem in Germany of differentiating preventative detention from a prison sentence, was shared in Switzerland due to both mainly being served in penitentiaries. In 1971 Article 42 was reformed following recognition that preventative detention was no different from a prison sentence. This followed studies that indicated detention was being used mainly against persistent petty offenders and not violent offenders, who posed a danger to public safety. Even after the reforms, detention continued to be applied mainly to persistent property offenders and a further revision of the law was recommended in 1993. Detention under Article 42 was abolished and Article 68 was modified to accommodate dangerous violent offenders (Kinzig, 1997).

### 5.4.2 Current legislative scheme

4.88 Article 68 provides for detention, only in evidence of a deep-seated personality disorder. It was thought that these offenders should be detained under the penal system and that only the psychologically unsound or severely mentally handicapped should be admitted to a psychiatric hospital. Thus, an expert report is necessary to establish the mental condition of the offender.

4.89 Eligibility for detention is limited to serious violent offences (murder, voluntary manslaughter, grievous bodily harm, rape and arson). In addition, there must have been a previous act by which someone was or was intended to be seriously hurt, psychologically, physically or financially. Detention must be imposed in order to prevent further offending of a similar serious nature. Detention is undertaken as a prison sentence, instead of as previously, where detention was prevention and not a penalty.

4.90 Review of the detention is taken 2 years after the execution of the detention order, and each year thereafter. In addition, a judicial decision on the detention is required every three years, after a new report. The offender must be released as soon as a trial probation period is considered possible in light of the offender's condition. There is no maximum on the period of detention.

4.91 Although the reform of the detention order was welcomed, the requirement for a deep-seated personality disorder is problematic. Not only are diagnostic problems evident in the operation of the order, but also the lack of a therapeutic content to the detention is problematic.

4.92 The failure to separate the penalty and the detention measures distinguishes these provisions from Germany. While this failure to separate may be problematic for a theory of punishment combined with prevention, it does recognise the difficulty in making such a distinction. The reviewable nature of the detention also contributes to the transparency of the measure.

## 5.5 DENMARK

### 5.5.1 Legislation

4.93 In Denmark preventive detention was introduced into the Criminal Code in 1925 and was revised in 1930. A system of sanctions, for special offenders, provided for the indeterminate preventative confinement of 'normal' but dangerous recidivists, the indeterminate preventative confinement of criminal psychopaths not susceptible to the influence of punishment, the determinate sentence for psychopaths susceptible to the influence of punishment and the indeterminate commitment of non-responsible offenders. The detention of criminal psychopaths occurred in special high security psychiatric hospitals or 'special prisons' (Petrunik, 1997).

4.94 Concern over the efficacy of treatment provided in these special prisons led to the amendment of the Criminal Code in 1973. The reform provided for the preventative detention of dangerous offenders but restricted this to the most serious offences. It was intended that a very small number of offenders, no more than 5 per year and no more than 20-30 at any time, should be detained under the new provisions (Ray and Craze, 1992).

4.95 The Criminal Code now provides that where an offender is designated a 'dangerous offender', the court may make a dangerous offender order for a fixed period. The dangerous offender order is renewable at the expiry of that period. A dangerous offender is deemed to be a person who has committed, or who has threatened to commit severe bodily harm to others and is believed capable or likely to repeat such acts. Three criteria must be fulfilled:

- The offender must have been found guilty of homicide, robbery, rape, kidnapping, arson, or attempts of these;

- It must be assumed from the nature of the offence committed and from the information obtained about the offender, especially considering previous offences, that the offender presents an obvious risk to the life, body, health or freedom of other people;
- The application of detention in place of imprisonment must be considered necessary to counter this risk (Ray and Craze, 1992).

It is estimated that since 1973, 2 or 3 offenders per year have received the sentence of preventative detention (Hansen and Lykke-Olesen, 1997).

#### 5.5.2 Sexual offenders

4.96 In Denmark available information about the management and treatment of sexual offenders focuses on one institution and its practice of castrating serious sexual offenders. The Herstedvester Institute for Abnormal Offenders is a closed prison that serves the Danish Department of Prisons and Probation as an institution for offenders who require psychiatric or psychological treatment. Denmark has a long history of castrating sexual offenders and was the first country in Europe to legalise surgical castration, performing its first procedure in 1925 and enacting legislation in 1929. In the period 1935-1970, surgical castration was offered on a voluntary basis to sexual offenders in lieu of a prison sentence. Although surgical castration was combined with psychiatric treatment, it was eventually deemed to be inhumane and it was banned. In 1973 chemical castration was implemented as a last resort after other therapeutic measures have failed (Carpenter, 1998).

4.97 Treatment practices at the Treatment Institution at Herstedvester are reviewed by Hansen and Lykke-Olesen (1997). In the period 1935-70, 21 of the 43 offenders sentenced to preventative detention following violent rapes, were surgically castrated and released on probation within 18 months of being castrated. Those who refused the procedure were detained for extended periods of time. Following surgical castration, 2 of those released committed further sexual offences, both having been given hormone replacement therapy by their General Practitioner. 10 of those who refused castration committed further sexual offences. In 1970 surgical castration was discontinued.

4.98 In the period 1973-87, there were 22 sexual offenders serving a sentence of preventative detention at Herstedvester. Of those sentenced for sexual offences, 4 had murdered their victim, 9 had injured their victim to the danger of their victim's life, and 9 had threatened the life of their victim. The treatment of these offenders was mainly based on individual psychodynamically orientated therapy and was combined with an effort to correct

the behavioural attitudes of the offenders. Three offenders were chemically castrated using Androcur, an antiandrogen cyproterone acetate.

4.99 In the follow up of offenders serving sentences of preventative detention in the period 1973-87, there was a high rate of recidivism. Two of the 3 offenders treated with Androcur committed a further sexual offence, one of which involved the murder of the victim. Three offenders committed new sexual offences while serving their sentence. Twelve were released from preventative detention and placed on probation following the recommendation of psychiatrists and psychologists that they were no longer dangerous. Six of those who were released had re-offended; 4 had committed sexual offences (3 of the 4 were very serious sexual offences that resulted in either life imprisonment or further preventative detention), 2 had committed violent offences and one had committed a property offence. Of the 6 that were released and had not re-offended at the time of the follow up, one had been charged with rape but released following insufficient evidence, one was later convicted of attempted murder and one was later convicted of murder.

4.100 Because of the recidivism outlined, since 1989 dangerous sexual offenders detained in Herstedvester have been treated with chemical castration combined with psychotherapy. Because it was demonstrated that even with the continued use of Androcur treatment, male sex hormone production could normalise after one or 2 years, Androcur is now supplemented with Decapetyl which helps to ensure the lasting reduction of the male hormone. Androcur is still given for the purpose of blocking peripheral receptors and thus preventing the illegal procurement of anabolic steroids.

4.101 In 1989 33 offenders were referred for chemical castration at Herstedvester. Three of those referred refused castration, 2 of whom were later released and committed further sexual offences that were serious and resulted in further preventative detention. Of the 30 offenders who commenced treatment, 7 had their treatment discontinued, one after release. Twenty four offenders underwent treatment in the period of study (including the one who discontinued after release), and were rewarded with the lifting of liberty related restrictions. Of the 24 who commenced treatment, 5 are still detained, with privileges, 12 have been released on probation and continue to undergo treatment, one has been released on probation but has recently stopped treatment and is under continued supervision which includes antabuse<sup>23</sup> treatment. One was released and had treatment discontinued following aggressive

---

<sup>23</sup> Antabuse is medication that induces sickness if alcohol is consumed, preventing intoxication in the individual.

behaviour associated with the treatment, and 5 were released on probation with a limited period of supervision, all of whom discontinued treatment at the expiry of the supervision period. Of the 5 who discontinued treatment, one has committed a further sexual offence and has been sentenced to further preventative detention and 4 have been without treatment for an average of 2.5 years and have not re-offended. There has been no re-offending by those who have continued treatment.

4.102 All of those offenders who underwent treatment fulfilled the criteria for dyssocial personality structure (psychopathy). It is for this reason that psychotherapy is combined with chemical castration treatment.

4.103 The sample of offenders is small and the duration of the study is short, but the Institute is optimistic about the treatment regime. Offenders who are treated are reported to be content with the treatment, although in one case treatment was discontinued due to it causing an increase in aggression. Other offenders have experienced negative physiological side effects from the treatment.

4.104 Carpenter (1998) reports that it is the policy of the Institute to engage an offender in therapy before and after chemical castration treatment. Offenders typically spend one year in treatment and parole is not contemplated until at least 5-6 months after the chemical castration. Denmark is distinctive in its combination of Androcur and Decapetyl in the process of chemical castration, and provides intensive individualised therapy for offenders to adjust to the consequences of their treatment and the change to their lifestyle.

## 5.6 ENGLAND AND WALES

4.105 In England and Wales a hybrid system for the management of dangerous offenders has evolved. Since the beginning of the century, various forms of habitual offender legislation have been enacted to target recidivism and reduce re-offending (Kinzig, 1997; Pratt, 1996b). Consistent with other jurisdictions, habitual offender legislation was based on a reformatory ideal indicative of a clinical model of offender management. The maturation of the concept of dangerousness from persistence to physical and psychological harm, necessitated a transition from habitual offender legislation to dangerous offender legislation. The clinical ethos of offender management is echoed in the reliance in part on mental abnormality in the imposition of the discretionary life sentence. The preventative focus of current sentencing of dangerous offenders is, however, strongly consistent with the community protection model of offender management.

4.106 There remains, however, a strong clinical focus in England and Wales on the management of mentally disordered dangerous offenders. (Petrunick, 1994) Although most jurisdictions provide for the treatment of dangerous but mentally disordered offenders, in England and Wales mental disorder is interpreted widely and specifically includes offenders who suffer from a psychopathic disorder. Recent proposals in England and Wales for the creation of a 'third-way' disposal designed for dangerous personality disordered persons, who may or may not have committed an offence, indicate that a community protection model is increasingly preferred in the management of dangerous persons.

#### 5.6.1 Legislative background

##### *Post-sentence preventative detention*

4.107 In England and Wales, preventative detention dates to habitual offender legislation enacted by the Prevention of Crime Act 1908. The provision was based on the principles of rehabilitation and protection, and provided for the post-sentence detention of habitual offenders of 5-10 years. This provision remained in operation until 1948, when it was abolished following decreasing use and mounting criticism that it failed to reduce recidivism and it failed to target dangerous offenders but instead targeted persistent petty recidivists (Kinzig, 1994; Pratt, 1995).

##### *Indeterminate detention*

4.108 The Criminal Justice Act 1948 replaced the provision for post-sentence preventative detention with a single sentence for preventative detention of 5-14 years in lieu of a prison sentence. This provision lasted only until 1967, when it was also abolished following decreasing use, its failure to target dangerous offenders but instead targeting persistent petty recidivists, and a general preference for longer determinate sentencing (Kinzig, 1997).

##### *Enhanced sentences*

4.109 The Criminal Justice Act 1967 abolished preventative detention. In the period after the abolition of preventative detention, extended sentences and life imprisonment were used to sentence dangerous offenders (Kinzig, 1997).

4.110 The Power of Criminal Courts Act 1973 introduced the extended sentence, aimed at repeat dangerous offenders and not petty recidivists. The extended sentence was intended to prevent re-offending by providing appropriate treatment. In addition the extended sentence imposed a much longer period of probation than other sentences. The extended sentence

lasted until 1991, when it was abolished following decreasing use, the availability of similar sentences, and the application of the sentence to mostly property offenders (Kinzig, 1997).

4.111 In the period following the abolition of preventative detention up until the passage of the 1991 Act, the discretionary life sentence was used more frequently. By the time the Act came into force, a discretionary life sentence was imposed for a variety of serious offences other than homicide. A life sentence could be imposed where the offence was serious enough to justify a very long sentence, and if due to the offence or the offender's history it appeared that the offender was a mentally unstable person who, if released, would probably re-offend and be a danger to the public (Kinzig 1997; Fitzgerald, 1995).

#### 5.6.2 Current provisions of England and Wales

4.112 England and Wales has been described as adopting the 'clinical model' in respect of serious violent and sexual offenders and personality disordered offenders (Petrunik, 1994). While this is partially true and can be demonstrated by reference to the Hospital Order and Hospital Direction disposals, which are examined below under 'clinical disposals', it fails to take into account the recent 'shift' in criminal justice policy and legislation which evidences a move towards a public protection approach.

4.113 The provisions that evidence this 'shift' in approach are examined below under the heading of 'Public Protection disposals'. It should be noted that change is still ongoing. This is evident in the Home Office consultation document 'Managing Dangerous People with Severe Personality Disorder'. This document states

*"The challenge to public safety presented by the minority of people with severe personality disorder, who because of their disorder pose a risk of serious offending, has been recognised by successive administrations"* (Department of Health, 1999).

4.114 In response to the defined problem two options are contained within the paper. First, the strengthening of existing legislation to ensure that dangerous severely personality disordered offenders are not released from prison or hospital whilst they are still deemed to be a risk to the public. Second, the introduction of new powers which would provide for the indeterminate detention of dangerous severely personality disordered people in both civil and criminal proceedings. The location of detention would be separate from prison and health service sites and would be based on the risk they posed and their therapeutic needs rather

than whether they had been convicted of an offence. These options are clear indicators of a move from the 'clinical approach' and a new area where public safety is deemed paramount.

### 5.6.3 Clinical disposals

4.115 The clinical disposals available in England and Wales take the form of the Hospital Order and the Hospital Direction. The terms of these disposals and the literature reviewing them are discussed below.

#### *Hospital order*

4.116 In England and Wales under the provisions of the Mental Health Act 1983, the court following conviction can, where there is evidence that the accused is suffering from one of four mental disorders which includes psychopathic disorder, order that the accused be detained in a specified hospital. This disposal is known as a Hospital Order and may have a restriction order attached if, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, it is deemed necessary for the protection of the public from serious harm.

4.117 Restricted patients can be subsequently discharged from hospital either with the agreement of the Home Secretary or the Mental Health Review Tribunal. Discharge is usually on a conditional basis, allowing the continued treatment, supervision and monitoring of the patient in the community. The Home Secretary retains the power to recall any conditionally discharged patient to hospital (Street, 1998). Baker (1992, 1993) notes the anomaly in the criteria surrounding the restriction order where reference to public protection is necessary at the point of imposition whereas the discharge decision does not necessarily include these considerations. Also, whereas the Secretary of State makes the decision to discharge on the basis of risk of harm to the public, the Mental Health Review Tribunal considerations will include 'treatability' issues.

4.118 Street (1998) conducted a study that examined the characteristics of offenders who had received restricted hospital orders during 1992 and 1993. The sample of 372 offenders comprised of 77% diagnosed as being mentally ill; 13% diagnosed as psychopathically disordered; 6% as mentally impaired and 4% as mentally ill and psychopathically disordered. Just under half of the sample had been convicted of manslaughter, attempted murder or serious assault, with a further quarter convicted of sexual offences or arson. Forty seven percent of the sample had previous convictions for sexual or violent offences and 65% had previously been compulsorily detained under a section of the Mental Health Act.

4.119 The sample group were compared with a control group who had received unrestricted hospital orders. The control group had usually been convicted of less serious offences against property, excluding arson, or public order offences. However, some of the control group were convicted of very serious index offences, more serious than some of the sample group who had received restriction orders. Previous convictions for violence were significantly less evident in the control group. The author concluded that this illustrated that restriction orders are imposed on the basis of perceived risk and not just harm caused.

4.120 This study also monitored those patients on restricted orders who were first discharged between 1987 and 1990 and followed their progress until the end of 1994. This sample of 391 patients had received restricted hospital orders between 1961 and 1989. Sixty four percent had been detained under the category of mental illness, 24% as psychopaths, 3% as mentally impaired and 3% under a mixture of categories. Almost half of the index offences were manslaughter, attempted murder or serious assault. Fourteen percent of the sample had been convicted of a sexual offence and 17% were convicted of arson. Forty three percent of the total sample had a conviction for a previous violent or sexual offence.

4.121 Of this sample, 95% were conditionally discharged from hospital. A conditional discharge can include conditions relating to residency and social and psychiatric supervision. More significant, however, the Home Secretary has the power to recall any conditionally discharged patient to hospital about whom there is concern. The remaining 5% of the sample were absolutely discharged.

4.122 Patients on average spent nine years in prison, with mentally impaired patients spending longer than mentally ill or psychopathically disordered patients. The discharge of patients by the Home Office was found to follow favourable reports from those responsible for the care of the patient. The reason for release by the Mental Health Review Tribunal was cited as principally due to the patient's disorder no longer warranting detention, however, both Home Office and Mental Health Tribunal interviewed members reported that risk would always be taken into account when deciding on the discharge of patients from hospital.

4.123 The 391 patients discharged into the community were monitored in respect of reconviction and recall. At the end of the study period, 5% of the total sample were reconvicted of a serious offence which was defined as violence, threats to kill, arson, abduction and aggravated burglary. Serious reconvictions were more likely where the individual had previous convictions for violent and particularly sexual offences. Twelve

percent of the total sample were reconvicted of any type of offence. Those patients in the category of personality disorder were found to be most likely to be reconvicted of a serious or any other type of offence<sup>24</sup>. It is noted, however, that the differences are not statistically significant due to the small numbers involved.

4.124 Incidents deemed harmful to others that did not result in reconviction occurred in 13% of conditionally discharged patients. There was police involvement in approximately a third of these cases but this was not pursued as far as a prosecution being conducted. Recall of these patients or some other form of psychiatric intervention occurred in a majority of cases. There was no significant statistical difference in the mental states of patients within this group.

4.125 A quarter of the conditionally discharged patients were recalled to hospital during the follow-up period, with 5% being recalled on more than one occasion. Recall of patients is described as most commonly due to concerns about the mental state of the patient with risk concerns being relevant in over half of recalls.

#### *Hospital direction*

4.126 Hospital and Limitation Directions were introduced in England and Wales by section 46 of the Crime (Sentences) Act 1997. This order also known as a 'hybrid order' is available to the crown court, following conviction, where it is satisfied that the offender is suffering from a psychopathic disorder which makes it appropriate for him to be detained in hospital for medical treatment and that such treatment is likely to alleviate or prevent a further deterioration of his condition. The court, in addition to making this order, will also specify the term of imprisonment to be served by the offender (Thomas, 1997).

4.127 The effect of the order is that the offender is initially transferred from court to hospital. If the offender is deemed to no longer need or be susceptible to treatment then he can be transferred to prison to complete the sentence passed rather than be discharged from hospital. The Hospital Direction disposal has not been reported as having been used as yet, however, criticism of the disposal has been made.

4.128 The new order was widely condemned by psychiatric practitioners (Eastman, 1996; Chiswick, 1996; and Royal College of Psychiatrists, 1996) and others who anticipated that its

---

<sup>24</sup> In respect of serious offences, 9% of personality disordered offenders were reconvicted compared with 5% of the mentally ill and no mentally impaired. In respect of 'any offence', 17% of personality disordered offenders were reconvicted, 10% of the mentally ill and 12% of the mentally impaired.

impact would be detrimental in the treatment of mentally disordered offenders (Laing, 1997; Eastman and Peay 1998). Cavadino (1998), suggests that the 'hospital direction' represents triple jeopardy for the convicted 'psychopath' as the straightforward determinate sentence is replaced by hospitalisation which continues only for as long as the offender's treatment is ongoing. The 'shining reward' for successful treatment is transfer to prison to complete the sentence. The offender who co-operates but receives no effective treatment can be transferred to prison or remain detained indefinitely in hospital. He suggests, that the best option for the offender is to make it clear from the beginning that he will not co-operate with the psychiatrist as this will result in transfer to prison to serve out the sentence imposed.

4.129 Laing (1998), suggests that there is a lack of guidance in the legislation and accompanying Home Office circular 54/1997 as to when the 'order' should be used. The Hospital Order remains available, as do prison sentences for offenders within this category. This lack of guidance as to appropriate use may result in greater reliance on psychiatric evidence. If this occurs, psychiatrists may be more influential in the disposal decision than would normally be the case (Eastman and Peay, 1998). Laing suggests that this disposal will be the preferable course of action in relation to serious and repeat offending by psychopathic offenders where there is uncertainty about their suitability for treatment.

4.130 The supplementary circular in respect of this legislation (HOC 52/1997) states that it is still government policy that mentally disordered offenders should receive specialist care and treatment in a therapeutic environment, however, this must be balanced with the needs of public safety and protection. Laing (1998) suggests that the introduction of this disposal evidences a distinct shift in focus that now places greater emphasis on public safety and attempts to balance the needs of the offender with the protection of the public.

#### *Public protection disposals*

4.131 Since 1991 a number of legislative provisions in England and Wales have been introduced which provide for longer than normal custodial sentences, discretionary life sentences, extended sentences (which involves post-release licence), and sex offender orders.

#### *The Criminal Justice Act 1991*

4.132 This Act abolished extended sentences and provided a new structure for the sentencing of dangerous offenders. The Act provides more detailed conditions for the

imposition of discretionary life sentences and also provides for longer definite sentencing for certain dangerous offenders.

#### *Longer than normal sentence*

4.133 Section 2(2) of the Criminal Justice Act 1991 provides that it is the duty of the sentencing court to impose a longer than normal sentence on a person convicted of any sexual or violent offence where the court is of the opinion that this is required for the protection of the public from serious harm. Although the sentence is a determinate one, it is justified not simply by the gravity of the offence, but by the protection of the public.

4.134 The Act provides that the length of a custodial sentence should be commensurate with the seriousness of the offence or, in the case of a violent or sexual offence, such longer term as is necessary to protect the public from serious harm from the offender. The logical effect of this provision is that a discretionary life sentence can only be imposed in cases of violent or sexual offences (Department of Health, 1999). Guidance on the meaning of 'protecting the public from serious harm' is provided in section 31(3) which refers to protection from serious personal injury occasioned by further such offences. The 'serious harm' requirement must be satisfied before either a discretionary life sentence or longer than normal determinate sentence and one or both of previous convictions and medical evidence is required to support such a sentence.

4.135 Unlike the discretionary life sentence, the imposition of the extended sentence does not require that the court declare what proportion of the sentence is punitive and what proportion is preventative (although the court may do so) and it does not require a review of the preventative portion of the sentence.

4.136 The first 35 Appeal Court hearings involving 'longer than normal' sentences (LTNS) were examined by Solomka (1996). In 30 cases LTNS sentences had been passed by the original sentencing judge and in 5 cases this was imposed by the Court of Appeal. In 28 of the 35 cases the accused had previous convictions for violent or sexual offences. In 16 cases the appeal was dismissed, in 2 cases the sentence was reduced but remained a LTNS, in 12 cases the application of the terms of section 2(2) was considered inappropriate and in 5 cases a LTNS sentence was imposed in substitute for the original sentence.

4.137 Of the 22 cases where a psychiatric report was considered, personality abnormalities were identified in 9 cases ranging from 'bizarre' to diagnoses of personality disorder in 6

cases. Eight case reports described the offender as having a disorder of sexual preference and in 5, the offender was described as not suffering from any mental disorder.

4.138 In the context of these provisions, Solomka (1996) examines the role of psychiatric evidence, which while recognised as helpful at the post-conviction phase of the trial, is not unproblematic. In the case of a mentally abnormal violent or sexual offender, the opinion of the psychiatrist on the question of 'risk of serious harm' can be potentially used for two very different purposes: treatment or punishment. The opinion of the expert will be used to determine whether the offender requires a hospital type disposal or a custodial disposal. One effect of the 1991 provisions is to place power in the hands of individual psychiatrists while making the restraint and balance in the giving of evidence a matter for the clinician's personal judgement.

4.139 Ashworth (1992) expressed concern in respect of the lack of procedural guidelines to protect the offender against sincere but fallible predictions of individual psychiatrists and the absence of provision that the judge should ensure that predictions have a sound basis. This concern over the abuse of psychiatric testimony is not a new concern triggered by the 1991 Act provisions. Chiswick (1985) urges the limitation of opinion-giving by psychiatrists to matters of mental illness and warns that stepping beyond such limits increases the chances of misuse.

#### *Discretionary life sentences*

4.140 In addition to the legislative provisions in respect of discretionary life sentences, common law court decisions have expressed the criteria for imposition. The leading cases have established three criteria that continue to be relevant. These are first, that the offence or offences are grave enough to require a very long sentence; second, that it appears from the nature of the offence or the history of the accused that he has a mental instability and if liberated would probably re-offend and present a grave danger to the public and; third, that the accused will remain unstable and a potential danger for a long or uncertain period of time (Department of Health, 1999).

4.141 Smith (1998) reflects on the common law criteria for the imposition of a discretionary life or indeterminate sentences which were derived from the three principles described in *R v Hodgson* (1968). The court of appeal has indicated that the second criteria of mental instability and likelihood of re-offending should be based on medical evidence in most cases, (*R v De Havilland*, 1983 and *R v Dempster*, 1987). The study covered 50 consecutive appeal

court judgements reported over a 10-year period. A range of index offences ranging in severity from conspiracy to rob through manslaughter attracted the 77 indeterminate sentences made in respect of the 50 offenders. Indeterminate sentences were most commonly granted in respect of rape convictions (23) and manslaughter (12). No more than 6 indeterminate sentences were granted in respect of any of the remaining 42 index offences.

4.142 Smith highlights three areas related to the role of psychiatric evidence in cases where an indeterminate sentence is considered. First, the quality of instructions received by psychiatrists varies. Some instructions do not make it explicit that an indeterminate sentence is being considered and consequently the onus is on the psychiatrist to understand the legal requirements and expectations in a given case. Second, psychiatric evidence is admissible and expected in the consideration of an indeterminate sentence. This evidence is expected to cover a full range of conditions some of which are outwith the range that fall within the Mental Health Act 1983.

4.143 While it is accepted that psychiatrists do or should have this wider range of special expertise in assessment, it is suggested that there should be stricter criteria to establish the expertise of the clinician than is currently achieved by reference to qualification under the Mental Health Act 1983. The latter point is deemed to be particularly relevant when examining conditions such as sexual deviancy and predictions of future behaviour where there may be varying levels of experience amongst psychiatrists in dealing with such individuals in these categories. A statement of experience and methodology used in arriving at the opinion offered would allow greater scrutiny of that opinion. Third, ethical issues and potential conflicts are recognised in the conflicting roles of psychiatrists in these cases where the demarcation between the psychiatrist's role as forensic examiner and treating doctor is sometimes blurred.

4.144 In response to the ruling of the European Court of Human Rights in *Thynne v The United Kingdom*, the 1991 Act introduced a new system for the review of discretionary life sentences and permitted additional procedural rights to the discretionary lifer. The discretionary life sentence comprises a punitive stage and a preventative stage. Although the preventative stage could only be justified as long as the offender remained a danger to the public, the law did not provide safeguards for the review of the preventative period. In *Thynne*, the European Court held that the offender ought to have the right to have their danger to the public tested. As a result of this ruling, the 1991 Act mandated that the court in imposing the discretionary life sentence declare the tariff for the punitive period, after which

the offender is entitled to have the sentence referred to a panel of the Parole Board for review.

4.145 Although this would seem to satisfy the requirements of the ruling, the criteria mandated by the Act for a decision to release, may not be in accordance with the European Convention. According to the Act, the Parole Board shall not give a direction for release unless it is satisfied that the confinement of the offender is no longer necessary for the protection of the public. This places the burden on the offender to prove that they are no longer dangerous, and the criterion also justifies continued detention on grounds much less demanding than the test of dangerousness required for the discretionary life sentence to be applied.

#### *Sentences extended for licence purposes*

4.146 Extended sentences for violent and sexual offences were first introduced by section 44 of the Criminal Justice Act 1991, which provisions were amended by sections 58 and 59 of the Crime and Disorder Act 1998. These extended sentences apply a period of supervision (not detention) in a custodial sentence. The original 1991 provisions were amended in 1998 to include violent as well as sexual offences.

4.147 An extended sentence can be passed in cases where the court considers that the offender would otherwise be subject to an inadequate licence period on release in respect of the prevention of further offences and rehabilitation. The extended sentence is the sum of the custodial sentence and the defined extended period. Before a court can pass an extended sentence in respect of a violent offence, the custodial sentence must not be less than four years and the extended period cannot be more than five years. There is no minimal custodial sentence in respect of sexual offences and the extended period can be up to ten years. In no circumstances can the extended sentence exceed the maximum sentence applicable to the offence committed. If the offender commits a new offence while on licence, the court in addition to dealing with the new offence, will remit the offender back to prison to serve out the rest of the outstanding sentence which includes both the original sentence period and the extension period (Leng, Taylor and Wasik, 1998).

4.148 Any prisoner serving a fixed term of imprisonment in excess of one year is subject to supervision, on release, until the three-quarter point of the original sentence (Criminal Justice Act 1991, Part II). A life prisoner remains on licence for the rest of his life. If the licence

conditions are breached the prisoner may be recalled to prison to serve out the balance of the sentence.

### *Sex offender order*

4.149 In addition to the extended sentence for sexual offences the sex offender order was introduced by section 2 of the Crime and Disorder Act 1998. A sex offender, regardless of date of conviction may have an order made against him. The making of an 'order' has two main consequences for the offender. First, if not already subject to the registration scheme introduced by the Sex Offenders Act 1997, the offender will be made subject to such registration for the duration of the 'order'. Second, the 'order' may prohibit the offender doing anything that is prescribed by the order.

4.150 The scope of the prohibitions is restricted to 'those necessary for the purpose of protecting the public from serious harm from the defendant' (section 2(4)). An 'order' which will not be for less than five years can be varied or discharged on application to the court but an 'order' cannot be discharged within 5 years unless both parties consent. Prohibitions may relate to staying away from particular places or not seeking particular types of work. More extensive restrictions e.g., involving curfews or requiring the defendant to move home may be possible in extreme cases but risk being struck down as being contrary to the European Convention on Human Rights (Leng, Taylor and Wasik, 1998). Appeal against an 'order' lies to the Crown Court which can make such orders to give effect to its determination of the appeal and such incidental or consequential orders as appear just. There is no right of appeal by the chief constable or a local authority against a refusal by the court to make such an order. Breach of the prohibitions contained in an 'order', without reasonable excuse, will attract a fine, not exceeding the statutory minimum or imprisonment up to six months.

#### 5.6.4 Treatment issues

### *Management of sexual offenders*

4.151 In England and Wales dangerous offenders are either subject to discretionary life sentences, enhanced sentences or, where appropriate, to mental health disposals. Because there is no more specific sentence for dangerous offenders, these offenders will be managed and treated in the prison setting or in the mental health setting. Fisher and Beech (1999) provide a review of the treatment of sexual offenders in Britain.

4.152 In England and Wales sexual offenders who are deemed to be mentally disordered, will be treated in a hospital setting. Those who are sentenced and imprisoned are generally

managed by forensic psychiatric services that comprise regional secure units (regionally based medium secure units) and special hospitals (maximum-security hospitals). Mentally disordered sexual offenders will usually be either mentally ill or suffering from a psychopathic personality disorder. The numbers of mentally disordered sexual offenders admitted to regional secure units are limited. Mentally ill sexual offenders are generally treated for their mental illness, although it is doubtful that in all cases sexual offending is caused by the mental illness. Psychopathic sexual offenders are generally referred from special hospitals for rehabilitation in the community. They are regarded as difficult to treat and there is reluctance to admit them into inpatient services.

4.153 Because of small numbers in regional secure units, treatment for sexual offending is limited. Where there are a higher number of sexual offenders in special hospitals, treatment is generally undertaken on an individual basis with a focus on fantasy modification techniques and an understanding of sexuality. More recently group programs are being developed in special hospitals as a result of the use of group programs in outpatient settings.

4.154 Current practice with sexual offenders in a prison setting emerged from the establishment of an expansive prison based treatment program in 1991 which presently includes 25 prisons. Treatment is largely group based and is mainly comprised of cognitive-behavioural methods.

### *Castration*

4.155 In England and Wales surgical castration is virtually unavailable and chemical castration is only offered in response to a voluntary request for it. Surgical castration is viewed as brutal and barbaric and has even been refused to a repeat sexual offender who campaigned for the procedure (Carpenter, 1998). Chemical castration is available following a request for it but it is unlikely ever to be mandatory as it would likely constitute a violation of the European Convention of Human Rights on many grounds, and is associated with a plethora of negative side effects.

## 6. CHAPTER FIVE: OTHER JURISDICTIONS

### 6.1 INTRODUCTION

5.1 Information obtained for the following jurisdictions has not allowed the application of the 'model approach'. Legislative provisions and literature that were available in English are reviewed below.

### 6.2 BELGIUM

5.2 Petrunik (1994) identified that in 1930, a Social Defence Law provided for indeterminate confinement for mentally abnormal offenders and recidivists. This was modified in 1964.

#### 6.2.1 Sexual offenders

5.3 In Belgium the rape and torture of 15 young girls in early 1996 by a released repeat sexual offender, Marc Dutroux, created public outrage (Albrecht, 1997). Belgium was thought to have an especially weak system for the supervision of paroled sexual offenders. It has, however, strengthened the parole eligibility of sexual offenders and is currently debating whether to implement chemical castration to prevent sexual re-offending (Carpenter, 1998).

5.4 Cosyns (1999) reports that treatment for sexual offenders in Belgian prisons is virtually non-existent although outpatient facilities are provided. Treatment cannot, however, be imposed as a condition of parole although parole may be offered as an incentive to treatment. Belgium has no specific sexual psychopathy laws but if an offender has a psychiatric disorder, in certain cases, the court may pronounce a safety measure (internment), that provides for treatment instead of punishment. Internees, however, remain largely untreated, and they cannot be compulsorily treated. An internee may only be hospitalised in a civil psychiatric hospital with the agreement of the hospital, which is rare in the case of sexual offenders.

### 6.3 NORWAY

5.5 Petrunik (1994) observes that in Norway, the Penal Code 1902, provided 2 measures of security: *etterforvaring* to extend the prison term of normal recidivists and *sikring* as a treatment measure for abnormal offenders who were either not responsible or partially responsible. This was reformed in 1929 to provide for special treatment and security measures for abnormal offenders and dangerous recidivist felony offenders. Kinzig (1997) notes that reform has been advocated in this jurisdiction.

### 6.4 ITALY

5.6 In the 1930's, a social defence measure that provided for the indeterminate confinement of socially dangerous recidivists was available in Italy (Petrunik, 1994). This

was amended in 1953 and 1971. Kinzig (1997) notes that admission to a workhouse for habitual professional or compulsive criminals is possible. Judges are reported to refuse on principle to make a finding of dangerousness and consequently preventative measures are hardly imposed at all on offenders with responsibility.

#### 6.5 SPAIN, ICELAND, FINLAND, FRANCE, HUNGARY, POLAND

5.7 Kinzig (1997) relates that in Spain, the law on dangerousness to society and social rehabilitation was repealed in 1995. In Iceland, indeterminate preventative detention is hardly applied and in Finland, the abolition of preventative detention was imminent in 1995. In Hungary, the justification and application of preventative detention was criticised and abolished in 1989, since it had become an extension of the prison sentence. In Poland, the new Draft Criminal Code is based on prolonged prison sentences for dangerous recidivists, although some advocate additional measures.

5.8 Until 1970, relegation was available in France as a preventative measure. It was replaced by *tutelle penale* (preventative observation) that was abolished in 1981. Nothing replaced it. Protection of the public from dangerous recidivists is provided by the prolonged sentence, imposed for recidivists of various offences. It is also possible to add a prison sentence of at least 10 years duration for a safety period (*periode de surete*). This prevents the detainee from being given any privileges or an early release for a certain period of time (Kinzig 1997). Pochard et. al., (1998) identify that a 'medico-social follow-up penalty' is set to be introduced in France for consenting sexual offenders in order to prevent relapses. The treatment will employ hormonal and psychotherapy treatment.

## 7. CHAPTER SIX CONCLUSION

### 7.1 INTRODUCTION

6.1 The preceding chapters outline the treatment of serious violent and sexual offenders in a number of jurisdictions. Although there are variations in the content of specific provisions, it is clear that there is, in many countries, a trend towards implementing provisions that are specifically geared towards public safety. Evaluations of the effectiveness of such provisions in achieving this goal are rather sparse and, therefore, it is difficult to draw firm conclusions in this respect. In light of this fact, this concluding chapter will focus on issues surrounding any legislative changes that may occur in Scotland.

6.2 Part of the remit of this research was to examine whether legislation and practice in operation in other jurisdictions could be applied to the Scottish criminal justice system. One of the main factors in considering the applicability of any provisions is the extent to which they comply with the European Convention on Human Rights. The current Scottish provisions available in respect of offenders perceived to be serious violent or sexual offenders and severe personality disordered offenders are outlined below. The provisions of the Convention and recent decisions of the European Court of Human Rights will be reflected upon in an outline of the provisions that must be complied with in any legislative changes.

### 7.2 CURRENT SCOTTISH PROVISIONS

6.3 The disposals available to the court in Scotland are in many cases very similar to those available in England and Wales that are outlined in Chapter 4. The Scottish disposals are outlined in the consultation document published in respect of the Lord MacLean Committee on Serious Violent and Sexual Offenders. They are summarised briefly below, however, it is worth noting that limited evaluation of these disposals exist.

6.4 Prison sentences include the mandatory life sentence that must be imposed in cases of murder. Discretionary life sentences are also available, but are rarely imposed (only 2 or 3 per year until 1995, then 6 or 7 respectively in 1996 and 1997). When a discretionary life sentence is passed, the minimum period that the offender must serve in custody for punishment and deterrence is specified by the court and following this period the Parole Board determine whether detention should continue for the protection of the public. Determinate sentences are also available and again, the Parole Board in respect of offenders sentenced to four years or more, when half of the sentence has been served, considers release. Once 2/3 of any determinate sentence has been served all prisoners must be released.

6.5 The extended sentences for sex and violent offenders introduced by the Crime and Disorder Act 1998, outlined in Chapter 4 in relation to England and Wales, also apply to Scotland. The extended sentences apply only to crimes committed after 30 September 1998 and there is not, as yet, information available to assess their impact on public protection.

6.6 In Scotland, a Hospital Order with or without restriction is available to the court following conviction where there is evidence of mental disorder. In Scotland, however, prior to the Mental Health (Public Safety and Appeals) (Scotland) Act 1999, mental disorder was defined as including mental illness and mental disorder only. This 1999 legislation widened the definition of mental disorder to include personality disorder. Research on the use of the Hospital Order has been conducted in respect of mentally disordered offenders who were found unfit to plead or acquitted on the grounds of insanity (Burman and Connelly, 1999), however, this did not include individuals who had been convicted and for the duration of this research, the term 'mental disorder' did not include personality disorder.

6.7 A Hospital Order can be made with or without a restriction order. Where a restriction order has been made by the court to 'protect the public from serious harm' this will be without limit of time. Application for release can be made between 6 and 12 months after the order and once every 12 months thereafter. The application to the First Minister is considered on the basis of whether the detention of the patient is necessary for public protection. If the application is refused, the patient may appeal to a Sheriff. Prior to the Mental Health (Public Safety and Appeals) (Scotland) Act 1999, the Sheriff considered the application on the basis of whether the person had a continuing need for and was receiving treatment. This has now been replaced by consideration of whether detention is necessary to protect the public from serious harm. A right of appeal by the Executive against the Sheriff's decision has also been introduced.

6.8 A restricted patient may be released conditionally. Such a patient is liable to be recalled at any time, however, the decision of the European Court of Human Rights in the case of *Kay v UK*, established that any recall must involve evidence of mental illness.

6.9 In addition to a Hospital Order, a convicted accused may, if there is evidence of mental disorder, receive a Hospital Direction disposal in Scotland. This disposal, introduced by the Crime and Punishment (Scotland) Act 1997, involves the court passing a determinate sentence where the offender is initially transferred from court to hospital. If during the term of sentence, the offender is deemed to have recovered, they will be remitted

to prison to serve the remainder of their sentence. The normal sentence reduction rules apply to these offenders. This new disposal has rarely been used since it became available on 1 January 1998. A review of these provisions is ongoing.

### 7.3 THE EUROPEAN CONVENTION ON HUMAN RIGHTS

6.10 The key provisions in the European Convention that must be complied with in the drafting of any legislation are articles 5(1) and 5(4). The relevant parts of these articles are as follows:

#### Article 5

##### Right to Liberty and Security

1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a. the lawful detention of a person after conviction by a competent court;  
e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of a person of unsound mind, alcoholics or drug addicts or vagrants.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

6.11 Articles 5(1) and 5(4) have been interpreted as requiring a judge, when passing any extended or indeterminate sentence, to specify which part of the sentence is punitive and which is preventive. The offender should have access to a review body following the end of the punitive part of the sentence to have their continued detention reviewed. This review body should not involve the executive and be before a court or tribunal which are both independent of the executive and are empowered to order the individual's release. A parole board has been recognised as capable of exercising this function (Fitzgerald 1995).

6.12 The case of *Thymie, Wilson and Gunnell v The United Kingdom*<sup>25</sup> recognised that these safeguards did not exist in respect of the discretionary life sentence in England and Wales. This was addressed in section 34 of the Criminal Justice Act 1991, however, only in relation to discretionary life sentences. The provisions for 'longer than normal' sentences introduced in the same Act, do not impose any of the procedural safeguards outlined above (Fitzgerald, 1995).

6.13 The European Court has responded to the phenomenon of preventative detention by insisting that provisions to protect offenders against arbitrary and unjustified prolonged detention are in place. The individual's characteristics that result in preventative detention, e.g., recidivism or dangerousness, are recognised by the court as qualities susceptible to change. As a result the inclusion of periodic review to test the merits of 'ongoing' detention

---

<sup>25</sup> (1991) 13 E.H.R.R. 666.

has been applied to both fixed-term and indeterminate preventative measures (Fitzgerald (1995); Van Droogenbroeck v Belgium<sup>26</sup>).

6.14 There would appear to be both authority and ‘regulation’ by the court in respect of preventative detention. The legality of preventative detention does appear to rest on both the ‘punishment’ and ‘prevention’ part of the sentence being made and specified at the point of disposal. The case law and the provisions of the Convention suggest that the form of civil commitment adopted in the USA, which occurs following the conclusion of a determinate sentence, would not be available in a European jurisdiction as this would be contrary to the convention. However, the legality of such a system of detention has not been ‘tested’ before the European Court of Human Rights as this is not an approach currently adopted in Europe. Most European jurisdictions provide for the punishment and prevention parts of the sentence as two parts of an inseparable whole.

6.15 Article 3 of the Convention; Prohibition of Torture, protects against inhuman or degrading treatment or punishment. Any form of punishment must, therefore, comply with this. The introduction of punishment for sexual offenders in the form of castration may be problematic. As is noted in Chapter 4, surgical castration was used in Denmark from 1935-1970 when it was deemed to be inhumane and banned. Chemical castration is used in countries that are signatories to the convention and appears, therefore, to comply with this provision. Due to the plethora of negative side effects, however, this treatment would require to be voluntary i.e., at the prisoner’s request, rather than mandatory as it may then contravene Article 3.

---

<sup>26</sup> (1982) 4 E.H.R.R. 443.

## **BIBLIOGRAPHY**

### **Charters and Conventions**

European Convention on Human Rights  
Canadian Charter of Rights and Freedoms 1982.

### **Legislation**

CCC (Canadian Criminal Code) 1960-61.

CCC (Canadian Criminal Code) 1997.

(1901) Criminal Code. QLD.

(1905) Habitual Criminals Act. NSW.

(1913) Criminal Code. WA.

(1924) Criminal Code. TAS- Tasmania.

(1957) The Habitual Criminals Act. NSW.

(1983) Criminal Code. NT-Northern Territory.

(1988) Criminal Law (Sentencing) Act. SA-South Australia.

(1989) Sentencing Act. NSW.

(1990) Community Protection Act. VIC.

(1992) Crime(Serious and Repeat Offender) Sentencing Act. WA-Western Australia.

(1992) Penalties and Sentences Act. QLD-Queensland.

(1993) Criminal Justice Amendment Act. New Zealand.

(1993) Sentencing (Amendment) Act. VIC-Victoria.

(1994) Community Protection Act. NSW New South Wales.

(1998) Child Protection and Sexual Predator Punishment Act(Washington DC).

### 7.3.1 Books and Journals

Adams and Toch (1996). "The Disturbed Violent Offender." Contemporary Psychology **41** (3): 268.

Adams, K. and H. T. OrNeal (1993). "The Disturbed Violent Offender." Contemporary Psychology **38** (4): 424.

Albrecht, H.-J. (1997). "Dangerous Criminal Offenders in the German Criminal Justice System." Federal Sentencing Reporter **10** (2): 69-73.

Applebaum, P. (1997). "Law and Psychiatry: Confining Sex Offenders." Psychiatric Services **48** (10): 1265.

Ashworth, A. (1992). Sentencing and Criminal Justice London, Weidenfeld & Nicolson.

American Psychiatric Association (1996). Kansas Law on Sexual Offenders Unconstitutional, APA Comments. Psychiatric News. **31**: 8.

American Psychiatric Association (1998). APA Opposes Civil Commitment of Sex Offenders After Prison. Psychiatric News. **33**: 4.

American Psychiatric Association (1998). Violent Offenders Appraising and Managing Risk American Psychological Association.

American Psychiatric Association (1999). Dangerous Sex Offenders: A Task Force Report of the American Psychiatric Association. Washington, D.C., APA.

Bailey, S., D. Chiswick, et al. (1999). Offenders with Personality Disorders, Royal College of Psychiatrists.

Baker, E. (1992). "Dangerousness. The neglected gaoler: disorder and risk under the Mental Health Act 1983." Journal of Forensic Psychiatry **3** (1): 31-52.

Baker, E. (1993). "Dangerousness, rights and criminal justice." Modern Law Review **56** (4): 528-547.

Ball, J. (1996). "Public Disclosure of America's Secret Shame." Loyola University of Chicago Law School **27** (Winter): 401-48.

Berlin, F. (1994). "The Case for Castration." The Washington Monthly **26** (5): 29.

Blackburn, R. (1993). Clinical Programs with psychopaths. Clinical approaches to mentally disordered offenders. K. Howells, & Hollin, C.R. Chichester, Wiley.

Blakey, K. (1996). "The Indefinite Civil Commitment of Dangerous Sex Offenders Is An Appropriate Legal Compromise Between Mad and Bad." Nortre Dame Journal of

Law Ethics and Public Policy **10** (1): 227-99.

Bland, R. C., et al. (1990). "Prevalence of personality disorder in a special hospital population." Journal of Forensic Psychiatry **1**: 43-52.

Boerner, D. (1992). "Confronting Violence: In the Act and in the Word." University of Puget Sound Law Review **15** (3): 525-577.

Bonta, Law, et al. (1998). "The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders." Psychological Bulletin **123** (2): 123-142.

Bonta and Montiuk (1996). High Risk Violent Offenders in Canada Ottawa, Correctional Service of Canada.

Bonta, J, A. Harris, et al. (1996). The Crown Files Research Project: A Study of Dangerous Offenders. Ottawa, Solicitor General Canada.

Bonta, J., I. Zinger, et al. (1998). "The Dangerous Offender Provisions: Are They Targetting the Right Offenders?" Canadian Journal of Criminology **40** (4): 377-400.

Boruchowitz, R. C. (1992). "Sexual Predator Law .The Nightmare in the Halls of Justice." University of Puget Sound Law Review **15** (3): 827-842.

Brooks, A. (1996). The Incapacitation by Civil Commitment of Pathologically Violent Sex Offenders. Law Mental Health and Mental Disorder Bruce, Shuman and D. Sales.

Brooks, A. D. (1992). "The Constitutionality and Morality of Civilly Committing Violent Sexual Predators." University of Puget Sound Law Review **15** (3): 709-754.

Brooks, A. D. (1994). "The Civil Commitment of Pathologically Violent Sex Offenders." Administration and Policy in Mental Health **21** (5): 417-429.

Brown, M. (1996). "Serious Offending and the Management of Public Risk in New Zealand." B. J. Crim **36**: 18-36.

Brown, M. (1998). "Serious Violence and Dilemmas of Sentencing: A Comparison of Three Incapacitation Policies." Criminal Law Review 710-722.

Campbell, I. (1991). Indeterminate Sentences and Dangerousness Serious Violent Offenders: Sentencing, Psychiatry and Law Reform, Australian Institute of Criminology.

Capaldi and Patterson (1996). "Can Violent Offenders be distinguished from Frequent Offenders." Journal of Research in Crime and Delinquency **33** (2): 206-231.

Carpenter, A. (1998). "Belgium, Germany, England, Denmark and the US The Implementation of Registration and Castration Laws." Dickenson Journal of International Law **16** (2): 435-57.

Cavadino (1998). "Death to the Psychopath." The Journal of Forensic Psychiatry 9 (1): 5-8.

Chiswick, D. (1985). "Use and Abuse of Psychiatric Testimony." British Medical Journal 290: 975-7.

Chiswick, D. (1992). "Compulsory treatment of patients with psychopathic disorder: an abnormally aggressive or seriously irresponsible exercise?" Criminal Behaviour and Mental Health 2: 106-113.

Chiswick, D. (1996). "Sentencing mentally disordered offenders. A new law to 'protect the public' will block beds in secure units." British Medical Journal 1497-1498.

Clark and Henry (1997). Three Strikes and You're Out A Review of State Legislation, US Department of Justice National Institute of Justice.

Clarkson, C. M. V. (1997). "Beyond Just Desserts: Sentencing Violent and Sexual Offenders." Howard Journal of Criminal Justice 36 (3): 284-292.

Coid, J. W. and C. Cordess (1992). "Compulsory admission of dangerous psychopaths." British Medical Journal 304: 1581-1582.

Coihen-Gallet, B. (1999). "New York Felony Sentencing: A Shift in Emphasis to Increase Penalties for Violent Offenders." New York State Bar Journal 71 (1): 40-8.

Coles, E. M. and F. E. Grant (1991). "The Role of the Psychiatrist in Dangerous Offender Hearings." Canadian Journal of Psychiatry 36 (7): 534-543.

Cook, J. H. (1999). "Civil Commitment of Sex Offenders: South Carolina's Sexually Violent Predator Act." South Carolina Law Review 50: 543-563.

Cook, J. H. (1999). "Civil Commitment of Sex Offenders: South Carolina's Sexually Violent Predators Act." South Carolina Law Review 50 (2): 543.

Cooke, D. J. (1995). "Psychopathic Disturbance in the Scottish Prison Population: The Cross-Cultural Generalisability of the Hare Psychopathy Checklist." Psychology, Crime & Law 2: 101-118.

Cote, G., & Hodgins, S. (1990). "Co-occurring mental disorders among criminal offenders." Bulletin of the American Academy of Psychiatry and Law 18: 271-281.

Courtless, T. (1997). "Commitment of Mentally Disordered Criminal Offenders in the State of Maryland." Journal of Forensic Psychiatry 8 (2).

Craze, L. and P. Moynihan (1994). "Violence Meaning and the Law: Responses to Gary David." Australian and New Zealand Journal of Criminology 27(1): 30-45.

Cullen, E. (1994). "Grendon: The Therapeutic Prison That Works." Therapeutic Communities 15 (4): 301-11.

Department of Health. (1999). *Managing Dangerous People with Severe Personality Disorder*. London, Home Office.

Dinoveizer, R. (1997). "The Myth of Rapists and Other Normal Men: The Impact of Psychiatric Assessments." Canadian Journal of Law and Society **12** (Spring): 147-69.

Dockerill and Ward (1999). "The Predictive Accuracy of the Violent Offender Treatment program Risk Assessment Scale." Criminal Justice and Behaviour **26** (1): 125.

Dolan, B., Evans, C. & Norton, K. (1995). "Multiple Axis II diagnosis of personality disorder." British Journal of Psychiatry **166**: 107-112.

Dolan, B., Ed. (1996). Perspectives on Henderson Hospital. Surrey, Henderson Hospital.

Dolan, B. and J. Coid (1993). Psychopathic and Anti-Social personality Disorders Treatment and Research Issues, Gaskell.

Doren, D. (1998). "Recidivism Base Rates, Predictions of Sex Offender Recidivism and the Sexual Predator." Behavioural Sciences and the Law **16** (1): 97-114.

Dwyer, Prinoth, et al. (1997). "Results of a Treatment Programme with Incarcerated Sexual Offenders and their Significant Others." Psychiatric Praxis **24** (4): 190.

Eastman, N. (1998). "Hybrid Orders: an analysis of their likely effects on sentencing practice and on forensic psychiatric practice and services." Journal of Forensic Psychiatry: 481-494.

Eastman, N. and J. Peay (1998). "Sentencing psychopaths: Is the "Hospital and Limitation Direction" an ill-considered Hybrid?" Criminal Law Review: 93-108.

Editorial (1997). "Sexual Offences." Georgia State University Law Review **14** (1): 95.

Editorial (1997). "US Supreme Court Upholds a Kansas Law Allowing Indefinite Civil Commitment." Psychiatric Services **48** (8): 1093.

Editorial (1998). New Jersey DB Decides to Back State Law on Sex Offenders. Psychiatric News. **33**: 4.

Editorial (1999). "Canada/Special Report: Targeting Violent Youth." Maclean's **112** (14): 15.

Eisenman, R. (1993). "Selective Incapacitation: Preventative Detention of the Violent Offender Donald Hanks." Journal of Criminal Justice **21** (2): 194.

Elco, J. (1998). "Kanas v Hendricks." Duquesne Law Review **36**: 471-491.

Ellis, J. W. (1992). "Limits on the State's Power to Confine 'Dangerous' Persons: Constitutional Implications of Foucha v Louisiana." University of Puget Sound Law Review **15** (3): 635-653.

Faerstein, S. (1998). "Sexually Dangerous Predators and Post Prison Commitment Laws." Loyola of Los Angeles Law Review **31**(3): 895.

Fairall, P. A. (1993). "Violent Offenders and Community Protection in Victoria: The Gary David Experience." Criminal Law Journal **17** (Feb): 40-54.

Falk, A. J. (1999). "Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment after Kansas v. Hendricks." American Journal of Law and Medicine **25**: 117-147.

Fallon, P. Report into Personality Disorder Unit at Ashworth Special Hospital Vol 1 and 2, Stationary Office CMND 4194-11.

Federal/Provincial/Territorial Task Force. (1995). Strategies for Managing High-Risk Offenders. Canada, FPT Ministers Responsible for Justice: 1-52

Feldbrugge, J. T. T. M. (1992). "Rehabilitation of patients with personality disorders: patient-staff collaboration used as a working model and a tool." Criminal Behaviour and Mental Health **2**:169-177.

Fisher and Beech (1999). "Current Practice in Britain with Sex Offenders." Journal of Interpersonal Violence **14** (3): 240.

Fisher, M. (1996). "Changing Pennsylvania's Sentencing Philosophy Through the Elimination of Parole." Widener Journal of Public Law **5**: 269-96.

Fitch, W. L. (1998). "Sex Offender Commitment in the US." Journal of Forensic Psychiatry **9** (2): 237-240.

Fitzgerald, E. (1990). "Chemical Castration: MPA Treatment of the Sexual Offender." American Journal of Criminal Law **18** (Fall): 1-60.

Fitzgerald, E. (1995). "The Criminal Justice Act 1991: Preventative Detention of the Dangerous Offender." European Human Rights Law Review **1** (1): 39-48.

Fox, K. (1999). "Changing Violent Minds." Social Problems **46** (1): 88-103.

Franklin, D. (1994). "The Right Three Strikes." The Washington Monthly **26** (9): 25.

Frenken, J., L. Gijls, et al. (1999). "Sexual Offender Research and Treatment in the Netherlands." Journal of Interpersonal Violence **14** (4): 347-371.

Fujimoto, B. K. (1992). "Sexual Violence, Sanity, and Safety." University of Puget Sound Law Review **15** (3): 879-911.

Gallagher, B. (1997). "Now That We Know Where They Are, What Do We Do With Them: The Placement Of Sex Offenders in the Age of Megan's Law." Widener Journal of Public Law **7**: 39-85.

Genders, E. and E. Player (1995). Grendon. Oxford, Clarendon Press.

Glaser, W. (1991). Assessing the Dangerousness and Treatability of Sex Offenders in the Community. Serious Violent Offenders: Sentencing, Psychiatry and Law Reform, Australian Institute of Criminology.

Gordon, D. (1998). "Keeping Sex Offenders off the Streets." State Legislatures **24** (3): 32.

Gould, K. K. (1998). "If it's a Duck and Dangerous . Permanently Clip its Wings or Treat it until it Can Fly?" Loyola of Los Angeles Law Review **31**: 859-882.

Grann (1999). "Psychopathy (PCL-R) Predicts Violent Recidivism Among Criminal Offenders." Law and Human Behaviour **23** (2): 205.

Grann (1999). "Psychopathy (PCL-R) Predicts Violent Recidivism among Criminal Offenders with Personality Disorders in Sweden." Law and Human Behaviour **23**(2): 205.

Grant, I. (1998). "Legislating Public Safety: The Business of Risk." Canadian Criminal Law Review **3** (2): 177-242.

Greenburg, D. M. (1998). "Sexual Recidivism in Sex Offenders." Canadian Journal of Psychiatry **43** (5): 459.

Greig, D. (1991). The Politics of Dangerousness. Serious Violent Offenders: Sentencing, Psychiatry and Law Reform, Australian Institute of Criminology.

Grossman, L. S. (1999). "Are Sex Offenders Treatable? A Research Overview." Psychiatric Services **50**(3): 349-361.

Guggenheim and Fagan (1996). "Preventative Detention and the Judicial Prediction of Dangerousness for Juveniles." Journal of Criminal Law and Criminology **86** (2): 415 . 448.

Gunn, E. (1994). "Washington's Sexually Violent Predator Law: The 'Predatory Requirement' ." UCLA Women's Law Journal **5**: 277-287.

Halpern, A. L. (1992). "The Insanity Verdict, the Psychopath and Post Acquittal Confinement." Psychiatric Quarterly **63** (3): 209-243.

Hanks, D. K. (1991). Selective Incapacitation: Preventative Detention of the Violent Offender, Vantage Press.

Hansen and Lykkelesen (1997). "Treatment of Dangerous Sexual Offenders in Denmark." Journal of Forensic Psychiatry **8** (1): 195-199.

Hansson, D. (1990). Recommendations from the Institute of Criminology, University of Cape Town to the Commission of Inquiry into the Continued Inclusion of Psychopathy as a Certifiable Mental Illness and the Handling of Psychopathic and Other Violent Offenders. Cape Town, University of Cape Town.

Hare, E. H. (1991). The Hare Psychopathy Checklist - Revised. Toronto, Multi-Health Systems.

Harris, P. (1995). "Prison-Based Sex Offender Treatment Programs in the Post Sexual Psychopath Era." Journal of Psychiatry and the Law **23** (4): 555.

Hasselt, V. and Hersen (1999). Handbook of Psychological Approaches with Violent Offenders Contemporary Strategies and Issues, Kluwer Academic/Plenum Publishers.

Henham, R. (1993). "The European Context of Sentencing Violent Offenders." International Journal of the Sociology of Law **21** (3): 265.

Henham, R. (1995). "Dangerous Trends in the Sentencing of Mentally Abnormal Offenders." Howard Journal of Criminal Justice **34** (3): 10-18.

Henham, R. (1998). "Sentencing Sex Offenders: Some Implications of Recent Criminal Justice Policy." Howard Journal of Criminal Justice **37** (1): 70-81.

Herman, M. J. (1995). "Are the Children of Illinois Protected from Sex Offenders." The John Marshall Law Review **28**: 883-914.

Hicks, P. (1993). "Castration of Sexual Offenders: Legal and Ethical Issues." Journal of Legal Medicine **14** (December): 641-67.

Hiday, V. A. (1990). "Dangerousness of Civil Commitment Candidates A 6 Month Follow Up." Law and Human Behaviour **14** (6): 551-567.

Hill, R. W. (1992). "Prediction of Dangerousness (Letter)." Canadian Journal of Psychiatry **37**(3): 222.

Hobson, J. S., J. (1998). "Measurement of Psychopathy in a UK Prison Population Referred for Long-Term Psychopathy." Brit. J. Crimolo.

Holnes, C. A. (1991). "Psychopathic disorder: a category mistake?" Journal of Medical Ethics **17**: 77-85.

Home Office. (1998). Mentally Disordered Offenders Conference Report, Home Office Special Conferences Unit.

Home, Office. (1999). Criminal Justice Conference: Protecting the Public From Dangerous Offenders, Home Office Special Conference Unit.

Home Office. (1999). Managing People with Severe Personality Disorder Home Office. (1999). Report of the Department of Health and Home Office Working Group on Psychopathic Disorder, Department of Health.

Hood, R. and S. Shute (1996). "Protecting the Public: Automatic Life Sentences, Parole, and High Risk Offenders." Criminal Law Review: 788-800.

Horowitz, A. (1995). "Sexual Psychopath Legislation: Is There Anywhere to Go But Backwards?" University of Pittsburgh Law Review **57**: 35-78.

Hughes (1997). "First Stage Evaluation of a Treatment programme for Personality Disordered Offenders." Journal of Forensic Psychiatry **8** (3): 515-527.

Jackson, M. (1997). "The Sentencing of Dangerous and Habitual Offenders in Canada." Federal Sentencing Reporter **9** (5): 256-61.

Janus, E. (1996). "Preventing Sexual Violence: Setting Principled Boundaries." Indiana Law Journal **72** (Winter): 157-214.

Janus, E. 5. (1998). "Hendricks and the Moral Terrain of Police Power Civil Commitment." Psychology, Public Policy and Law **4** (1/2): 297-322.

Jerusalem, M. (1995). "A Framework for Post-Sentence Sex Offender Legislation: Perspectives on Prevention." Vanderbilt Law Review **48** (January): 2 19-55.

Jones (1998). "An Investigation of the Personality Characteristics of Mentally Disordered Offenders." Journal of Forensic Psychiatry **9** (1).

Ministry of Justice. (1997). *Sentencing Policy and Guidance: A Discussion Paper*, New Zealand Ministry of Justice.

Kahn and Chambers (1991). "Assessing Reoffence Risk and Juvenile Sexual Offenders." Child Welfare **VLXX**(3): 333-346.

Keon-Cohen, B. (1991). Can the Victoria Parliament Abolish Fundamenta Rights? Serious Violent Offenders: Sentencing, Psychiatry and Law Reform, Australian Institute of Criminology.

Kinzig J. (1997). "Preventative Measures for Dangerous Recidivists." European Journal of Crime, Criminal Law and Criminal Justice **5** (1): 27-57.

Klein, R. K. (1998). "Colloquium Remarks: Sexually Violent Predator Law." Loyola of Los Angeles Law Review **31**(3): 883-893.

Klotz, J. A., D. B. Wexler, et al. (1992). "Cognitive Restructuring Through Law: A Therapeutic Jurisprudence Approach to Sex Offenders and the Plea Process." University of Puget Sound Law Review **15**(3): 579-595.

Kopel, D. (1995). "Sentencing Policies Endanger Public Safety". USA Today **124**:64

Kroner and Mills (1997). "The Criminal Sentiments Scale: Predictive Validity in a Sample of Violent and Sex Offenders." Journal of Clinical Psychology **53**(4): 399.

Kunz, C. (1997). "Towards Dispassionate Effective Control of Sexual Offenders." The American University Law Review **47**(2): 453-85.

La-Fond, J. (1992). "Washington's Sexually Violent Predators Statute: Law or

- Lottery? A Response to Professor Brooks.” University of Puget Sound Law Review **15**(3): 755-799.
- La-Fond, J. Q. (1992). “Washington’s Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control.” University of Puget Sound Law Review **15**(3): 655-708.
- Lageman, A. (1997). “Dangerous Offender Legislation: A Short Term Solution in a Long Term Problem.” Dickenson Journal of International Law **16**(1): 203-26.
- Laing, J. (1997). “The likely impact of mandatory and minimum sentences on the disposal of mentally disordered offenders.” Journal of Forensic Psychiatry **8**(3): 504-8.
- Laing, J. (1998). “Mentally disordered offenders: sentencing policy under the Crime (Sentences) Act 1997.” The Journal of Forensic Psychiatry **9**(2): 424-434.
- Larson and Z. Hanlon (1999). “The Minnesota SOST and Sexual Reoffending in North Dakota: A Retrospective Study.” International Journal of Offender Therapy and Comparative Criminology **43**(1): 71-77.
- Lieb, R. (1996). Washington’s Sexually Violent Predator Law: Legislative History and Comparison with Other States, Washington State Institute for Public Policy.
- Leng, R., Taylor, R. & Wasik, M. (1998). Crime and Disorder Act 1998 London, Blackstone Press Ltd.
- Leone, C. M. (1994). “Sexual Predators.” Seton Hall Legislative Journal **18**: 890-909.
- Leuw, E. (1995). Recidive na onslag uit tbs (Recidivism after forensic-psychiatric treatment) English Summary, WODC (Ministry of Justice, Netherlands).
- Lieb, R. and Matson, S., (1998). Sexual Predator Commitment Laws in the United States: 1998 Update. Olympia, Washington, Washington State Institute of Public Policy: 38.
- Lieb, R., V. Quinsey, et al. (1998). Sexual Predators and Social Policy. Crime and Justice: A Review of Research. M. Tonry, The University of Chicago Press. **23**: 43-114.
- Lohrasbe, S. (1992). “Dangerous Offender Hearings (Letter).” Canadian Journal of Psychiatry **37**(3): 221.
- Lombardo, R. (1997). “California’s Unconstitutional Punishment for Heinous Crimes.” Fordham Law Review **65**: 2611-46.
- Losel, F. (1998). Treatment and Management of Psychopaths. Psychopathy: Theory, Research and Implications for Society. D. J. Cooke, Forth, A.E., Hare, R.D. Dordrecht, Kluwer Academic Publishers.

Lucas, W. E. (1991). Review for Release: The Use and Misuse of Psychiatric Opinion Serious Violent Offenders: Sentencing, Psychiatry and Law Reform, Australian Institute of Criminology.

Lynam, D. R. (1996). "Early Identification of the Fledgling Psychopath." Psychological Bulletin **120**(2): 209-234.

Lynch, J. and W. Sabol (1997). Did Getting Tough on Crime Pay. Washington, Urban Institute Crime Policy.

Maleng, N. (1992). "The Community Protection Act and the Sexually Violent Predators Statute." University of Puget Sound Law Review **15**(3): 82 1-826.

Mals, P. and G. Grantham (1993). "Queensland Boards a Sinking Ship: New Dangerous Offenders Legislation." Alternative Law Journal **18**(1): 17-20.

Marques (1999). "How to Answer the Question Does Sex Offender Treatment Work." Journal of Interpersonal Violence **14**(4): 437.

Marshall (1999). "Current Status of North American Assessment and Treatment Programmes for Sexual Offenders." Journal of Interpersonal Violence **14**(3): 221.

Mason, B. (1995). The Penalties and Sentences Act 1992 (Qld): Pitfalls for the Disadvantaged?, Austlii Web Site 1999.

Mason, J. and B. Parke (1995). "The Queen of Hearts in Queensland: A Critique of Part 10 of the Penalties and Sentencing Act 1992 (QLD)." Criminal Law Journal **19**(6 December).

McMurrin, M., Egan, V. and Ahmadi, S. (1998). "A Retrospective Evaluation of a Therapeutic Community for Mentally Disordered Offenders." The Journal of Forensic Psychiatry **9**(1): 103-113.

Meek, J. (1995). "The Revival of Preventative Detention in New Zealand 1986-93." Australian and New Zealand Journal of Criminology **28**(3): 225-257.

Merkel, R. (1991). 'Dangerous Persons': To Be Gaoled for What They May Do, Not For What They Have Done. Serious Violent Offenders: Sentencing, Psychiatry and Law Reform, Australian Institute of Criminology.

Miller, B. (1998). "A Review of Sex Offender Legislation." Kansas Journal of Law and Public Policy **7**(2): 40-69.

Moran, P. (1999). Anti-Social personality Disorder and Epidemiological Perspectives Gaskell.

Nash, M. (1992). "Dangerousness Revisited." International Journal of the Sociology of Law **20**(4): 337-350.

Neal, D. (1991). Personality Disorder. The Criminal Justice System and the Mental Health System. Serious Violent Offenders: Sentencing, Psychiatry and Law Reform, Australian Institute of Criminology.

Neff, C. (1997). "Victim's Rights and Megan's Law; Deterrence, Remediation or Vengeance." The Maryland Bar Journal**30**(September/October): 14-18.

New South Wales Law Reform Commission, (1996). The Structure of Imprisonment in New South Wales in Sentencing. Sydney, New South Wales Law Reform Commission: 73-149.

New York Bar Association, (1997). "Report on the Proposed Determinate Sentences for Non-Predicate Violent Felony Offenders." Record of the Association of the Bar of the City of New York **52** (Oct.): 717-25.

Ogloff, J. R. P., Wong, S. and Greenwood, A. (1990). "Treating Criminal Psychopaths in a therapeutic community." Behavioural Sciences and the Law**8**:181-90.

Oldham, J. M., Kellman, H. D., et al (1992). "Diagnosis of DSM-III-R personality disorders by two semi-structured interviews: patterns of comorbidity." American Journal of Psychiatry **149**: 213-220.

Pallone, N. (1990). Rehabilitating Criminal Sexual Psychopaths: Legislative Mandates. Clinical Quandaries Transaction Publishers.

Parke, J. and B. Mason (1995). "The Queen of Hearts in Queensland: A Critique of Part 10 of the Penalties and Sentences Act 1992 (Old)." Criminal Law Journal**19**: 3 12-33 1.

Petrunik, M. (1994). Models of Dangerousness A Cross Jurisdictional Review of Dangerous Offender Legislation and Practice Ottawa, Solicitor General Canada.

Pfafflin (1999). "Issue, Incidence and Treatment of Sexual Offenders in Germany." Journal of Interpersonal Violence **14**(4): 372.

Potas, I. (1991). The Principles of Sentencing Violent Offenders: Towards a More Structured Approach. Serious Violent Offenders: Sentencing, Psychiatry and Law Reform, Australian Institute of Criminology.

Pouchard (1998). "Prevention and Repression of Sexual Offenders Against Children." European Psychiatry: The Journal of the Association of European Psychiatrists **13** (2): 112.

Pratt, J. (1995). "Dangerousness, Risk, and Technologies of Power." Australian and New Zealand Journal of Criminology**28**: 3-31.

Pratt, J. (1996). "Criminology and History: Understanding the Present." Current Issues in Criminal Justice**8**(1): 60-76.

Pratt, J. (1996). "Governing the Dangerous: An Historical Overview of Dangerous Offender Legislation." Social and Legal Studies **5**(1): 21-36.

Pratt, J. (1996). "Reflections on Recent Trends towards the Punishment of Persistence." Crime Law and Social Change **25**(3): 243-264.

Prettyman, T. (1998). "Federal and State Constitutional Law Challenges to State Sex Offender Laws." Rutgers Law Journal **29**: 1075-1103.

Pins, H. (1990). "The Supervision of Potentially Dangerous Offender Patients in England and Wales." International Journal of Offender Therapy and Comparative Criminology **34** (3): 213-222.

Pins, H. (1998). "Dangerous Offenders: Some Problems of Management." International Review of Law Computers and Technology **12** (2): 299-313.

Royal College of Psychiatrists, (1996). Response to Home Office Consultation Document. London, Royal College of Psychiatrists.

Ray, M. and L. Craze (1991). Provisions for Violent Offenders: Perpetuating Myths or Confronting Challenges Serious Violent Offenders: Sentencing, Psychiatry and Law Reform, Australian Institute of Criminology.

Reardon, J. D. (1992). "Sexual Predators: Mental Illness or Abnormality? A Psychiatrist's Perspective." University of Puget Sound Law Review **15**(3): 849-853.

Reske, H. (1994). "Throwing Away the Key." American Bar Association Journal **80**: 66.

Rice, M. E., T. H. Grant, (1992). "An Evaluation of a Maximum Security Therapeutic Community for Psychopaths and Other Mentally Disordered Offenders." Law and Human Behaviour **16**(4): 399-412.

Richards, L. (1998). "Criminal Procedure-Plea Withdrawal-Grounds for Allowance North Dakota." North Dakota Law Review **74**(1): 157-76.

Rideout, J. C. (1992). "So What's in a Name? A Rhetorical Reading of Washington's Sexually Violent Predators Act." University of Puget Sound Law Review **15**(3): 781-807.

Robinson, P. (1993). "Forward: The Criminal-Civil Distinction and Dangerous Blameless Offenders." Journal of Criminal Law and Criminology **83**(Winter): 693-717.

Rogers, R. (1992). "Dangerous Offender Hearings (Letter of Reply)." Canadian Journal of Psychiatry **37**(3): 221-222.

Rogers, R. (1992). "Prediction of Dangerousness (Letter of Reply)." Canadian Journal of Psychiatry **37**(3): 222-223.

Rogers, R. and E. Lynett (1991). "The Role of Canadian Psychiatry in Dangerous Offender Testimony." Canadian Journal of Psychiatry **36**(2): 79-84.

Rollman, E. M. (1998). "'Mental Illness': A Sexually Violent Predator is Punished Twice for One Crime." Journal of Criminal Law and Criminology **88**: 985-1014.

Romi, J. C. (1996). "Sexual Offenders and the Law." Prensa Medica Argentina **83**(4): 304.

Rothchild, S. (1996). "Beyond Incarceration: Juvenile Sex Offender Treatment." Journal of Law and Policy **4**: 7 19-58.

Royal College of Psychiatrists. Offenders with Personality Disorders, Royal College of Psychiatrists.

Russell, S. (1997). "Castration of Repeat Sexual Offenders." Houston Journal of International Law **19**(Winter): 425-59.

Sahola and Chesterman (1998). "Sexual Offending in the Context of Mental Illness." Journal of Forensic Psychiatry **9** (2): 267-280.

Salm, D. New Law Relating to Civil Commitment of Sexually Violent Persons (1993 Wisconsin Act 479), Wisconsin Legislative Council Staff Info Memo 94-21.

Scheingold, S., T. Olson, et al. (1992). "The Politics of Sexual Psychopathy: Washington State's Sexual Predator Legislation." University of Puget Sound Law Review **15**(3): 809-820.

Shapiro, J. (1992). "Sources of Security." University of Puget Sound Law Review **15**(3): 843-848.

Shaw and Conacher (1993). "The Use of the Ontario Mental Health Act as a Means of Preventative Detention for the Dangerous Mentally Ill Offender." Journal of Forensic Psychiatry **4**(3): 441.

Shine, H. A. (1998). "Measurement of Psychopathy in a UK Prison Population Referred for Long Terms Psychotherapy." B. J. Crim. **38**(3): 504.

Sigler and Hageman (1998). "An Evaluation of the Implementation of a Specialised Treatment of Sexual Offenders Programme." International Journal of Offender Therapy and Comparative Criminology **42**(3): 198-209.

Singleton, N., Meltzer, H., Gatward, R., (1998). Psychiatric Morbidity Among Prisoners in England and Wales. London, Statistical Office.

Smith, A. (1998). "Psychiatric Evidence and Discretionary Life Sentences." Journal of Forensic Psychiatry **9**(1): 17-38.

Smith, A. (1998). "Psychiatric evidence and discretionary life sentences." The Journal of Forensic Psychiatry **9**(1): 17-38.

Smith, A. N. (1995). "What's Unfair About the Community Protection Act 1994." Civil Liberty **159** (March): 8.

Solomka, B. (1996). "The role of psychiatric evidence in passing 'longer than normal' sentences." Journal of Forensic Psychiatry **7**: 239-55.

Soothill and Francis (1998). "Poisoned Chalice or Just Desserts (The Sex Offenders Act 1997)." Journal of Forensic Psychiatry **9**(2): 281-293.

Soward, J. (1998). "Mandatory Indeterminate Sentences Under Dangerous Offender Legislation." Dalhousie Journal of Legal Studies **7**:189-213.

Stein, P. and G. Tyler (1993). Personality Disorder Reviewed, Gaskell.

Stovall, C. (1998). "The State's Response to Sexual Offenders." Kansas Journal of Law and Public Policy **7**(2): 29-39.

Street, R. (1998). *The restricted hospital order: from court to the community*. London, Home Office.

Stuhff, P. E. (1998). "Utah's Children: Better Protected than Most by New Civil Sex Offender Incapacitation Laws?" Journal of Contemporary Law **24**(2): 295-333.

Suedfeld, P. and Landon (1978). *Approaches to Treatment. Psychopathic behaviour: Approaches to research*. R. D. Hare, and Schalling D. Chichester, Wiley.

Svensson, P. (1991). *The Case for Due Process in Reviewable Sentences. Serious Violent Offenders: Sentencing, Psychiatry and Law Reform*, Australian Institute of Criminology.

Swanson, J. W. B., R.; Swartz, M.S. and Monahan, J. (1996). "Psychotic symptoms and disorders and the risk of violent behaviour in the community." Criminal Behaviour and Mental Health **6**: 309-329.

Tak, P. J. P. (1999). *The Dutch Criminal Justice System*, WODC (Ministry of Justice Netherlands): 1-109.

Teir, R. and K. Coy (1997). "Approaches to Sexual Predators: Community Notification and Civil Commitment." New England Journal of Criminal and Civil Confinement **23**: 405-426.

The Social Development Committee. (1992). *Inquiry into Mental Disturbance and Community Safety: Second Report*. Victoria, The Social Development Committee.

Thomas and Heberton (1996). "Sexual Offenders in the Community". International Journal of the Sociology of Law **24** (4): 427-443.

Thomas, D.A. (1997). "The Crime (Sentences) Act 1997". Criminal Law Review 83-92.

Toch, H. (1992). The Disturbed Violent Offender (Revised Edition) American Psychological Association.

van IJzendoorn, M. (1997 July). "Attachment Representations of Personality Disordered Criminal Offenders". American Journal of Orthopsychiatry **67** (3):449.

van IJzendoorn, M. H. F., J.T.T.M.; Derks, F.C.H.; de Ruiters, C.; Verhagen, M.F.M.; Philoos, M.W.G.; van der Staak, C.P.F.; Riksen-walraven, J.M.A. (1997). "Attachment Representations of Personality-Disordered Criminal Offenders." American Journal of Orthopsychiatry **67** (3): 449-459.

Van-Zeist, A.J.M. (1997). Forensic Psychiatry in the Netherlands. [www.http://bama.ua.edu/~jhooper/nll.html](http://bama.ua.edu/~jhooper/nll.html) 1999.

Voohis (1995). "Evaluating Interventions with Violent Offenders: A Guide for Practitioners and Policy Makers." Federal Probation **59** (2):17.

Ward and Hudson (1998). "A Model of the Relapse Process in Sexual Offenders." Journal of Interpersonal Violence **13** (6): 700.

Weeks, E.A. (1998). "The Newly Found 'Compassion' for Sexually Violent Predators." Georgia Law Review **32**: 1261-1300.

Wettstein, R.M. (1992). "A Psychiatric Perspective on Washington's Sexually Violent Predators Statute." University of Puget Sound Law Review **15** (3): 579-633.

Williams, C.R. (1991). Coping with the Highly Dangerous: Issues of Principle Raised by Preventative Detention. Serious Violent Offenders: Sentencing, Psychiatry and Law Reform, Australian Institute of Criminology.

Wilson, L.A. (1998). "No Longer Free to Offend: Involuntary Civil Commitment Statutes for Sexual Predators Create the Basis for a Uniform Act." Northern Illinois University Law Review **18**: 351-386.

Winick and L. Fond (1998) "Special Theme: Sex Offenders- Scientific Legal and Policy Perspectives." Psychology, Public Policy and the Law **4** (1/2): 1076-8971.

Wolchover, D. a-A., Anthony (1999 February 26). "Detention of Psychopaths without Trial, Gaol cell confessions and the case against Michael Stone." New Law Journal: 285.

Wood, D. (1990). "A One Man Dangerous Offenders Statute – The Community Protection Act 1990 (Vic)." Melbourne University Law Review **17** (June): 497-505.

Wood, D. (1997) "Reductivism, Retributivism and the Civil Detention of Dangerous Offenders." Utilitas **9** (1): 131-146.

Wood, F. (1991). Risk Assessment and Release Procedures for Violent Offenders, Sexual Psychopaths, Final Report. Minnesota, Department of Corrections.

Wormith and Hanson (1992). "The Treatment of Sexual Offenders in Canada;An Update." Canadian Psychology **33** (2) : 180-198.

Yoon, A. (1998). Politics and Precedence: The Legislative History of Violent Offender Incarceration and Truth in Sentencing in the 1994Crim Bill and 1995 AmendmentsRand.

Zalewski, R. (1992) "Preventative Detention: Justified or Justice Denied?" Law Institute Journal **66** (11): 1008-1011.

Zonana, H.V. and M.A. Norko (1999). "Sexual Predators." The Psychiatric Clinics of North America **22** (1):109-127.

### **Personal Contact Sources**

Campbell, M., (1999), Director, Corrections Policy, Department of Justice, Canada.

Lieb, R. (1999), Washington State Institute for Public Policy.

Leuw, Ed., (1999), Ministry of Justice, The Netherlands.