Dangerousness and Preventive Detention

by Mr. JOHN VAN GRONINGEN

Mr Van Groningen is well known to members of the Australian Crime Prevention Council. He has been Chairman of the Victorian branch for some years and has served a term as National President of the Council. He has done much valuable research work for the Government of Victoria, holding senior posts in the Attorney-General's Department and in the Law Reform Commission of Victoria. His paper was written to promote discussion on the treatment of dangerous offenders. There should be no doubt about its achieving that aim.

A SOCIOLOGICAL APPROACH

Four major issues (and many minor ones) stand in the way of efforts to reach a consensus on what the basis of criminal justice should be. Unfortunately, these are not subject to proof in the light of present knowledge, and all have major moral components on which there are considerable disagreements. I have chosen to state these in the form of premises and have accepted them as given. I acknowledge that in taking this position, I leave myself open to criticism.

I The Authority of the Crown (State)

The Crown has the right, and indeed the obligation, to protect its citizens from dangerous activities, including those defined as crimes. The Crown has the right to determine and define which activities and actions (as well as lack of actions) are to be defined as crimes. It is acknowledged that the Crown is responsible to the people.

When analysed, it can be seen that there is no single monolithic Crown or State. It exists in several (if not many) forms, Municipal, State and Commonwealth Governments being the most obvious. The authority of each of these, the powers they possess and the responsibilities they have vary greatly.

When it comes to criminal justice, as with its other responsibilities, the Crown has the obligation to promote an environment that allows and encourages humans to flourish. These conditions include peace, protection of democratic institutions and the resolution of conflict.

II Personal and Social Responsibility

The individual offender and society to varying degrees share the responsibility for the commission of crimes.

A human being is not merely the passive product of the interplay between his or her inborn characteristics and his or her life experiences (nature and nurture). Society must share the responsibility for the individual's actions if and when it fails to provide the environment that gives children the chance to develop as human beings. Further, current social attitudes and activities serve as precipitating factors in crime. Society has an obligation to seek remedies for all involved in and affected by crime and anti-social behaviour.

III Punishment

Punishment cannot and should not be separated from the concept of desert. The concept of desert is the primary link between punishment and justice and should remain so.

According to the theory held by some (often referred to as the humanitarian view), to punish is mere revenge. They maintain that the only legitimate motives for punishing are to deter others by example or to 'cure' the person being punished. When this theory is combined, as it frequently is, with the belief that all crime is more or less pathological, the idea of 'healing' or 'curing' results in punishment becoming therapeutic. Programs criminals are required to undertake, even if and when referred to as being therapeutic, are just as compulsory as when they were referred to as punishment. This, I contend, results in a person who breaks the law being deprived of his rights as a human being.

The humanitarian theory of punishment will result in an instrument of tyranny more far reaching than the concept of desert, for if crime and disease are to be regarded as the same thing, it follows that any state of mind which 'we' choose to call 'disease' can be treated as crime and compulsorily cured. The concepts of crime and punishment will be replaced by those of disease and cure.

IV Dangerous and Mentally Impaired Persons

The Crown has an obligation to protect the community from persons who are dangerous. Further, the Crown should identify and treat people who are mentally ill or suffering from mental disorders.

These are undoubtedly very controversial issues. (Recent events in Victoria should be sufficient to verify this assertion.)

The premise includes the implication not only that such persons exist (of which there is general agreement) but that they can be identified (of which there is much disagreement).

While there are undoubtedly issues arising from the first

three of the premises stated above, I will confine the remainder of my remarks to the fourth premise, mentally impaired and dangerous persons.

At the outset, it should be made clear that the issues of dangerousness and preventive detention need not be complicated by mental impairment – but it is often the case that they are.

In discussing the issues of dangerousness and the need for protection from such persons, Nigel Walker states,

> Every jurisdiction has some statute or practice which allows it to deal in some special way with offenders who are considered dangerous. In some jurisdictions, the statutes use the word 'dangerous'. Some merely imply it by phrases such as 'for the protection of the public'. Some do not clearly distinguish dangerousness from mere recidivism, and rely on measures which allow persistent offenders to receive special sentences."[1]

(It is not clear as to whether "every jurisdiction" was meant to include jurisdictions outside of the United Kingdom or not.) Recent research conducted by the author of this paper determined that legislation exists in each State and Territory in Australia with the exception of Victoria which provides for a judicial finding whereby an offender can be detained as a "dangerous or habitual offender". Similar legislation existed in Victoria but was repealed in 1985.

A summary of the legislation can be found in Appendix 1 of this paper.

At first glance, it might be concluded that this legislation is directed at habitual offenders who may or may not be dangerous. However, it should be noted that in every instance, with the possible exception of the Northern Territory which is not as specific, the legislation makes it clear that the behaviour must be serious and include repeated acts of violence.

Victoria continues to detain persons "at the Governor's Pleasure". As this detention is indeterminate, it might be argued that this practice is similar to that existing in other States relating to the imprisonment of dangerous offenders. This is only partially correct as a person can only be detained at the Governor's Pleasure subsequent to having been found not guilty by reason of insanity of an offence (in practice, almost always for homicide).

Since 1908, England has had either "preventive detention" (either as a supplement to or as substitute for ordinary sentences), or the "extended sentence" introduced by the *Criminal Justice Act* 1967 and now included in the Power of Criminal Courts Act 1973 (sections 28, 29). These sections permit but do not mandate a higher court to impose an extended term of imprisonment for persistent offenders who have been convicted on indictment of an offence carrying a maximum sentence of at least two years, providing the following conditions are satisfied:

a) The offence of which he has been convicted is punishable with imprisonment for two years or more.
b) The offence was committed within three years of a previous conviction of such an offence or within three years of his final release from prison after serving a sentence for such an offence.
c) He has been convicted on indictment or sentenced by a higher court for such an offence on at least three previous occasions since his 21st birthday.
d) The total length of the prison sentences for which he was sentenced on those occasions was not less than 5 years and he was sentenced to preventive detention on at least one of them or to imprisonment on at least two of them including either one sentence of at least three years or two of at least two years in respect of a single offence.
e) The court is satisfied, by reason of his previous conduct and the likelihood of his commiting further offences that it is 'expedient to protect the public from him for a substantial time'.
f) The offender has been given at least three days notice of the intention to prove the necessary convictions and sentences. The Prosecution should indicate to the court, on the advance copy of the offender's antecedents, that he seems eligible for the sentence, and on the basis of which convictions and sentences. Notice, however, is given after conviction, and only if the court has indicated its intention to pass an extended sentence. If he is in custody, the prison governor serves the notice; otherwise this is done by the police.
g) The court issues an 'extended sentence certificate'.

In practice the courts seem content to pass extended sentences of less than ten years. This relates primarily to the release provisions. Extended sentence prisoners earn similar remissions to ordinary prisoners and are also eligible for parole although much less likely to be granted it. If released, the prisoner will be on licence and therefore subject to recall until the nominal end of his sentence. He is therefore under supervision for a much longer period of time.

Based on research information, the use of extended sentences is rare. Only a few of those who satisfy the criteria for eligibility are sentenced in this manner.

One of the reasons put forward in respect of the reluctance of imposing extended sentences relates to the availability of life imprisonment for many cases in which judges feel a need to protect the public. Life sentences while mandatory for murderers over the age of 18 are discretionary for a number of other offences, including burglary, aggravated burglary, arson, criminal damage intended to endanger life, grievous bodily harm, incest or intercourse with a girl under 13 years of age, kidnapping, manslaughter, murder and rape.

It is normal practice to consider medical evidence before passing a life sentence, and it is accepted that the offender's mental condition need not be one which psychiatrists can treat. Even if it is, a condition which would not justify a hospital order, may justify life imprisonment; for example, personality disorder falling short of treatable psychopathic disorder.

If the offender's mental condition is of a nature or degree which makes a hospital order appropriate, the Crown Court can take the special precaution of adding a restriction order under s.40 of the *Mental Health Act* 1983 if the court believes that the nature of the offence makes this necessary for the "protection of the public".

The effects of the restriction order are:

a) none of the limitations on the compulsory detention of a non criminal patient apply to the offender-patient;

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1 Walker, Nigel, *Sentencing: Theory, Law and Practice.* Butterworths, London, 1985 (p.356).

b) the medical officer in charge cannot give him leave of absence, transfer him to another hospital or discharge him without the Home Secretary's consent. If leave of absence is allowed, the Home Secretary as well as the hospital administration can recall the patient;

c) if discharge is allowed, it can be made subject to conditions in much the same way as a parole licence, and if it is, the ex-patient is liable to be recalled (on grounds which do not seem to be limited to the breach of a condition).

A restriction order can specify its duration or in other cases no time limit is set. Most orders appear to have no time limit.

Only the Crown Court can make a restriction order, but a Magistrates Court can commit an offender to the Crown Court with a view to this, provided that he is not under the age of 14, that all conditions for a hospital order are fulfilled, and that the Magistrates Court has not made a hospital order to deal with him in any other way. The Crown Court is then free to make a hospital order with or without a restriction order or to deal with the offender in any other way in which the Magistrates Court could have dealt with that person.

Given the present level of knowledge and human resources and taking into account the attitude toward capital punishment of most civilised countries, the only effective way to protect society from dangerous offenders is to place them in custody. In theory, this practice will only be effective for the duration of the incarceration, or until the person is unlikely to re-offend. If offenders are not held for such periods as is present practice, the incarceration results in only a postponement of offences in the view of many. For the majority of offences, postponement is what we achieve as the vast majority of offenders are released. Unfortunately, many of those released offend again. Our society accepts this and the practice of releasing offenders into the community after having served a term of imprisonment is not seriously criticised. (The length of time they were incarcerated is, however, often criticised.)

Ironically, the objections to and problems associated with preventive detention are more pronounced in jurisdictions where sentences are short. Where sentences are relatively long for serious offences, both dangerous and non-dangerous offenders are kept out of circulation for substantial periods of time. In jurisdictions which have relatively short sentences, the push for the introduction of preventive detention is much stronger.

Those opposed to preventive detention, often referred to as 'anti-protectionists', are opposed for two major reasons; practical and ethical. The practical argument is one of logistics. It is asserted that the number of persons who repeatedly steal, rob, use or sell drugs or vandalise are so numerous that no society could afford the resources to detain these people in custody and so protect society. They argue that the most that can be accomplished is to selectively incapacitate small numbers of offenders because they are the most likely to re-offend if and when returned to society. In practice, however, not even experts (if these claim to exist) are able to identify those most likely to re-offend. As those who commit the most offences would therefore be the most likely to be detained, this policy would result in the most repetitive offenders being the most likely to be detained. Consequently, it can be argued that from the point of view of prevention, the majority of long, protective sentences are unnecessary and, in the opinion of the anti-protectionists, they are mistakes. They assert that there are fewer mistakes if there were no protective sentences at all.

The ethical argument put forward by the anti-protectionists is simpler still. Since deserts set the limits to the severity of the penalty for an offence, a term of imprisonment which is longer in order to prevent possible repetition is unjustified.

The superficiality of the ethical version is not difficult to see. It begs two questions; first, by assuming at the outset that there must always be retributive limits to the length of a prison sentence and second, that the only proper function of a custodial sentence is retributive punishment. The first assumption would probably be granted by the majority of people, but it is not logical to take it for granted; it is not axiomatic. The second assumption needs to have the support of an argument which the anti-protectionists have not provided. Even if it is accepted that imprisonment is normally used with the intent to be retributive, this does not mean that it should not be used for other purposes.

Likewise, the logistics argument is flawed when it points out that so far as harmful offenders are concerned, fewer mistakes would be made if there were no increase in the length of sentences for the protection of other people. This is now a very doubtful claim. Research in England and California has shown that it is possible to identify categories of men whose re-conviction rate for robberies and other forms of crime involving violence is substantially greater than 50 per cent, so that their prolonged (preventive) detention would involve fewer mistakes than their release.[2] Belkin and his colleagues concluded that over 87 per cent of those arrested will have been arrested before, or put differently, the probability of being arrested is 0.87 chances in one, or close to a certainty.[3] While this latter research pertains to re-arrest and not to re-offence, it must be acknowledged that most of those arrested for serious crimes are convicted and, consequently, imprisoned. An argument which relies on counting the number of mistakes as is done by the anti-protectionists assumes that all mistakes are equally serious. However, the mistakes involved in deciding to release are quite different than those made in respect of those it is decided to retain. One involves releasing a number of offenders who will again inflict serious harm on society. The other involves retaining (not releasing) a number of offenders who, if released, would not do so, but who cannot be distinguished at the time of the decision from those who would. Most people would consider the first kind of mistake to be far more serious than the second type of mistake. Classifying the two types of mistakes as simply mistakes and glossing over the differences in the impact that would result from each type of mistake is, in my opinion, dishonest.

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2 Walker, Nigel, "Unscientific, Unwise, Unprofitable or Unjust?" *British Journal of Criminology.* 22:3, 1982 (p.276).

3 Belkin, Jacob; Blumstien, Alfred and Glass, William, "Recidivism as a Feedback Process: An Analytical Model and Empirical Validation" *Journal of Criminal Justice* 1; 1973 (pp.7-26).

4 Floud, J. and Young, W., *Dangerousness and Criminal Justice,* Heinemann, London, 1981.

Some, for example the Floud Committee,[4] would add that offenders who have inflicted serious harm on people have, in effect, given society the right to use sentences for the protection of the public.

It is accepted that to live in society we have to bear the risk of being assaulted, raped or otherwise wronged by people who have hitherto shown no disposition to commit offences. Society has no right to demand that people be detained because their mere existence contributes to this risk. (To argue otherwise would result in most, if not all of us, being detained.) People must be allowed a 'presumption of harmlessness' unless and until they have forfeited this right. But they forfeit it when they demonstrate by proved conduct that they have failed to adhere to the rules proscribing such conduct. Society then has, in the words of the Floud Committee, the right to "redistribute the risks". This does not mean that the courts must impose a preventive or protective sentence – it merely argues that they should not be prevented from doing so.

So far, I have said very little about those persons who are said to be suffering from some form of mental impairment. In my opinion, if the issue of dangerousness has not been raised; that is, there is no history of behaviour that can be described as dangerous, then these persons should be given treatment consistent with their condition as determined by health professionals.

I accept that if and when people are involuntarily detained in a hospital, that this may well be considered a form of preventive detention. I do not, however, wish to canvass that matter in this paper.

When mentally impaired persons have a history of dangerous behaviour and/or have been before the courts having been charged with offences which involved violence, whether or not they were found guilty, then, in my opinion, intervention is both necessary and justified.

The right of such individuals to receive treatment, as well as the obligation of society to treat mentally ill and mentally disordered dangerous people, should be accepted.

I accept that there is considerable debate as to the definition of mental illness. It is not for me to define mental illness, and I do not propose to offer a definition. I do, however, strongly recommend that mental illness be defined. Further, the definition should clearly state what mental illness is – as opposed to what it is not. I would go as far as to recommend that the recommendations made by the Council of Europe in its discussion of rules and guidelines for involuntary placement in hospitals become the basis for such a definition. The Council states in its, "comments on the rules";

> The term "persons suffering from mental disorder" was preferred to that of "mentally ill persons" since certain persons, although they are not considered as "mentally ill", suffer from such mental disorders that they might require placement. It was therefore thought that these persons, when subjected to involuntary placement, also need the legal guarantees and protection offered by the rules. [5]

I do not accept the narrow view that concludes that only persons who have been diagnosed as having some specific illness (or condition) are eligible for hospitalisation. To accept such a view, in my opinion, would result in many persons needing treatment and care being deprived of such treatment and care. Similarly, society which has an obligation to provide this treatment and care is prevented from providing this to those who need and, at times, request it. Further, in cases where such people are dangerous, not only is society placed at risk, but such persons may well be subject to unfair and brutal management by persons not capable or trained to assist them.

Conclusion

I accept that the passing of legislation and the creation of more laws is seen by many as an erosion of the freedoms that we have. If we glance at the pages of history, we will find laws which merely are, or if they are not, surely should be, compacts of free men. Often these have been mere tools to control certain classes or individuals and at other times have resulted from an accidental or temporary need.

> Happy are those few nations that have not waited for the slow succession of coincidence and human vicissitude to force some little turn for the better after the limit of evil has been reached, but have facilitated the intermediate progress by means of good laws. And humanity owes a debt of gratitude to that philosopher who from the obscurity of his isolated study, had the courage to scatter among the multitude the first seeds, so long unfruitful, of useful truths.[6]

I think it appropriate to look at the principles of those early writers on which so much of today's criminal justice system was established. Cesare Beccaria, in his essay, *On Crimes and Punishments*, makes this observation in discussing the role of society (the Crown) to punish, protect and control;

> No man ever freely sacrificed a portion of his personal liberty merely in behalf of the common good. That chimera only exists in romances. If it were possible, every one of us would prefer that the compacts binding others did not bind us; every man tends to make himself the centre of his whole world; laws are the conditions under which independent and isolated men united to form a society. Weary of being in a continual state of war, and of enjoying a liberty rendered useless by the uncertainty of preserving it, they sacrificed a part so that they may enjoy the rest in peace and safety. (Beccaria drew heavily on the writings of Rousseau, Montesquieu and Plato).[7]

It is my view that we need legislation to address the issues canvassed in this paper.

The legislation should in respect of dangerous people strike a balance which will ensure that the rights of individuals are protected and that society is protected from dangerous individuals.

Those that are mentally ill, disordered and dangerous deserve to be treated and protected from abuse. Society has a vested interest in ensuring that every effort is made to safeguard itself from such persons as well as to provide for them treatment and care, and, if possible and practical, to return them to live in the community.

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5 Council of Europe, "Legal Protection of Persons Suffering from Mental Disorder Placed as Involuntary Patients". Recommendation No. R (83)2, Strasbourg 1983.

6 Jacoby, Joseph E., *Classics of Criminology*, Moore Publishing Company, Illinois, 1979.

7 Beccaria, Cesare, *On Crimes and Punishments*, 1764, (Translated by Henry Paolucci), Bobbs-Merrill, 1963.

HABITUAL DANGEROUS OFFENDERS

	SA	QLD	NT	Tas.	NSW	WA
When Status is Assigned	At time of sentencing in addition to any other sentence imposed	At time of sentencing as part of the sentence. If in lower court – court may order person to be brought before the Supreme Court to be dealt with as a habitual criminal	At time of sentencing, person can be assigned a status of habitual criminal. This status commences when sentence imposed by the court has been completed.	At time of sentencing, person may be deemed to be a "dangerous criminal".	At time of sentencing in addition to any other sentences imposed.	At time of sentencing in addition to any other sentence *or* instead of another sentence.
Level of Court	Supreme	Any court	Any court	Not Specified	Supreme & District	Not Specified
Type of Offence	Indictable	Indictable & Summary	All offences (determined by 'nature' of offence)	Any crime including an element of violence	Indictable & Summary	Indictable
Age	Over 18	Not Specified	Not Specified	Over 17	Over 25	Over 18
Prior Offences/ Pattern of Offending	2 or 3 depending on the seriousness of the prior offences	2 or 3 depending on the seriousness of the prior offences	Implies a pattern ie "number of times" Implies serious offences "nature of such convictions"	At least 1 prior offence (including an element of violence)	At least 2 indictable offences	At least 2 offences (indictable)
Length of Status – as Habitual (Dangerous) Criminal	Indeterminate – discharge by Supreme Court on application by the Crown or by the person	Indeterminate – discharge at the recommendation of a Supreme Court Judge to the Governor – person can apply	Indeterminate – at the Administrators pleasure – can be discharged on the recommendtion of a Supreme Court judge to the Administrator	Indeterminte – at the Governor's Pleasure – release by Royal Prerogative of mercy	Not less than 5 or more than 14 years – concurrent with other sentences. Release at expiration of habitual criminal sentence or earlier on license by order of the Governor	Indeterminate – at Governor's Pleasure – procedure for release not specified in Criminal Code