

**AUSTRALIA'S PREVENTIVE DETENTION LAWS:
AN ANALYSIS OF RISK ASSESSMENT PRACTICES AND
CHARACTERISTICS OF SEX OFFENDERS**

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GENERAL DECLARATION

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Declaration for thesis based or partially based on conjointly published or unpublished work.

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I hereby declare that this thesis contains no material which has been accepted for the award of any other degree or diploma at any university or equivalent institution and that, to the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

This thesis includes 2 original papers published in peer reviewed journals and 2 unpublished publications. The core theme of the thesis is the intersection of Australia's post-sentence legislation targeting sexual offenders and the forensic clinical risk assessment. The ideas, development and writing up of all the papers in the thesis were the principal responsibility of myself, the candidate, working within the Centre for Forensic Behavioural Science, School of Psychology and Psychiatry under the supervision of Professor James RP Ogloff and Doctor Stuart DM Thomas.

The inclusion of co-authors reflects the fact that the work came from active collaboration between researchers and acknowledges input into team-based research.

In the case of chapters 3, 4, 5, and 6 my contribution to the work involved the following:

Thesis chapter	Publication title	Publication status	Nature and extent of candidate's contribution
Chapter Three, Paper 1	Calling the tune without the music: A psycho-legal analysis of Australia's post-sentence legislation	Published	Reviewed literature; conducted theoretical analysis; prepared paper. 70%
Chapter Four, Paper 2	Designated as dangerous: Characteristics of sex offenders subject to post-sentence orders in Australia	In Press	Reviewed literature; secured ethics; collected, coded and statistically analysed data; prepared paper. 70%
Chapter Five, Paper 3	An analysis of dangerous sexual offender assessment reports: Recommendations for best practice	In Press	Reviewed literature; designed study, secured ethics; collected, coded and statistically analysed data; prepared paper. 70%
Chapter Six, Paper 4	A clarion call: Caution and humility must be the theme when assessing risk for sexual violence under post-sentence laws	Published	Reviewed literature; developed theoretical analysis; prepared paper. 45%

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ABSTRACT

In an effort to reduce repeat sexual offending, some Australian jurisdictions have introduced legislation providing for the restriction of a sex offender's liberty in anticipation of future predicted crimes. The operation of preventive detention legislation relies centrally upon forensic clinician assessments of risk for future sexual offending. This legislation has raised important research questions related to the validity of the laws' assumptions on sexual recidivism and risk prediction, the characteristics of sex offenders submitted to post-sentence orders, and clinicians' standard of practice of risk assessment in this legal context. This thesis conducted a series of theoretical and empirical investigations linked to these research areas.

The first study consisted of a psycho-legal analysis whereby the assumptions underpinning the laws' provisions were evaluated in light of the empirical evidence on risk prediction, sex offender recidivism, and sex offender rehabilitation. Together, the findings revealed that many of the laws' assumptions are invalid; this has implications for the efficacy of the legislation to protect the community from sexual offending.

The second study empirically examined the demographic, developmental, clinical, and criminal characteristics of a sample of 50 sex offenders under post-sentence orders in Western Australia, New South Wales, and Victoria. Data was obtained from court-ordered clinical risk assessment reports. The findings described a group of demonstrably dangerous men who exhibited an early onset of sexual offending and complex psychiatric presentations, with a high prevalence of sexual deviance and antisociality. Their developmental histories were characterised by early exposure to multiple vulnerability factors such as abuse, illicit substance use, and social dislocation. Their complex and varied needs require a comprehensive treatment

approach. The early onset of their offending suggests that well resourced early intervention services, such as those offered by mental health professionals, can play a critically important role in any effort to alter offending trajectories such as those exhibited in this sample.

The third study empirically evaluated the standard of risk assessment practice amongst experts retained in preventive detention proceedings. Eighty-six court-ordered forensic evaluation reports prepared by 23 mental health professionals were obtained and analysed. Overall, the findings were mixed. Positively, valid structured risk assessment tools were commonly utilised. Also, there was good agreement between experts on the final risk assessment outcome, suggesting a consensus in relevant areas relating to risk assessment. However, a number of concerning results were also found (e.g., some evaluators adopted invalid risk assessment methodologies; others incorrectly applied and interpreted otherwise valid risk tools). Taken together, the findings suggest that the standard of practice of risk assessment must be raised. Recommendations for best practice were proposed.

Key words: risk assessment, sex offenders, characteristics, preventive detention, legislation, best practice, public policy, psycho-legal analysis

PART I: INTRODUCTION AND STUDY OVERVIEW

Chapter 1

Introduction

Societal Context

Fear of the sexual predator occupies a prominent position in the collective consciousness of society. Over the past generation it has changed our behaviour such that parents in many countries now routinely drive their children to school for fear of what might happen to them if they are left alone. In recent times, this fear has been exacerbated in Australia and elsewhere by a small number of highly publicised incidents involving child-sex offenders reoffending against young children after serving a custodial sentence for a similar offence (McSherry, Keyzer, & Freiberg, 2006). The considerable media attention accorded to such tragic sexual crimes has inflamed and given expression to the public's outrage (Vess, 2009a). In the aftermath of these incidents, communities have demanded that governments protect them from sexual offenders and the risks they pose for repeat offending (La Fond, 2005).

The pressure placed on governments to address the problem of sexual violence has also intensified in light of the growing recognition of the high incidence of sexual victimisation and its harmful consequences. A brief survey of the literature indicates that sexual abuse is a worldwide social problem with high prevalence (Beech, Leam, & Browne, 2009; Fergusson & Mullen, 1999; Fitch & Hammen, 2003; Johnson & Sacco, 1995). Indeed, research into the frequency of child sexual abuse suggests that 5-10% of boys and girls experience severe abuse involving sexual penetration (Fergusson & Mullen, 1999). While in a recent Australian Bureau of Statistics' (2005)

report, 5.5% of men and 19.1% of women reported being the victims of sexual assault since the age of 15.

Research has also identified that victims of sexual abuse suffer a number of long-term deleterious outcomes related to mental health and interpersonal functioning (Fergusson & Mullen, 1999; Gilbert et al., 2009; Mullen, Martin, Anderson, Romans, & Herbison, 1993). Contemporary research indicates that victims of child sexual abuse are 20 times more likely to commit suicide and are at a significantly increased risk for accidental fatal drug overdose (Cutajar et al., 2010).

This confluence of factors, combined with societies' increasing preoccupation with both the ascertainment and avoidance of risk (Glazebrook, 2010), has contributed to a pressure that has been brought to bear upon governments to protect the public from sexual offenders. In response, governments have enacted a range of criminal justice policies specifically targeting sex offenders. These have included, for example, enhanced sentencing options, mandated treatment, community registration, and residency and reporting requirements (Harris, Smallbone, Dennison, & Knight, 2009; Smallbone & Ransley, 2005; Vess, 2009a). However, arguably the most hard-line and controversial legislative effort toward the prevention of repeat sexual offending has been the enactment of preventive detention (or post-sentence) legislation introduced in many American states, and most recently New Zealand and a number of Australian states (Ogloff & Doyle, 2009).

Statement of the Problem

Post-sentence legislation provides for the continued detention or community supervision of sex offenders whose sentences have expired but who are still considered to be 'dangerous' (Mercado & Ogloff, 2007; Sentencing Advisory Council, 2006). Given the laws allow for the deprivation of liberty in anticipation of

future predicted crimes, the stakes are enormously high in preventive detention proceedings: erroneous decisions may result in the indefinite loss of an individual's rights and liberties or place the community at risk (Hart, 2003).

Clearly, for a reliable and valid operation of this legislation, it is imperative that the courts are able to accurately identify those at highest risk for committing further sexual offences. In reaching a decision on whether to impose a post-sentence order, courts are statutorily required to consider forensic clinician reports that assess the level of risk or likelihood that the offender would commit further sexual offences if released from prison or if not supervised in the community. While in some cases this risk assessment is not treated as decisive (see *Director of Public Prosecutions for Western Australia v. Mangalamara*, 2007), more commonly the court's judgment turns critically upon the clinician's assessment of risk for future sexual violence (Ogloff & Doyle, 2009).

The laws' dependence on clinicians' risk assessments has raised concerns amongst mental health professionals that the technology of risk assessment is not sufficiently advanced to enable experts to identify high-risk offenders with a definitive level of certainty (Doyle & Ogloff, 2009; see Hart, Michie, & Cooke, 2007). Indeed, the judicial attention given to the clinical risk assessment in the operation of such grave legislation places a considerable burden on the clinician and raises expectations perhaps impossible to attain.

Nevertheless, despite an extensive literature on risk assessment instruments for sex offenders (see Hanson & Morton-Bourgon, 2007) and risk factors for sexual recidivism (Hanson & Bussière, 1998), as well as international guidelines for conducting assessments of risk for future sexual violence (Doren, 2002; Miller,

Amenta, & Conroy, 2005), there is no Australian data on the risk assessment practices of clinicians operating within this legal setting.

Establishing the standard of risk assessment practice of clinicians conducting assessments for preventive detention proceedings is a central aim of this thesis. The field of risk assessment has evolved significantly in the last 10 years. This has given rise to the development of new methods and instruments of risk assessment as well as a greater understanding of the limits to the science of risk assessment. Thus, evaluating the standard of practice of risk assessment of evaluators assessing offenders under post-sentence proceedings warrants considerable attention. This is made all the more urgent given the gravity of this legislation.

Research Aims

Preventive detention legislation is a relatively new phenomenon in this country. This thesis represents the first empirical analysis of offenders subject to, and clinicians' risk assessment reports under, Australia's preventive detention laws. Given this, the broad aims of the thesis are acceptably exploratory.

Research aim one. To describe the major provisions of Australia's preventive detention legislation as they pertain to the relevant jurisdictions, evaluate the validity of the assumptions underpinning the provisions by reference to the contemporary literature on sexual recidivism, sex offender treatment, and risk assessment for future sexual violence, and consider the soundness of the legislation in light of the analysis.

Research aim two. To describe a cohort of sex offenders subject to post-sentence orders across demographic, developmental, clinical, and criminal dimensions and consider treatment and policy implications in light of the findings.

Research aim three. To evaluate the standard of forensic clinicians' risk assessment practices in the context of performing evaluations under preventive

detention legislation. This includes an analysis of the: (a) methods and instruments of risk assessment utilised by clinicians, (b) reporting of Static-99 outcome information, (c) limitations to the practice of risk assessment identified by clinicians, and (d) inter-rater reliability of clinicians' final risk judgments.

Overall, this thesis presents a series of coherently-themed theoretical and empirical investigations pertinent to Australia's post-sentence laws. It seeks to advance our understanding of how clinicians go about the task of assessing risk for future sexual violence, and the collective characteristics of those sex offenders submitted to a post-sentence order. In so doing, this thesis aims to provide the first such data of its kind in Australia.

Thesis Outline

This thesis comprises seven chapters organised into four parts. The thesis consists of two articles published in peer reviewed journals and two articles accepted for publication in peer reviewed journals.

Part I of the thesis comprises the introduction that includes a brief outline of the social, legal, and clinical context of this research, an enunciation of the thesis' aims, and the thesis outline, which comprises a brief description of the chapters of the thesis.

Part II consists of chapters 2 and 3. Chapter 2 contains a literature review that aims to orient readers to the central themes of the thesis. There is some overlap between the literature review and sections of the papers. Where appropriate an abbreviated review of the literature is provided and the reader is referred to the relevant chapter where the literature is discussed in greater depth. Chapter 3 comprises the psycho-legal analysis. This theoretical analysis seeks to assess the extent to which the assumptions underpinning preventive detention legislation are

supported by the research literature on sexual recidivism, sex offender treatment, and the technology of risk assessment. Given that effective legislative policy depends upon the validity of the basic assumptions upon which it is founded, an analysis of the laws' assumptions was warranted in light of the haste with which the legislation was passed. While an original analysis in its own right, this chapter also extends upon its predecessor by providing a concise review of the relevant literature. The chapter begins with a preamble and the paper published in a peer reviewed journal is then presented.

Part III presents the empirical analyses of the thesis. The first empirical investigation is set out in chapter 4. The paper presents the first systematic descriptive characterisation of a sample of offenders subject to post-sentence orders along demographic, developmental, clinical, and criminal dimensions. Court-ordered psychiatric and psychological risk assessment reports required under these laws were the data source. Treatment and policy implications are presented. Again, the chapter begins with a preamble, followed by the article accepted for publication in a peer reviewed journal.

Chapter 5 presents the second empirical investigation and is the focal point of this thesis. Employing the same data source referred to above, this study descriptively analyses the risk assessment and reporting practices of Australian mental health professionals across three states. Recommendations for best practice are presented. The chapter begins with a preamble and is followed by a paper which has been accepted for publication.

Part IV consists of an integrated discussion. Chapter 6 presents a paper published in a peer reviewed journal that summarises the prominent clinical and practical issues that limit the utility of an assessment of risk for future sexual

violence. The paper advocates for a clinically cautious and professionally rigorous approach to risk assessment. An alternative model to managing sex crime risk is also proposed. The final chapter of the thesis presents an overview of the main findings, summarises the implications arising from the studies, presents the limitations pertaining to the empirical investigations, and considers future directions to advance the literature on how forensic clinicians go about the task of risk assessment.

Readers should note that a separate chapter detailing the empirical studies' methodology was deemed redundant. The method pertaining to the empirical investigations is straightforward and has been provided in sufficient detail as part of the empirical analyses papers.

PART II: LITERATURE REVIEW AND PSYCHO-LEGAL ANALYSIS

Part II of the thesis is composed of two chapters. The first chapter presents a review of the literature addressing the international and national development of preventive detention legislation targeting sexual offenders, the role of mental health professionals under the Acts, a brief history of risk assessment focusing on current approaches, and prior research evaluating standards of risk assessment practice amongst forensic clinicians. There is overlap between some sections of the literature review and the papers presented in the thesis. Chapter 3 presents a psycho-legal analysis of Australia's preventive detention laws. Implications for the efficacy of the legislation are considered in light of this theoretical analysis. Chapter 3 consists of a paper published in a peer-reviewed journal.

Chapter 2

Literature Review

"Legal justice today has at least as much to do with criminals as with crimes...[F]or a long time, the criminal had been no more than the person to whom a crime could be attributed and who could therefore be punished, today, the crime tends to be no more than the event which signals the existence of a dangerous element..."

(Michel Foucault, *The Dangerous Individual*, in *Politics, Philosophy, Culture*, 1988, p. 128)

The (Initial) Rise and fall of Preventive Detention Legislation in America

Sexual crime has long been known to incite the public's fear and anger (see Hirning, 1945; Sutherland, 1950). Accordingly, governments have, over the years, exclusively targeted sex offenders with various criminal justice policies designed to reduce the risks of sexual recidivism and attenuate public concern (Smallbone & Ransley, 2005; Vess, 2009a). One of the earliest examples of special legislation to deal with sex offenders was that of the Sexual Psychopath statutes enacted in some of the United States during the 1930s (Vess, 2009a). These laws allowed for the indefinite civil commitment of sex offenders for the purpose of protecting society from future sexual victimisation by treating the mental malady understood to impel the offender to commit sexual crime (Sutherland, 1950). Interestingly, the laws' focus on treatment reflected the prevailing belief in American society at that time that

sexual offences were an expression of a mental illness that was treatable (Burdon & Gallagher, 2002); such that sex offenders were viewed as people who needed hospitalisation and treatment, as opposed to incarceration and punishment (Janus, 2000). Accordingly, the indefinite civil commitment of sex offenders was introduced as a replacement for a custodial sentence (McSherry & Keyzer, 2009).

This first generation of civil commitment laws targeting sex offenders began to fall out of favour during the 1970s (Burdon & Gallagher, 2002). A number of factors were understood to contribute, including (a) the rising doubt over the efficacy of sex offender treatment, (b) increasing concerns of mental health and criminal justice agencies regarding the difficulty in identifying sexual psychopaths and predicting post-release behaviour, and (c) the larger shift in society from a rehabilitative to a retributive philosophy for dealing with criminal offenders (American Psychiatric Association, 1999; Burdon & Gallagher, 2002; Janus, 2000). Consequently, many of the Sexual Psychopath statutes were eventually repealed which brought the first generation of the indefinite civil commitment of sex offenders to a close.

The Resurrection of Sexually Violent Predator Laws in 1990s America

The resurrection of civil commitment laws was again triggered by a familiar sequence of events: the media reporting of a brutal sexual crime, an outraged public demanding something be done; and a besieged government passing legislation targeting sex offenders and their risks for reoffending (Sutherland, 1950). Specifically, in Washington State in 1989, a recently released child-sex offender who had vocalised his intent to torture children upon his release, abducted, raped and sexually mutilated a young boy (La Fond, 2005). The outraged public demanded that the community be protected against such predatory sex offenders who continued to

pose a risk of sexually reoffending despite completing custodial sentences for previous sexual offences.

However, the task set before the state was not straightforward. The US Constitution prohibited extending someone's prison term after conviction and punishment and therefore the state was unable to use the criminal justice system to confine dangerous sexual offenders at the expiration of their sentence (La Fond, 2005). To meet the demands of the public and Constitutional mandates, a task force set up by Governor Booth Gardner developed the *Community Protection Act of 1990* (Fitch & Hammen, 2003), which established statutory procedures for the civil commitment of persons who, due to a 'mental abnormality or a personality disorder', were likely to engage in predatory acts of sexual violence (Washington State Department of Social and Health Services, 2008). This second generation of civil commitment laws differed from the earlier legislation because it came into force *after* rather than in lieu of sentence (McSherry & Keyzer, 2009).

The constitutionality of the US post-sentence civil commitment schemes was first challenged in the Supreme Court in the State of Kansas. A five to four decision upheld the law as constitutional (*Kansas v Hendricks* 521 US 346, 1997), thus giving constitutional approval to previously enacted laws and "giving the green light to other States wanting to enact similar legislation" (McSherry & Keyzer, 2009, p. 6).

Since this Supreme Court decision 20 U.S. states and federal governments have enacted laws providing for the post-sentence civil commitment of sex offenders (Elwood, Doren, & Thornton, 2010).

Preventive Detention Legislation in Australia

The decision to introduce preventive detention legislation in Australia came about in circumstances similar, though far less dire, than those in the State of

Washington. The impending release of a recidivistic child-sex offender, Dennis Raymond Ferguson, gave rise to considerable police and community concern about the risk that he would reoffend. Ferguson had a long history of convictions for sexual assaults on children and in January 2003 he was released following the expiration of a 14-year prison term during which he had failed to participate in any treatment programs and had been overheard declaring his intention to engage in further child-sex offences upon release (*Director of Public Prosecutions v. Ferguson*, 2003). Ferguson's initial release in 2003 is understood to have provided the impetus for the Queensland government to consider ways of preventively detaining sexual offenders who, at the completion of their prison sentence, continue to present an unacceptable risk for sexual offending (McSherry, 2005).

In June 2003, the Queensland Parliament enacted the *Dangerous Prisoners (Sexual Offenders) Act 2003* (hereafter *DP(SO)A 2003*, (QLD)). This Act enabled the Attorney-General to apply to the Supreme Court for the continued detention (or supervised release) of a subclass of sexual offenders for the stated purposes of (a) community protection and (b) the provision of continued control, care or treatment to facilitate an offender's rehabilitation (Mercado & Ogloff, 2007).

The first application under this legislation concerned Robert John Fardon, an offender with a history of recidivistic sexual violence. Indeed, in 1988, after having served 8 years for indecently dealing with a girl under the age of 14 and rape, Fardon was released from prison, only to commit further offences of rape, sodomy, and assault 20 days later (McSherry & Keyzer, 2009). Sentenced to another 14 years imprisonment, Fardon's sentence expired just after the Queensland Act was enacted in 2003.

Fardon challenged the validity of the Act in the Queensland Court of Appeal and in the High Court of Australia on the basis that it conferred on the Supreme Court of Queensland functions incompatible with its judicial role, under the requirements of Chapter III of the Constitution (Keyzer, Pereira, & Southwood, 2004). Six of the seven judges (Justice Kirby dissented) upheld the constitutional validity of the Act, opening the door for preventive detention regimes across Australian jurisdictions (McSherry, 2005).

Since this ruling, the States of Western Australia (*Dangerous Sexual Offenders Act 2006*, hereafter *DSOA 2006*, (WA)) and New South Wales (*Crimes (Serious Sex Offenders) Act 2006*, hereafter *CSSOA 2006* (NSW)), have introduced parallel legislation allowing for the continued detention or supervised release of sexual offenders at the end of their prison terms. In Victoria, the government initially introduced legislation allowing only for the community supervision of child-sex offenders post-release (*Serious Sex Offenders Monitoring Act 2005*, hereafter *SSOMA 2005* (VIC)). Later, the government extended the relevant offences to include sexual offences against adults (Justice Legislation Amendment Bill, 2008, s 2(c)). Most recently, the Victorian government expanded the scope of the legislation and introduced a detention scheme (*Serious Sex Offenders (Detention and Supervision) Act 2009*, hereafter *SSO(DS)A 2009* (VIC)). This new law repeals the earlier legislation.

As it now stands, the states of Queensland, Western Australia, New South Wales, and Victoria have all implemented legislation allowing for the post-sentence detention or community supervision of sexual offenders considered to pose an unacceptable risk of sexual reoffending at the expiration of their prison term. We now

turn to the statutorily prescribed role of mental health professionals in bringing these laws into effect.

The Role of the Mental Health Professional and Risk Assessment under the Acts

In the operation of Australia's post-sentence schemes mental health professionals and their expert opinion on risk for future sexual offending figure centrally. Under the schemes in Queensland, New South Wales, and Western Australia, the court must appoint two qualified psychiatrists to conduct separate psychiatric examinations of the offender (*DP(SO)A 2003*, (QLD), s 8(s); *DSOA 2006* (WA), s 14(2); *C(SSO)A 2006* (NSW), s 15(4)). Under the Victorian scheme applications must be accompanied by an assessment report prepared by a psychologist, psychiatrist, or other health service provider (*SSO(DS)A 2009* (VIC), s 8(b)). The primary issue to be addressed by the psychiatric and psychological examinations is the offender's level of risk or likelihood to commit future sexual offences. In deciding whether to order the offender's continuing detention or community supervision, the court must have regard to the risk assessment report(s) mandated by each Act. While the experts' reports are not necessarily dispositive, very often the court's decision of whether to impose the order turns critically upon the clinician's opinion of risk for future sexual violence.

Although the criminal justice system often turns to clinicians for an opinion on the level of risk for violence posed by an offender (e.g., for assistance with decisions regarding bail applications, sentencing, parole etc, see Ogloff & Davis, 2005), never has a clinical risk assessment operated as the main reason for depriving an individual of their liberty in the absence of a finding of guilt for crimes already committed. Indeed, the law's dependence on risk assessment for the operation of this legislation

places a considerable burden on the clinician given the consequences of the legal decision to be made.

The primary role of risk assessment in these proceedings has also intensified concerns amongst mental health professionals and others (e.g., Daffern, 2010; Ruschena, 2003), regarding the validity and precision of risk assessment methods and technologies. Presently, there are a number of plausible approaches to conducting risk assessment. In what follows, these approaches, along with their advantages and limitations, will be described, and evidence for their precision outlined. An exhaustive review of risk assessment methods and instruments is beyond the scope of this chapter; however, given that assessments of risk for future sexual violence play such an important role in post-sentence legislation, a discussion of the contemporary and alternative approaches to risk assessment is warranted.

The Practice of Risk Assessment

Historically, psychiatrists and psychologists were unable to reliably discriminate between those who would, and would not, engage in future violent behaviour (Ewing, 1991; Monahan, 1981). Research indicated that mental health professionals and release decision-makers tended to be especially cautious in their assessments and over-predicted the probability of future violent behaviour (see Belfrage, 1998). One problem leading to such a high number of false positives in predicting risk for violence was the fact that research had not identified empirically valid risk factors associated with violence. Accordingly, subjective and unstructured clinical decisions were being made, with questionable accuracy (see Grove & Meehl, 1996).

However, within the last 15 years, substantial research efforts to develop and enhance risk assessment technologies have resulted in the identification of numerous

risk factors associated with sexual recidivism, and a collection of formal tools for assessing risk for future sexual violence (Douglas & Skeem, 2005; Ogloff & Daffern, 2004). This research has culminated in the development of a number of risk assessment frameworks from within which clinicians can approach the task of risk assessment.

Empirically guided risk assessment. As noted, the historically poor reliability of clinical predictions of violence was partly linked to a paucity of research establishing factors empirically linked with future violent behaviour. Furthermore, given that no single study would be sufficient to determine the validity of any risk factor, cumulative findings from multiple studies was necessary to validly identify factors associated with sexual recidivism (Cortoni, 2009). To this end, Hanson and Bussière (1998) conducted a land-mark meta-analysis of 61 independent follow-up studies between 1943 and 1995 with a total sample size of 28,972 sexual offenders. This review examined 69 potential predictors of sexual offence recidivism; the study yielded important group findings related to risk factors empirically associated with sex offenders at increased risk for sexual reoffending (Mercado & Ogloff, 2007).

The strongest predictors of sexual reoffending were related to sexual deviancy, such as prior sexual offences, deviant victim choices (e.g., boys, strangers), variety of sexual offences (e.g., contact and non-contact sexual offences), and sexual interest in children, assessed phallometrically (Hanson & Bussière, 1998). The next most important factors related to sexual recidivism were indicators of antisocial orientation, including a diagnosis of antisocial personality disorder, total number of prior criminal offences, and Psychopathy Checklist scores (PCL-R, Hare, 2003) (Hanson & Bussière, 1998). Apart from the sexual deviancy and antisociality factors, other factors to emerge as empirically related to sexual recidivism included young age,

marital status (i.e., single), and failure to complete treatment (Hanson & Bussière, 1998). More recently, Hanson and Morton-Bourgon (2005) updated this meta-analysis which reinforced deviant sexual preferences and antisocial orientations as the major predictors of sexual recidivism, thereby providing increased confidence in the validity and reliability of these risk factors.

Importantly, Hanson and Bussière's (1998) review also identified a number of factors that were not related to repeat sexual offending. These unrelated factors included being sexually abused as a child, denying the sex offence, low self-esteem, degree of force used in the sexual offence, and lacking victim empathy. Factors not related to sexual reoffending, as noted by Mercado and Ogloff (2007), are of "particular importance given the risk that clinicians may over-emphasize factors that intuitively seem relevant but in actuality bear little empirical relationship to recidivism" (p. 53).

This meta-analytic research provided robust empirical support for factors associated with sexual reoffending. Accordingly, clinicians wishing to estimate the recidivism risk of sexual offenders were now able to approach this task from an empirically guided framework, whereby an evaluator could consider a wide range of empirically validated risk factors and then form an overall opinion regarding risk (Hanson, 1998). In this way, individuals with a high number of risk factors could be said to represent a greater risk for subsequent sexual offending than individuals with few risk factors (Hanson, 2000; Hoberman, 1999).

There have been relatively few studies to evaluate the accuracy of risk assessments based upon an empirically guided approach. This is likely to be the case because actuarial approaches to risk assessment (discussed below) quickly followed the identification of risk factors associated with sexual recidivism and were

anticipated to provide superior risk judgments. Nevertheless, there is some evidence that the empirically guided approach provides an assessment of risk with some accuracy (e.g., Smith & Monastersky, 1986). Indeed, a re-analysis of Hanson and Bussière's (1998) recidivism studies indicated that studies that used guided risk assessment demonstrated significantly greater associations with recidivism than that found for unguided assessments (Hanson, 1998).

A shortcoming associated with the empirically guided framework is that because no single risk factor is sufficiently correlated with sexual recidivism to justify its use in isolation, evaluators are required to consider a *range* of empirically validated factors. However, this process lacks a transparent method for translating the pattern and number of risk factors into a recidivism prediction (Hanson, 2000). This limitation has led to the concern that the empirically guided method will result in risk assessments of low validity and low inter-rater reliability between mental health professionals (Boer, Hart, Kropp, & Webster, 1997). Accordingly, this concern stimulated efforts to develop actuarial risk scales that not only specified a grouping of risk factors but provided explicit rules and formulae for combining the presence of risk factors into probability estimates of recidivism (Hanson, 2000; Mercado & Ogloff, 2007).

Actuarial risk assessment. The actuarial framework is also based on relevant risk factors predictive of sexual reconviction. Typically, an actuarial scale consists of a limited number of risk factors that are weighted and combined to form a total risk score (Hanson, 1998). This risk score is then translated into a risk descriptor (e.g., low, medium, or high), depending upon the number of risk factors present in the individual case. The risk scores can also be used to estimate recidivism rates (Craig, Beech, & Harkins, 2009; Hanson, 1998). An advantage of this approach over the

empirically guided method is that the actuarial scale specifies the particular items to be considered in the risk assessment and provides explicit instruction as to the relative importance of each item (Hoberman, 1999).

A number of actuarial tools have been developed, mostly in North America and the UK; the most well-known instruments include the Rapid Risk Assessment for Sex Offender Recidivism (RRASOR, Hanson, 1997), the Static-99 (Hanson & Thornton, 1999), the Sex Offence Risk Appraisal Guide (SORAG, Quinsey, Rice, & Harris, 1995), and the Risk Matrix 2000 (RM2000, Thornton et al., 2003). Upon their development, the actuarial scales were found to predict sexual reconviction with moderate degrees of accuracy (Hanson, Morton, & Harris, 2003). The tools have subsequently been submitted to numerous cross-validation and replication studies across samples and countries including: Canada (Barbaree, Seto, Langton, & Peacock, 2001; Kingston, Yates, Firestone, Babchishin, & Bradford, 2008), Australia (Allan, Dawson, & Allan, 2006), the United Kingdom (Craig, Browne, & Stringer, 2004), Belgium (Ducro & Pham, 2006), Sweden (Långström, 2004), and Denmark (de Vogel, de Ruiter, van Beek, & Mead, 2004). These validation studies provided further evidence for the reliably modest predictive accuracy of actuarial scales (Craig & Beech, 2010), as does a recent meta-analysis of the accuracy of recidivism risk assessments for sexual offenders which found that actuarial scales were the most accurate method of risk assessment currently available (Hanson & Morton-Bourgon, 2007). Indeed, the ease with which actuarial assessments can be conducted, their cost-effectiveness, transparency and reliably moderate degrees of accuracy, combine to justify the popularity of this approach to risk assessment (Craig & Beech, 2010; de Vogel et al., 2004).

However, actuarial scales have limitations that relate to their general utility and to their use in applied assessments such as preventive detention hearings. Firstly, most actuarial instruments consist exclusively of static risk factors which are by their nature non-changeable (e.g., previous convictions for sexual offences). Therefore, while actuarial tools may be useful for evaluating long-term risk, they are limited by being unable to predict the onset of sexual offending behaviour, assess changes in level of risk over time, and identify those factors which need to be addressed in treatment for risk to be reduced (Craig et al., 2009; Hanson & Harris, 2000). This limitation has led to the researching of dynamic risk factors that are “changeable characteristics of the offender that have a demonstrated empirical relationship with sexual offending behaviour and that, when reduced, lead to reductions in recidivism” (Cortoni, 2009, pp. 41-42).

Secondly, the predictive accuracy of actuarial scales is dependent upon the base rate of sexual recidivism for the population from which the assessed offender is drawn (Szmurkler, 2001; Wollert, 2006). This point was illustrated by Wollert’s (2006) evaluation of the test performance of the Static-99 (Hanson & Thornton, 1999), as a function of the base rate of sexual recidivism. For the developmental sample of the Static-99, the sexual recidivism base rate was 25%, and those offenders considered high-risk (i.e., scoring 6 or above), were correctly identified as recidivists 52% of the time. However, when the recidivism base rate was reduced to 12%, Wollert’s (2006) analysis revealed that the percentage of accurately identified recidivists in the high-risk category fell from 52% to only 31%. This resulted in the clear majority of sexual offenders (i.e., 69%), though classified as high-risk, being non-recidivists. The implication of this finding is that the preservation of an actuarial tool’s predictive accuracy is dependent upon the similarity between the offender one

is assessing and the developmental sample that was used to derive the original recidivism probability estimates (Prentky, Janus, Barbaree, Schwartz, & Kafka, 2006). Discrepancies in this regard will produce many false positives.

Irrespective of this limitation, it must be noted that offenders classified as high-risk based upon the Static-99 do reliably represent an *increased* risk for reoffence relative to other sex offenders.

A significant issue that compromises the utility of actuarial instruments in applied assessments, such as preventive detention hearings, concerns the unreliability of applying the group based risk evaluation of an actuarial tool to the assessment of risk in the *individual* case (Berlin, Galbreath, Geary, & McGlone, 2003; Hart et al., 2007; Mullen & Ogloff, 2009). For example, if an offender scores 6 on the Static-99 instrument he is considered to be in the ‘high-risk’ category, 52% of whom (in the original sample) were known to reoffend throughout a 15 year follow-up. However, the instrument cannot specify whether the ‘high-risk’ offender belongs to the 52% of people in this category who sexually reoffended, or to the 48% of people who did not (Berlin et al., 2003). Therefore, an individual’s risk score on the actuarial tool fails to be a reliable guide to the individual’s *specific* risk to sexually reoffend, for the simple reason that actuarial tools are not designed to assign levels of risk to individuals but to groups (Mullen & Ogloff, 2009). This criticism has not gone uncontested (see Harris, 2003), and the debate is more fully defined in the following chapter.

Finally, other issues have been raised that arguably limit the validity of actuarial scales in the legal arena. Essentially, concerns have been raised regarding the legal relevancy of the tools and the lack of one-to-one correspondence between the legal question to be answered and the evaluative results of actuarial tools (Berlin,

2003; Hart, 2003; Mercado & Ogloff, 2007). Again, the following chapter outlines these limitations in greater detail.

Despite these shortcomings, it is well accepted that risk judgments based on actuarial tools are more accurate than unstructured clinical judgments (Bengtson & Långström, 2007; Grove, Zald, Boyd, Snitz, & Nelson, 2000; Hanson & Morton-Bourgon, 2007). Nevertheless, research efforts have been directed at developing another risk assessment framework to compensate for some of the limitations associated with the actuarial approach.

Structured professional judgment. Structured professional judgment (SPJ) instruments consist of empirically informed guidelines to assist clinicians to develop an assessment of risk (Hart, Kropp, & Laws, 2003). Similar to actuarial scales, SPJ tools also consist of risk factors derived from a consideration of the empirical and clinical practice literature (Davis & Ogloff, 2008). However, in contrast to the actuarial approach of summing items in a mechanical fashion to obtain explicit probability estimates of future reoffending risk, the SPJ framework allows clinicians to develop a structured clinical opinion of low, moderate, or high risk. The SPJ framework also takes into account both historical and dynamic risk factors. This allows clinicians to not only provide long-term assessments of risk, but develop a dynamic formulation of an individual's offending and consider the possible nature, severity and imminence of future violence (Hart et al., 2003; Mercado & Ogloff, 2007), and identify those risk factors that can be managed and those that are amenable to intervention (Mullen, 2000). In this way, the SPJ framework enables clinicians to utilise their professional judgment within a structured framework so that idiosyncratic but important characteristics of the individual that pertain to risk are considered. Thus,

it follows that the SPJ method has also been recommended for those wishing to understand their cases in depth (Hanson & Morton-Bourgon, 2007).

The Sexual Violence Risk-20 (SVR-20, Boer et al., 1997) and the Risk for Sexual Violence Protocol (Hart et al., 2003) are examples of sexual risk assessment instruments based on the SPJ framework. Due to its somewhat recent development, the SPJ approach has only been evaluated in a handful of studies; although this research has generally been quite promising, finding that the SVR-20 is predicting sexual offending with moderate degrees of accuracy (Craig et al., 2004; de Vogel et al., 2004; Macpherson, 2003). In fact, a meta-analysis of the accuracy of risk assessment instruments revealed that the strongest single predictor of sexual recidivism was a measure of structured professional judgment (de Vogel et al., 2004). The RSVP essentially builds upon the strengths of the SVR-20; however, there has been no published data validating the RSVP.

Despite often heated debate in the literature regarding the relative merits and predictive superiority of actuarial and SPJ methods (Harris, Rice, & Quinsey, 2008; Hart et al., 2007; Quinsey, Harris, Rice, & Cormier, 1998), both approaches have comparable predictive validity (Hanson & Morton-Bourgon, 2007). Moreover, actuarial and SPJ frameworks arguably represent complementary approaches to risk assessment. Actuarial tools provide a risk baseline given the empirically robust relationship between static factors and future sexual violence, while the SPJ method compliments this approach by incorporating dynamic and idiographic risk information into a comprehensive evaluation of the possible nature of future violence and provides targets for risk management (Boer, 2006; Vess, 2009b).

The final approach to risk assessment to be reviewed is one that also attempts to overcome the limitations of the actuarial framework by incorporating both static and dynamic risk factors into an overall risk evaluation.

Adjusted actuarial risk assessment. The adjusted actuarial framework is an attempt to combine the predictive accuracy of the actuarial approach with some of the flexibility of clinical judgment. The adjusted actuarial framework involves the acquisition of an actuarial prediction of risk, followed by an adjustment based upon the presence of dynamic risk factors that were not included in the initial actuarially-derived prediction, but are relevant to risk assessment (Hanson & Bussière, 1998). For example, an offender deemed as ‘high-risk’ using actuarial methods, may be reclassified as ‘medium’ risk if he is no longer abusing substances or contracts a crippling disease. The limitation of actuarial tools with respect to their exclusion of potentially relevant risk factors was a catalyst for the development of this approach (Doren, 2002).

However, concerns regarding the adjustment of actuarial predictions based on clinical judgment have been held for some time (e.g., Holt, 1986). These concerns can be summarised in the oft-cited statement of Quinsey et al (1998): “actuarial methods are too good and clinical judgment too poor to risk contaminating the former with the latter” (p. 171). As previously noted, the clinical prediction of future violence has a poor track record, thus a strong resistance to the notion of adjusting actuarial estimates based upon clinical judgment is understandable. But this caution cannot disrupt the reality that relevant risk factors that may increase or decrease reoffending risk are not considered by actuarial tools, and that dynamic risk factors remain an important consideration to an accurate assessment and management of risk (Douglas

& Skeem, 2005). How then to incorporate and combine actuarial estimates of risk with relevant dynamic risk items remains an outstanding research question.

The development of the Sex Offender Need Assessment Rating instrument (SONAR, Hanson & Harris, 2000), provided clinicians with a framework for considering how the presence of dynamic risk items may be used to adjust actuarial predictions. However, the development of this instrument contained limitations such as invalid items and when combined with the Static-99, the SONAR tool failed to add any significant incremental contribution to predicting sex crime recidivism (Hanson, Harris, Scott, & Helmus, 2007). While the tool was refined in a later study (see Hanson et al., 2007), the instrument again contained items not related to recidivism risk; however, it demonstrated a small but significant incremental validity to actuarial predictions.

While some form of adjusted actuarial risk assessment may yet rise to represent the “highest standard of practice in the coming years” (Hanson & Bussière, 1998, p. 67), it seems that at this stage, the field awaits the emergence of a valid method for doing so.

To summarise, as this abbreviated review indicates, the field of risk assessment has come along way since Monahan (1981) declared that “psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behaviour over a several year period” (p. 77). Indeed, the effect size for violence risk assessment is now superior to that of many other medical and psychological practices (Davis & Ogloff, 2008). The catalyst for this improvement has been the development of empirically-based approaches to risk assessment, such as the actuarial and structured professional judgment frameworks. Accordingly, clinical evaluations of risk informed by empirically-derived risk data should be of assistance to the courts in

making sound and reliable decisions about preventive detention or community supervision (Mercado & Ogloff, 2007).

Nevertheless, despite improved predictive accuracy the assessment of risk remains a complex task and, as outlined, there remain theoretical and practical limitations on effective prediction in the individual case (Mullen & Ogloff, 2009). Indeed, the practice of risk assessment requires a sophisticated and judicious approach. In light of such complexities, it is vital to evaluate the quality of practice in order to preserve the highest standards; in the context of preventive detention, whereby the clinical risk assessment operates as the main reason for depriving an individual of their liberty, this is a must.

Evaluating the Standard of Risk Assessment Practice

Since the introduction of preventive detention legislation in Australia, numerous publications considering the role of risk assessment in the operation of these contentious laws have been produced (e.g., Keyzer et al., 2004; McSherry, 2005; McSherry & Keyzer, 2009; Scott, 2008; Sentencing Advisory Council, 2006; Smallbone & Ransley, 2005; Sullivan, Mullen, & Pathé, 2005; Vess, 2009b; Wood & Ogloff, 2006). Despite this attention being paid to the intersection of post-sentence law and the technology of risk assessment, to date, there has been no empirical evaluation regarding *how* such assessments of risk are being conducted under these new laws.

There are, however, a handful of studies examining risk assessment practices in equivalent legal settings in the United States. For example, Levenson (2004b) investigated the inter-rater reliability of risk assessment instruments under Florida's Sexually Violent Predator (SVP) civil commitment schemes. The purpose of the study was to ascertain whether two independent evaluations of a sexual offender would

yield comparable assessments of risk; the findings would have implications for the validity of SVP statutes. The inter-rater reliability of risk assessment scores was compared on a number of risk assessment instruments, including the Static-99, PCL-R, and the RRASOR. The author found that clinicians demonstrated good inter-rater reliability with respect to their independent evaluations of risk based upon formal tools (Levenson, 2004b).

An analysis of forensic clinicians risk assessment practices for civil commitment proceedings has also been conducted (Amenta, 2005). This unpublished doctoral dissertation analysed 109 risk assessment reports prepared on sex offenders being considered for civil commitment proceedings in the State of Texas. Amongst other aims, Amenta (2005) sought to describe the risk assessment and reporting practices of mental health professionals conducting evaluations for these proceedings. Some notable findings were that (a) evaluators commonly failed to substantiate their diagnostic conclusions, (b) some evaluators neglected to identify empirically supported risk factors present in the case such as sexual deviance and antisociality, (c) a number of evaluators identified factors as indicating increased reoffending risk that have little or no empirical support, (d) few evaluators communicated the limitations to the state of scientific knowledge of risk assessment, and (e) valid risk tools were commonly employed by evaluators, as stipulated by the civil commitment statute (Amenta, 2005).

This study identified a number of areas within the practice of risk assessment that required improvement, including relevance of psychological testing utilised, identification of empirically supported risk factors, risk communication, and substantiation of psycho-legal conclusions.

The Present Study

Despite the gravity of preventive detention legislation, and the role of the clinical risk assessment in bringing the laws into effect, there is no local data examining the risk assessment practices of Australian mental health professionals in this context.

Commonly, local (e.g., Allan, Martin, & Allan, 2000; Martin, Allan, & Allan, 2001) and international (e.g., Mercado, Elbogen, Scalora, & Tomkins, 2001) attempts to understand how clinicians approach an assessment or operate within the forensic arena are made by *surveying* mental health professionals. However, a limitation to this methodology is its vulnerability to self-report biases. A more objective assessment of how forensic clinicians go about the task of risk assessment is achieved via an analysis of their *actual* reports (e.g., Amenta, 2005). The present empirical investigation represents the first analysis of reports prepared by mental health professionals conducting assessments of risk for sexual recidivism under Australia's preventive detention legislation.

This investigation is important for a number of reasons. Firstly, the research will enable a measure of the quality of expert opinion on risk being provided to legal decision-makers. Secondly, if it is found that the practice of risk assessment is inadequate then this will need to be immediately remedied given that compromised risk assessments have significant implications for public safety, the civil liberties of offenders, and the integrity of the professions to which the evaluators are ascribed. In light of these considerations, the value of an analysis of the state of forensic practice in this legal area is clear.

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Chapter 3

Psycho-Legal Analysis of Australia's Post-Sentence Legislation

Preamble to Psycho-Legal Analysis Paper

This chapter presents the first study of the thesis. It begins by contextualising the rise of preventive detention legislation in Australia and abroad. More significantly, the paper provides a psycho-legal analysis of Australia's preventive detention legislation, whereby the major assumptions underpinning these laws were isolated and their validity evaluated in light of the contemporary empirical literature on sexual recidivism, sex offender treatment, and risk assessment. Concern for the efficacy of this legislation is raised in light of the outcome of this psycho-legal analysis. Implications for developing future public-policy regarding the management of sexual offenders are discussed.

This article has been published in *The Australian and New Zealand Journal of Criminology*, a peer-reviewed journal promoting multi-disciplinary criminological study. The journal has an impact factor .316 (ISI Web of Knowledge, 2010).

The paper recently received "high commendation" from The Australian and New Zealand Society of Criminology. It was runner up in the Allen Austin Bartholomew Award 2010, an award given annually for the best article published in *The Australian and New Zealand Journal of Criminology*.

DECLARATION FOR THESIS CHAPTER THREE

Monash University

Declaration by candidate for Thesis Chapter 3, Paper 1

In the case of Chapter three, Paper 1, the nature and extent of my contribution to the work was the following:

Nature of contribution	Extent of contribution (%)
Conducted literature review, developed theoretical analysis and drafted and revised this paper.	70%

The following co-authors contributed to the work. Co-authors who are students at Monash University must also indicate the extent of their contribution in percentage terms:

Name	Nature of contribution	Extent of contribution (%) for student co-authors only
James RP Ogloff	Co-investigator, participated in the theoretical analysis and assisted with the preparation of the paper.	30%

Candidate's Signature		Date
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Declaration by co-authors

The undersigned hereby certify that:

- (1) the above declaration correctly reflects the nature and extent of the candidate's contribution to this work, and the nature of the contribution of each of the co-authors.
- (2) they meet the criteria for authorship in that they have participated in the conception, execution, or interpretation, of at least that part of the publication in their field of expertise;
- (3) they take public responsibility for their part of the publication, except for the responsible author who accepts overall responsibility for the publication;
- (4) there are no other authors of the publication according to these criteria;
- (5) potential conflicts of interest have been disclosed to (a) granting bodies, (b) the editor or publisher of journals or other publications, and (c) the head of the responsible academic unit; and
- (6) the original data are stored at the following location(s) and will be held for at least five years from the date indicated below:

Location(s)**Centre for Forensic Behavioural Science, Monash University.
505 Hoddle St, Clifton Hill, VIC 3068**

[Please note that the location(s) must be institutional in nature, and should be indicated here as a department, centre or institute, with specific campus identification where relevant.]

Signature 1

	Date
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Calling the Tune Without the Music: A Psycho-Legal Analysis of Australia's Post-Sentence Legislation

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Australian governments have introduced legislation to detain or supervise sex offenders whose sentences have expired but who are still considered to be dangerous. In the enactment of these controversial laws, governments largely overlooked a significant body of empirical knowledge on sexual offending and risk prediction. Consequently, these schemes are based on unexamined assumptions. Accordingly, an evaluation of the compatibility between these assumptions and the available science is warranted. To this end, the article will submit the central provisions of the legislation to a psycho-legal analysis whereby the assumptions underpinning the laws will be weighed against the empirical evidence. The article reveals that there is considerable disconnect between the laws' assumptions and the existing literature on sexual offending and risk prediction, such that the evidence suggests that the legislation will not achieve its aims in any meaningful and sustainable way. Future criminal justice policy in the area of sex offending needs to be collaboratively developed between policymakers and the relevant scientific communities and experts. It must be founded on cost-effective and empirically defensible approaches based on what we understand, rather than what we fear, about sex offenders.

'It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so'. (Mark Twain, 1835–1910)

The prospect of known sex offenders reoffending sexually is a significant community and criminal justice concern. Recently, the issue has been exacerbated in Australia and elsewhere by a small number of highly publicised incidents involving child-sex offenders reoffending against young children after serving a custodial sentence for a similar offence (McSherry, Keyzer, & Freiberg, 2006). In response, communities have demanded that governments protect them from sexual offenders and the risks

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they pose for repeat offending (La Fond, 2005). Over the past 5 years, a number of Australian jurisdictions have reacted to this situation by enacting special post-sentence criminal justice policies (McSherry et al., 2006).

Collectively known as 'preventive detention' legislation, Australia's post-sentence laws allow for the continued detention or community supervision of sexual offenders whose sentences have expired but who are still considered to be 'dangerous' (Sentencing Advisory Council, 2006). This legislation represents a radical departure from traditional legal philosophy and judicial functions, from punishing offenders for offences already committed to restricting the liberty of offenders for offences they *might* commit in the future (Keyzer, Pereira, & Southwood, 2004; Sentencing Advisory Council, 2006). Notably, mental health professionals play a key role in post-sentence hearings, by providing the court with an assessment of the nominated offender's risk of sexually reoffending upon which the court's decision is reliant (Scott, 2008).

The main objective of post-sentence legislation is the protection of the community from dangerous sexual offenders (McSherry et al., 2006). However, significant concerns have been raised over whether this legislation can achieve this, and other aims, in any meaningful and sustainable way (Birgden, 2007; Smallbone & Ransley, 2005; Sullivan, Mullen, & Pathé, 2005; Wood & Ogloff, 2006). These concerns have arisen following the haste with which Australian governments enacted these laws, and the lack of collaboration between policymakers and relevant professional bodies that characterised their development and implementation (Sullivan et al., 2005; Wood & Ogloff, 2006).

Within the last 20 years the forensic mental health disciplines have built a substantial and advancing body of evidence-based knowledge on measuring, managing and predicting the risk sex offenders pose for sexual reoffending (see Barbaree, Seto, Langton, & Peacock, 2001; Hanson, Morton, & Harris, 2003; Matravers, 2003). However, this scientifically based research appears to have been substantially overlooked while successive state governments enacted these controversial post-sentence legislative measures. Consequently, Australia's post-sentence laws are based on unexamined empirical assumptions about sexual offending and risk assessment; and indeed, effective legislative policy for sex offending is only as good as the accuracy of the basic assumptions upon which it is founded (Simon, 2000). Given this, an evaluation of the laws' assumptions against the current empirical state-of-play is warranted.

In this article, we first contextualise the development of post-sentence criminal justice policies targeting sex offenders and briefly outline their initial rise in the United States and later Australia. The next section identifies three major provisions of the statutes that are underpinned by assumptions about sexual reoffending and risk. These provisions will be described and interjurisdictional differences will be noted. Finally, these provisions will be submitted to a psycho-legal evaluation that consists of examining whether the assumptions upon which they are based are supported by the empirical evidence regarding sex offender recidivism, risk assessment and risk management.

When it comes to the issue of sex offenders, it is acknowledged that governments and legislators are in a difficult position, in that they have a responsibility to respond to legitimate community concern. Further, it is well-recognised that victims

of sexual abuse suffer a number of long-term deleterious outcomes, including an incidence of suicide that is more than 20 times the rate of the general population (Cutajar, Mullen, & Ogloff, in prep; Fergusson & Mullen, 1999). However, in the case of post-sentence legislation, it appears that the pressure to attenuate the public's anxieties has resulted in the development of extreme laws based more on rhetoric and anecdote, than on research and evidence-based approaches relating to sex offending and risk management (Robinson, 2003). Ultimately, this can undermine the community's confidence in governments and criminal justice agencies.

It is anticipated that a discussion of these issues can inform future law reform efforts and emphasise the need for greater cross-disciplinary collaboration in the development of criminal justice policy in the area of sex offending. We turn now to a brief review of the rise of post-sentence legislation in the United States and Australia.

The United States: The Emergence of Post-Sentence Civil Commitment

In Washington State in 1989, a recently released child sex offender who had vocalised his intent to torture children upon his release, abducted, raped and sexually mutilated a young boy (La Fond, 2005). The outraged public demanded that the community be protected against such predatory sex offenders. However, the task set before the state was not straightforward. The US Constitution prohibited extending someone's prison term after conviction and punishment and therefore the state was unable to use the criminal justice system to confine dangerous sexual offenders at the expiration of their sentence (La Fond, 2005).

To meet the demands of the public and Constitutional mandates, the State of Washington drafted a novel law: the *Community Protection Act of 1990* (Fitch & Hammen, 2003). Also known as the Sexually Violent Predator (SVP) Statute, the state established statutory procedures for the civil commitment of persons who, due to a 'mental abnormality or a personality disorder', were likely to engage in predatory acts of sexual violence (Washington State Department of Social and Health Services, 2008). Washington's 'mental health' approach to managing the problem of repeat sexual violence served as a model for other state SVP legislation in the United States (Mercado & Ogloff, 2007).

The constitutionality of the US post-sentence civil commitment schemes was first challenged in the State of Kansas. In *Kansas v. Hendricks* (1997), the US Supreme Court issued a five to four decision upholding the constitutionality of Kansas' SVP statute, rejecting Hendricks' claims that the statute violated his constitutional rights, including the double jeopardy provisions (Mercado & Ogloff, 2007; Miller, Amenta, & Conroy, 2005).

Since this Supreme Court decision, a total of seventeen states have enacted civil commitment laws for sexual offenders (Douard, 2007). As of May 2006, a total of 3,646 offenders have been detained or committed in the United States under SVP statutes (Deming, 2006). Although gaining some acceptance, the majority of US states have not accepted such laws.

The Australian Story: Ferguson, Fardon and Beyond

The decision to introduce preventive detention legislation in Australia came about in circumstances similar, though far less dire, than those in the State of Washington. In January 2003, Dennis Raymond Ferguson, a convicted child-sex offender, was released in Queensland following the expiration of his 14-year prison term. Ferguson had failed to participate in any treatment programs and had been overheard declaring his intention to engage in further child-sex offences upon release (*Director of Public Prosecutions v. Ferguson*, 2003). After relocating to New South Wales, Ferguson was charged under the *Child Protection (Offenders Registration) Act 2000* (NSW) for failing to comply with his reporting obligations having obtained employment with a cleaning company that involved him distributing its products to schools for fundraising activities (McSherry, 2005). This case provided the impetus for the Queensland government to consider ways of preventively detaining dangerous sexual offenders in prison at the completion of their sentence (McSherry, 2005).

In June 2003, the Queensland Parliament enacted the *Dangerous Prisoners (Sexual Offenders) Act 2003*, hereafter *DP(SO)A 2003*, (QLD)). This Act enables the Attorney-General to apply to the Supreme Court for the continued detention (or supervised release) of a subclass of sexual offenders for the stated purposes of (a) community protection and (b) the provision of continued control, care or treatment to facilitate an offender's rehabilitation (McSherry, 2005; Mercado & Ogloff, 2007). Similar to the SVP legislation in the United States, detention under the Queensland Act is indefinite and commences at the expiration of a prison sentence. Unlike the US legislative scheme, the Queensland legislation is part of criminal law, not civil commitment (Mercado & Ogloff, 2007).

The State of Queensland first applied its Act to Robert John Fardon, an offender with a history of recidivistic sexual violence. Indeed, in 1988, after having served 8 years for indecently dealing with a girl under the age of 14 and rape, Fardon was released from prison, only to commit further offences of rape, sodomy and assault 20 days later (*Attorney-General v. Fardon*, 2003). Sentenced to another 14 years imprisonment, Fardon's sentence expired just after the Queensland Act was enacted in 2003.

Fardon challenged the validity of the Act in the Queensland Court of Appeal and in the High Court of Australia on the basis that it conferred on the Supreme Court of Queensland functions incompatible with its judicial role, under the requirements of Chapter III of the Constitution (Keyzer et al., 2004). In *Fardon v. Attorney-General for the State of Queensland* (HCA 46, 2004), the High Court of Australia issued a six to one decision upholding the constitutional validity of the Act.

Since this ruling, the states of Western Australia, *Dangerous Sexual Offenders Act 2006*, hereafter *DSOA 2006*, (WA), and New South Wales, *Crimes (Serious Sex Offenders) Act 2006*, hereafter *C(SSO)A 2006*, (NSW), have introduced parallel legislation allowing for the continued detention or supervised release of sexual offenders at the end of their prison terms. In Victoria, the government initially introduced legislation allowing only for the community supervision of child-sex offenders post-release (*Serious Sex Offenders Monitoring Act 2005*, hereafter *SSOMA 2005*, (VIC)). Recently, however, the government introduced a Bill amending the original Act, and extending the relevant offences to include sexual offences against

adults (Justice Legislation Amendment Bill, 2008, s 2(c)). Additionally, the Victorian government intends to introduce a detention scheme (Hansard, 17 April 2008).

Interestingly, Victoria also recently enacted the *Charter of Human Rights and Responsibilities Act 2006* (VIC), and arguments have been put forward that Victoria's extended supervision legislation may be in violation of the Charter (Sentencing Advisory Council, 2006). While examining preventive detention legislation's compatibility with human rights is beyond the scope of the article, it is worth bearing in mind that a tension exists between Victoria's law and the Charter, the ramifications of which are currently being tested in Victoria's Court of Appeal (Australian Associated Press, 2008).

As of May 2008, there are 82¹ sex offenders in Australia who have been submitted to a continuing detention or extended supervision order and an ever-increasing number will have their liberties similarly deprived. In contrast to Australia's general enthusiasm for preventive detention legislation, other countries have not moved in this direction. For example, New Zealand has only introduced an extended supervision scheme, while Canada decided against enacting such legislation altogether.

As noted, Australia's post-sentence laws were hastily enacted and a significant resource of scientific research on sexual offending and assessing sexual recidivism risk was largely overlooked. The following analysis brings this research to the fore to evaluate the assumptions upon which these laws rest and thus determine whether the intended aims of this legislation can be achieved.

A Psycho-Legal Analysis of Australia's Post-Sentence Laws

In this analysis, three central provisions of Australia's post-sentence schemes are evaluated. The provisions under examination are: (a) the purposes of the schemes, (b) the eligible offenders targeted by the legislation and (c) the role of the clinical risk assessment in the legal test of risk for sexual reoffending. Each provision is described and interjurisdictional differences are identified. The provision is then submitted to an evaluation with respect to the current empirical evidence produced within the social sciences generally, and the forensic mental health professions specifically.

The psycho-legal analysis will show that: (a) while the main purpose of the schemes is to protect the community, continued detention and extended supervision is likely to have a negligible impact on reducing sexual offending; (b) the object of offender rehabilitation is compromised by its incidental status and the antitherapeutic effects of the schemes; (c) the targeting of sexual offenders for additional criminal justice intervention on the premise that sex offenders are highly recidivistic and specialise in sex crimes is misguided and unsupported by the research evidence; and (d) the assumption that forensic clinicians can identify high-risk sex offenders to the legal standard required by the schemes is empirically unjustified.

THE PURPOSES OF POST-SENTENCE SCHEMES

As Table 1 illustrates, the purposes of preventive detention and extended supervision schemes are generally (a) community protection and (b) the provision of continued care and treatment necessary to facilitate an offender's rehabilitation.

TABLE 1

The Purposes of Post-Sentence Detention and Supervision Schemes

State	Purpose of scheme
QLD (CD & ES)	To ensure adequate protection of the community [s 3(a)]. To provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation [s 3(b)].
VIC (ESO only)	To enhance the protection of the community [s 1(1)]. The purposes of the conditions are to ensure that the community is adequately protected by monitoring the offender; and to promote the rehabilitation and the care and treatment, of the offender [s 15(2)].
WA (CD & ES)	To ensure adequate protection of the community [s 4(a)]. To provide for the continuing control, care, or treatment, of persons of a particular class [s 4(b)].
NSW (CD & ES)	To ensure the safety and protection of the community [s 3(a)]. To facilitate the rehabilitation of serious sex offenders [s 3(b)].

Note. CD & ES = Continuing Detention Scheme and Extended Supervision Order. ESO only = Extended Supervision Order Scheme only.

However, differences exist interjurisdictionally with respect to the *dominant* purpose of the provisions.

Unlike the other states, the objects of New South Wales's legislation invoke a greater focus on offender rehabilitation in addition to community protection (C(SSO)A 2006, (NSW), Part 1). On the other hand, the overriding purpose of the extended supervision scheme in Victoria is 'to enhance community protection' (SSOMA 2005, (VIC), s 1). Only in section 15 of Victoria's Act does it detail the purposes of the conditions as designed to 'ensure that the community is adequately protected by monitoring the offender; and to promote the rehabilitation and the care and treatment of the offender' (SSOMA 2005, (VIC), s 15 (2)). By contrast again, the Queensland and Western Australian schemes articulate the objectives of community protection and offender treatment as alternatives: 'to provide for continuing control, care *or* treatment' (DP(SO)A 2003, (QLD), s 3(b); DSOA 2006, (WA), s 4(b)). This would suggest that under Queensland and Western Australia's legislation, the control of an offender could be provided in place of the offender's treatment (Sentencing Advisory Council, 2006). Indeed, in *Attorney-General v. Francis* (2006), Queensland's legislation was interpreted in this fashion by the court, suggesting that an offender could be submitted to a continuing detention order on the basis of any one of these alternatives in isolation (Sentencing Advisory Council, 2006).

The major assumption underpinning the schemes' purposes is that continued detention and extended supervision will meet the objectives of community protection and secondarily, the promotion of offender rehabilitation. On the surface, this assumption appears plausible, but upon closer examination of the schemes and the available science, it is less than credible. First and foremost, whether these objectives can be achieved rests solely on the premise that individuals posing a serious danger to

the community can be accurately identified. As is discussed later in the article, the scientific evidence demonstrates this assumption to be questionable (Wood & Ogloff, 2006). Nevertheless, putting the difficulties of risk prediction aside, the legislation is vulnerable to additional criticisms that cast doubt over its ability to actually achieve its purposes of community protection and offender rehabilitation in any meaningful way. In the following section, we shall evaluate whether continued detention or the conditions of community supervision will meet the Acts' objectives.

Ensuring the Protection of the Community

Post-sentence preventive detention involves detaining offenders at the end of their term of imprisonment on the basis of the person's risk to sexually reoffend. The primary goal of post-sentence detention is community protection (McSherry et al., 2006). Indeed, it is the case that the community is at least protected against the specific offender who remains detained as a result of a continuing detention order (Cohen & Jeglic, 2007). However, community protection needs to be considered beyond the duration of the offender's continued detention because unless society is prepared to detain such offenders forever, the majority will return to the community at some stage. Thus, the goal of community protection can only be persuasively accomplished if the offender's risk to the community is reduced during their post-sentence detention. However, as outlined above, offender rehabilitation is predominantly a secondary consideration. Indeed, in Queensland and Western Australia the detention of an offender could be provided in place of the offender's treatment (DP(SO)A 2003, (QLD), s 3(b); DSOA 2006, (WA), s 4(b)). Therefore, continuing detention will only defer, rather than reduce, the risk they pose to reoffend (Sentencing Advisory Council, 2006). To this end, the goal of community protection has only been temporarily reached.

When the issue of community protection is considered more broadly, the authors are also concerned that preventive detention will have a negligible impact on reducing the *overall* rates of sexual offending in the community. Firstly, most sex offences are committed by those who do not have previous sexual offence convictions (Walker, 1996). Therefore, focusing such drastic legislative attention toward a small group of offenders already in custody for sexual offences will have only a slight impact on the overarching problem of sexual offending. Secondly, research has long indicated that the majority of sexual offences committed against both children and adults are perpetrated by family members and acquaintances, the majority of whom are not reported to the police (Australian Bureau of Statistics, 2005). As a result, this legislation effectively ignores a much larger and more insidious issue of sexual abuse perpetrated by people known to their victims (Simon, 2003). These laws, informed by the erroneous stereotype of the ubiquitous predatory stranger, can be criticised for ignoring the empirical realities of sexual offending (Simon, 2003). Thus, the legislation is likely to be of limited effectiveness in increasing public safety (Becker & Murphy, 1998).

The purpose of post-sentence extended supervision is to also provide adequate protection to the community and, instead of detaining the person, generally requires the offender to comply with a range of conditions, including residence requirements, attendance and reporting, sex offender registers, curfew conditions

and treatment conditions (Birgden, 2007; Sentencing Advisory Council, 2006). Again, the legislation assumes that these conditions will meet the purpose of community protection. However, a review of the literature provides only equivocal support for the usefulness of community supervision and monitoring in protecting the community from repeat offenders (Cohen & Jeglic, 2007).

In one of the very few studies to examine the effectiveness of supervision, McGrath, Cumming, Livingston, and Hoke (2003) found that few sex offenders committed new sexual offences while receiving after-care services, and significantly fewer supervised offenders reoffended at all, compared to those without after-care. In addition, the longer an offender received after-care services, the less likely they were to sexually reoffend (McGrath et al., 2003). These results provide a small evidence base for the role of community supervision in reducing recidivism and increasing public safety.

Conversely, a number of strategies used to monitor offenders under supervised release lack empirical support. For example, each post-sentence supervision scheme in Australia requires the offender to notify Corrective Services of changes of address, name or employment (*DP(SO)A* 2003, (QLD), s 16(c); *SSOMA* 2005, (VIC), s 15(3); *C(SSO)A* 2006, (NSW), Part 2 11(c); *DSOA* 2006, (WA), s 18(c)). These registration conditions are designed to deter the commission of offences as well as assist police to solve new offences (La Fond, 2005). Apart from the fact that, to date, there is no empirical evidence that a sex offender register reduces the likelihood of reoffending (La Fond, 2005), other research foreshadows the potential ineffectiveness of this strategy given that it assumes that sex offenders are inclined to reoffend with another sexual offence. This assumption, evaluated in detail later, contradicts a large body of evidence that indicates that adult sex offenders are significantly more likely to be reconvicted for nonsexual crimes than they are to be convicted for sexual ones (Cann, Falshaw, & Friendship, 2004; Grünfeld & Noreik, 1986; Hanson & Bussière, 1998; Miethe, Olson, & Mitchell, 2006; Smallbone & Wortley, 2004; Weinrott & Saylor, 1991).

Australia's post-sentence laws also allow for the imposition of electronic monitoring as a condition of extended supervision.² However, not only has electronic monitoring been found to be ineffective in reducing subsequent general offending once the monitoring ceases (McGuire, 2002), but it is unknown whether it is an effective strategy with sex offenders in particular (Cohen & Jeglic, 2007; Harris, Rice, & Quinsey, 1998).

Australia's post-sentence laws have been introduced to primarily protect the community by detaining or supervising dangerous sex offenders. However, these legal approaches are either short-sighted, unproven or underresearched; furthermore, the limited research that exists is often less than promising (Cohen & Jeglic, 2007). Unfortunately, these schemes have not been enacted based on a coherent body of empirical evidence demonstrating that they can enhance community safety. As a result, these orders are unlikely to serve as a sound basis for keeping the community safe from sexual offenders (Berlin, 2003). We turn now to consider whether the objective of offender rehabilitation can be accomplished in the operation of post-sentence legislation.

Promoting Offender Rehabilitation

Promoting the rehabilitation of sex offenders is the other stated purpose of Australia's post-sentence legislation. However, the Acts are clearly weighted toward community protection with sex offender treatment a distant secondary consideration. The legislative prioritisation of community protection over rehabilitation is captured in *TSL v. Secretary to the Department of Justice* (VSCA 199, 2006) where the Victorian Appeal Court judges decided that 'the desirability of treatment must not be allowed to obscure the main purpose of the Act' (para. 27). However, this relegation of treatment is highly problematic because the majority of sex offenders will eventually return to the community. Therefore, the effective treatment of those at risk to reoffend should be of primary, not secondary, concern. Moreover, the extent to which community protection is considered at the expense of rehabilitation is likely to produce a number of antitherapeutic effects that will compromise the goal of offender rehabilitation and, paradoxically, jeopardise the Acts' primary purpose of community protection.

For example, the subordination of rehabilitation to the goal of community protection raises the concern of using post-sentence powers to 'warehouse' offenders without providing adequate treatment that addresses the underlying causes of their offending (Sentencing Advisory Council, 2006). Indeed, such a situation appears to be developing in Victoria due to difficulties in finding suitable accommodation for offenders placed on extended supervision orders (The Adult Parole Board of Victoria, 2007). Currently, a small group of sex offenders under extended supervision orders are detained, together, within the boundaries of a prison, under highly restricted living conditions that lack educational, vocational and recreational opportunities; furthermore treatment is either nonexistent or inadequate (The Adult Parole Board of Victoria, 2007). This situation is likely to reduce the offender's engagement in their rehabilitation and, as a consequence, increase the offender's risk to the community (Birgden, 2007). In this instance, neither stated purpose of Victoria's schemes is likely to be meaningfully achieved.

The post-sentence schemes are expected to produce other antitherapeutic effects that will likely be a barrier to promoting offender rehabilitation. First, under the post-sentence laws information obtained in treatment is now being used to identify high-risk offenders who may be eligible for continued detention or extended supervision (Sentencing Advisory Council, 2006). If sexual offenders are aware that the information they disclose in the course of treatment may be used to justify their eligibility for a post-sentence order, it will likely discourage candid disclosure about deviant thoughts and impulses (Sullivan et al., 2005; Winick, 1998). This will clearly disrupt the therapeutic process. Furthermore, the dual role of the treating clinician under the legislation may also have deleterious effects on the therapeutic relationship (Sullivan et al., 2005; Winick, 1998). These effects will negatively impact on the offender's rehabilitative efforts.

Second, under the schemes, the offender may be forced to participate in a treatment program (*DP(SO)A 2003*, (QLD), s 3(b); *SSOMA 2005*, (VIC), s 16(3)(d) *DSOA 2006*, (WA), s 4(b); *C(SSO)A 2006*, (NSW), s 3(b)). However, compelling an offender to participate in treatment, rather than offering treatment on a voluntary basis may have a range of negative effects on treatment outcome (Winick,

1991). For instance, people coerced into treatment often respond with a negative mindset characterised by distrust in the therapist and a reluctance to engage willingly in the process (Winick, 1998). Thus, without an intrinsic motivation to participate, real and genuine therapeutic change is unlikely and offenders may simply go through the motions of the program but derive little benefit (Winick, 1998). In addition, the perceived unfairness of continuing the detention of an offender who has served their full term of imprisonment may act as another impediment to offender motivation to willingly engage in treatment (Victoria Legal Aid, 2006, as cited in Sentencing Advisory Council, 2006).

While it is promising that offender rehabilitation is one of the stated objectives of post-sentence legislation, a variety of factors inherent to the schemes may actually hinder its realisation. The subordination of treatment to the dominant objective of community protection, changes to the role of treating clinicians under the laws, as well as mandating treatment participation are all likely to have detrimental effects on offender rehabilitation. The assumption that offender rehabilitation could be facilitated in the operation of these schemes was hasty and unsupported by research evidence.

ELIGIBLE OFFENDERS

Broadly, offenders who have been convicted of sexual offences are the targets of Australia's post-sentence legislation. None of the schemes apply to serious violent offenders. Queensland's Act (*DP(SO)A 2003, (QLD)*) applies to offenders serving a period of imprisonment, before or after the commencement of the Act, for a serious sexual offence. A serious sexual offence is defined as an offence of a sexual nature involving violence or against children (s 2). In Western Australia, the Act (*DSOA 2006, (WA)*) also applies to offenders under sentence of imprisonment for a serious sexual offence (s 8(1)). Such an offence is defined in the Act as a sexual offence under the Criminal Code for which the maximum penalty that may be imposed is seven or more years (*Evidence Act 1906 (WA)*, s 106A). Such offences include sexual offences against children, aggravated indecent assault, sexual penetration without consent and sexual offences against mentally impaired persons (McSherry et al., 2006). New South Wales's legislation (*C(SO)A 2006, (NSW)*) applies to those offenders serving a sentence of imprisonment for a serious sexual offence or for an offence of a sexual nature (s 6(1)). This definition is broader than the Queensland and Western Australian schemes (McSherry et al., 2006), as it includes offences such as using an intoxicating substance to commit an offence of a sexual nature and enter a dwelling-house with intent to commit an offence of a sexual nature, where the punishment is less than 7 years imprisonment. In Victoria, the Act (*SSOMA 2005, (VIC)*) applies to an offender, before or after the commencement of the Act, on whom a court has imposed a custodial sentence in respect of a relevant offence (s 4(1)). A relevant offence is defined in the Schedule to the Act and refers to a broad range of sexual crimes or intended sexual crimes against children and adults.

The Acts' exclusive targeting of sexual offenders assumes that sex offenders are highly likely to reoffend with a sexual offence and therefore require unique legislative policies to manage their risk and protect the community. These assumptions reflect the public image of sexual offenders, summarised by Miethe, Olson and Mitchell (2006, p.

205), as involving 'attributions of uncontrolled sexual compulsion, specialisation, and persistence in behavioural patterns over their criminal careers'. However, despite the popularity of this view amongst politicians and the public alike, there is a substantial body of research that indicates that this prevailing perception of sex offenders is inaccurate (Matravers, 2003; Sentencing Advisory Council, 2007). This inaccuracy has significant implications for the justification of post-sentence schemes. Below, two key misperceptions about sexual offending are evaluated.

Most Sex Offenders Sexually Reoffend

The empirical data on the base rates³ of sexual offending generally does not support the assumption that most sex offenders sexually reoffend. In fact, the current evidence suggests that as far as reconviction is concerned most sex offenders will not commit a new sexual offence (Greenberg, 1998; Grubin, 1998; Hanson & Bussière, 1998; Hanson & Morton-Bourgon, 2005). Three large-scale studies have provided robust findings that support the low base rate offending for sex offenders. Harris and Hanson (2004) merged 10 individual datasets drawn from a range of jurisdictions in Canada and the United Kingdom for a combined sample of 4,724 sex offenders. After a long-term follow-up of 15 years, a relatively low number of sexual offenders, 23% of the sample, had been charged with, or convicted of, another sexual offence. In another comprehensive meta-analysis of sexual recidivism, Hanson and Morton-Bourgon (2005) examined 95 studies on 29,450 sex offenders. The reported recidivism rate was 13.7% after an average follow-up time of 5–6 years (Hanson & Morton-Bourgon, 2005). A previous meta-analysis by Hanson and Bussière (1998) established a very similar recidivism rate of 13.8%.

However, these base rates of sexual recidivism are understood to be an underestimation of true recidivism rates as many sexual offences are unreported and thus undetected (Lievore, 2004). Still, even in studies with long follow-up periods (15–20 years) and more comprehensive markers of reoffence (i.e., informal reports and arrest records as well as officially recorded convictions), the recidivism rates rarely exceed 40% (Hanson & Bussière, 1998). While this figure is unacceptable, it does invalidate the claim that sex offenders reoffend as a matter of course. Thus, while repeat sex offences attract legitimate community concern, the available research does not support the assumption that sex offenders inevitably reoffend.

Sex Offenders Are Sex Crime Specialists

The assumption that sex offenders specialise in sex crimes has reinforced the perception of sex offenders as dangerous because of the belief that sex offenders are highly likely to reoffend with another sex offence (Simon, 2000). This assumption lies at the core of current legislative targeting of sexual offenders. However, the knowledge base that exists in the criminological and mental health disciplines suggests that sex offenders exhibit versatile offending patterns and are far more likely to be reconvicted for a nonsexual offence than a sexual one (Cann et al., 2004; Hanson & Bussière, 1998; Miethe et al., 2006; Smallbone & Wortley, 2004; Sothill, Francis, Sanderson, & Ackerley, 2000). Indeed, most offenders are known to commit a variety of criminal offences as part of a lifelong pattern of antisocial

behaviour characterised by impulsivity, opportunism and a disregard for the long-term consequences of their behaviour (Gottfredson & Hirschi, 1990).

For example, Smallbone and Wortley (2004) obtained the official criminal histories of 221 adult males convicted of sexual offences against children in Queensland. Of the 203 offenders with previous convictions, 70 (34.5%) had previous convictions for sexual offences while 187 (92.1%) had previous convictions for nonsexual offences. Further, nonsexual offences accounted for 86.3% of all criminal history offences. Such findings indicate that sexual offenders, like nonsexual offenders, tend to commit a broad range of criminal offences (Smallbone & Wortley, 2004). Langan and Levin (2002) also provided evidence for the diverse criminality of sex offenders by tracing the rearrest rates of 272,111 United States prisoners in 15 states for three years after their release in 1994. The authors found that, out of the 3,183 released rapists, 46% were re-arrested for a new crime: 18.6% re-arrested for a new violent offence, 11.2% re-arrested for a new drug offence, 8.7% were re-arrested for a new nonsexual assault offence, and only 2.5% were re-arrested for a new rape offence (Langan & Levin, 2002).

Despite the fact that sexual offending continues to constitute a highly specialised area of research and focus of legislative policy, the literature indicates that sex offending specialisation is in fact a rarity (Simon, 1997, 2000). Furthermore, not only do the available empirical data suggest that sex offenders are less recidivistic and specialised than often assumed, the evidence also demonstrates that, as a group, sex offenders generally show lower recidivism rates than those observed in other offender populations (Hanson & Morton-Bourgon, 2005). Indeed, as a group, there is an empirical basis to the claim that sex offenders are not at elevated risk for reoffending when compared to violent offenders (Heilbrun, Nezu, Keeney, Chung, & Wasserman, 1998).

Clearly, the image of the specialist sex offender is a core assumption underpinning the post-sentence measures. However, against a solid body of scientific work, the image and the assumption become unsound.

In summary, while sexual reoffending is a legitimate community concern, the scientific evidence does not support the belief that sex offenders inevitably reoffend or that sex offenders are more recidivistic and specialised than other offending populations. The reality is normal males perpetrate most sexual offences and most offenders are known to their victims (Glaser, 1991). It is indeed a concern that current legislative policy toward sex offenders have grown out of empirically unsupported postulates.

THE LEGAL TEST OF RISK FOR SEXUAL REOFFENDING

For a court to issue a continuing detention or supervision order, it must be satisfied to the requisite standard of proof that the legal test of risk for sexual reoffending has been met. Under the Victorian Act, a court may only make an extended supervision order if it is satisfied to a 'high degree of probability' that the offender is 'likely to commit a relevant offence' if released in the community and not made subject to an extended supervision order (SSOMA 2005, (VIC), s 11(1)). In contrast, under the Queensland and Western Australian schemes, the Supreme Court can only make an order if satisfied by 'acceptable, cogent evidence' and 'to a high degree of probability' that the offender is a 'serious danger to the community' by being an unaccept-

able risk to commit a serious sexual offence if not made subject to a continuing detention or extended supervision order (*DP(SO)A 2003*, (QLD), s 13(2); *DSOA 2006*, (WA), s 7(1)). In New South Wales, the Supreme Court must also be satisfied to a 'high degree of probability' that the offender is 'likely to commit a further serious sex offence' if not detained or adequately supervised in the community (*C(SSO)A 2006*, (NSW), s 17(3)).

In deciding whether the legal test of risk has been met, the courts must have regard to a number of relevant issues such as the offender's antecedents and criminal history, pattern of offending behaviour and participation in rehabilitation. However, the piece of evidence of primary consideration is the risk assessment report(s) mandated by each Act. Under the Victorian scheme, applications must be accompanied by an assessment report from a psychologist, psychiatrist or specified health service provider (*SSOMA 2005*, (VIC), ss 6–7). Under the schemes in Queensland, Western Australia, and New South Wales, the court must appoint two qualified psychiatrists to conduct separate psychiatric examinations of the offender (*DP(SO)A 2003*, (QLD), s 8(2); *DSOA 2006*, (WA), s 14(2); *C(SSO)A 2006*, (NSW), s 15(4)). The primary issue to be addressed by the psychiatric and psychological examinations is the offender's level of risk or likelihood to commit future sexual offences. This clinical risk assessment plays a central role in whether the court will issue a continuing detention or supervision order, and brings us to our final issue for psycho-legal analysis.

The major assumption underpinning the reliance on risk assessment in the operation of post-sentence legislation is that forensic clinicians are able to identify those most likely to sexually reoffend with a high degree of certainty. However, the available science recognises a number of clinical limitations of risk assessment and other issues that affect the precision and legal relevancy of clinical risk predictions. Taken together, these issues undermine the validity of the assumption on risk prediction made by Australia's post-sentence legislation.

In what follows, the literature pertaining to a range of issues that impact upon the precision, utility and legal significance of risk prediction will be considered. A comprehensive evaluation of this research is beyond the scope of this article. Rather, the purpose of this section is to bring attention to the relevant research that calls into question the validity of the assumption on risk prediction upon which these post-sentence laws are based.

The Perennial Problem: The Impact of Base Rates on Prediction

The ability to predict a future event is, in accordance with probability theory, greatly influenced by how often that event is known to actually occur (i.e., the event's base rate). Therefore, the lower the base rate of sexual reoffending in the population, the harder it is to accurately predict which individual will sexually reoffend (Ogloff & Davis, 2005). As previously discussed, recidivism research consistently finds that, as a group, most sex offenders do not go on to sexually reoffend (i.e., the sexual recidivism rates averaged 13.7% over 5–7 years) (Hanson & Bussière, 1998; Hanson & Morton-Bourgon, 2005).

This research finding that the base rate for sexual recidivism is relatively low has immediate and significant implications for an accurate application of post-sentence

legislation: future sexual recidivists cannot be easily identified because of the inherent difficulties in predicting an event with a low base rate (Craig, Browne, Stringer, & Beech, 2004; Grove & Meehl, 1996; Swets, 1992). Moreover, the correct identification of a recidivist will unavoidably result in the incorrect identification of many more offenders who would not go on to reoffend. Simply, the odds of correctly identifying a recidivist are not in the courts' favour. Clearly then, the assumption that forensic clinicians can identify those most likely to sexually reoffend with a high degree of certainty is, from the outset, weakened on account of the evidence that sexual reoffending is not known to occur frequently.

Nevertheless, despite the challenge of predicting future sexual offending, the evolution of the field of risk assessment has given rise to empirically based approaches to determine the risk of sexual reoffending moderately well. This may be well enough for purposes such as sentencing, classification and parole decisions but not, we would argue, preventive detention.

Accuracy of Sex Offender Risk Assessment

The assumption that forensic clinicians can identify high-risk offenders with a high degree of certainty, brings to the fore the issue of risk prediction accuracy, an issue that arose in *Fardon*. In his sole dissenting opinion in *Fardon* (HCA 46, 2004), Justice Kirby referred to historical academic literature that indicated that experts demonstrate a one third to 50% success rate in accurately predicting violence (*Fardon* HCA 46, 2004); and so concluded that the Act deprived people of personal liberty 'on a prediction of dangerousness, based largely on the opinions of psychiatrists which can only be, at best, an educated or informed "guess"' (para. 125). While Justice Kirby's attention to the fallibility of risk prediction is warranted, the field of risk assessment has advanced considerably in recent years and the research evidence now indicates that best-practice risk assessment methods provide increasingly reliable and valid risk predictions (Mercado & Ogloff, 2007; Ogloff & Davis, 2005). Nonetheless, his point is well-taken and largely valid.

Historically, psychiatrists and psychologists were unable to reliably discriminate between those who would, and would not, engage in future violent behaviour (Ewing, 1991; Monahan, 1981). It was found that mental health professionals and release decision-makers were inclined to make conservative decisions that overpredicted the probability of future violence (Ogloff & Davis, 2005).

To correct for the errors associated with these subjective and unstructured judgments of risk, researchers developed formal and objective procedures to evaluate risk, which culminated in the construction of actuarial risk assessment instruments (Ogloff & Davis, 2005). Specifically, these instruments were developed on the basis of statistical analyses of data from known groups of recidivistic and nonrecidivistic sexual offenders (Hart, Michie, & Cooke, 2007). In short, those factors that best differentiated between those who sexually reoffended and those who did not, were weighted and combined to form empirically validated actuarial tools (Prentky, Janus, Barbaree, Schwartz, & Kafka, 2006).

Actuarial instruments conceptualise recidivism risk solely in terms of probability of future offending and the accuracy of the risk score is a function of the similarity of the assessed individual to the members of the reference group that were used to

derive the probability estimate (Hart et al., 2007; Prentky et al., 2006). Currently, actuarial prediction methods have generally been associated with the strongest evidence for predictive accuracy (Dvoskin & Heilbrun, 2001) and, as such, they represent one of the most commonly used methods to reach opinions about sexual violence risk (Doren, 2002; Hart, Kropp, & Laws, 2003). Given this, research pertaining to the accuracy and limitations of actuarial methodology will be the focus of the evaluation of the schemes' assumption as to the precision and reliability of risk prediction.

The Static-99 (Hanson & Thornton, 1999) and its predecessor, the Rapid Risk Assessment for Sex Offence Recidivism (RRASOR; Hanson, 1997), are the most widely utilised and validated actuarial tools (Hanson et al., 2003), having been submitted to a number of cross-validation and replication studies (Barbaree et al., 2001; de Vogel, de Ruiter, van Beek, & Mead, 2004; Långström, 2004; Sjöstedt & Långström, 2002). The RRASOR is made up of only four static (i.e., historical) risk factors found to be significantly related to sexual reoffending, while the Static-99 is a 10-item instrument. A review of the literature indicates that the AUC value⁴ reported for each instrument is typically around 0.65 to 0.75, with the Static-99 consistently demonstrating greater, albeit marginal, superior accuracy (Hanson et al., 2003). These AUC values mean that using the RRASOR and Static-99, there is a 65–75% probability a randomly selected known sexual recidivist will have a higher risk score than a randomly selected nonrecidivist (Smallbone & Ransley, 2005). Such values represent a degree of accuracy that lies between good and moderate (Cohen, 1992).

Thus, forensic clinicians, when required to provide assessments of risk for future sexual violence now rely upon instruments that have a demonstrated reliability and predictive validity that considerably exceeds chance (Mercado & Ogloff, 2007). Nevertheless, these instruments, although the best available, are still only moderately accurate and are recommended to be considered a 'work in progress' (de Vogel et al., 2004; Webster, Douglas, Eaves, & Hart, 1997). Regrettably, this empirical literature appears to have been overlooked in the enactment of post-sentence legislation in Australia. Evidently, given their limited accuracy, the uncontroverted use of actuarial risk assessments in such high-stakes legal decision-making, is more precarious than has been assumed.

Utilising such assessments in sentencing, classification and parole decisions may be appropriate, however, in the case of preventive detention, relying on such imperfect methods to deprive people of their liberty for a crime they might commit, is far less defensible. Although the aims of post-sentence legislation may be laudable, the complexities of predicting what people might do leads to inevitable errors and uncertainty that undermine the integrity of the legislation.

Unfortunately, the problems of risk assessment in these post-sentence proceedings extend beyond the aforementioned limited accuracy of risk prediction. Indeed, actuarial risk prediction methods contain other shortcomings that, in the context of post-sentence matters,⁵ are particularly troublesome.

Limitations to Assessing Sex Offender Risk

As noted, actuarial assessments of risk commonly form the crux of a forensic clinician's assessment of future sexual violence. However, beyond the limited accuracy of

this method, actuarial risk assessment is vulnerable to additional limitations that further question the soundness of relying upon a forensic clinician's assessment of risk to determine an offender's suitability for preventive detention.

First, interpreting the findings of actuarial risk assessment instruments is tricky, due to the uncertainty of applying probability estimates from group data to an individual 'within' such a group (Berlin, Galbreath, Geary, & McGlone, 2003). Being based on group data, the outcome of an actuarial risk assessment (i.e., an offender scores 6 or above on the Static-99), tells us that the offender has characteristics similar to a group of 'high-risk' offenders who also scored 6 or above on the Static-99. Further, this group of offenders was found to have a probability of sexual recidivism of 52% over 15 years. Critically, the instrument cannot specify whether the assessed offender belongs to the 52% of people in this category who sexually reoffended, or to the 48% of people who did not (Berlin et al., 2003). Although offenders in this high-risk group remain two times more likely to reoffend than other sex offenders, regardless, actuarial instruments do not allow the clinician to determine the specific risk level of the *individual* being assessed.

This criticism however has not gone uncontested. In defence of the use of actuarial instruments in post-sentence proceedings, Harris (2003) argues that most medical decisions, such as diagnosis and prognosis, are based on probabilistic statements about whether an individual falls within a particular reference class; such that any attempt to treat the patient as unique is akin to ignoring all prior scientific research. Thus, Harris (2003) maintains that actuarial methods represent the best available approach to the assessment of sexual offending risk. However, what appears to be obscured in this debate is the impact of context on the appropriateness of making decisions for individuals on the basis of probability estimates for groups. As observed by Mullen (2007), when health professionals are called upon to act on the basis of group probabilities applied to specific individuals, the group-based probability estimate is being used exclusively for the benefit of the patient (e.g., the likelihood they will have a heart attack), and the patient is in a position to reject the advice based on that estimate. However, in the context of post-sentence proceedings, neither circumstance applies to the offender. Thus, as concluded by Mullen (2007): 'As soon as we move away from using group-based probability estimates for the individual's benefit and toward compulsion we are in ethical and practical difficulties' (p. 4). That is, in post-sentence detention legislation, clinicians are tasked with making decisions about what people might do to harm others and whether they require supervision or detention to maintain community safety.

Second, recent scientific studies have indicated that as offenders age their risk to sexually reoffend is significantly reduced (Barbaree, Langton, & Blanchard, 2007; Hanson, 2005). The implications for these findings are noteworthy considering that actuarial instruments fail to account for the effect of advancing age on recidivism. For example, Hanson (2005) investigated the impact of age on sexual recidivism on the Static-99 instrument, the most popular actuarial tool for assessing sexual recidivism risk. In all the analyses it was found that there was a steady decline in recidivism rates for offenders after the age of 40 years, with and without controlling for Static-99 risk factors. After 5 years, the sexual recidivism rate of offenders over 60 years of age was only 2%, compared to 14.8% for offenders less than 40 (Hanson, 2005). In a more recent article, Barbaree, Langton, and Blanchard (2007) explored

the relationship between actuarial prediction and age-related reductions in recidivism of sex offenders. The authors found that an offender's advancing age has a far more significant relationship to recidivism than currently captured by actuarial measures (Barbaree et al., 2007). Given that many offenders being assessed for suitability for post-sentence detention are older than 45 years, with a significant minority much older, use of actuarial tools in these assessments will overestimate risk because as offenders age their reduced risk is not reflected in their actuarially derived risk score (Barbaree et al., 2007). While these findings underline the need to continue to develop and refine risk assessment tools, they also provide further evidence that the current risk prediction technology is far from perfect.

Third, that actuarial risk tools are yet to be substantially validated for use in Australian populations further weakens their utility in post-sentence proceedings. To date, only one validation study has been published in Australia and the findings provide conflicting support for the validity of the instruments for use on non-Indigenous Australians (Allan, Dawson, & Allan, 2006). While the Static-99 demonstrated moderate accuracy in classifying recidivists ($AUC = .78$), the RRASOR displayed a predictive accuracy worse than chance when predicting violent sexual offending ($AUC = .46$) (Allan et al., 2006). However, due to the small sample sizes the authors recommend that these results should be viewed with caution (Allan et al., 2006). While it is likely that the validity of the measures will be ultimately replicated in Australia — following their successful validation in Canada, the United States, the United Kingdom, and European countries — given that actuarial measures provide specific probability estimates for the population of offenders upon which the measures were developed or validated, one cannot simply determine the extent to which the measures would differ in domestic samples (Mercado & Ogloff, 2007; Ogloff & Davis, 2005).

The above limitations to actuarial methods impact upon the reliability and precision of the assessments of risk it provides. Indeed, based on these and other limitations, even the authors of the Static-99 caution that the tool is not comprehensive, does not consider a range of potentially relevant variables (i.e., dynamic factors) and idiographic features of individual cases limit the applicability of actuarial risk scales (Hanson & Thornton, 1999).

To overcome some of these concerns identified regarding actuarial tools, a new approach, labelled structured professional judgment (SPJ), has been developed (Ogloff & Davis, 2005). Instead of providing explicit probability estimates of future reoffending risk by reference to group data, the SPJ approach consists of a set of structured guidelines for considering a list of empirically validated factors and their anticipated impact on the possible nature, severity and imminence of future violence (Hart et al., 2003; Mercado & Ogloff, 2007). The Sexual Violence Risk-20 (SVR-20) (Boer, Hart, Kropp, & Webster, 1997) and the Risk for Sexual Violence Protocol (RSVP; Hart et al., 2003) are examples of sexual risk instruments based on the SPJ model. Due to their recent development, the SPJ approach has only been evaluated in a handful of studies; although this research has generally been quite promising and has found that the SVR-20 is predicting sexual offending with moderate to high degrees of accuracy (see Craig, Browne, & Stringer, 2004; de Vogel et al., 2004; Macpherson, 2003). While the SPJ approach overcomes some of

the concerns associated with actuarial risk assessment, future research is needed to provide further evidence for the predictive validity of SPJ models.

Finally, the use of actuarial risk assessment instruments to address the legal test of risk in post-sentence proceedings poses further difficulties that compromise the utility of its risk prediction in this particular legal context.

Lost in Translation: From Clinical Risk to the Legal Test of Risk

The difficulties associated with the role of clinical risk assessment in post-sentence legal proceedings refer to interface problems between science and law, such as translating clinical risk to legal risk and the legal relevancy of actuarial risk assessment instruments.

The central question in post-sentence matters is whether the court is satisfied to the requisite standard (i.e., high degree of probability) that the offender meets the relevant test of risk (e.g., 'serious danger to the community,' *DP(SO)A 2003*, (QLD), s 13(2)). This is a question of fact to be answered by the application of legal criteria to the evidence. It is in this application that difficulties of translation arise between legally relevant categories involved in the *test* of risk and the expert's descriptive categories of *clinical* risk involved in the risk assessment (Prentky et al., 2006). The legal categories of reoffence risk consist of 'likely' (*SSOMA 2005*, (VIC), s 11(1); *C(SSO)A 2006*, (NSW), s 17(3)), 'serious danger' and 'unacceptable' (*DP(SO)A 2003*, (QLD), s 13(2); *DSOA 2006*, (WA), s 7(1)). In the legal context, these categories are normative, that is, they represent a moral or value judgment about what kinds of circumstances justify the imposition of post-sentence detention and supervision (Prentky et al., 2006). On the other hand, the probabilistic scientific categories of risk, such as high, medium and low, are descriptive labels that, according to Prentky et al., (2006), derive their validity 'not because they are normatively sound, but because they are found to be useful as descriptors or predictors of some presumptive objective reality' (p. 360). Thus, difficulties in translation arise because there is no one-to-one correspondence between the evaluator's description of risk (i.e., high) and the lawyer's normative category of, for example, 'serious danger to the community,' (*DP(SO)A, 2003* (QLD), s 13(2)).

For instance, using the Static-99, an offender deemed 'high-risk' is likened to a group of offenders that demonstrated a 39% rate of sexual reoffending over 5 years (Hanson & Thornton, 1999). However, this denotation of risk as 'high,' does not necessarily equate to the legal standard. That is, does a 39% rate of reoffence risk equate to a 'high degree of probability' that the offender is a 'serious danger to the community' as the law requires? To translate the clinical risk assessment into the legal framework warrants the charge of naturalistic fallacy, whereby a 'what-is' (i.e., clinical description of risk) is illogically equated with a 'what-ought-to-be' (i.e., legal norm of unacceptable risk; Prentky et al., 2006). The question of whether an offender deemed high-risk meets the legal test of risk is not one that can be answered by reference to the expert's description of risk. Rather, this is essentially a social, moral and ultimately a legal question about the type of offender who generates the greatest fear within the community and deserves additional criminal justice involvement (McSherry et al., 2006).

The legal relevancy of actuarial instruments has also been called into question (Berlin et al., 2003; Hart, 2003). Ultimately, the difficulties stem from using an instrument that was developed in the context of treatment and intervention for use in the courtroom. For example, in the post-sentence schemes in Queensland, Western Australia, and New South Wales, forensic examiners are required to consider risk under (a) the condition of the offender being released from custody and (b) under the condition of the offender being released from custody and not made subject to a supervision order. However, Hart (2003) cautions that existing actuarial instruments are unable to be used to provide a conditional risk assessment, or assess risk as a function of variable living conditions. In this way, the actuarial instruments are not relevant to that legal question. The aforementioned structured professional judgment approach (SPJ) to risk prediction is protected against this criticism because it is a more fluid model of risk assessment that can be tailored to specific questions of risk and its idiosyncratic elements. Thus, the SPJ model represents a promising addition, or arguably alternative, to the actuarial risk assessment procedure (Hart et al., 2003). Currently, however, actuarial methods remain a leading force in the valid prediction of sexual violence. As a result, the limitations to this approach remain.

The legal relevancy of actuarial risk assessment instruments is further questioned when one considers whether the definition of sexual violence as defined in actuarial tools, is consistent with the legislative definition of sexual violence (Mercado & Ogloff, 2007). For example, under Queensland's Act an offender may be subjected to a post-sentence order if the court is satisfied that the person will commit a 'serious sexual offence' (s 13(2)). A 'serious sexual offence' is defined as an offence of a sexual nature involving violence or against children (s 2). However, in the Static-99, sexual recidivism was defined as a conviction for *any* sexual offence (i.e., noncontact and contact sexual offences) (R.K. Hanson, personal communication, January 17, 2008). Thus, as actuarial procedures may define sexual violence differently from the statute that is the basis for legal proceedings, the legal relevancy of the risk assessment is diluted (Hart, 2003).

In sum, in the development of post-sentence legislation, Australian governments have assumed that forensic clinicians, and ultimately the courts, are able to identify high-risk sexual offenders and do so with precision. However, as this section has articulated, the identifying of high-risk sexual offenders is not straightforward. The low base rate of sexual recidivism makes this task difficult and errors will inevitably occur. Furthermore, despite advances in the field of risk assessment, clinicians are only able to make predictions of risk with, at best, moderate predictive accuracy. Simply, risk prediction technology is unable to provide assessments of risk with the degree of certainty expected by the legislation. In addition to these issues, other limitations to actuarial prediction were outlined. Most notably, the probability estimates derived from actuarial tools may not reflect the 'true' probability of sexual reoffending for the individual being assessed. Finally, this section noted other difficulties associated with assessing risk in this legal context. Specifically, the legal questions to be answered in post-sentence matters do not parallel the risk assessment findings forensic clinicians can reasonably provide. This difficulty in translation further weakens the relevancy of predictions of future sexual violence in post-sentence proceedings.

As the research currently stands, the blind acceptance of actuarial assessments of risk in such high-stakes legal proceedings is unwarranted given its limitations outlined above. Indeed, it is concerning that these challenges to risk prediction were not considered in the drafting of Australia's post-sentence legislation. Clearly, the assumption as to the reliability of risk prediction made by the law is empirically unjustified.

Summary and Conclusions

Following a trend in some of the United States, Australian governments have enacted populist legislation allowing for the preventive detention or community supervision of sexual offenders whose sentences have expired but who are still considered to be dangerous. However, as successive state governments have sought to reduce the risk of sexual recidivism in the community and attenuate community concern, a significant body of literature on measuring, managing, and predicting the risk sex offenders pose for sexual reoffending has been largely overlooked. As a result, the laws that have been enacted are founded on a set of unexamined assumptions.

In this article, the assumptions upon which Australia's post-sentence laws rest were evaluated with reference to this body of empirical knowledge. This psychological analysis revealed that: (a) the legislation is likely to have a negligible impact on protecting the community from sexual offending, (b) the objective of offender rehabilitation is undermined by its subordination to the goal of community protection, as well as other antitherapeutic effects of the schemes, (c) the singling out of sex offenders for differential treatment by the legal system on the premise that sex offenders are highly recidivistic and specialise in sex crimes is misguided and unsupported by the evidence and (d) the assumption that experts can identify high-risk offenders to a level of certainty expected by the legislation, is empirically unjustified. Accordingly, the evidence suggests that this legislation cannot achieve its intended aims of protecting the community in any meaningful and sustainable way.

Ultimately, the success of any preventive detention scheme rests upon the ability to accurately identify those offenders at high risk for future sexual offending, without being overly inclusive in capturing those individuals who would not reoffend if released. However, this balance is unlikely to be achieved because predicting future behaviour such as sexual offending is notoriously difficult, and particularly so when based on limited technology. While the authors would encourage appropriate measures designed to protect the public from sexual violence, we hold significant concerns for the efficacy of Australia's post-sentence schemes in reducing the numbers of people being harmed by sex offenders.

When it comes to the issue of sex offenders, it is appreciated that governments are in a difficult position, in that they have a responsibility to respond to community concern. However, the community would be best served if future policymaking regarding sexual offenders is driven by a collaborative approach between the criminal justice and legislative sectors and the relevant scientific communities.

Furthermore, whether post-sentence schemes make the best use of resources is another concern. The costs of operating post-sentence schemes are significant, and include the substantial operating cost of keeping a person in prison, resources to fund assessments (and reassessments) of offenders, legal fees, court time and supervision costs. Clearly, resources are not unlimited and, as it stands, post-

sentence schemes allocate enormous resources toward the error-prone task of trying to pick out the few sex offenders who pose the greatest risk. As an alternative, the authors suggest a public health approach to the ways in which sexual offenders are sentenced, treated and managed in the community (see Ogloff & Doyle, 2009, for a more detailed enunciation of this alternative model). That is, we would suggest that government resources are likely to be more effective if *all* sex offenders are comprehensively and independently assessed at their first point of contact with the criminal justice system, but especially before sentencing, and then sex offenders receive treatment and management services commensurate with their level of reoffence risk and need. This public health approach is designed to reduce risk across the population of sex offenders and thus requires a shifting of resources to sex offenders' first point of contact with the criminal justice system, as well as properly funded sex offender treatment and management programs in custodial and community settings.

Lastly, there is a maxim in law that 'hard cases make bad law'. In the context of preventive detention, while the most difficult cases may be the most obvious, over time the net invariably widens. Indeed, the laws initially enacted in Australia were based on very difficult cases with high-risk individuals. Over time, though, a broader range of individuals are being subjected to these laws. A prudent approach to preventive detention is advisable. Responsible governments need to overcome the impulse to identify with the fears of the community, and invest in cost-effective and empirically defensible policies based on what we understand rather than what we fear about sex offenders.

Endnotes

- 1 The jurisdictional breakdown of the total number of sex offenders under continued detention or supervision orders is: 41 (Qld), 23 (Vic), 11 (WA), and 7 (NSW).
- 2 In Victoria, electronic monitoring may be imposed by the Adult Parole Board or the Secretary to the Department of Justice. In New South Wales and Queensland, the condition to wear electronic equipment may be directed by the judicial authority (i.e., Supreme Court). In Western Australia, electronic monitoring is not stated as a condition that may be imposed, however, it is available to the court under the following provision: 'The supervision order may contain any other terms that the court thinks appropriate' (*Dangerous Sexual Offenders Act*, 2006, (WA) s 19(2)).
- 3 The base rate for any given event is the relative frequency of occurrence of that event (i.e., sexual recidivism) in the population of interest (i.e., sexual offenders).
- 4 The Area Under the Curve of the Receiver Operating Characteristic (AUC, for short) is a standard statistical measure of the accuracy of predictive instruments. The AUC plots the hit rate (accurately identified recidivists), against the false positive rate (incorrectly identified recidivist). The AUC can range from .50 to 1.00 with values of .50 indicating prediction no better than chance, and values of 1.00 indicating perfect accuracy. The AUC statistic is the preferred method of assessing predictive accuracy because it is unaffected by the base rate of the event being predicted (Rice & Harris, 1995).

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PART III: EMPIRICAL ANALYSIS OF RISK ASSESSMENT PRACTICES
AND CHARACTERISTICS OF SEX OFFENDERS
UNDER AUSTRALIA'S POST-SENTENCE LEGISLATION

Chapter 4

Characteristics of Sex Offenders Subject to Post-Sentence Orders in Australia

Preamble to Characteristics of Dangerous Sexual Offenders Study

This chapter presents the first empirical study of the thesis. The paper provides a descriptive characterisation of Australian sex offenders submitted to a post-sentence order of either continuing detention or intensive community supervision. Data is presented across demographic, developmental, clinical, and criminal dimensions; the commonly occurring characteristics of the sample are emphasised. This study represents the first descriptive representation of sex offenders under this legislation. Importantly, the findings give rise to a number of practical recommendations with respect to the provision of treatment for this offender group.

This article has been accepted for publication in *Australian Psychologist*, a peer-reviewed journal concerned with a wide spectrum of clinical and applied issues, spanning from clinical matters including therapy and assessment to issues within wider society. The journal has an impact factor .898 (ISI Web of Knowledge, 2010).

DECLARATION FOR THESIS CHAPTER FOUR

Monash University

Declaration by candidate for Thesis Chapter 4, Paper 2

In the case of Chapter four, Paper 2, the nature and extent of my contribution to the work was the following:

Nature of contribution	Extent of contribution (%)
Conducted literature review, secured ethics, participated in design and management of the study, implemented the study by collecting, coding and statistically analysing data, and drafted and revised this paper.	70%

The following co-authors contributed to the work. Co-authors who are students at Monash University must also indicate the extent of their contribution in percentage terms:

Name	Nature of contribution	Extent of contribution (%) for student co-authors only
James RP Ogloff	Co-investigator, participated in study design, and assisted with preparing and revising the paper.	15%
Stuart DM Thomas	Contributed to statistical analyses and assisted in preparation of the statistical sections of this paper.	15%

**Candidate's
Signature**

	Date
--	-------------

Declaration by co-authors

The undersigned hereby certify that:

- (7) the above declaration correctly reflects the nature and extent of the candidate's contribution to this work, and the nature of the contribution of each of the co-authors.
- (8) they meet the criteria for authorship in that they have participated in the conception, execution, or interpretation, of at least that part of the publication in their field of expertise;
- (9) they take public responsibility for their part of the publication, except for the responsible author who accepts overall responsibility for the publication;
- (10) there are no other authors of the publication according to these criteria;

- (11) potential conflicts of interest have been disclosed to (a) granting bodies, (b) the editor or publisher of journals or other publications, and (c) the head of the responsible academic unit; and
- (12) the original data are stored at the following location(s) and will be held for at least five years from the date indicated below:

Location(s)

**Centre for Forensic Behavioural Science, Monash University.
505 Hoddle St, Clifton Hill, VIC 3068**

[Please note that the location(s) must be institutional in nature, and should be indicated here as a department, centre or institute, with specific campus identification where relevant.]

Signature 1

Signature 2

	Date

.....

Running head: CHARACTERISTICS OF DANGEROUS SEX OFFENDERS

Designated as Dangerous: Characteristics of Sex Offenders Subject to Post-Sentence
Orders in Australia

Word Count: 4379

Abstract

The earliest characterisation of Australian sex offenders subjected to post-sentence legislation is presented. Demographic, developmental, clinical, and criminal characteristics were obtained for sex offenders under post-sentence orders in Western Australia, New South Wales, and Victoria. Data on 50 offenders were recorded from psychological and psychiatric risk assessment reports statutorily required at the initiation of post-sentence legal proceedings. The findings describe a group of demonstrably dangerous men who exhibited an early onset of sexual offending, high rates of mental disorder, sexual deviance and antisociality. Their developmental histories are characterised by early deprivation, disadvantage, abuse, early exposure to substance abuse, and social and psychological dislocation. These offenders present a conundrum to criminal justice agencies. They are an objectively unfortunate group and have engaged in significantly harmful behaviours. However, the early onset of their offending suggests that early intervention services, such as those offered by mental health professionals, have a critically important role to play in any effort to alter offending trajectories such as those exhibited in this sample. A paradigm shift in public policy from a post-hoc model to a well resourced preventative and public health approach to the problem of sexual violence is proposed. Broad treatment implications are also considered.

Key words: sex offenders, characteristics, post-sentence legislation, public policy

Designated as Dangerous: Characteristics of Sex Offenders Subject to Post-Sentence Orders in Australia

The problem of sexual violence has led many governments to enact a range of legislative schemes targeting sex offenders (McSherry, Keyzer, & Freiberg, 2006; Sentencing Advisory Council, 2006; Sullivan, Mullen, & Pathé, 2005). These have included, for example, enhanced sentencing options, mandated treatment, community registration and residency and reporting requirements (Harris, Smallbone, Dennison, & Knight, 2009; Smallbone & Ransley, 2005; Vess, 2009). More recently, governments have extended their efforts to reduce the risk of sexual recidivism by implementing laws that provide for the continued detention or community supervision of sex offenders whose sentences have expired but who are still considered to be dangerous (Mercado & Ogloff, 2007; Sentencing Advisory Council, 2006). These post-sentence schemes have been enacted in some of the United States, New Zealand, and now the Australian states of Queensland, Western Australia, New South Wales and Victoria (Ogloff & Doyle, 2009).

The enactment of post-sentence legislation in Australia has raised concerns from legal commentators, mental health professionals and libertarians (Birgden, 2007; Doyle & Ogloff, 2009; Keyzer, Pereira, & Southwood, 2004; McSherry, 2005; McSherry et al., 2006; Ruschena, 2003; Scott, 2008; Sentencing Advisory Council, 2006; Sullivan et al., 2005). The jurisprudential problems posed by these laws arise in light of the fact that individuals may have their liberty restricted not for offences already committed but for offences they *might* commit in the future (Glazebrook, 2009). It has been argued that curtailing an individual's liberty based on an assessment that they are *likely* to reoffend potentially undermines a number of fundamental legal principles and core rights, such as the presumption of innocence,

finality of sentencing, the principle of proportionality, and the principle against double punishment (Glazebrook, 2009; Keyzer et al., 2004; McSherry et al., 2006; Sentencing Advisory Council, 2006).

Post-sentence legislation has also attracted criticism from the mental health professions (Birgden, 2007; Doyle & Ogloff, 2009; Sullivan et al., 2005; Wood & Ogloff, 2006). Under the laws, psychologists and psychiatrists are required to prepare reports that assess the level of risk or likelihood that the offender would commit further sexual offences if released from prison or if not supervised in the community. In fact, courts are statutorily required to take into account this clinical assessment of risk in deciding whether to impose a post-sentence order. However, mental health practitioners have argued that the technology of risk assessment is not sufficiently advanced to enable experts to identify high-risk offenders with a level of certainty required by the law (Doyle & Ogloff, 2009; Smallbone & Ransley, 2005). Furthermore, treatment providers have expressed concern that the legislation will produce anti-therapeutic factors that will likely have a detrimental impact upon offender rehabilitation (Birgden, 2007; Doyle & Ogloff, 2009; Sullivan et al., 2005).

Regardless of these wide-ranging concerns from mental health, legal, and other professionals, post-sentence laws have operated uninhibitedly for the last six years. And despite the increasing number of published discussions regarding the laws themselves, essentially nothing is known collectively about those individuals who have been detained or supervised under this legislation. Indeed, beyond the sensationalised media depictions of a select few of this high-profile group (Ducat, Thomas, & Blood, 2009), no empirical data are available since no systematic information has heretofore been analysed and published. Clearly, it is warranted that we now turn our attention to those offenders who have fallen under the ambit of post-

sentence legislation. Since the laws' inception a small but significant group of sexual offenders has been subjected to these legal measures.

Although no prior Australian data exist, some international research is available for comparison. A handful of studies describing equivalently sanctioned sex offenders in the United States have been published (Becker, Stinson, Tromp, & Messer, 2003; Jackson & Richards, 2007; Janus & Walbek, 2000; Levenson, 2004). Civilly committed under Sexually Violent Predator legislation (Mercado & Ogloff, 2007; Miller, Amenta, & Conroy, 2005), these sex offenders exhibited high rates of paraphilic diagnoses, substance abuse, and antisocial personality disorder, together with chronic sexual and non-sexual offending histories (Becker et al., 2003; Jackson & Richards, 2007; Janus & Walbek, 2000; Levenson, 2004).

The aim of the present study was to provide a comprehensive characterisation of those offenders placed under post-sentence detention and supervision orders in Australia. To this end, the offenders are descriptively represented across a range of dimensions, from demographic information and developmental histories to their lifetime and current clinical diagnoses, sexual and non-sexual offending histories, and treatment participation. Given that this study represents the earliest characterisation of this population of offenders in Australia, the present analysis was undertaken as a primarily descriptive and exploratory exercise.

Secondarily, the investigation aimed to reflect on both treatment and public policy implications in light of the findings. Indeed, such considerations are important given the well established understanding that victims of sexual abuse suffer a number of long-term deleterious outcomes (Cutajar et al., 2010; Fergusson & Mullen, 1999). The negative sequelae of sexual abuse underlines the importance of protecting people

from unwanted sexual contact by optimising the interventions that mental health and criminal justice agencies provide for those at risk of sexual (re) offending.

Method

Participants

Fifty-six offenders were identified as the subjects of post-sentence proceedings in the states of Western Australia, New South Wales, and Victoria. Although approached, authorities in Queensland refused approval. At the time of conducting the analyses, six offenders had yet to have their legal proceedings finalised. Accordingly, analyses were conducted on 50 offenders known to have received either a continuing detention or extended supervision order.

Measures

Data were recorded from psychological and psychiatric risk assessment reports prepared at the initiation of post-sentence legal proceedings in the relevant jurisdictions; where necessary, more complete information was obtained from the judgments arising from the matters. The reports were based on clinical interview(s) with the offender and comprehensive collateral information such as criminal records, correctional files, and clinical histories. While the degree to which the examiner verified information provided by the offender is unknown, each report indicated that extensive collateral information was made available to the examiner.

The authors developed a coding manual detailing the scoring criteria for variables of interest. The manual was modelled on two other coding instruments used in previous report analyses (Amenta, 2005; Skeem, Golding, Cohn, & Berge, 1998) and was subjected to comprehensive review and a pilot analysis. This analysis resulted in a refining of the coding instrument to ensure consistency of information

was obtained across reports (a copy of the data collection form is available from the authors upon request).

Procedure

To obtain access to the forensic reports written requests were sent to the Chief Justices of the Supreme Courts of Queensland, Western Australia, and New South Wales. Although the Supreme or County Courts of Victoria are eligible to hear post-sentence proceedings, the vast majority of post-sentence applications have been heard in the lower court; therefore, a request was only sent to the Chief Judge of the County Court of Victoria. Access was provided to the relevant reports in the jurisdictions of New South Wales, Western Australia, and Victoria on the condition that the identities of all persons referred to in the report, including the report author, were kept confidential. Upon receipt of the reports, raw, de-identified data were transcribed onto the coding manual. Unique identifiers were assigned to the offender, the reports, and the evaluator.

Results

For the purposes of this study, employment history was considered in terms of stability which was defined as being employed for two or more years in the same workplace. A substance-use problem was defined as any form of substance dependence, substance abuse, or substance-induced disorder, with the exception of nicotine-related disorders.

Basic Assessor Details

Psychologists authored reports in relation to 20 (40%) offenders, while 30 (60%) offenders were assessed by psychiatrists. The assessments consisted of 21 (42%) from Victoria, 15 (30%) from Western Australia, and 14 (28%) from New South Wales.

Demographic Characteristics

The sample of 50 offenders ranged in age from 20 to 74 years, with a mean age of 44.4 years ($SD = 13.29$). All were male. Table 1 presents the ethnicity, educational, and employment characteristics of the group.

[Insert Table 1 about here]

Developmental History

Familial stability. Twenty one (42%) offenders were reported to have been removed from the family home as a child or adolescent. Seventeen (34%) offenders were placed in government institutions (i.e., foster home, boys' homes) as youth; of these, 9 (53%) experienced multiple placements. Of those not formally removed from the care of their families, 4 (8%) offenders were reported to have spent a significant portion of their upbringing in the care of others, such as relatives. Neglect (42%), parental abuse (26%), and behavioural issues (21%), comprised the primary reasons for their removal.

Experience of abuse. Almost three quarters ($n = 36$, 72%) of the sample self-reported having experienced abuse during their childhood or adolescence. Of those, 29 (58%) reported a history of sexual abuse, 22 (44%) physical abuse and 15 (30%) offenders reported both sexual and physical abuse.

Learning and behavioural difficulties. Over half of the sample ($n = 27$, 54%) was recorded as demonstrating learning difficulties or reduced intellectual functioning. In the case of 20 (40%) offenders, the reports indicated the presence of learning difficulties during school, with half of these reported as having attended either special education classes or repeating school years. An additional 7 (14%)

offenders were reported to have intellectual functioning within the intellectual impaired or low average range.

Twenty-one (42%) offenders were recorded as having behavioural problems in their youth; fighting (48%), expulsion/suspension (48%), and truancy (43%), were the most commonly reported behavioural disturbances. One quarter ($n = 12$, 24%) of the sample were reported to have both learning difficulties and behavioural problems.

Substance Use

During their childhood and adolescence, 24 (48%) offenders were reported to have had an alcohol abuse problem, while over one third ($n = 18$, 36%) were reported to have had an illicit substance abuse problem. In adulthood, 27 (54%) and 23 (46%) offenders, respectively, were reported to have alcohol and illicit substance abuse problems.

Diagnosis

Current diagnoses. As Table 2 indicates, almost three-quarters of the sample ($n = 35$, 70%) received a diagnosis of an Axis I disorder. A majority of offenders ($n = 32$, 64%) received a diagnosis of paraphilia. Non-paraphilic Axis I disorders were infrequently diagnosed in the sample.

[Insert Table 2 about here]

More than half the sample ($n = 26$, 52%) had been diagnosed with a current personality disorder, with antisocial personality disorder the most prevalent ($n = 17$, 34%). A third of offenders ($n = 17$, 34%) had been diagnosed with both Axis I and Axis II disorders.

Lifetime diagnoses. Almost one third ($n = 16$, 32%) received an Axis I diagnosis over their lifetime, independent of any current diagnoses. The most common lifetime diagnoses were depression ($n = 9$, 18%), anxiety ($n = 4$, 8%), paraphilia ($n = 3$, 6%), and psychosis ($n = 2$, 4%). Separate from presently diagnosed personality disorders, two (4%) offenders received an Axis II diagnosis over their lifetime (i.e., personality disorder NOS and schizoid personality disorder).

Lifetime psychiatric difficulties were also recorded in cases where offenders were reported to have experienced psychological dysfunction of a sub-clinical nature. Twenty-one (42%) offenders were reported to have a history of sub-clinical psychiatric difficulty, with depression ($n = 14$, 28%) and anxiety ($n = 13$, 26%) again the most prevalent. Further, over one quarter of offenders had a history of suicide ($n = 13$, 26%) and self-harm ($n = 14$, 28%).

Combined Vulnerabilities

In the paragraphs above vulnerabilities have been dealt with separately across the demographic, developmental and substance use domains. Here these vulnerabilities will be regarded together. Vulnerabilities considered are: secondary school completion, employment stability, removal from home, institutional placement, sexual abuse, physical abuse, learning and behavioural difficulties at school, and alcohol and illicit substance use during childhood and adolescence.

The mean number of vulnerability factors present in the individual case was 4.74 ($SD = 2.71$) and ranged from 0 to 9. Two offenders (4%) had none of the vulnerability factors, although for one of the offenders data was unavailable for 4 of the vulnerability factors. Four offenders (8%) had one vulnerability factor, 5 (10%) had two factors, 9 (18%) had three factors, 5 (10%) had four factors, while 25 (50%) offenders presented with 5 or more vulnerability factors.

Sexual Offending History

Table 3 summarises a number of characteristics associated with the sample's sexual offending histories; these figures exclude the offenders' index sexual offence(s). The majority ($n = 45$, 90%) had prior sentencing dates for sexual offences and one third ($n = 17$, 34%) of offenders had committed their earliest sexual offence before the age of 18 years.

[Insert Table 3 about here]

Females were the exclusive victim choice for the majority of offenders ($n = 28$, 56%). Three quarters ($n = 38$, 76%) offended only against people outside their immediate family (i.e., extrafamilial victims).

Index sexual offence. The majority of offenders ($n = 45$, 90%) committed a contact sex offence, with 3 (6%) committing a non-contact sex offence (i.e., knowingly possess child pornography) and 2 (4%) receiving convictions for both contact and non-contact sexual offences. Almost half the group ($n = 24$, 48%) used violence in the commission of their index sexual offence.

The mean number of victims of the offenders' index sex offences was 2.30 ($SD = 2.68$), and ranged from 0 to 13 victims. The majority ($n = 32$, 64%) offended against one or fewer victims and over half the sample ($n = 29$, 58%) exclusively victimised females.

Almost three quarters of the men ($n = 37$, 74%) offended solely against people outside of their immediate family. This comprised 22 (44%) offenders victimising acquaintances and 21 (42%) offenders victimising strangers.

Index offence data on the age of the youngest (or only) victim were available for 40 offenders. The youngest victim in 4 (8%) cases was in the birth to 4 years category, with 18 (36%) cases between 5 and 9 years, 8 (16%) cases between 10 and 13 years, and 5 (12.5%) cases in both the 14 to 17 years and adult categories. Seventeen offenders (34%) had more than one victim of their index sex offence. Of this sub-group, for 14 (82%) offenders the oldest victim fell into the same age category as their youngest victim.

Non-Sexual Offending History

The general criminal histories of the group are summarised in Table 4. The majority ($n = 45$, 90%) had previous convictions for non-sexual offences with half ($n = 25$, 50%) receiving their first criminal conviction as a juvenile. The types of general offences committed by the group were numerous and varied.

[Insert Table 4 about here]

Treatment History

Almost three quarters ($n = 37$, 74%) of the group had participated in at least one sex-offence specific treatment program, with just over one half ($n = 27$, 54%) completing a sex offender treatment program. Nineteen (38%) offenders were reported to have a history of treatment refusal, 9 (18%) had been removed from a sex offender program, 4 (8%) had been deemed ineligible for sex offender treatment due to denial of sex offences, and one offender (2%) was reported to have dropped-out of treatment.

Discussion

The primary purpose of this investigation was to develop the earliest descriptive characterisation of sex offenders subjected to Australia's post-sentence legislation. To this end, the demographic, developmental, clinical, and criminal characteristics of 50 such offenders were presented. Taken together, the findings describe a group of demonstrably dangerous, disadvantaged, and life-damaged men who have engaged in behaviour greatly harmful to others and to themselves.

A Descriptive Representation

Demographically and developmentally the sample is characterised by disrupted home environments, inconsistency of care-giving, self-reported exposure to physical and sexual abuse, poor education, learning difficulties, behavioural problems, and unstable employment histories. Indigenous offenders were over-represented, though this continues a well-documented trend in the over-representation of indigenous offenders amongst correctional samples (Snowball & Weatherburn, 2006). Substance abuse problems were remarkably frequent, often with a childhood or adolescent onset. Taken together, most offenders experienced several of the vulnerability factors across the demographic, developmental and substance use domains.

Diagnostically, the group is characterised by significant sexual deviance, antisocial and maladaptive personalities and moderate rates of mental illness, particularly anxiety and depression, over their lifetime.

The onset of sexual offending for a large proportion of the group was at a relatively young age (i.e., prior to the age of 24 years). However, there exists substantial variation in the chronicity of the samples' sexual offending histories. A

high proportion of the sample exclusively offended against people outside the family home, and histories of violent sexual offending were also uncommonly high.

The group exhibited an early onset of general criminality and committed a variety of non-sexual offences ranging in severity from breach and minor drug offences, to serious crimes of violence. While half of the sample successfully completed a sex offender treatment program, treatment amenability was largely poor.

Characteristics in Context

Compared with international research on equivalently sanctioned sex offenders in the United States, the current sample evidenced similar levels of psychopathology (Becker et al., 2003; Jackson & Richards, 2007; Janus & Walbek, 2000; Levenson, 2004). Together, this research portrays post-sentence sex offenders as presenting with complex psychiatric presentations comprised of paraphilias, personality disorders (in particular antisocial personality disorder), and comorbid substance abuse. Given that most symptoms of antisocial personality disorder are behavioural in nature, however, care must be taken when considering the validity of the diagnosis (Ogloff, 2006). The length of the offenders' sexual offence histories was similar and each group showed significant criminal diversity (Becker et al., 2003; Janus & Walbek, 2000; Levenson, 2004).

Compared with sex offending populations in general, both similarities and differences were found. The levels of criminal diversity present in this study confirm previous findings on criminal versatility among sexual offenders (Hanson & Bussière, 1998; Harris et al., 2009; Langan & Levin, 2002; Simon, 2000; Smallbone & Wortley, 2004). Many offenders, including sexual offenders, are known to commit a variety of criminal offences as part of a lifelong pattern of antisocial behaviour characterised by rule-breaking, exploitation, dishonesty, impulsivity, and a disregard for the long-term

consequences of their behaviour (Gottfredson & Hirschi, 1990; Simon, 2000; Smallbone & Wortley, 2004). The observed rates of substance abuse, particularly alcohol abuse, have also been found with other sex offending populations (Abracen, Looman, & Anderson, 2000; Langevin & Lang, 1990; Marshall, 1996). Conversely, this group of offenders demonstrated more violent sexual offending and a greater proportion of extrafamilial victims than general sex offending populations (Simon, 2003).

This present sample is also broadly similar to nonspecific correctional populations, given that both groups are characterised by early family instability, victimisation, limited schooling, unstable employment records, substance abuse, and elevated rates of mental disorder (Butler & Allnutt, 2003; Deloitte Consulting, 2003). Lastly, the prevalence of mental disorder among the present sample of offenders is also significantly greater than that found in the general population (Ogloff, 2002; Short, Thomas, Luebbers, Ogloff, & Mullen, in press).

Implications

Sexual offenders subject to post-sentence detention or supervision in the states of Western Australia, New South Wales and Victoria present a conundrum to criminal justice agencies, mental health services, the courts, and society. They are demonstrably dangerous, and have been adjudicated as such by courts and colleagues. However, beyond this dangerousness lie other considerations. Objectively, they are an unfortunate group, and exemplars of the all-too-familiar story of criminality, typified by early deprivation, disadvantage, abuse, early exposure to alcohol and illicit substances, poor academic records, social and psychological dislocation, early onset of antisocial conduct and criminality, poor mental health and the development of problematic personalities. While a thorough reflection on how to best manage this

challenging group of offenders is beyond the scope of the paper, the findings do reveal some ways forward that deserve elaboration. Indeed, despite the simplicity of the statistical analyses, some valid treatment and policy recommendations arise as implications from this investigation.

Treatment. Firstly, the poor treatment amenability found amongst the current sample underscores the need to more successfully engage sex offenders in well-validated treatment programs; though this is no doubt a familiar challenge for treatment providers. Secondly, with regard to treatment content, the findings suggest that these offenders require a comprehensive treatment approach. Indeed, the multiple vulnerability factors present in so many of their histories highlights their complex needs. The high rates of substance abuse indicate the need for the provision of drug and alcohol treatment services. The prevalence of personality disorder diagnoses support the treatment of maladaptive personality characteristics in combination with addressing the problematic sexual behaviour. More broadly still, the offenders' social context (i.e., social isolation, poor self-esteem, childhood abuse), maladaptive cognitive schemas (i.e., cognitive distortions, indifference, entitlement etc), and skills deficits (anger management, communication skills etc) are valid treatment targets. This multi-faceted treatment approach seeks to address not only the criminogenic psychopathology but also the psychological and social determinants of the offenders' problematic sexual behaviour (Warren, MacKenzie, Mullen, & Ogloff, 2005).

Policy. That the sample exhibited an early onset of sexual and general offending indicates that many of these men are coming into contact with criminal justice agencies and the courts either in their youth or as young adults. This finding highlights the critical importance of early identification and intervention in response to the problem of sexual deviance, at the offenders' earliest point of contact with

criminal justice agencies. Indeed, the early, accurate and comprehensive identification of offenders' risks and needs combined with the provision of empirically-validated psychological and medical treatments remains the most promising means to alter highly damaging offending trajectories such as those exhibited in this group of men.

Improvements in risk/need identification and early intervention require a paradigmatic shift in public policy to a preventative and public health model. Such an approach is characterised by a comprehensive and independent assessment of all sex offenders at their first point of contact with the criminal justice system, but especially before sentencing (Ogloff & Doyle, 2009). Following this, all sex offenders would then be offered treatment and management services in accordance with well established principles of offender rehabilitation (Andrews & Bonta, 2006). This approach also requires a shifting of resources to sex offenders' first point of contact with the criminal justice system, as well as properly funded and empirically validated sex offender treatment and management programs for custodial and community settings. Early, proper psychological and psychiatric treatment is likely to remediate some of the risks and problems posed by this atypical group.

The high rates of sexual victimisation reported by the present sample of sex offenders reflects previous findings (Jespersen, Lalumiere, & Seto, 2009; Ogloff & Cutajar, 2009). The most obvious implication is that the prevention of sexual abuse and the improved care of those who have been sexually abused hold some promise of reducing the number of sexual offenders.

Lastly, these data may also be of some use to other states considering the merits of similar legislative strategies, by providing a broad-brush picture of those offenders most likely to be considered for a post-sentence order.

Limitations and Future Research

The present findings are limited by the fact that data were obtained primarily from psychological and psychiatric reports that were partly based on self-report. Given the nature of the legal proceedings (i.e., pre-sentence) that prompted the assessment some doubt would be raised regarding the veracity of the offenders' reporting of information. However, attenuating this limitation somewhat is the fact that extensive collateral information was made available to the examiners, thus enabling him or her to evaluate the validity of the examinees' claims.

Also, the study was limited by some inconsistency in the availability of information; not all variables were available for coding from each forensic report due to the different reporting practices of the assessors. Thus, descriptive findings could not always be performed on the entire sample. Additionally, the sample size was smaller than expected following Queensland's decision to not participate in the study.

Additional research is required in this area. It would be worthwhile for future research to further investigate the relationship between vulnerability factors and risks to sexually (re) offend. This information may assist in the allocation of early intervention efforts towards those at higher risk for offending as well as identify treatment targets more closely linked to future offending. Comparing the profiles of the present sample to those of other serious offenders is also warranted. Such research would increase our understanding of differences between other serious offenders and this group of specially targeted sexual offenders.

Conclusions

The current paper has provided an initial, though detailed, snapshot of this targeted group of sex offenders subject to post-sentence legislation in Australia. While the injurious nature of their offending must be recognised, these findings also indicate

that they are a disadvantaged group of men with longstanding and pervasive deficiencies. How best to manage these men is a challenging question for the criminal justice system, the courts, and society. Clearly though, the old idiom 'prevention is better than cure' points to a responsible and defensible way forward.

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Table 1

Demographic Characteristics of the Sample

Demography	N	%
Ethnicity		
Caucasian	40	80
Indigenous	7	14
Other	3	6
Marital Status¹		
Single	14	28
Divorced/Separated	10	20
Partner	6	12
Married/De Facto	3	6
Education Level^b		
Less than High School	40	80
High School or Equivalent	3	6
Trade Certificate/Diploma	2	4
Tertiary Degree – Incomplete	2	4
Tertiary Degree – Graduated	1	2
Employment Stability^c		
Stable Work History	18	36
Unstable Work History	25	50

¹The offenders' marital status was available in 33 (66%) cases. ^bEducation level data were available in 48 (96%) cases. ^c Work history data were available in 43 (84%) cases.

Table 2

Prevalence of Currently Diagnosed Axis I and Axis II Disorders

Diagnosis	N	%
Axis I		
Sexual Disorders		
Pedophilia	26	52
Hebephilia	4	8
Sexual Sadism	4	8
Voyeurism	4	8
Fetishism	6	3
Frotteurism	6	3
Exhibitionism	2	4
Transvestic Fetishism	1	2
Sexual Masochism	1	2
Male Erectile Disorder	1	2
Non-Sexual Disorders		
Psychotic Disorder	3	6
Anxiety Disorder	2	4
Adjustment Disorder	1	2
Pervasive Developmental Disorder	1	2

Table 2 Continued

	N	%
Axis II		
Antisocial Personality Disorder	17	34
Personality Disorder NOS	9	18
Psychopathic Personality Disorder	4	8
Borderline Personality Disorder	2	4
Avoidant Personality Disorder	2	4
Narcissistic Personality Disorder	2	4
Dependent Personality Disorder	1	2
Schizoid Personality Disorder	1	2

Table 3

Characteristics of Sexual Offending History

Sexual Offending	Mean (SD)	N	%
Prior Sentencing Dates for Sex Offences	2.76 (2.69)	45	90
0 – 1	-	23	44
2 – 4	-	19	38
5 – 13	-	9	18
Age at First Sexual Offence	24.06 (11.12)		
< 18 years	-	17	34
18 – 24 years	-	16	32
24 – 30 years	-	3	6
30 – 40 years	-	9	18
> 40 years	-	5	10
Total Number of Victims¹	3.54 (2.74)		
0 – 1	-	13	26
2 – 3	-	16	32
4 – 7	-	17	34
8 – 12	-	4	8
Gender of Victims^b			
Female Only	-	28	56
Male Only	-	8	16
Both	-	9	18

Table 3 Continued

	Mean (SD)	N	%
Relationship of Victim(s) to Offender^c			
Extrafamilial Only	-	38	76
Intrafamilial Only	-	0	0
Both	-	7	14
Age of Youngest Victim^d			
Birth – 4 years	-	6	12
5 – 9 years	-	17	34
10 – 13 years	-	4	8
14 – 17 years	-	2	4
18 – 41 years	-	1	2

¹Excluding index offence. ^bThe gender of the victims in the samples' sex offence history was based on 45 (90%) cases. ^cThe relationship of victim(s) to offender was based on 45 (90%) cases. ^dInformation on the age of the youngest victim was available in 30 (60%) cases.

Table 4

General Offending History and Characteristics

General Offending	Mean (SD)	N	%
Convictions for General Offending	-	45	90
Age at First General Offence¹	19.78 (9.32)	-	-
< 18 years	-	25	50
18 – 22 years	-	7	14
23 – 51 years	-	9	18
Ever Arrested as a Juvenile	-	30	60
General Offences			
Breach of Legal Order	-	38	76
Theft	-	37	74
Violence (e.g., assault)	-	26	52
Driving	-	15	30
Deception	-	12	24
Bad Public Behaviour	-	13	26
Property Damage	-	10	20
Drug	-	9	18
Weapon	-	6	12
Stalking	-	3	6

¹General offending information was available in 41 (82%) cases.

Chapter 5

Analysis of Dangerous Sexual Offender Reports

Preamble to Analysis of Dangerous Sexual Offender Reports Study

This chapter presents the third study of the thesis. This study is the central empirical investigation of the thesis and presents a descriptive analysis of the risk assessment and reporting practices of forensic clinicians who prepared reports under Australia's preventive detention legislation. The study provides a timely analysis of clinicians' risk assessment practices in this legal context, including the type of risk assessment method and instruments employed by clinicians and the nature of their reporting of Static-99 outcome information. This study establishes, for the first time, the local standard of risk assessment practice in this high-stakes legal context. Practical recommendations toward establishing best practice standards are provided.

This article has been accepted for publication in *Psychiatry, Psychology, and Law*, a fully refereed journal that aims to publish and disseminate information regarding research and development in forensic psychiatry, forensic psychology and areas of law.

DECLARATION FOR THESIS CHAPTER FIVE

Monash University

Declaration by candidate for Thesis Chapter 5, Paper 3

In the case of Chapter five, Paper 3, the nature and extent of my contribution to the work was the following:

Nature of contribution	Extent of contribution (%)
Conducted literature review, secured ethics, participated in design and management of the study, implemented the study by collecting, coding and statistically analysing data, and drafted and revised this paper.	70%

The following co-authors contributed to the work. Co-authors who are students at Monash University must also indicate the extent of their contribution in percentage terms:

Name	Nature of contribution	Extent of contribution (%) for student co-authors only
James RP Ogloff	Co-investigator, participated in study design, assisted in statistical analyses, contributed to the preparation of the manuscript.	15%
Stuart DM Thomas	Assisted with designing the data collection and coding protocol, contributed to statistical analyses and assisted in preparation of the statistical sections of this paper.	15%

**Candidate's
Signature**

	Date
--	-------------

Declaration by co-authors

The undersigned hereby certify that:

- (13) the above declaration correctly reflects the nature and extent of the candidate's contribution to this work, and the nature of the contribution of each of the co-authors.
- (14) they meet the criteria for authorship in that they have participated in the conception, execution, or interpretation, of at least that part of the publication in their field of expertise;
- (15) they take public responsibility for their part of the publication, except for the responsible author who accepts overall responsibility for the publication;

- (16) there are no other authors of the publication according to these criteria;
- (17) potential conflicts of interest have been disclosed to (a) granting bodies, (b) the editor or publisher of journals or other publications, and (c) the head of the responsible academic unit; and
- (18) the original data are stored at the following location(s) and will be held for at least five years from the date indicated below:

Location(s)

Centre for Forensic Behavioural Science, Monash University.
505 Hoddle St, Clifton Hill, VIC 3068

[Please note that the location(s) must be institutional in nature, and should be indicated here as a department, centre or institute, with specific campus identification where relevant.]

Signature 1

Signature 2

	Date

.....

Running head: AN ANALYSIS OF AUSTRALIAN FORENSIC REPORTS

An Analysis of Dangerous Sexual Offender Assessment Reports:
Recommendations for Best Practice

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Abstract

The operation of Australia's preventive detention legislation depends upon forensic clinician assessments of risk for future sexual offending. However, to date, no information is available regarding how such assessments of risk are being conducted. This study provides the first descriptive analysis of the risk assessment practices of mental health professionals conducting assessments under preventive detention legislation around Australia. Eighty-six forensic evaluation reports on 56 sex offenders subject to preventive detention proceedings were obtained and analysed. Overall, the findings are mixed. Positively, valid structured risk assessment tools were commonly utilised. Also, there was good agreement between experts on the final risk assessment outcome, suggesting a consensus in relevant areas relating to risk assessment. However, a number of concerning results were also found (e.g., some evaluators adopted invalid risk assessment methodologies; others incorrectly applied and interpreted otherwise valid risk tools). Taken together, the findings suggest that the standard of practice of risk assessment must be raised. Recommendations for best practice are proposed.

Key words: risk assessment, sex offenders, preventive detention, legislation, best practice

An Analysis of Dangerous Sexual Offender Assessment Reports:

Recommendations for Best Practice

“Better get a lawyer son. Better get a real good one.”

(Cruel Sea, 1995)

The assessment of risk for future violence is central to many decisions made within the criminal justice system (McSherry, Keyzer, & Freiberg, 2006). Decisions with regard to bail applications, sentencing, parole, and conditions of release from custody may all be affected by the offender’s perceived level of risk for violence (Glazebrook, 2010). Accordingly, the law often turns to clinicians – particularly psychiatrists and psychologists – for opinions on the level of risk for violence posed by an offender (Ogloff & Davis, 2005). Recently, however, clinician opinions of risk for future violence have been afforded an even greater responsibility following the enactment of unique legislation targeting sexual offenders.

In recent years, a number of Australian states have introduced laws allowing for the continued detention or community supervision of sex offenders whose sentences have expired but who are still considered to be dangerous (Doyle & Ogloff, 2009; Sentencing Advisory Council, 2006). The enactment of these preventive detention measures continues an international trend in the proliferation of legislation designed to reduce risks of sexual recidivism (Mercado & Ogloff, 2007; Vess, 2009b). Most recently, the government in Victoria has introduced legislation expanding the scope of the post-sentence community supervision provisions for sex offenders to allow for their ongoing detention in prison (Hansard, 10 November 2009).

In contrast to traditional criminal justice principles, preventive detention legislation is predicated not on the crimes previously committed by an offender and

tied to a finding of guilt, but rather on the offender's *risk* to commit other sexual crimes in the future. This shift in focus from previous offending to the risk of future offending has placed the clinical risk assessment as the paramount consideration in preventive detention proceedings (Glazebrook, 2010). Indeed, under the legislation, psychologists and psychiatrists are required to prepare reports that assess the level of risk or likelihood that the offender would commit further sexual offences if not detained in prison or supervised for an extended period upon release. Moreover, the courts are statutorily required to take into account this clinical assessment of risk in deciding whether to preventively detain or supervise the nominated offender (Doyle & Ogloff, 2009). While the experts' reports are not necessarily dispositive, very often the court's decision of whether to impose the order turns critically upon the clinician's opinion of risk for future sexual violence (Ogloff & Doyle, 2009).

The law's dependence on risk assessment for the operation of this legislation places a considerable burden on the clinician and raises expectations that are perhaps impossible to attain. Accordingly, concerns held by mental health professionals regarding the validity and precision of risk assessment approaches and technologies have intensified (Ogloff & Doyle, 2009), and, in turn, raised doubts about the appropriateness of this legislation (Doyle & Ogloff, 2009).

However, irrespective of these misgivings, numerous preventive detention proceedings have occurred nationally and hundreds of risk assessment reports have been tendered to the courts. Yet, to date, nothing is known about how clinicians go about the task of assessing risk for future sexual violence in Australia for no systematic information has heretofore been analysed and published.

The current study presents the findings of a descriptive analysis of risk assessment reports prepared by mental health professionals pursuant to Australia's

preventive detention legislation. It is vitally important to establish an understanding of clinicians' risk assessment practices within this high-stakes legal context to ensure that legal decision-makers are provided with the highest quality of expert opinion on risk and to preserve and reinforce professional standards.

This paper will first provide an overview of current approaches to risk assessment. While a comprehensive review of the risk assessment literature is beyond the scope of this article, some contemporary approaches will be highlighted. Secondly, some of the theoretical and practical issues that limit the precision of risk assessment will be outlined. Finally, the descriptive analysis of Australian forensic clinicians' dangerous sexual offender assessment reports will be presented. A number of recommendations for best practice in the assessment of risk for future sexual violence will be proposed.

Contemporary Approaches to Sex Offender Risk Assessment

Within the last 15 years, substantial research efforts to develop and enhance risk assessment technologies have resulted in the development of numerous formal tools for assessing risk for future sexual violence (Douglas & Skeem, 2005; Ogloff & Daffern, 2004). These can be divided into two broad camps: actuarial models and structured professional judgment (SPJ).

Actuarial prediction. Actuarial tools comprise variables that have been found to have a statistical relationship to subsequent offending (Ogloff & Davis, 2005). The final actuarial model consists of the combination of risk factors that demonstrated the strongest statistical relationship to the predicted outcome (i.e., sexual offending). The Static-99 (Hanson & Thornton, 1999), a 10-item instrument, is one of the most popular actuarial tools for the prediction of future sexual offending (Hanson, Morton, & Harris, 2003). Numerous validation studies, and, more recently, a meta-analysis of

the accuracy of risk assessment instruments, demonstrate that this instrument reliably provides assessments of risk with a moderate degree of accuracy (Barbaree, Seto, Langton, & Peacock, 2001; Hanson & Morton-Bourgon, 2007; Långström, 2004).

Structured professional judgment. SPJ instruments consist of empirically informed professional guidelines to assist clinicians to develop an assessment of risk (Hart, Kropp, & Laws, 2003). Similar to actuarial prediction, SPJ tools also consist of risk factors derived empirically and rationally from the research literature. However, in contrast to the actuarial model, rather than summing the items in a mechanical fashion, clinicians formulate a structured clinical opinion of low, moderate, or high risk (Davis & Ogloff, 2008). The SPJ approach takes into account both historical *and* dynamic risk factors, and allows clinicians to utilise their professional judgment within a structured framework, so that idiosyncratic but important characteristics of the individual that pertain to risk are considered.

The Sexual Violence Risk-20 (SVR-20; Boer, Hart, Kropp, & Webster, 1997) and the Risk for Sexual Violence Protocol (RSVP; Hart et al., 2003) are examples of sexual risk instruments based on the SPJ model. Due to its somewhat recent development, the SPJ approach has only been evaluated in a handful of studies; although this research has generally been quite promising (e.g., Craig, Browne, & Stringer, 2004; de Vogel, de Ruiter, van Beek, & Mead, 2004; Hanson & Morton-Bourgon, 2007; Macpherson, 2003).

Despite often heated debate in the literature regarding the relative merits and predictive superiority of actuarial and SPJ methods (see Harris, Rice, & Quinsey, 2008; Hart, Michie, & Cooke, 2007; Quinsey, Harris, Rice, & Cormier, 2006), both approaches have comparable predictive validity (Hanson & Morton-Bourgon, 2007).

As noted, the field of risk assessment has advanced considerably in recent years. Indeed, the effect size for violence risk assessment is now superior to that of many other medical and psychological practices (Davis & Ogloff, 2008). Nevertheless, despite these advances, the assessment of risk is a complex task and there remain theoretical and practical limitations on effective prediction in the individual case (Mullen & Ogloff, 2009).

A Cautionary Tale

A full critique of the issues that limit the reliability and validity of risk assessment is beyond the scope of this article (see Ogloff & Doyle, 2009). However, some salient concerns will be briefly reviewed; for the limitations of risk assessment are as relevant as the very outcome of the assessment itself. From the outset, the practical issue of the base rate of sexual reoffending serves to curtail the precision of risk assessment (Wollert, 2006). As explained in greater detail elsewhere (see Mullen & Ogloff, 2009; Ogloff & Davis, 2005), the less common the future behaviour under prediction in the population, the less accurate the predictions. And, contrary to popular opinion, sexual reoffending is not a high frequency occurrence (Doyle & Ogloff, 2009). Indeed, sexual recidivism research consistently finds that, as a group, most sex offenders do not go on to sexually reoffend (e.g., a meta-analysis of sexual recidivism including 30,000 sex offenders found an average recidivism rate of 13.7% over 5-7 years) (Hanson & Bussière, 1998; Hanson & Morton-Bourgon, 2005). Given this relatively low base rate of sexual recidivism and the practical difficulties in predicting a low base rate event, attempting to predict who will commit further serious sexual offences will inevitably be accompanied by false accusations (Doyle & Ogloff, 2009).

A significant issue that compromises the validity of actuarial instruments concerns the unreliability of applying the group based risk evaluation of an actuarial tool to the assessment of risk in the individual case (Berlin, Galbreath, Geary, & McGlone, 2003; Hart et al., 2007; Mullen & Ogloff, 2009). For instance, if an offender scores 6 on the Static-99 instrument he is considered to be in the ‘high-risk’ category, 52% of whom (in the original sample) were known to reoffend throughout a 15 year follow-up. However, the instrument cannot specify whether the ‘high-risk’ offender belongs to the 52% of people in this category who sexually reoffended, or to the 48% of people who did not (Berlin et al., 2003). Therefore, an individual’s score on the actuarial tool fails to be a reliable guide to the individual’s specific risk to sexually reoffend, for the simple reason that actuarial methods are not designed to assign levels of risk to individuals but to groups (Mullen & Ogloff, 2009).

Other considerations that arguably weaken the validity of actuarial models of risk assessment have been detailed elsewhere (see Doyle & Ogloff, 2009; Ogloff & Doyle, 2009), and include the tools’ insensitivity to the impact of age on risk, the lack of parallel between the legal question to be answered and the evaluative results of the instruments, and the limited data validating the instruments’ use locally.

Importantly, however, these limitations also emphasise that when mental health professionals are asked to provide opinions of risk for future violence to courts, or other decision-making bodies, it is incumbent upon the clinician to be clear to state the limitations to the science upon which their findings rest (Mullen & Ogloff, 2009).

The Present Study

The number of publications concerned with the role of risk assessment under preventive detention legislation is considerable and continues to grow (i.e., Keyzer, Pereira, & Southwood, 2004; McSherry, 2005; McSherry et al., 2006; Mercado &

Ogloff, 2007; Mullen & Ogloff, 2009; Ogloff & Doyle, 2009; Scott, 2008; Sentencing Advisory Council, 2006; Smallbone & Ransley, 2005; Vess, 2009a, 2009b; Wood & Ogloff, 2006). Despite this attention being paid to the issue, to date, there has been no empirical evaluation regarding *how* such assessments of risk are being conducted under these laws.

Commonly, investigations of clinical practice are achieved by surveying the professionals (e.g., Allan, Martin, & Allan, 2000; Martin, Allan, & Allan, 2001; Mercado, Elbogen, Scalora, & Tomkins, 2001). However, a limitation to this methodology is its vulnerability to self-report biases. A more objective assessment of how forensic clinicians go about the task of risk assessment is achieved via an analysis of the actual reports that they tender to the court. While content analyses of reports produced under equivalent legislation in the United States have been conducted (see Amenta, 2005; Levenson, 2004), the present study represents the first analysis of reports prepared by mental health professionals conducting assessments of risk for sexual recidivism under Australia's preventive detention legislation. This research seeks to develop a greater understanding of the methodology and standard of practice among forensic clinicians providing expert evidence to the courts within this particular legal context.

We believe this investigation is important for a number of reasons. Firstly, this research will enable a measure of the quality of expert opinion on risk being provided to legal decision-makers. Secondly, if it is found that the practice of risk assessment is inadequate then this will need to be immediately remedied given that compromised risk assessments have significant implications for public safety, the civil liberties of offenders, and the integrity of the professions to which the evaluators are ascribed. In

light of these considerations, the value of an analysis of the state of forensic practice in this legal area is clear.

Method

Sample

Eighty-six forensic evaluation reports on 56 sex offenders subject to preventive detention legal proceedings were made available to the researchers. The sample is comprised of 27 (31.4%) reports from Victoria, 33 (38.4%) reports from Western Australia, and 26 (30.2%) reports from New South Wales. The reports ranged in date from May 30, 2005, to February 2, 2009. Consistent with statutory language all subjects in New South Wales and Western Australia were examined by two forensic evaluators, though at the time of data collection in three cases only one psychiatric report was made available to the researchers. In Victoria two applications were accompanied by two assessment reports. In summary, the researchers were provided access to 60 reports produced in relation to 30 offenders and 26 reports written in relation to 26 offenders.

Report Coding Procedure

Data were recorded via review of the aforementioned forensic evaluation reports. Based upon a comprehensive review of the literature the authors developed a coding manual detailing the scoring criteria for variables of interest. The manual was modelled on two other coding instruments used in previous report analyses (Amenta, 2005; Skeem, Golding, Cohn, & Berge, 1998) and underwent several iterations and a pilot analysis. This analysis resulted in a refining of the coding instrument to ensure consistency of information was obtained across reports (a copy of the data collection form is available from the authors upon request).

Data Collection Procedure

To obtain access to the forensic reports, written requests were sent to the Chief Justices of the Supreme Courts of Queensland, Western Australia, and New South Wales. In Victoria, although both the Supreme and County Courts are eligible to hear post-sentence proceedings, the lower court has heard the vast majority of post-sentence applications. Accordingly, a request was only sent to the Chief Judge of the County Court of Victoria. Although authorities in Queensland declined participation, all other states consented. Upon receipt of the reports, raw, de-identified data were transcribed onto the coding manual. Unique identifiers were assigned to the offender, the reports, and the evaluator. Full ethical approval from Monash University was received.

The reports typically included psychosocial, criminal history, diagnosis, and risk assessment information. Specifically, the information of interest to the researchers were organised around three central themes. Firstly, the rater coded (a) the examiners' general assessment practices (e.g., number and length of interviews), (b) whether the examiner included the referral source and purpose of the assessment, and (c) whether the examiner described notifying the defendant about the purpose and confidentiality of the evaluation and documented their consent to proceed.

Secondly, the rater coded (a) the types and number of risk assessment methodologies and instruments employed, (b) the manner in which risk assessment results were communicated, (c) the method of communicating the final opinion of risk, (d) the nature of any statements of limitations pertaining to the practice of risk assessment, and (e) if examiners identified factors associated with risk outside of a structured assessment, whether such factors have either robust or equivocal support in the literature on sexual recidivism.

Thirdly, for the purposes of assessing inter-rater reliability, the rater coded (a) Axis I and Axis II diagnoses, (b) risk scores on the Static-99 and PCL-R, and (c) the final risk rating provided by each examiner.

Analyses

Similar to previous analyses of psychiatric and psychological reports both domestically (Allan et al., 2000; Martin et al., 2001) and internationally (Amenta, 2005; Heilbrun & Collins, 1995; Heilbrun, O'Neill, Strohman, Bowman, & Philipson, 2000; Larkin & Collins, 1989; Petrella & Poythress, 1983; Skeem, Golding, Cohn, & Berge, 1998), the findings of this study were predominantly descriptive. As the first empirical analysis of clinicians' risk assessment practices under Australia's preventive detention legislation, this was deemed appropriate.

Inter-rater reliability was examined on the total score of the Static-99 using the intraclass correlation coefficient (ICC) two-way model for continuous variables (Bartko, 1966; Shrout & Fleiss, 1979). The PCL-R was inconsistently reported as a numerical value, category, or percentile between evaluators. Therefore all scores and percentiles were transformed into a categorical rating of low (less than 20), medium (between 20 and 30), or high (more than 30). Thus, the PCL-R inter-rater reliability was assessed using kappa coefficients.

DSM-IV (American Psychiatric Association, 2000) diagnoses and final risk ratings were dichotomous variables and were also assessed using kappa coefficients. Kappa coefficients were computed when a 2x2 table was attained. Given the relatively small number of cases included in the reliability analyses, and the disproportionate impact on kappa values this can have, levels of agreement (%) are also provided. While different interpretations of reliability coefficients exist, this study, consistent with Levenson's (2004) approach, adopted a higher standard given

the seriousness of the decisions being made in this legal context. For this study, a reliability coefficient below .60 is considered poor, .60 to .74 is considered fair, and .75 to 1.0 is considered good (Bloom, Fischer, & Orme, 1999).

Results

Participants

Report authors. Twenty-three mental health professionals authored 86 reports. Sixteen psychiatrists authored 60 (69.8%) reports, with 14 (87.5%) psychiatrists indicating that they had a specialisation in the forensic field. Seven psychologists authored 26 (30.2%) reports. Of those with psychology training, four (57.1%) evaluators had received postgraduate qualifications (i.e., Doctor of Psychology), while the highest level of qualification for three¹ (42.9%) evaluators was Honours or Graduate Diploma in Psychology. The number of reports per evaluator ranged from 1 to 9. Sixteen evaluators (70%) had 5 or fewer reports included in the sample and 7 evaluators (30%) had between 5 and 9 reports.

Offenders under evaluation. The demographic, clinical, and criminal characteristics of those subject to these forensic evaluations have been reported elsewhere (Doyle, Ogloff, & Thomas, in press). Briefly, their mean age was 44.7 years ($SD = 14.2$), and 10 (17.9%) were known to be in a relationship at the time of the legal proceedings. The majority ($n = 45$, 80.4%) had less than a high school education. Almost two thirds ($n = 35$, 62.5%) were reported to have had a substance abuse problem throughout their lifetime, and more than two thirds ($n = 38$, 67.9%) were currently diagnosed with an Axis I disorder. Thirty-five (62.5%) received a paraphilia diagnosis, the most common of which was a diagnosis of pedophilia ($n = 29$, 51.8%). More than half ($n = 30$, 53.6%) were diagnosed with a personality disorder, with antisocial personality disorder ($n = 20$, 35.7%) being the most common.

The vast majority of the offenders ($n = 51, 91.1\%$) had previous convictions for sexual offences prior to their index offence, with a mean number of prior sentencing dates of 2.91 ($SD = 2.7$). Mean age at conviction for their first sex offence was 23.8 years ($SD = 11.0$), with over one third ($n = 20, 35.7\%$) committing their first sexual offence prior to the age of 18 years. Twenty-five (44.6%) offenders had a history of offending against male victims, while the majority ($n = 47, 83.9\%$) had a history of sexual offences against female victims. Most offenders had a history of offending outside the family ($n = 53, 94.6\%$) and a history of violent sexual offending ($n = 33, 58.9\%$). The majority ($n = 51, 91.1\%$) also had prior convictions for non-sexual offences.

Report Writing Characteristics

General assessment practices. All reports indicated the number of interviews conducted with the offender; the average was 1.62 ($SD = 0.85$) but ranged from 1 to 5. The majority of reports ($n = 79, 91.9\%$) were based on either one or two interviews. The total length of the interviews was noted in 67 (77.9%) reports, with a mean length of 234.81 minutes (3.9 hrs) ($SD = 129.24$), ranging from 90 minutes (1.5hrs) to 645 minutes (10.75 hrs).

Inclusion of information. Almost two thirds ($n = 56, 65.1\%$) of reports included a statement that identified the authority that requested the evaluation, while 30 reports (34.9%) omitted this information. The purpose of the assessment was clearly articulated in 17 (19.8%) reports. The majority ($n = 66, 76.7\%$) indirectly referred to the reason for assessment by reference to the legislation, while 3 (3.5%) reports omitted any reference to the purpose of the assessment. All reports indicated that the author had engaged in a review of collateral information.

Documentation of notification. Less than two thirds of the reports ($n = 53$, 61.6%) included a statement that the offender was notified regarding the limits to confidentiality. Consent to participate in the assessment was documented in 51 (59.3%) reports, while 39 (45.3%) reports included a statement that the offender was told the nature and purpose of the evaluation. That the offender understood the information contained within the notification was documented in 46 (53.5%) reports.

Risk Assessment Practices

Risk assessment methods. Table 1 presents the type, frequency and combination of risk assessment methods employed by the evaluators. Multiple methods of risk assessment were regularly utilised, with 2 ($n = 35$, 40.7%) and 3 ($n = 35$, 40.7%) methods being the most common. The methods of unstructured clinical judgment and adjusted actuarial, were, respectively, used in 18 (21%) and 24 (27.9%) reports. The most common combination of methods comprised actuarial and structured professional judgment ($n = 25$, 29.1%).

Risk assessment tools. A range of risk assessment instruments derived from actuarial, adjusted, and structured professional judgment methodologies were employed by the evaluators (see Table 2). The Static-99 was clearly the most frequently used risk assessment tool. The structured professional judgment tools of the SVR-20 and RSVP were utilised in 44 (51.1%) reports.

Reporting and interpreting the Static-99. Table 3 presents frequency data across a number of dimensions relevant to reporting Static-99 results and interpreting the tool's probability estimates. Of those reports that used the Static-99 risk assessment, the majority included the probability estimate ($n = 66$, 83.5%). A number of reports contained errors in the reporting of the evaluative results ($n = 19$, 28.8%).

Stating the limitations of risk assessment. The type and frequency of statements provided by assessors regarding the limitations of the Static-99 risk tool specifically, and the practice of risk assessment generally are listed in Table 4.

Static-99 specific statements of limitations were provided in 46 (58.2%) reports, ranging from 0 to 5. The limitation most commonly stated concerned the difficulties in applying the group estimate of risk to the individual case ($n = 36$, 45.6%).

A general statement of the limits to the practice of risk assessment was provided in 39 (45.3%) reports, ranging from 0 to 3. The statement most commonly provided concerned the limited accuracy of risk assessment ($n = 29$, 33.7%).

Risk factors. In 52 (60.5%) reports, evaluators identified factors outside of a formal (i.e., instrument-based or empirically guided) risk assessment procedure, that they considered to be associated with an elevated risk for reoffence. Table 5 lists those risk factors identified by evaluators that do have empirical support for being associated with recidivism risk. Prior sex offences ($n = 27$, 31.4%), deviant sexual preferences ($n = 31$, 36%) and lack of social/familial/community support ($n = 22$, 25.6%), were the individual risk factors most commonly identified by evaluators and supported by the sexual recidivism literature to be associated with risk of sexual reoffending.

Additionally, factors that were identified by evaluators external to a formal risk assessment procedure as being associated with risk, but that do not have strong empirical support, are presented in Table 6. Thirteen (56.5%) evaluators wrote 28 (32.6%) reports within which they identified such 'risk' factors. Minimising culpability ($n = 17$, 19.7%), and denial ($n = 9$, 10.5%) were the two factors most

commonly believed to be associated with sexual recidivism that are currently lacking in empirical support.

Communication of final risk rating. A final opinion of risk was provided in 79 (91.9%) reports. Of those reports to include a final opinion, all but one ($n = 78$, 98.7%) utilised a categorical method of risk communication (i.e., high, moderate, low). The majority of assessments concluded the offender posed a high risk ($n = 64$, 74.4%) of sexual reoffending. Five reports (5.8%) provided a risk rating of ‘very high.’ Risk ratings of moderate-high, moderate and moderate-low were, respectively, noted in 5 (5.8%), 2 (2.3%), and 3 (3.5%) reports. A risk rating of ‘likely’ was provided in one report (1.2%).

In addition to describing the subject as ‘high risk’ for future sexual offending, 16 (18.5%) reports also described the offender as being ‘some risk’, a ‘significant risk,’ a ‘virtually certain risk’, and ‘very’, ‘significantly,’ and an ‘unacceptably’ high risk.

Inter-Rater Reliability

Risk scores, diagnoses, and final risk ratings. All inter-rater reliability results are displayed in Table 7. Analysis of the Static-99 produced an ICC coefficient of .85. While the level of agreement was moderate (65%), the inter-rater reliability (Pearson $r = .81$) was high. Static-99 scores differed in 7 cases; in all but one the difference in Static-99 scores did not correspond with a difference in the associated risk rating. The PCL-R was used by both evaluators in only 10 cases with good levels of agreement (70%), but poor reliability ($\kappa = .46$).

Reliability of Axis I diagnoses ranged from good to excellent. Pedophilia demonstrated excellent reliability ($\kappa = .93$), as did psychotic disorders ($\kappa =$

1.0). The reliability of Axis II diagnoses was poor, except for psychopathy ($\kappa = 1.0$).

The level of agreement between evaluators on the final risk rating was very good (84.7%).

Discussion

The assessment of an offender's risk for further sexual offending is central to preventive detention proceedings. This investigation provided the first descriptive analysis of forensic evaluators' risk assessment practices and the reliability of risk assessment outcomes in these legal matters. Despite the descriptive nature of this study, some important conclusions can be drawn, and practical recommendations made.

Taken together, the findings of this investigation are mixed. That the majority of clinicians employed valid structured tools to assess future sexual violence risk is encouraging, and indicates a significant translation of empirical research into clinical practice. Encouraging too was that there was good agreement between the experts on the final risk assessment outcomes, suggesting a consensus in relevant areas relating to risk assessment. Despite these relatively positive findings, however, a number of disconcerting results were also found. For example, some evaluators adopted invalid risk assessment methodologies. Others incorrectly applied and interpreted otherwise valid risk tools. Also, the limits that constrain the science of risk assessment were all too infrequently communicated. Given that these legal proceedings involve fundamental questions of individual liberty and public safety, these are egregious errors.

Overall, the findings suggest that the standard of practice of risk assessment must be raised. In what follows the results across the domains of interest will be discussed. Recommendations for best practice will be proposed.

Report Writing and Assessment Practices

Under the code of ethics applicable to the professions of psychology and psychiatry (Australian Psychological Society, 2007; Royal Australian and New Zealand College of Psychiatrists, 1998), practitioners are obligated to provide the examinee with a notification outlining the nature and purpose of an assessment, the limits to confidentiality that pertain to the assessment, and obtain the person's informed consent to proceed with the interview. However, a significant proportion of reports failed to document that the various constituents of the notification had taken place. Obviously, we do not presume that failure to document the notification equates to failure to provide the notification. Nevertheless, the careful documentation of the notification is advised so that fulfilment of the ethical obligation to notify is formally recorded and the assessor is protected from claims to the contrary.

Contrary to general principles of forensic report writing (e.g., Allnutt & Chaplow, 2000), a number of reports failed to identify the authority (e.g., Supreme Court) that requested the evaluation and clearly articulate the reason for the referral. For clarity, the authors recommend that the referrer and the purpose of the assessment be clearly documented.

Risk Assessment Practices

Methods of risk assessment. Despite ongoing debate among experts regarding the relative merits of various sex offender risk assessment methods, some broad points of agreement are being reached. These emerging points of agreement are that empirically validated actuarial measures best form the foundation of risk assessment

while a structured consideration of dynamic risk factors assist in formulating the nature of the risk presented by the offender and a management strategy to reduce such risks (Vess, 2009b). A significant number of reports approached the task of risk assessment in this way, combining actuarial and structured professional judgment methods. It is positive that their expert opinion has been grounded in the best risk assessment methods available.

Less encouraging was the finding that a number of clinicians utilised an *unstructured* clinical judgment approach in their assessment of sexual violence risk. Simply, the empirical evidence does not support unaided clinical judgment as a valid method of risk assessment (Hanson & Morton-Bourgon, 2007; Ogloff & Davis, 2005). Some may advocate that an unstructured approach to risk assessment is necessary when no relevant structured tools are available (e.g., when required to assess risk for sexual recidivism in women offenders). However, in such cases experts are cautioned from providing an opinion that is without empirical foundation.

Several reports, problematically, presented an opinion on risk based solely upon the results of an actuarial method. The actuarial approach provides a valid, yet incomplete assessment of risk. Even the instrument's authors advise that the Static-99 is not comprehensive because it "neglects whole categories of potentially relevant variables" (Hanson & Thornton, 1999, p. 18). Clinicians are cautioned from relying exclusively upon an actuarial method at the expense of a more comprehensive, multi-modal risk assessment procedure.

A significant number of reports utilised the adjusted actuarial method as part of their risk assessment. While the consideration of dynamic risk variables is relevant to risk assessment (Douglas & Skeem, 2005), the empirical validity of the adjusted actuarial approach is far from established. Indeed, the development of the dynamic

risk instrument SONAR in Hanson and Harris' (2000) research contained limitations such as invalid items, while its refinement in a later study (Hanson, Harris, Scott, & Helmus, 2007) had little effect on its capacity to add incremental validity to actuarial predictions. While the method holds some promise for evaluating changes to an offender's risk, further and better research is needed to justify the use of this method in a legal context.

Risk assessment tools. As noted, a risk assessment should be based upon the best available methodology (Mercado & Ogloff, 2007). Clearly, meeting this requirement necessitates the use of the best available risk assessment tools. Positively, the results showed that the majority of clinicians used valid and reliable structured tools, across actuarial and SPJ methodologies.

The Static-99 was utilised in almost all reports, which reflects its status as a well validated tool with reliably moderate degrees of accuracy (Hanson & Morton-Bourgon, 2007). However, used only in half of the reports were SPJ tools the RSVP and SVR-20. Although SPJ tools are relatively recent, they have been validated in a number of studies with promising results (Craig et al., 2004; de Vogel et al., 2004; Macpherson, 2003). Indeed, Hanson & Morton-Bourgon's (2007) meta-analysis of the accuracy of risk assessment instruments revealed that the strongest single predictor of sexual recidivism was a measure of structured professional judgment (i.e., de Vogel et al., 2004). The structured professional judgment approach, unlike actuarial tools, can assist the clinician in the formulation of the nature of the risk posed by the offender; it has also been recommended for those wishing to understand their cases in depth (Hanson & Morton-Bourgon, 2007).

Lastly, a number of assessors utilised the dynamic risk tool SONAR (Hanson & Harris, 2000; Hanson & Harris, 2001). As discussed previously, this risk

instrument, and the adjusted actuarial method to which it belongs, lacks the sufficient empirical base to justify its use in preventive detention proceedings.

Communicating Static-99 results. The utility of a risk assessment tool is realised only when it is correctly administered, accurately interpreted, and its results are effectively communicated. Concerningly, the findings showed that the utility of the Static-99 was too often undermined by inadequate reporting of outcome information, erroneous reporting of its results and its incorrect interpretation.

Firstly, omitted from a significant number of reports were the probability percentages of recidivism associated with the offender's risk score and the samples' recidivism base rate upon which the probability percentages were determined. This information is imperative to understanding and contextualising the tool's risk rating; its omission disallows judicial decision-makers the necessary information to fully understand the descriptive and relative nature of the Static-99's rating in relation to future sex offending risk.

Several reports also expressed the probability estimates associated with an offender's Static-99 score as indicating the offender's *specific* risk of reoffending (i.e., "There is a 4 in 10 chance that [the offender] will reoffend within 5 years"). More reports still were unclear about this relationship between the probability estimate and the offender's specific reoffence risk (i.e., "[the offender's] risk is quantified as a 40% likelihood of reoffending over 5 years from a sample of similar offenders in Canada and UK"). The probability estimate associated with the offender's score refers to the recidivism percentages of a *group* of sexual offenders. To apply this group-based percentage to the individual is wrong. Given the gravity of the decision to be made by the court partly, but necessarily, based upon the expert's risk assessment, this incorrect interpretation of the Static-99 risk tool is a glaring error.

A number of mistakes were also made in the direct reporting of the probability estimates themselves. Contrary to the tool's manual (Harris, Phenix, Hanson, & Thornton, 2003), a handful of evaluators applied the uncollapsed recidivism percentages to offenders whose risk score was higher than 6. In so doing, the offender's risk for reoffending has been erroneously inflated. In other reports recidivism percentages were incorrectly quoted. For example, a number of reports stated the 15 year recidivism estimate for the high-risk category as '54%' when the instrument's manuals and publications note this as "52%" (Hanson & Thornton, 1999). In some reports the probability estimates were rounded up (i.e., from 39% to 40%). While these may be relatively minor errors, given the role that the exact numerical probability estimate may play in the judiciary's decision on whether the offender meets the threshold level of risk to warrant an order (see *RJE v Secretary to the Department of Justice*, 2008; *TSL v Secretary to the Department of Justice*, 2007), it is a fundamental requirement that the correct percentages are communicated to the courts.

Finally, users of the Static-99 considered the effect of the offender's age on the validity of the actuarial assessment on very few occasions. This is contrary to the research evidence. The literature indicates that actuarial instruments insufficiently capture the decline in recidivism risk associated with advanced age (Ogloff & Doyle, 2009). Indeed, adjusted age-related probability estimates have been available for some years (Hanson, 2005), while a revised Static-99 coding form that better captures the impact of advanced age on risk is now available (see <http://www.static99.org>).

It has been argued that the incorrect use of a recognised risk measure is potentially worse than not using a measure at all for "erroneous and misleading conclusions may be drawn that appear to have the weight of scientific research behind

them and therefore carry an undeserved weight in legal proceedings” (Vess, 2009b, p.186). The standard of practice in the use of the Static-99 must be raised.

Stating the limitations to risk assessment. Limitations associated with risk assessment tools or the risk assessment enterprise more generally, were infrequently stated. There a number of pertinent limitations to the assessment of risk for future sexual violence, as outlined here and elsewhere (Ogloff & Doyle, 2009). Failure to convey the limits to the technology upon which one’s expert opinion rests, contravenes the professional’s ethical obligations and invites the potential for the court to accord undeserved weight to the risk outcome than is warranted (Glazebrook, 2010).

Risk factors. A number of reports identified factors outside of a formal risk assessment procedure the author believed to be associated with an increased risk for sexual recidivism. The majority of such factors were static and dynamic factors themed around the offender’s sexual criminal history, sexual deviance, and maladaptive interpersonal functioning and social supports. These factors have consistently been identified as empirically associated with sexual recidivism (Hanson & Bussière, 1998; Hanson & Morton-Bourgon, 2005), thus reflecting an emerging concordance of opinion on risk. However, conversely, a number of reports also included risk factors that were identified by evaluators as being associated with risk that have equivocal or no empirical support (Hanson & Bussière, 1998; Hanson & Morton-Bourgon, 2005). For example, a number of reports identified factors such as denial, a lack of victim empathy, low treatment motivation, and history of violent offending, to indicate elevated risk, when in fact such factors do not have a well-accepted empirically supported relationship to the outcome being predicted (Hanson & Bussière, 1998). Simply, one cannot justify the use of such risk factors.

Inter-Rater Reliability

The inter-rater reliability of risk assessment scores on the Static-99 was good, though somewhat lower than previous research (Bartosh, Garby, Lewis, & Gray, 2003; Harris, 2003; Levenson, 2004). This indicates that clinicians will consistently provide comparable assessments of the likelihood of sexual reoffence risk based on this instrument. The inter-rater reliability for Axis I paraphilic diagnoses was high, thus clinicians are reliably identifying the important psychopathological constructs that are linked to reoffence risk. Finally, the level of agreement between the evaluators regarding the final risk rating was good. This result is significant for it indicates that there is a consensus in relevant areas relating to risk assessment.

Communication of Final Risk Rating

Almost all reports communicated a final opinion on risk using the categorical method (i.e., high, medium, and low). A uniform approach to risk communication is clearly helpful for the task the court is engaged in. Lastly, some reports included additional descriptors such as ‘some risk,’ ‘virtually certain risk,’ ‘unacceptably high,’ or ‘very high’ in addition to their conclusion of high risk. These additional statements are ambiguous, potentially misleading, and likely to contribute an unnecessary element of confusion to considerations of risk.

Recommendations for Best Practice

The findings of this investigation suggest there is substantial room for improvement in how clinicians assess risk for sexual violence and communicate their findings. In order to strengthen the reliability and validity of expert opinion in this area and preserve professional standards, a number of recommendations can be put forward.

1. The use of an unstructured clinical judgment approach to the assessment of risk is invalid, and therefore has no probative value and should not be relied upon exclusively in these assessments.
2. Clinicians are cautioned against adjusting actuarially-derived risk ratings based on dynamic risk variables until more and better research provides an empirically defensible reason for doing so. Dynamic risk factors are useful in understanding offending in an individual but as yet have limited validity in predicting risk over the long-term.
3. The actuarial and structured professional judgment methods are valid and complementary approaches to risk assessment. Actuarial assessments are wisely used to anchor the risk assessment, given the empirically robust relationship between static risk factors and future sexual violence. The SPJ method compliments this approach by incorporating dynamic and idiographic risk information into a comprehensive evaluation of the possible nature of future sexual violence and provides targets for risk management. It would be appropriate for clinicians to utilise both when assessing risk for future sexual violence in applied assessments such as preventive detention proceedings.
4. The types of risk assessment tools recommended for use are simply those that have the greatest evidence base. Accordingly, the Static-99 remains the most reliable and best validated actuarial measure. The RSVP and its predecessor the SVR-20 are very promising SPJ tools and will enable the clinician to understand their cases in much greater detail. The PCL-R is also a valid measure of the construct of psychopathy, which, given its relationship to sexual violence risk, requires evaluation in an assessment of risk for future sexual violence.

5. The results of a properly conducted risk assessment must be effectively communicated. When reporting the results of the Static-99 clinicians are advised to qualify comparative categorical labels such as high risk with the associated probability estimates of recidivism. Additionally, clinicians must report the correct probability percentages, consider the effect of the offender's age on the validity of the actuarial result, and be very careful to not assign the probability estimate of recidivism to the specific offender.
6. The base rate of recidivism associated with an actuarial instrument's test sample must also be communicated. This is because the evidentiary value of the offender's probability of recidivism is dependent on the base rate.
7. Clinicians must know and convey the limitations to the state of knowledge in the field of risk assessment. Failure to do so violates ethical obligations and potentially gives the court the wrong impression about the predictive ability of the available technology.
8. When communicating final opinions on risk, evaluators should employ the categorical method (e.g., high, medium, low). Defined conventionally, medium/moderate risk would be equal to the base rate of recidivism associated with the individual offender, high risk is significantly higher than the base rate, and low risk is significantly lower than the base rate. Evaluators are also cautioned from describing an offender's risk as 'unacceptable,' 'significant,' or 'likely.' Such terms invite unnecessary ambiguity to the process of determining an offender's risk potential.
9. Forensic clinicians need to be reminded that much research has identified numerous factors to be empirically associated with sexual reoffence risk. To identify factors that lack such empirical support is unjustifiable. Clinicians are

recommended to remain well versed in the contemporary research literature on risk assessment. Keeping up-to-date with scientific advances and debates within the field will protect the clinicians' opinion on risk from serious criticism and a scathing cross-examination.

Limitations and Future Directions

This present study has limitations that should be considered when interpreting these findings. Firstly, the sample size was smaller than expected following Queensland's decision to not participate in the study. Therefore, the results apply only to those clinicians preparing reports under this legislation in New South Wales, Western Australia, and Victoria. Secondly, the disciplines of psychiatry and psychology were not evenly represented and some evaluators authored more reports in the sample than others. Accordingly, some of the results may be more relevant to a particular discipline, or author. Nevertheless, the sample of reports is a valid representation of reports tendered in these matters across the participating jurisdictions. Another limitation was the small number of cases available for the inter-rater reliability analyses.

Additional research is required in this area. An extension of this analysis to Queensland is warranted to provide a truly national assessment of the standard of practice of risk assessment in this legal context. Further, expanding research into the areas of clinicians' decision making processes in evaluating risk and how outcomes derived from multiple risk assessment tools and methods are integrated into a final opinion on risk, is needed.

Conclusions

This investigation described the risk assessment practices of forensic clinicians following an analysis of sex offender assessment reports submitted under

Australia's preventive detention legislation. As an analysis of clinicians' actual practices, via their reports, this research represents a methodological advancement of previous investigations into the clinical practices of mental health professionals.

The results of this investigation were mixed. On the one hand, the findings indicated that there is a consensus in relevant areas relating to risk assessment resulting in regular agreement between clinicians with regard to the final risk assessment outcome. Furthermore, the consistent use of structured risk tools is an encouraging sign that the hard science of the field is translating into applied practice. However, beyond these relatively positive findings, more concerning results were found. Too many clinicians used unreliable methods of risk assessment, erroneously reported the results of a risk instrument, and failed to effectively communicate risk assessment outcomes. Too few clinicians stated the limitations that pertain to the science of risk assessment. In short, the standard of the practice of risk assessment for future sexual offending must be raised. Clinical modesty and professional rigour is required.

The implications of these findings extend beyond recommendations for improving clinical practice. Preventive detention proceedings involve fundamental questions of human rights and community safety. Under this legislation courts are faced with the unenviable task of balancing the human rights of offenders with the risk to community safety posed by such offenders. A less than competent risk assessment and report unnecessarily complicates this task with potentially deleterious consequences for the public and the offender.

It is hoped that this research will be used by clinicians, judges, and the legal fraternity to raise the level of practice in this area, so that the court can be assisted in

its efforts to achieve that balance between the civil liberties of offenders and the right of the public to be kept safe from undue risk.

Endnotes

¹ However two psychologists were approaching completion of their doctoral degrees in psychology

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Table 1

Frequency and Type of Risk Assessment Methods Employed by Evaluators

Risk Assessment Method	N	%
Actuarial Alone	3	3.5
Actuarial + Dynamic ¹	2	2.3
Actuarial + SPJ ^b	25	29.1
Actuarial + Dynamic + SPJ	5	5.8
Actuarial + Adjusted + SPJ	4	4.7
Clinical Judgment Alone	5	5.8
Clinical Judgment + Actuarial	8	9.3
Clinical Judgment + Actuarial + Dynamic	1	1.2
Clinical Judgment + Actuarial + Empirically Guided	1	1.2
Clinical Judgment + Actuarial + Adjusted + SPJ	3	3.5
Empirically Guided Alone	1	1.2
Empirically Guided + Actuarial	4	4.7
Empirically Guided + Actuarial + Adjusted	17	19.8
Empirically Guided + Actuarial + SPJ	7	8.1

¹Dynamic refers to tools that, though comprised of dynamic variables, were not used to adjust the assessment of risk based on historical factors. ^bSPJ is an abbreviation for Structured Professional Judgment.

Table 2

Frequency and Type of Risk Assessment Tools Employed by Evaluators

Risk Assessment Tool	N	%
Static-99	79	91.9
RSVP	31	36.0
SONAR	23	26.7
SVR-20	13	15.1
3-Predictor Model	9	10.5
RRASOR	4	4.7
SORAG	1	1.2
HCR-20	12	14.0
PCL-R ^a	46	53.5

^aAlthough not designed to be a risk assessment tool, the PCL-R has been reliably associated with both violent and sexual recidivism.

Table 3

Reporting and Interpreting Static-99 Results

Components of Static-99 Reporting	N ¹	% ^b
Inclusion of Static-99 Results		
Total Static-99 score	52	65.8
Probability estimate	66	83.5
Base rate data	7	10.6
Interpretation of the probability estimate		
Group-based risk	38	57.6
Individual's risk	10	15.2
Unclear/Contradictory	15	27.3
Errors in reporting probability estimates		
Incorrect recidivism percentages	14	21.2
Uncollapsed recidivism percentages	5	7.6
Impact of offender's age on Static-99 result	15	19

¹Number of reports that included the described information. ^bRefers to the percentage of reports that provided the relevant information relative to those reports that used the Static-99 tool.

Table 4

Frequency of Statements of Limitations Provided for Static-99 and General Risk Assessment

Statement of Limitation	N	%
Static-99 Risk Assessment		
Moving from group to individual estimations of risk	36	45.6
Absence of dynamic factors	23	29.1
Not validated on Australian sex offenders	18	22.8
Accuracy of the instrument	13	16.5
Ethical issues regarding its use in the legal context	11	13.9
Dissimilar definition of sex offence between Static-99 and legislation	6	7.6
Not validated on Indigenous sex offenders	3	3.8
General Risk Assessment		
Accuracy of risk assessment	29	33.7
Limitations to the science of risk prediction	18	20.9
Not entirely objective process	9	10.5
Tools not validated for use in Australia	2	2.3

Table 5

Frequency of Empirically Supported Risk Factors

Factors	N	%
Demographic Factors	4	4.7
Age	1	1.2
Marital status	2	2.3
Employment history	3	3.5
Criminal History	22	25.6
Total number of prior offences	8	9.3
History of rule violation	13	15.1
Sexual Criminal History	29	33.7
Prior sex offences	27	31.4
Stranger victims	6	7.0
Extrafamilial victims	9	10.5
Early onset of sexual offending	1	1.2
Male victims	11	12.8
Diverse sexual crimes	10	11.6
Sexual Deviance	32	37.2
Deviant sexual preferences	31	36.0
Sexual preoccupations	5	5.8

Table 5 Continued

	N	%
<hr/>		
Personality Disorder		
Psychopathy	2	2.3
Antisocial personality disorder	6	7.0
Any personality disorder	1	1.2
Treatment History	7	8.1
Failure to complete treatment	3	3.5
Failure to participate in treatment	4	4.7
Dynamic Factors	41	47.7
Sexual attitudes tolerant of sexual violence	7	8.1
Intimacy deficits	14	16.3
Lack of appropriate adult sexual relationship	11	12.8
Impulsivity	12	14.0
Substance abuse	14	16.3
Circumstances post release (e.g., release plans)	8	9.3
Lack of social/familial/community support	22	25.6
Psychological problems (i.e., negative mood)	5	5.8
<hr/>		

Table 6

Frequency of Identified Risk Factors with Equivocal Support

Factors	N	%	d ^a
Minimising culpability	17	19.7	.00
Denial	9	10.5	-.02
Low treatment motivation	8	9.3	-.02
Victim empathy	7	8.1	-.01
Low intelligence	7	7.0	.04
Prior history of violent offending	6	7.0	.01
Victim of sexual abuse	3	3.5	.02
Degree of force used	2	2.3	.00
Degree of sexual contact	1	1.2	-.16
Adverse childhood environment	1	1.2	.00

^aThe standardised mean difference statistic is taken from Hanson and Morton-

Bourgon's (2004) updated meta-analysis of predictors of sexual recidivism.

According to Cohen (1988) d values of .20 are considered small. The value of d is approximately twice as large as the correlation coefficient calculated from the same data.

Table 7

Inter-Rater Reliability Coefficients

Measures and Variables	N	Agreement %	ICC	Kappa ^a
Risk Assessment Instruments				
Static-99	20	65.0	.81	
PCL-R	10	70.0		.46
Diagnoses				
Pedophilia	30	96.7		.93
Other paraphilias	30	96.7		
Multiple paraphilias	30	93.3		.76
Psychotic disorder	30	100.0		1.0
Other Axis I disorder	30	96.7		.78
Antisocial PD	30	83.3		.65
Psychopathy	30	100.0		1.0
Personality disorder NOS	30	73.3		.19
Other personality disorder	30	86.7		-.053
Final Risk Rating	24	84.7		
High ^b	24	79.2		.42
Moderate ^c	24	79.2		.32
Moderate low	24	95.8		

^aKappa values were only available when a 2x2 table could be attained. ^bVery high and high ratings were merged to form a single rating of high for the purposes of cross-tabulation. ^cModerate-high and moderate ratings were merged.

PART IV: INTEGRATED DISCUSSION

The integrated discussion consists of two chapters. The first chapter presents a paper published in a peer reviewed journal. This paper summarises the salient clinical and practical issues that limit the validity of an assessment of risk for future sexual violence. The leading aim of the article is to sound a clarion call to mental health professionals requested to provide their expert opinion on risk for sexual violence in post-sentence matters. The paper advocates for a clinically cautious and professionally rigorous approach to risk assessment. A secondary aim of the paper is to outline in basic detail an alternative model for managing sex crime risk. The concerns raised in the psycho-legal analysis regarding the efficacy of post-sentence legislation suggest the development of more effective ways to respond to the risks sex offenders pose to reoffend is warranted.

The second chapter of the integrated discussion more formally addresses the main findings of the thesis, discusses the implications of these findings, considers limitations to the investigation, identifies future research directions, and provides concluding remarks. The second chapter is relatively brief because the findings and implications arising from the theoretical and empirical investigations have been articulated within the papers themselves.

Chapter 6

Advocating a Judicious Approach to Risk Assessment under Preventive Detention Legislation

Preamble to Discussion Paper

This chapter presents the fourth paper of the thesis. While relevant to a range of interested professionals, the paper is intended for forensic clinicians undertaking risk assessments in this legal area. Accordingly, the paper focuses on the task of risk assessment and details a number of theoretical and practical issues that limit the precision with which assessments of risk for future sexual violence can be made. The paper seeks to increase clinicians' awareness and understanding of the issues that limit the science upon which their assessments of risk are based. Clinicians are also encouraged to confidently outline the nature of such limitations. Given the rapidly increasing number of preventive detention proceedings occurring nationally, this paper provides a timely caution for those preparing assessments in these matters. Indeed, the paper advocates a cautious and humble approach when assessing risk for sexual violence under Australia's preventive detention laws. A secondary aim of the paper is to outline an alternative model to managing sex crime risk.

This article has been published in *Sexual Abuse in Australia and New Zealand*, a peer-reviewed journal whose publications focus on the application of research and practice in the sex offending area.

DECLARATION FOR THESIS CHAPTER SIX

Monash University

Declaration by candidate for Thesis Chapter 6, Paper 4

In the case of Chapter six, Paper 4, the nature and extent of my contribution to the work was the following:

Nature of contribution	Extent of contribution (%)
Assisted with the review of the literature, contributed to the development and the theoretical analysis, and prepared and revised the paper.	45%

The following co-authors contributed to the work. Co-authors who are students at Monash University must also indicate the extent of their contribution in percentage terms:

Name	Nature of contribution	Extent of contribution (%) for student co-authors only
James RP Ogloff	Co-investigator, participated in the literature review, development of theoretical analysis and revision of the paper	55%

Candidate's Signature		Date
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Declaration by co-author

The undersigned hereby certify that:

- (19) the above declaration correctly reflects the nature and extent of the candidate's contribution to this work, and the nature of the contribution of each of the co-authors.
- (20) they meet the criteria for authorship in that they have participated in the conception, execution, or interpretation, of at least that part of the publication in their field of expertise;
- (21) they take public responsibility for their part of the publication, except for the responsible author who accepts overall responsibility for the publication;
- (22) there are no other authors of the publication according to these criteria;
- (23) potential conflicts of interest have been disclosed to (a) granting bodies, (b) the editor or publisher of journals or other publications, and (c) the head of the responsible academic unit; and
- (24) the original data are stored at the following location(s) and will be held for at least five years from the date indicated below:

Location(s)**Centre for Forensic Behavioural Science, Monash University.
505 Hoddle St, Clifton Hill, VIC 3068**

[Please note that the location(s) must be institutional in nature, and should be indicated here as a department, centre or institute, with specific campus identification where relevant.]

Signature 1

	Date
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A Clarion Call: Caution and Humility Must be the Theme when Assessing Risk for Sexual Violence under Post-Sentence Laws

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Introduction

“[It] is very difficult to predict alarming but infrequent sex crimes with any reasonable degree of certainty, no matter how much money is spent on doing so.”

(Wollert, 2006, p. 81)

Fear of the sexual predator occupies a prominent position in the collective consciousness of society. Over the past generation, this fear has turned to outrage. It has changed our behaviour such that parents in many countries now routinely drive their children to school for fear of what might happen to them if they are left alone. Considerable media attention has been directed to some tragic and infamous incidents of re-offending by convicted child-sex offenders upon release (McSherry, Keyzer, & Freiberg, 2006; Sullivan, Mullen, & Pathé, 2005; Wood & Ogloff, 2006). In the aftermath of such incidents, the community demanded to be protected from such offenders and the risks they pose to sexually re-offend (La Fond, 2005; Wood & Ogloff, 2006).

In an effort to attenuate the public's anxieties and reduce the risk of sexual recidivism, a growing number of jurisdictions, including many American states, and most recently New Zealand and a number of Australian states, have enacted exceptional legislative schemes targeting sexual offenders. The legislation enables either the continued detention or extended community supervision of a subclass of sex offenders whose sentences have expired but who are still considered to be 'dangerous' (Sentencing Advisory Council, 2006). The dominant purpose of these laws is to protect the community.

Post-sentence detention and supervision legislation represents a significant departure from traditional legal philosophy, from punishing offenders for offences already committed to restricting the liberty of offenders for offences they *might* commit in the future (Sentencing Advisory Council, 2006). Indeed, this

legislation has received wide-ranging criticism from lawyers, libertarians, and treatment providers (Birgden, 2007; Ruschena, 2003; Sentencing Advisory Council, 2006; Sullivan et al., 2005).

However, of particular concern to the authors, is the role of mental health professionals in bringing these controversial laws into effect. In deciding whether to submit an offender to a post-sentence detention or supervision order, courts must consider assessments of risk of future sexual offending conducted by mental health professionals. However, predicting the future is very difficult and the pivotal role played by this clinical assessment of risk in the outcome of post-sentence hearings is cause for concern.

With recent advances in the field of risk assessment, the available methods to predict risk for future sexual offending are significantly better than chance but still relatively moderately accurate (Hanson & Morton-Bourgon, 2005; Wood & Ogloff, 2006). Indeed, as the opening quotation declares, predicting an event known to not occur with frequency cannot be done with any certainty (Wollert, 2006). Furthermore, there are a number of other clinical issues that limit the reliability and validity of risk prediction (e.g., Berlin, Galbreath, Geary, & McGlone, 2003; Hart, Michie, & Cooke, 2007; Wood & Ogloff, 2006). Taken together, these limitations highlight the danger of assigning clinical risk assessments to such a lead role in these high-stakes legal decisions. Simply, the role of risk assessment in post-sentence matters is far more precarious than assumed by both clinicians and the law.

In this article we consider the task of risk assessment in post-sentence supervision and detention proceedings, particularly in Australia and New Zealand where such proceedings occur within the criminal law. The article begins with a brief overview of these legislative initiatives in New Zealand and Australia and outlines the role of mental health professionals in their operation. The next section identifies and explores the clinical limitations of risk assessment and other issues that affect the precision of risk predictions. Following this, some recommendations for mental health

This article is based on a Keynote Address the first author presented at the 2006 Conference of the Australian and New Zealand Association for the Treatment of Sexual Abuse.

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professionals performing assessments in this legal area are put forward. Finally, the article surveys the shortcomings of post-sentence legislation and outlines an alternative model to managing sex offending risk.

The purpose of this article is to sound a clarion call to mental health professionals requested to provide their expert opinion on risk for sexual violence in post-sentence matters. The assessment of risk for future sexual violence is a complex task demanding of a sophisticated approach. It is vital that mental health professionals burdened with the responsibility of assessing risk in this legal context are cognisant of the field's limits and the parameters of their expert opinion. In our view, clinicians have a useful role to play in these proceedings, but caution and humility must be the theme in preparing reports and presenting them to the courts.

The Emergence of Social Control Legislation for Sex Offenders in Australia and New Zealand

In recent years, a range of criminal justice policies directed exclusively at sexual offenders have emerged, such as enhanced sentencing schemes, community registration statutes, and community notification laws (Mercado & Ogloff, 2007; Smallbone & Ransley, 2005). The targeting of sexual offenders for such legislative attention is understood to have developed from an increased awareness of the prevalence and harmful consequences of sexual violence (Hart, Kropp, & Laws, 2003), coupled with a fear of crime that continues to pre-occupy Western societies (Mullen, 2007). Arguably, however, the most aggressive legislative initiative toward preventing repeat sexual violence has been the post-sentence schemes enacted in the Australian states of Queensland, New South Wales, Western Australia, and, to a lesser extent, Victoria and the country of New Zealand (Mercado & Ogloff, 2007).

In Australia and New Zealand post-sentence legislation consists of two types of schemes – those that allow for either continuing detention or extended community supervision, and those that allow only for extended community supervision, post-release.

Queensland was the first Australian state to introduce such a scheme with the enactment of the *Dangerous Prisoners (Sexual Offenders) Act 2003*. This Act enables the Attorney-General to apply to the Supreme Court for the continued detention, or supervised release, of sexual offenders whose terms of imprisonment are expiring, but who the State considers posing an unacceptably high risk to sexually re-offend. Following the High Court's decision to uphold the constitutional validity of Queensland's Act (*Fardon v. Attorney-General for the State of Queensland*, HCA 46, 2004), the states of Western Australia (*Dangerous Sexual*

Offenders Act 2006), and New South Wales (*Crimes (Serious Sex Offenders) Act 2006*) introduced parallel legislation allowing for either the continued detention or supervised release of sexual offenders at the end of their prison terms. Alternatively, New Zealand (*Parole (Extended Supervision) Amendment Act 2004*) and Victoria (*Serious Sex Offenders Monitoring Act 2005*), introduced legislation allowing only for the community supervision of child-sex offenders post-release.¹

Despite the differences in the scope of these laws, the objectives of these initiatives are equivalent. That is, the clear purpose of post-sentence legislation, as articulated in each Act, is to protect the community from the risks that sex offenders pose to sexually re-offend. Mental health professionals, particularly psychiatrists, are required to prepare reports that assess the level of risk or likelihood that the offender would commit further sexual offences if released or if not supervised.

Under post-sentence legislation the courts are statutorily required to take into account this clinical assessment of risk in deciding whether to impose a post-sentence order. While in some cases this risk assessment is not treated as decisive (see *Director of Public Prosecutions for Western Australia v. Mangolamara*, 2007), more commonly the court's judgment turns critically upon the mental health professional's clinical assessment of risk. However, an uncontroverted acceptance of risk assessment testimony is problematic. As the following section illustrates, there exist a number of factors that complicate the risk assessment task and limit the accuracy with which assessments of risk can be made. Indeed, these issues loom as considerable obstacles to a valid and reliable assessment of risk for future sexual violence.

Clinical Limitations of Assessing Risk for Sexual Violence

Historically, mental health professionals were unable to accurately predict violent behaviour, and as a result the practice was seen to be unethical (Ewing, 1991; Monahan, 1981). This was perhaps even more serious with sexual re-offending, given the fact that the base-rate of sexual re-offending is considerably lower than the base-rate of violent behaviour. It was found that clinicians exhibited a tendency to over-predict the likelihood of future violence (false positive predictions) and thus made conservative decisions in relation to release decision-making (Ogloff & Davis, 2005). Since

¹ Recently, the Victorian government amended the original Act and widened the scope of the legislation to include sexual offences against adults (*Justice Legislation Amendment Bill 2008*, s 24). Also, the Victorian government has formed the intention to introduce a detention scheme (Hansard, 17 April 2008).

this early finding a productive period of research has ensued. Currently, the forensic mental health disciplines have identified a range of validated risk factors for sexual recidivism (Hanson & Bussière, 1998; Hanson & Morton-Bourgon, 2005) and a myriad of empirically evaluated risk assessment instruments (McCarthy, 2001; Mercado & Ogloff, 2007). In fact, when required to provide assessments of risk for future sexual violence, mental health professionals now rely upon risk methods and tools that have a demonstrated reliability and predictive validity that considerably exceeds chance (Mercado & Ogloff, 2007).

Nevertheless, despite this improvement, the best available instruments remain only moderately accurate and are recommended to be considered "works in progress" (de Vogel, de Ruiter, van Beek, & Mead, 2004; Webster, Douglas, Eaves, & Hart, 1997). Indeed, there exist a number of factors that currently limit the precision with which clinicians can make predictions of risk. In what follows some recent research findings in the area of sex offender risk assessment and recidivism will be reviewed. Taken together, these findings suggest that the path to assessing risk for future sexual violence is far more hazardous than is commonly appreciated by mental health and legal professionals.

Base Rates² for Sexual Recidivism

The publicity surrounding tragic high-profile sexual crimes has led to the widespread belief amongst politicians and the public alike that most sex offenders sexually re-offend. However, a substantial body of research indicates that this prevailing perception is inaccurate (Matravers, 2003; Mercado & Ogloff, 2007). A number of large scale investigations have provided strong findings that suggest a low base rate for sexual re-offending. For example, Hanson and Morton-Bourgon (Hanson & Morton-Bourgon, 2005) conducted a meta-analysis of 82 recidivism studies on 29,450 sex offenders. The authors found that after a 5-6 year follow-up the rate of sexual recidivism was 13.7% (Hanson & Morton-Bourgon, 2005). A previous meta-analysis by Hanson and Bussière (1998) established a very similar rate of 13.8%. Furthermore, in both meta-analyses, sexual offenders were significantly more likely to commit a non-sexual offence than a sexual offence, suggesting also that sexual offenders may be less specialised in their offending patterns than commonly assumed (Mercado & Ogloff, 2007; for a review of this issue see Simon, 2000).

The research finding that the base rate for sexual recidivism is relatively low has two significant

implications for the assessment of risk for future sexual violence that should be heeded by mental health professionals conducting such assessments. Firstly, in accordance with probability theory, the ability to predict a future event is greatly influenced by the event's base rate (Craig, Browne, Stringer, & Beech, 2004; Ogloff & Davis, 2005; Swets, 1992). Therefore the lower the base rate of sexual re-offending in the population, the less likely it is to accurately predict which individual will sexually re-offend (Doren, 1998; Ogloff & Davis, 2005). Consequently, post-sentence orders will, unavoidably, be erroneously imposed on numerous individuals who would not have gone on to re-offend. Clinicians, when requested to assess future risk in post-sentence matters, and courts when they consider the assessment results, would do well to keep in mind that the odds of correctly identifying a recidivist are not in their favour. When undertaking such assessments mental health professionals are faced with the reasonable likelihood that a false positive error may occur.

Secondly, base rates of sexual recidivism impact upon the predictive abilities of actuarial risk assessment instruments (Szmurkler, 2001; Wollert, 2006). This point was illustrated by an evaluation of the test performance of a popular actuarial tool - the Static-99 (Hanson & Thornton, 1999) - as a function of the base rate of sexual recidivism (Wollert, 2006). For the developmental sample of the Static-99, the sexual recidivism base rate was 25%, and those offenders considered high-risk (i.e., scoring 6 or above on the Static-99), were correctly identified as recidivists 52% of the time. However, when the recidivism base rate was reduced to 12%, Wollert's (2006) analysis revealed that the percentage of accurately identified recidivists in the high-risk category fell from 52% to only 31%. This resulted in the clear majority of sexual offenders (i.e., 69%), though classified as high risk, being non-recidivists.

Wollert's (2006) research has noteworthy implications for clinicians' providing assessments of risk based on actuarial instruments. The valid use of actuarial tools is dependent upon the similarity between the offender one is assessing and the developmental sample that was used to derive the original probability estimates (Prentky, Janus, Barbaree, Schwartz, & Kafka, 2006). Therefore, dissimilarity in the base rate of sexual recidivism between the sample the offender represents, and whose risk one is determining, and the original sample used to construct the actuarial tool, may negatively impact upon the accuracy of the actuarial prediction of sexual violence risk. Following from this, it is thus important for mental health professionals to have an understanding of the base rate of recidivism known to apply to the sample from which the subject of their assessment is drawn. This data will enable the

² The base rate refers to the true prevalence of the defined behaviour (i.e., sexual re-offending) within a defined population (i.e., sexual offenders) (Doren, 1998).

clinician to determine the validity of applying the risk category and its associated probability estimate from the actuarial instrument to the assessed offender.

The base rate of sexual recidivism for samples of sexual offenders is a valuable area of knowledge for mental health professionals conducting assessments of risk for the courts. Armed with this understanding clinicians are better able to appreciate the statistical uncertainty associated with predicting future offending, and that the precision of actuarial tools is undermined by a low base rate of sexual recidivism. Beyond matters of recidivism base rates, however, there remain further challenges to reliably assessing future risk for sexual violence.

On the Limits of Actuarial Predictions of Risk

The advent of empirically validated actuarial tools that can reliably place sex offenders into categories with known rates of risk for sexual re-offending is a significant evolution in the field of risk assessment. Actuarial tools are now commonly used to reach opinions about sexual violence risk (Doren, 2002; Hart et al., 2003), and have generally been associated with the strongest evidence for predictive accuracy (Dvoskin & Heilbrun, 2001). Despite all of this, while actuarial measures have acceptable degrees of predictive validity, they are far from perfect (for a meta-analytic review see Hanson & Morton-Bourgon, 2004, 2007). Indeed, interpreting the findings of actuarial instruments such as the Static-99 (Hanson & Thornton, 1999) and New Zealand's own Automated Sexual Recidivism Scale (ASRS) (Skelton, Riley, Wales, & Vess, 2006), is far less straightforward than assumed and thus the certainty with which clinicians can form decisions regarding the individual risk posed by an offender is curtailed.

One significant problem with the use of actuarial tools, as identified by Berlin, Galbreath, Geary, and McGlone (2003), is that the category of risk and associated re-offence rates that the assessed offender is judged to reflect, are derived from group data. This means that the estimates of re-offence risk apply not to the individual, but to the group in which they have been placed by virtue of their score. For example, an offender scoring 5 or above on New Zealand's ASRS reflects the fact that this offender shares specific characteristics with the 'high-risk' offenders who also scored 5 or above during the validation of this instrument. Moreover, this high-risk group was found to have a sexual recidivism rate of 50% after 10 years (Skelton et al., 2006). However, the instrument is unable to inform the risk assessor of which group the assessed offender actually falls (i.e., subsequent recidivist or subsequent nonrecidivist). That is, the score of 5 cannot tell us whether this specific offender belongs to the 50% of offenders who go on to commit a sexual offence, or to the 50% who do not (Wood & Ogloff, 2006). Therefore, despite being classified as a

'high-risk' sexual offender, an individual's score on an actuarial tool fails to be a reliable guide to that individual's actual risk to sexually re-offend.

Irrespective of this limitation, based on the ASRS, those offenders who fall in the high-risk category still remain two times more likely to re-offend than other sex offenders; thus the instrument can reliably identify those offenders who represent an increased re-offence risk relative to other sex offenders.

This uncertainty in moving from group to individual risk suggests that actuarial instruments such as the Static-99 and ASRS may be more appropriately used only to identify the risk category into which the offender falls on account of their risk score. However, there is some doubt over the accuracy with which actuarial instruments can perform even this task (Mullen, 2007). In an analysis of the precision of group estimates of actuarial instruments, Hart, Michie, and Cook (2007) calculated the 95% confidence limits of the group re-offence estimates for the Static-99. The analysis revealed an overlap among the risk categories such that the Static-99 "yielded only two distinct group estimates of risk: low (categories 0-3) and high (categories 4-6+)" (Hart et al., 2007, p. s62). Based on this finding it is arguably difficult to state with a high degree of certainty that one individual's risk is even higher than that of other individuals, based on their actuarially derived group score. While overlap of confidence limits is common to other areas of measurement, given the potential restrictions of liberty that may result from a post-sentence hearing, this overlap is less palatable.

Hart et al.'s (2007) findings highlight the importance of validating actuarial tools on large samples of sexual offenders. Confidence limits are inherently tied to sample size, such that an increase in the sample size will reduce and refine confidence limits. In turn, this will allow for actuarial measures and their associated risk categories to be applied with increased validity and greater confidence. To this end, the need to collect and compile recidivism data and risk scores across jurisdictions cannot be emphasised enough.

Altogether though, this research on the accuracy, or lack thereof, of actuarial risk assessment tools, supports the drawing of two distinct yet related conclusions: (1) actuarial instruments are significantly limited in their ability to identify individual-level risk for future sexual violence, and thus (2) mental health professionals should be extremely cautious when using these tools to draw inferences about an individual's risk for future sexual offending. In addition to concerns over the validity of actuarial tools to determine an individual's risk, the task of risk assessment is further complicated by the effects of ageing on recidivism risk potential.

On the Effect of Age on Risk Prediction

It is well known that in the general criminal population, rates of crime decrease with age (Hirschi & Gottfredson, 1983). In recent years, this age-crime pattern has been exclusively tested with respect to sexual offenders (see Barbaree, Blanchard, & Langton, 2003; Barbaree, Langton, & Blanchard, 2007; Hanson, 2005; Harris & Hanson, 2004). This research has found that not only does group-based sexual recidivism risk decrease with age, but that current actuarial tools may be of limited value for identifying older offenders who are likely to sexually re-offend (Saari & Saari, 2002).

For instance, with a combined sample of 4,673 sexual offenders, Hanson (2002) found that the rate of sexual recidivism declined steadily with age, even when the sample was differentiated along dimensions of offence type (i.e., rapists, incest offenders, and extrafamilial offenders). In a more recent study, Harris and Hanson (2004) compared the rate of sexual recidivism between two groups of sexual offenders: those aged under 50 years, and those aged over 50 years, upon release. Based on another large combined sample of 4,270 sexual offenders, the authors found that age had a substantial association with recidivism, with offenders older than age 50 at release re-offending at *half the rate* of those offenders younger than age 50 at release (Harris & Hanson, 2004).

Critically, this age-related reduction in risk to sexually re-offend amongst sex offenders occurs irrespective of their level of risk (Barbaree et al., 2003; Barbaree et al., 2007). For instance, in a later study, Hanson (2005) investigated the extent to which the Static-99 accounts for the decline in recidivism risk associated with increasing age. The study found that older offenders demonstrated lower rates of sexual recidivism than expected given their Static-99 risk categories (Hanson, 2005). That is, the age related decrease in risk was the same across risk levels. More recently, Barbaree, Langton, and Blanchard (2007) explored the relationship between actuarial prediction and age-related reductions in recidivism of sex offender and found that an offender's advancing age has a far more significant relationship to recidivism than currently captured by actuarial measures. This research indicates that actuarial instruments insufficiently capture the decline in recidivism risk associated with advanced age.

The limits of actuarial tools for predicting sexual recidivism among older offenders is highly relevant for mental health professionals conducting assessments of risk in post-sentence hearings. Many offenders being assessed under post-sentence legislation are older than 45 years; with a significant minority much older. Currently, actuarial measures will overestimate their re-offence risk. Therefore, it is incumbent upon risk assessors to integrate this information into their

assessment of risk and acknowledge that the validity of actuarial tools is weakened when applied to older sexual offenders. A final set of issues that complicate the risk assessment task and are relevant considerations in any clinical assessment of risk, are set out below.

Additional Considerations for an Assessment of Sexual Violence Risk

When conducting assessments of risk for future sexual violence, other considerations bear upon the validity of the assessment. These considerations include the need to validate risk measures for the population of sex offenders upon which they are used, and the difficulty in evaluating change to an offender's risk on account of their behaviour in prison and treatment participation. These issues will be briefly considered in turn.

There are limited local data validating sexual offender risk instruments. Given that actuarial tools provide specific probability estimates for the population of offenders upon which the measures were validated, there is a need to ascertain the validity of those estimates for the samples upon which the measures are used (Ogloff & Davis, 2005). Recently, New Zealand's Department of Corrections published data on the validity of their newly developed Automated Sexual Recidivism Scale (Skelton et al., 2006). Based on a large sample of 1,133 male sexual offenders the instrument demonstrated predictive validity comparable to the Static-99 (i.e., $AUC = .70 - .78$). Given these findings, the ASRS can be applied to New Zealand's sex offenders with some confidence.

In Australia however, there has only been one published study validating actuarial measures for use with Australian sexual offenders (see Allan, Dawson, & Allan, 2006); and their findings provide equivocal support for their validity. While the Static-99 demonstrated moderate accuracy in classifying recidivists ($AUC = .78$), conversely, the RRASOR (Hanson, 1997) demonstrated predictive accuracy worse than chance ($AUC = .46$) when predicting violent sexual offending (Allan et al., 2006). The authors recommend that due to the very small sample size involved in the study that these results should be viewed with caution. There is a clear need to validate actuarial measures on very large samples of Australian sex offenders. While it is likely that the validity of the measures will ultimately be replicated in Australia, following their successful validation in Canada, the United States, the United Kingdom, and European countries, empirical evidence is required to justify the confidence with which such instruments are used in post-sentence proceedings.

The subject of an assessment in post-sentence proceedings has commonly spent many years in a custodial environment. Questions as to the effect of detention on the offender's recidivism potential are

often considered as part of a comprehensive assessment of risk. Recently, a method for evaluating risk in an institution has been devised. Termed 'offence paralleling behaviour' (OPB; Jones, 1997, 2000), OPB is defined as "any form of offence related behavioural (or fantasized behaviour) pattern that emerges at any point before or after an offence" (Jones, 2004, p. 38). According to Jones (2004) such behaviours do not have to result in an offence to be considered OPB, rather the behaviour only needs to bear a significant resemblance to the behaviours that may lead up to an offence.

Critically, for sexual offenders, it is difficult to evaluate whether their recidivism risk has changed throughout the period of their detention, because of the lack of opportunity to observe potential offence paralleling behaviours. For example, a sex offender may continue to indulge in his deviant sexual fantasies, and as unobservable phenomena, this offence paralleling behaviour can occur without detection. In another example, a child-sex offender's *modus operandi* may have included employing a range of strategies to gain the trust of children, their co-operation in sexual activity and to maintain their silence regarding the abuse. However, the absence of children in their custodial environment means that child-sex offenders have no opportunity to engage in the types of offence paralleling behaviours that they enacted as part of their offence cycle.

Consequently, clinicians' opinions as to the relationship between the offender's institutional behaviour and their risk potential are necessarily limited. Further, any assumptions that appropriate prison behaviour may translate into pro-social behaviour in the community are misguided.

Specifying the effect of treatment on recidivism risk will also be considered in a comprehensive assessment under post-sentence legislation. However, quantifying the effect of treatment on risk remains a speculative endeavour. Although there is considerable data about the relevant factors related to recidivism risk, such factors are typically static (e.g., sexual offence history) or highly enduring (e.g., personality disorder) in nature (Hanson, 2000). Given that the factors most reliably related to future risk are generally unchanging, risk assessors are far less capable of determining when an offender's risk level has actually changed (Mercado & Ogloff, 2007). Furthermore, the efficacy of sex offender treatment is yet to find robust empirical support (Hanson et al., 2002; Rice & Harris, 2003). Indeed, Hanson et al.'s (2002) meta-analysis of sex offender treatment studies found that while available evidence suggests that current treatments reduce recidivism, they warn that firm conclusions cannot be made until additional and improved research is conducted. Given this, clinicians must be cautious and provisional when considering whether an offender's participation in

treatment has impacted on the level of risk they pose for future offending.

It is important to acknowledge, though, that while the composite reviews show little overall treatment effect, some individual treatment programs have produced very good treatment results. In a recent study, for example, Olver, Wong, and Nicholaichuk (2008) assessed the treatment effect of a long-standing and well-validated treatment program for sexual offenders. The "Clearwater Program" is a 48 bed treatment unit in a secure prison hospital in Saskatchewan, Canada delivered to moderate- to high-risk sexual offenders. The program is comprehensive, lasts for 6-9 months, and has approximately 20 hours (group and individual) of clinical contact per week. It uses a cognitive-behavioural approach, grounded in social learning theory and the "what works" principles (Andrews & Bonta, 2006). In a methodologically sophisticated study of almost 500 treated sex offenders, matched with untreated sex offenders, the results showed significant differences in re-offence rates over time after release (e.g., 13.6% untreated vs. 5.9% treated at 2 years to 32.3% untreated vs. 21.8% treated after 10 years). These results are quite dramatic with fewer treated prisoners re-offending as compared to the control group. However, not all treatment programs are equal in reducing offending risk, and even those that are effective may produce relatively modest results.

Under post-sentence legislation, mental health professionals are required to provide a comprehensive assessment of risk for future sexual offending. Furthermore, the courts will have questions relating to ways in which the offender's risk may have altered throughout the course of their detention. Unfortunately, the limits of our science are such that clear and unequivocal answers are currently unavailable. Mental health professionals must be confident to accurately represent the current state of knowledge in the field of risk assessment. Sometimes this will mean that the most appropriate answer is "the state of the research literature is such that we do not know" or, more simply, "I don't know."

Assessing Risk for Sexual Violence: Caution and Humility Must be the Theme

As noted previously, mental health professionals play a significant role in post-sentence hearings, by providing the court with assessments of risk for future sexual violence upon which the court's decision is reliant (Scott, 2008). However, while the available research indicates that clinicians are now armed with knowledge and tools to determine risk with some accuracy, the technology is far from perfect.

We have thus far reviewed a number of issues that limit the reliability and validity of clinical assessments of risk. The discussion revealed that the path to a

precise assessment of risk was muddled by: (1) the low base rate of sexual recidivism, (2) the margins of error associated with actuarial assessments of risk at both the individual and group levels, (3) the inability of actuarial tools to adequately account for the effect of advancing age on recidivism risk, (4) the need to make available published normative data for the use of actuarial measures in Australia, and (5) the equivocal effects that detention and treatment have on recidivism potential. Taken together, these clinical limitations and other issues should highlight to mental health professionals that the assessment of risk for future sexual violence is imbued with uncertainty. As a result, the efficacy of the clinician's input into any post-sentence hearing is necessarily limited and caution must be exercised by mental health professionals undertaking risk assessments under post-sentence legislation.

Despite the difficulty associated with predicting future behaviour, clinicians do have a useful role to play in post-sentence proceedings. In assessing risk it is recommended that mental health professionals develop their clinical decisions based on the best available methodology. As the research currently stands, empirically validated risk assessment instruments, such as actuarial and structured professional judgement measures, represent the most valid and reliable approach to assessing risk for sexual violence. Further, these tools also bring a transparency to the process of assessing risk and thus allow the courts to evaluate the strengths and weaknesses of the risk assessment procedure (Mercado & Ogloff, 2007; Ogloff & Davis, 2005). However, in preparing reports and presenting them to the courts, clinicians also need to keep in mind the limits of the science they utilise.

In summary, the assessment of risk for future sexual violence is a complex task requiring a sophisticated and judicious approach. While ultimately it is the role of the courts to decide whether an offender is suitable for post-sentence management, clinicians do have a useful role to play in these proceedings. Still, caution and humility must be the theme in providing expert opinion in this controversial area.

Lastly, statutes that limit expert opinion on risk for future sexual violence to psychiatrists are misguided. There is no evidence that suggests that psychiatrists can more accurately predict risk for sexual offending than psychologists. In fact, psychologists conduct the majority of research published in the risk prediction field, as well as develop many of the risk assessment measures currently available (Mercado & Ogloff, 2007). Instead of limiting post-sentence assessments to psychiatrists, it would seem prudent to include those psychologists appropriately trained and qualified in the practice of forensic mental health and the assessment of risk for future sexual violence. In the final section, an

alternative model to managing sex offending risk is outlined.

Future Directions: Towards an Alternative Model to Manage Sex Crime Risk

Post-sentence legislation has been criticised on empirical, legal, human rights, resource, and therapeutic grounds (Birgden, 2007; Ruschena, 2003; Sullivan et al., 2005; Wood & Ogloff, 2006). For instance, there is the concern that these laws will be unable to meet their objectives because their success is reliant upon the accuracy of risk assessment technology which remains limited. The laws have also been criticised for violating traditional legal principles such as proportionality and finality of sentencing and lacking compatibility with local and international human rights declarations (McSherry et al., 2006). These laws are inordinately expensive to administer, given the costs of expert assessors, court time, and the cost of housing and supervising those sexual offenders captured by the legislation. As such, questions have been raised regarding the soundness of allocating enormous resources toward a small group of high-risk sex offenders when most sex offences are committed by those who do not have previous sexual offence convictions (Walker, 1996), and research has long indicated that the majority of sexual offences are perpetrated by family members and acquaintances, the majority of whom are not reported to the police (Australian Bureau of Statistics, 2005). While huge resources are allocated to try to accurately identify which particular offender is so risky to deserve post-sentence detention or supervision, relatively few resources have been allocated to comprehensively assessing and treating broad numbers of sexual offenders to reduce the overall level of re-offending. Fewer resources still are dedicated to bridging treatment/relapse prevention programs and community follow-up.

In short, these criticisms make room for the need to develop other ways to deal with the risks sex offenders pose to re-offend. While a full articulation of an alternative model to managing sexual offending risk is beyond the scope of this article, some suggestions for how sexual offending risk could be more soundly managed are set out below.

Post-sentence legislation represents a reactive tinkering at the margins of the criminal justice system and its management of sex offenders. Instead, the authors recommend an overhaul to the ways in which sexual offenders are assessed, sentenced, treated, supervised and managed in the community. Instead of allocating enormous resources toward the difficult, and error-prone, task of identifying the few sex offenders who pose the greatest danger, the authors recommend

the adoption of a public health approach to managing sex offence risk.

The public health approach is characterised by a focus on systematically reducing risk across the entire sex offending population, as well as efforts to prevent sexual offending initially. To this end, we would suggest that increased independent expert evidence is required at the time of sentencing. All sexual offenders should be assessed by a qualified psychologist or psychiatrist with relevant expertise prior to sentencing. This role would involve a comprehensive assessment of sexual deviance, the motivation for offending sexually, and risk for future sexual offending, followed by the development of a risk management plan for the offender's rehabilitation. This would assist the court in taking into account the treatment needs, prognosis, and risk of re-offending at the time of sentencing. After sentencing, and in accordance with well established principles of offender rehabilitation (Andrews & Bonta, 2006), sex offenders would receive treatment and management that is commensurate with the identified level of risk and need. Careful attention needs to be paid to offender's responsivity to treatment (including matters such as motivation, insight and characteristics such as intellectual impairment or psychopathy). This inclusive approach is aimed at reducing risk across the population of sex offenders. Its successful implementation would require both a shifting of resources to the front-end processes involved in sex offenders' first point of contact with the criminal justice system, as well as properly funded sex offender treatment and management programs in custodial and community settings.

We will provide two examples here to help illustrate the points being made. In the first example, we shall consider the practical effects of high-quality treatment programs on recidivism rates. In the second example, we shall demonstrate how difficult it is to accurately differentiate which offenders will or will not re-offend, and the concomitant errors that result. To begin, let us take for example the Clearwater treatment program results discussed above (Olver et al., 2008). Using those results, accredited treatment programs for sexual offending would produce re-offence reductions ranging from 57% in the first five years after release to 33% after 10 years. In concrete terms, if 500 offenders are treated, as they were in the Clearwater program, 30 would re-offend in the first 5 years and this number would rise to 109 over 10 years. However, if 500 offenders were not treated, 62 would re-offend after 5 years and 162 over 10 years. Thus, 53 fewer offenders would re-offend sexually. Even if each one who re-offended had only one victim, 53 fewer people would be victimized. Thus resources provided to treat offenders in high-quality programs can reduce re-offending. These results might have even been

strengthened with a high-quality continuity of care and community-based bridging programs and further treatment.

Let us now turn to a consideration of the practical difficulty of trying to accurately identify which offenders will or will not re-offend sexually. For this example, we shall use recidivism rates from the Static 99 (Hanson & Thornton, 1999) and assume we had a sample of 500 offenders. Based on the outcome data from the Static-99 validation sample, for every 500 offenders assessed 126 would re-offend and 374 would not re-offend. Considering the levels of risk of the offenders, though, 310 will be "low risk" or "medium-low risk" and 195 will be "medium-high risk" or "high risk." Of the 310 identified in the low and medium low risk categories, 45 (14.5%) would go on to re-offend. By contrast, 124 of the 195 (63.6%) offenders found to be at medium high or high risk, would *not* re-offend. Making decisions on risk alone, therefore, would be fraught with difficulty. Even if the example is limited to the "high risk" group (i.e., with scores of six and greater), of the 60 offenders who would be assessed as being at high-risk, half of those will re-offend and half will not (31/60). Thus, if post-sentence detention was limited to those who fall into the high risk category, 29/60 (48%) of the group would be detained or subjected to post-sentence supervision when, in fact, they would not have re-offended. Taken together, using a sample of 500 offenders, 45 of those designated low or medium low risk would go on to re-offend while 28 people designated high risk would not re-offend. This example shows clearly how fraught with difficulty decision making is when based on risk assessment.

An alternative approach to managing sex crime risk also needs to increase the likelihood of protecting people in the community by ensuring that legislation motivates the offender to meaningfully participate in treatment. Unfortunately, under post-sentence laws, information obtained in treatment is now being used to identify high-risk offenders who may be eligible for continued detention or extended supervision (Sentencing Advisory Council, 2006). In point of fact, sex offenders might reveal their sexually deviant fantasies and desires to clinicians who treat them while they would not reveal the information to prison officers. Thus, it is partly from the treatment notes and reports that information about a particular offender's sexual deviations are identified. Under these circumstances, sexual offenders will be discouraged from candidly disclosing deviant thoughts and impulses (Sullivan et al., 2005), and this will likely be an impediment to effective offender rehabilitation. This is an unsound imposition upon the therapeutic process. Rather, sex offenders require incentive to address their sexual deviancy, anti-social attitudes, and cognitive distortions. Adhering to a therapeutic jurisprudential

approach to managing sex offenders will provide a better balance between individual autonomy and community protection (Birgden, 2007).

Lastly, the level of legal practice in this area must also be raised. Given that it is common for offenders to consent to post-sentence orders (at least initially in Victoria when they believed they would be in the community), there is little testing and scrutiny of the expert reports and evidence presented. The exception has been in Western Australia, which has seen more keenly contested hearings. Overall, though, increased legal attention paid to the assumptions underpinning clinical assessments of risk will contribute to the development of higher standards of practice in the mental health professions and provision of expert opinion.

Conclusions

The community has a heightened concern regarding the risks sex offenders pose to sexually re-offend. Within this culture of fear, perhaps it is understandable that New Zealand and a number of Australian governments have enacted legislation designed to protect the community from these risks. These laws require mental health professionals to present to the courts their assessment of the risk that offenders pose to sexually re-offend. As the article has articulated, there remain a number of clinical issues that limit the precision with which assessments can be made. In preparing reports and presenting them to the courts, mental health professionals must be aware of the limits of risk prediction technology and confident to point out the boundaries to the science upon which their expert opinion rests. As discussed, consideration needs to be given to alternative assessment and treatment models to provide further protection to the public from the broad range of sexual offenders, not just those identified in the post-sentence procedures as being a continued risk to the community.

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Chapter 7

Integrated Discussion

“[A]lthough we should prize precision when we can get it, we should never pretend to precision we lack; and we should ever be mindful of our ignorance even when it hurts...Scientists and technologists should not pretend to knowledge they do not have because a government or public demands that they be supplied with answers to questions for which there is insufficient evidence.”

(Isaac Levi, *The Enterprise of Knowledge*, 1983, pp. 441-2, 444)

Ogloff and Doyle’s (2009) paper, presented above, provides a theoretical critique of the primary clinical and practical issues that limit the validity of an assessment of risk for future sexual violence. Given the complexities and limitations to risk assessment practice that it discusses, the paper concludes by advocating for a clinically cautious and professionally rigorous approach to risk assessment.

In this final Chapter, conclusions specifically related to the findings of the thesis’ investigations are discussed. Firstly, the main findings of the thesis are addressed. Secondly, the implications of these results are expounded. Lastly, limitations to the investigations along with future research directions are presented, followed by concluding remarks.

Overview of Main Findings

The findings of this thesis were derived from three studies. The first, a theoretical piece, placed the central provisions of Australia’s post-sentence legislation

under psycho-legal analysis whereby the assumptions underpinning the laws were evaluated in light of a body of empirical research. It was found that many of the assumptions were not supported by the empirical literature pertaining to risk assessment, sex offender recidivism, and offender rehabilitation. Given that effective legislative policy depends upon the validity of the basic assumptions upon which it is founded, these findings raise legitimate concerns regarding whether post-sentence legislation can achieve its intended aims of protecting the community in any meaningful and sustainable way.

The second and third studies of this thesis were empirical. The second paper examined a cohort of sex offenders placed under post-sentence orders across multiple variables within the demographic, developmental, criminal, and clinical domains. The empirical analysis revealed this group to be characterised by disadvantage, abuse and social dislocation in their early years and an early onset of both general and sexual offending. A complex clinical picture also emerged where sexual deviance often went hand-in-hand with substance abuse, personality dysfunction and poor mental health. This group was found to require a multifaceted treatment approach to address the psychopathological, psychological, and social determinants of their problematic sexual behaviour.

The third study constituted the main empirical investigation of the thesis and presented a descriptive analysis of forensic clinicians' risk assessment practices in the context of performing risk evaluations under preventive detention legislation. Positive findings were found, including that valid structured risk assessment tools were commonly utilised by the evaluators in assessing future sexual violence risk potential. However, the results also revealed a number of disconcerting trends, such as the continued reliance by some clinicians on invalid methods of risk assessment and the

erroneous reporting of risk assessment results. The findings of the theoretical and empirical analyses are now considered in more detail in the context of the three research aims of this thesis.

Research aim one: Psycho-legal analysis of post-sentence laws. The first research aim sought to appraise the soundness of post-sentence legislation by evaluating the validity of the assumptions upon which the laws rest. The analysis was justified given the haste with which the legislation was passed and the lack of collaboration with professional bodies, which also characterised the implementation of these laws.

A number of key assumptions were identified and their validity considered under the spotlight of contemporary empirical knowledge. The first major assumption identified was that continuing the detention of an offender would meet the laws' objectives of community protection. This assumption was first considered with respect to the particular offender detained. The analysis revealed that post-sentence legislation is structured to prioritise the offender's detention over their treatment. Accordingly, the paper argued that this in fact worked *against* the aim of protecting the community because unless the offender's risk is reduced, the community's safety will be compromised upon the offender's release. Therefore, the analysis concluded that continuing detention defers, rather than reduces offenders' recidivism risk, and in this way, the goal of community protection can only be temporarily secured.

Secondly, the assumption that providing for the ongoing post-sentence detention of sex offenders would achieve the aim of community protection was also considered in light of the broader social problem of sexual violence. Research indicates that the majority of convictions for sexual offences involve first-time sex offenders (Walker, 1996), and that most sex offences are not reported to the

authorities, and are most often committed by people known to their victim (Australian Bureau of Statistics, 2005; Glaser, 1991). Accordingly, post-sentence legislation concentrates on a small proportion of purportedly ‘high-risk’ sex offenders at the expense of addressing the far greater social problem of sexual abuse perpetrated by ordinary males well acquainted with their victims. Given this, the paper argued that the laws will be of limited effectiveness in increasing overall public safety.

Another major assumption identified in the paper was that sex offenders, as the exclusive offender group targeted by post-sentence laws, are highly likely to reoffend with a sexual offence and therefore *require* unique legislative strategies to manage their risk. Again, the scientific evidence does not support the validity of this assumption. Indeed, the research indicates that sex offence specialisation is a rarity (Simon, 1997, 2000), and that far from inevitably reoffending, most sex offenders are not convicted for another sex offence (Hanson & Morton-Bourgon, 2005). This finding raised the concern that post-sentence laws are based more on rhetoric and anecdote, than on research and evidence-based approaches relating to sex offending and risk management (Robinson, 2003).

The final assumption evaluated was that forensic clinicians can identify high risk offenders with a high degree of certainty so that the legal test of risk can be validly determined. However, in reviewing the research on the accuracy of sex offender risk assessment, the paper identified a number of clinical and practical issues that affect both the precision and legal relevancy of clinical risk predictions. For example, the low base rate of sexual recidivism and the currently limited accuracy of sex offender risk assessment tools are two significant impediments to identifying dangerous sex offenders with the level of certainty expected by the laws. Furthermore, that the risk assessment instruments themselves were designed for use in a treatment

setting, as opposed to a legal one, compromises the legal relevancy of the instruments such that the legal questions to be answered in post-sentence matters do not parallel the risk assessment findings forensic clinicians can reasonably provide. Taken together, it was argued that the assumption that experts can identify high-risk offenders with a level of precision presumed by the legislation is empirically unjustified.

Overall, the findings of the psycho-legal analysis revealed that the major assumptions upon which post-sentence laws rest are not supported by the weight of research evidence. Simply, the laws' foundations are compromised by structural weaknesses such that the efficacy of the laws is seriously undermined. Implications arising from these findings are considered later.

Research aim two: Characteristics of post-sentenced sex offenders. Research aim two sought to examine one of the first cohorts of sex offenders under post-sentence orders in Australia, particularly their commonly occurring characteristics. The offenders were described across demographic, developmental, clinical, and criminal dimensions.

The paper found that all of the offenders in the sample were male and mostly Caucasian, though Indigenous offenders were over-represented. The education level across the sample was consistently low and unstable employment histories were also common. Developmentally, the sample was characterised by disadvantage, social dislocation, and exposure to abuse and illicit substance use. For example, 42% were removed from the care of their families, sexual abuse and physical abuse reportedly occurred in 58% and 44% of cases respectively, while learning and behavioural difficulties were also relatively common. Very high rates of alcohol and illicit substance abuse were reported during their childhood or adolescence and adulthood.

The clinical picture of this sample was complex. Diagnostically, the sample was characterised by sexual deviance (64% received a diagnosis of a paraphilia). This is a relatively unsurprising finding given the offending profile of the group. A personality disorder was diagnosed in 52% of cases, in particular antisocial orientations, and the sample exhibited moderate rates of mental illness, particularly anxiety and depression, over their lifetime. Thirty four per cent had been diagnosed with both Axis I and Axis II disorders. Psychiatrically, the sample presented with similar levels of psychopathology compared to equivalently sanctioned sex offenders in the United States (Jackson & Richards, 2007; Janus & Walbek, 2000).

Their criminal histories were characterised by an early onset of sexual offending, with 66% of the sample receiving their first sexual offence convictions prior to the age of 24 years. The relatively early commencement of their sexual offending highlights the critical importance of proper assessment and treatment at the time of their first contact with criminal justice agencies and the courts. The majority (90%) had prior sentencing dates for sex offences, though the chronicity of offending was varied. With respect to general criminality, the sample also exhibited an early onset, with 64% committing their first general offence prior to the age of 22 years. The sample also demonstrated significant criminal versatility. The levels of criminal diversity in this study support previous findings on criminal versatility among sexual offenders (Gottfredson & Hirschi, 1990; Hanson & Bussière, 1998; Harris, Smallbone, Dennison, & Knight, 2009; Levenson, 2004a; Simon, 2000).

Lastly, while 74% of the group had participated in at least one sex offence specific treatment program, just over one half (54%) had completed a sex offender treatment program. Thirty eight per cent had a history of treatment refusal.

To summarise, this group of offenders was found to be demonstrably dangerous and the impact of their offending cannot be overstated. Nevertheless, the findings illustrated also that they are an unfortunate group of people, exposed to very difficult life circumstances from a young age. Indeed, the group is characterised by early exposure to multiple vulnerability risk factors. They exhibit complex psychiatric presentations, multiple risks and needs, and longstanding personal and social deficiencies; all of which necessitates a multifaceted treatment program. Implications arising from these findings are summarised later.

Research aim three: Risk assessment in post-sentence proceedings. The final research aim sought to investigate forensic clinicians' risk assessment practices. This was explored by examining the dangerous sex offender risk assessment reports tendered by forensic clinicians in post-sentence matters. This study represented the first analysis of Australian clinicians' risk assessment practices within this legal context.

With respect to more general report writing and assessment practices, it was found that, contrary to the code of ethics applicable to the professions of psychology and psychiatry (Australian Psychological Society, 2007; Royal Australian and New Zealand College of Psychiatrists, 1998), a significant proportion of reports failed to document that the various constituents of the notification had taken place. Additionally, numerous reports neglected to identify the authority that requested the evaluation and clearly articulate the reason for the referral. It was recommended that the notification, referrer and purpose of assessment be carefully and plainly documented.

On the matter of risk assessment, the findings were varied. Clinicians commonly employed empirically derived methods of assessment in undertaking their

risk evaluation. Indeed, 94% of clinicians utilised at least one valid structured risk assessment tool. Principally, the actuarial and structured professional judgment methods were frequently utilised, and often in combination. This evidence based approach ensured that expert opinion was grounded in the best risk assessment methods available and was an encouraging finding.

However, a number of clinicians also developed their opinions of risk based on *invalid* methods of assessment. For instance, 21% of reports utilised an unstructured clinical judgment approach in their provision of a risk evaluation. Simply, this finding is alarming given the relatively long-standing research highlighting this method's inferior accuracy (Grove & Meehl, 1996; Grove, Zald, Boyd, Snitz, & Nelson, 2000; Hanson & Morton-Bourgon, 2007; Meehl, 1954). Given that these legal proceedings involve fundamental questions of individual liberty and public safety, for an expert to provide an assessment of risk wholly or partly based upon an unreliable measure is an egregious error. To illustrate by way of analogy, the equivalent finding in a medical context would be that 20% of a sample of oncologists employed an obsolete measure to test for cancer.

A number of other reports utilised the adjusted actuarial method as part of their risk assessment, which, while promising, lacks a sufficient research base to justify its use in these matters. In sum, only empirically supported risk assessment methods, such as actuarial and structured professional judgment, were recommended to be employed in any risk assessment. Maintaining an awareness of the scientific advances in the field will hopefully lead clinicians to disregard invalid methods of assessment.

The actuarial tool the Static-99 was the most frequently used risk assessment instrument, employed in 92% of reports. The structured professional judgment tools,

the RSVP and the SVR-20, were employed in 62% of reports. This too was a positive finding given the empirical validation of these tools and suggests a rather substantial translation of research into the applied clinical practice of professionals. Conversely, the SONAR tool was employed in over a quarter of reports, which was a concerning finding given that the instrument contains invalid items, resembling the method to which it belongs, and lacks a sufficient empirical base to justify its application in these proceedings.

An analysis of the reporting of the results from the Static-99 tool revealed a tendency to undermine the tool's utility by selectively reporting outcome information and erroneously reporting and interpreting the tool's results. For example, it was found that the probability percentages corresponding to an offender's risk score and the recidivism base rate for the sample upon which the recidivism estimates are based were often omitted from the reports. This information is recommended to be included because it contextualises the tool's risk rating and allows the court to more fully comprehend the relative nature of the instrument's outcomes.

A number of other errors were found in the reporting of Static-99 results, including: (a) fifteen per cent of reports mistakenly expressed the probability estimates associated with an offender's Static-99 score as indicating the offender's specific risk for reoffending, (b) numerous errors were made in the direct reporting of the Static-99's probability estimates, (c) the uncollapsed recidivism percentages were reported in 7% of cases and (d) the impact of the offender's age on the validity of the Static-99 assessment was considered in only 19% of cases. These errors are glaring and amount to an ineffective and misleading communication of risk outcomes which has the potential to significantly compromise the quality of the legal decision-making.

Given the consequence of the legal decisions to be made, the level of concern these findings generate is substantial, as is the urgency to remedy this situation.

Another significant finding was that a considerable number of reports did not contain any statement conveying the limits to the practice of risk assessment or limits that pertain to the use of the Static-99 risk tool. This contravenes the ethical requirements pertaining to the experts' professions. Further, failure to communicate the limits to the science upon which one's expert opinion relies may result in the court placing an undeserved weight on the expert's risk judgment. Clinicians *must* acknowledge the limitations to the state of knowledge in the field of risk assessment.

It was also found that a number of authors wrongly identified 'risk' factors they believed to be associated with increased risk for sexual recidivism. Almost one third of reports contained at least one risk factor identified by evaluators as being associated with risk that have equivocal or no empirical support (see Hanson & Bussière, 1998; Hanson & Morton-Bourgon, 2005). There is much research available that has identified numerous factors to be empirically associated with reoffence risk. To identify factors that lack such empirical support is indefensible.

With regard to the reliability of clinicians' final risk judgment it was found that there was a good level of agreement between the evaluators. The inter-rater reliability of risk assessment scores on the Static-99 was also good, though slightly lower than previous research (Bartosh, Garby, Lewis, & Gray, 2003; Harris et al., 2003; Levenson, 2004b). The inter-rater reliability for Axis I paraphilic diagnoses was very high. Thus, evaluators are reliably identifying the relevant psychopathological constructs that are linked to reoffence risk (i.e., sexual deviance).

The analysis also found that all reports except for one communicated a final opinion on risk using the categorical method (i.e., high, medium, and low). This

uniform approach to describing risk is clearly helpful for the task the court is engaged in. It was also found that several reports would include additional descriptors when describing the risks presented by offenders, such as ‘some risk,’ and ‘very high’ risk. The paper recommended that clinicians should continue to communicate their final opinion on risk using the categorical method, but are advised to refrain from including other, more ambiguous descriptors.

Overall, this study identified that there is considerable room for improvement in the clinical practice of risk assessment under preventive detention laws. This finding is consistent with Amenta’s (2005) research that found similar weaknesses in the risk assessment practices of clinicians providing evaluations for equivalent legislation in the State of Texas. Amenta (2005) also concluded that clinicians were found wanting across a number of clinical practice areas of risk assessment, including communication of the limits to the science of risk assessment, and knowledge of factors known and not known to be associated with increased recidivism risk. The implications arising from these findings are considered below.

Implications

Implications for clinical practice. This thesis contributes to the knowledge on the current standard of practice of risk assessment in the context of Australian forensic clinicians performing evaluations under post-sentence legislation. Taken together, a number of implications arise in light of the findings.

Firstly, the standard of risk assessment in post-sentence matters must be raised. Shortcomings were found throughout the entire risk assessment process, from the choice of risk assessment method and interpretation of risk outcomes to the experts’ communication of results and limitations to the science of risk assessment. Given the courts’ reliance on risk assessment in forming its decision in post-sentence

matters, the significance of a less than competent assessment is well captured by Heilbrun, Dvoskin, Hart, and McNeil (1999): “Improper risk communication can render a risk assessment...completely useless – or even worse than useless if it gives consumers the wrong impression” (p. 94).

Raising the standard of practice in this area is important for preserving professional standards, maintaining the integrity of the mental health professions, and strengthening the reliability and validity of expert opinion in this area. Clinicians do have a useful role to play in post-sentence hearings given the availability of instruments that have a demonstrated reliability and predictive validity that considerably exceeds chance (Mercado & Ogloff, 2007). Nevertheless, the utility of expert opinion in this area is only optimally reached when the formation and expression of risk judgments adhere to an emerging consensus on best practice (Craig & Beech, 2010; Vess, 2009).

These findings raise the question of how to ensure that risk assessment practices meet best practice standards. Arguably, safeguards are needed to monitor the quality of risk assessment reports tendered to the court. Whether an assessment of risk is sought from an independent expert or from an employee of the government department seeking a post-sentence order, the development of a quality control procedure appears necessary. While proper training and qualification in the assessment of risk for violence and sexual offending should be a mandatory requirement, additional internal checks and balances seem appropriate in order to more fully preserve the highest standards of practice in this high-stakes legal context.

Implications for treatment. This thesis also contributes to the knowledge of the complex and varied treatment needs of sex offenders under post-sentence orders. A range of treatment implications arose from the descriptive analysis of the offenders’

developmental, psychiatric, treatment, and criminal histories. Given the commonly occurring characteristics of this sample, treatment modules are needed for a number of areas including drug and alcohol abuse/dependence, dysfunctional personality features, childhood maladjustment issues, sexual deviance, vulnerability to poor mental health and skills deficits. Taken together, this multifaceted approach aims to address both the offenders' criminogenic psychopathology and the psychological and social determinants of their problematic sexual behaviour (e.g., Warren, MacKenzie, Mullen, & Ogloff, 2005).

Additionally, this study indicated that increasing the numbers of sex offenders who complete treatment programs during their incarceration is required. Having sex offenders complete empirically-validated treatment programs remains the most appropriate means of reducing their risks for reoffending. However, it is concerning that post-sentence laws allow for information obtained in treatment to be used to identify high-risk offenders who may be eligible for continued detention (Sentencing Advisory Council, 2006). This is likely to discourage offenders from more candidly disclosing deviant thoughts and impulses (Sullivan, Mullen, & Pathé, 2005) and is an impediment to the therapeutic process.

Instead, sex offenders need to be motivated to meaningfully participate in, and complete, treatment. This remains a familiar and ongoing challenge for treatment providers. A relatively recent model of offender rehabilitation, termed the Good Lives Model (Ward & Gannon, 2006), claims to address this difficulty by more effectively integrating the issues of motivating offenders to participate in, and to persist with, treatment programs within its treatment framework (Ward, Collie, & Bourke, 2009). Researching the efficacy of this alternative rehabilitation model may be the necessary first step to improving rates of treatment completion by sex offenders.

Implications for the legal system and policy development. Raising the standard of legal practice in this area also emerges as an implication arising from the thesis' findings. Greater legal attention paid to the assumptions underpinning clinical assessments of risk will contribute to the development of higher standards of practice in the provision of expert opinion. The development of the legal fraternity's knowledge of risk assessment could readily be achieved via cooperation between the relevant scientific and legal institutions in the form of ongoing training and education. Bringing to bear a more informed scrutiny to experts' assessments of risk would further lessen the likelihood that the quality of judicial decision-making would be undermined by less than competent assessments of risk.

This thesis also contributes to knowledge of an inexperienced government approach to developing public policy to manage risks of sexual recidivism. That post-sentence legislation is based on unsupported assumptions suggest that the process adopted by governments to develop the legislation is deficient. It is understood that the process was hasty and lacked collaboration between government and relevant professional bodies and experts. While it is appreciated that governments were under pressure to attenuate the concerns of the community, nevertheless, the community would be best served if future policymaking regarding sexual offenders is driven by a collaborative approach between criminal justice and legislative sectors and the relevant scientific communities. Effective legislation to manage sex offending risk must be empirically defensible, cost-effective, and based upon what we understand, not what we fear, about sex offenders.

Throughout the papers, the need to develop an alternative model for managing sex offending risk has been highlighted. Unwanted sexual contact is a pervasive social problem. Post-sentence legislation represents the latest attempt at reducing the risks of

sexual recidivism. However, as has been argued, these laws exist as a very costly approach to protecting the community from sexual recidivism based upon an error-prone task of identifying only high risk sex offenders; the effect of these laws on reducing sexual offending can at best be limited. Alternatively, a public health approach to reducing sexual violence in the community has been proposed. Firstly, this approach focuses resources toward preventing sex offending (Laws, 2008). However, once sex offenders have been identified by the criminal justice system, the public health model advocates for the systematic reduction of reoffending risk across the entire sex offending population. This requires an overhaul to the ways in which sex offenders are assessed, sentenced, treated, supervised and managed in the community. In this way, resources could be more effectively allocated to comprehensively assessing sex offenders at the time of sentencing and providing the court with independent expert evidence regarding the offender's risks of reoffending, treatment needs, and prognosis. After sentence, and consistent with principles of offender rehabilitation (Andrews & Bonta, 2006), sex offenders would then receive treatment and management commensurate with their identified level of risk and need.

One of the more noteworthy findings of this thesis was that a significant majority of offenders submitted to a post-sentence order displayed an early onset of sexual offending. It is at this relatively early stage of their lives that resources are most needed, in order to accurately and comprehensively identify their risks and treatment needs and provide appropriate intervention (i.e., psychological and pharmacological). Indeed, meeting the needs of these people, before more entrenched deviance and criminality evolves, remains the most (and only) promising means to alter the sexual offending trajectories of these dangerous and damaged men.

On a final policy note, a number of Australia's post-sentence laws require that the court-ordered assessments of the nominated offender be conducted by two psychiatrists. Limiting expert opinion on risk for future violence to psychiatrists is misguided because there is no evidence to suggest that psychiatrists predict risk for sexual recidivism with any greater precision than psychologists. Rather, it would be prudent to limit post-sentence assessments to those mental health professionals with specialist qualifications and training in the practice of forensic mental health and the assessment of risk for future sexual violence.

Limitations

The limitations in the methodologies of the empirical studies in this thesis have been acknowledged in the papers generated by those studies. As such, they will be briefly iterated here. With respect to the study describing the characteristics of sex offenders who have received a post-sentence order, the findings were first limited by the fact that the data were obtained from psychological and psychiatric reports that were partly based on self-report. The issue here is that some doubt may be raised regarding the authenticity of the offenders' reporting of information. However, that each report indicated that extensive collateral information was made available to the evaluator, enabling the veracity of the offenders' accounts to be ascertained, moderates this limitation. Also, the findings from this study were limited by some inconsistency in the availability of information. Consequently, not all variables could be fully coded and descriptive analyses could not always be performed on the entire sample. Finally, this study was not able to provide a truly national examination of the characteristics of these offenders following Queensland's decision not to participate in the study.

The second empirical study investigating the risk assessment practices of clinicians also lacked national scope given that access to the relevant reports in Queensland was not provided. As a result, this evaluation of the standard of practice applies to those jurisdictions whose reports were utilised in this research. Further, the disciplines of psychiatry and psychology were not evenly represented as authoring the risk assessment reports and some evaluators authored more reports in the sample than others. Given this, some of the findings may be more relevant to a particular discipline or author. Finally, the inter-rater reliability analyses were limited by the small number of cases available.

Future Research Directions

Future research is required to expand on the scope of the empirical studies reported in this thesis and extend them into other fertile research areas. Extending each empirical analysis to Queensland is warranted to provide a truly national assessment of the characteristics of sex offenders under post-sentence orders and the standard of practice of risk assessment. Indeed, given that Queensland was the first state to pass post-sentence legislation broadening the scale of the research to include Queensland will increase the sample size of offenders and reports significantly.

The research identified that sex offenders under post-sentence orders were exposed to a high number of vulnerability factors and risks. There is scope to further explore the relationship between these factors and sexual offending. This research may contribute to the allocation of early intervention efforts towards those young offenders at higher risk for sexual (re) offending. As noted previously, early and proper psychological and psychiatric treatment is likely to remediate some of the risks and problems posed by this group and remains the most promising approach to modify highly damaging offending trajectories exhibited by those in this study.

Another useful research area to be explored involves comparing the profiles of sex offenders submitted to post-sentence orders with other serious offenders. The potential benefits of such research would be to increase our knowledge of how this group of specially targeted sex offenders differs from other serious offenders and may again sharpen our understanding of those factors that place offenders at greater risk for ongoing sexual offending.

With respect to the practice of risk assessment, more research is required to understand clinicians' decision making processes. For example, unanswered questions remain with respect to how clinicians integrate risk information from multiple risk tools and how risk information is weighted and alternative risk outcomes synthesised into an overall risk judgment. Clinicians will increasingly be called upon to provide assessments of risk in these and other matters. Additional research is vital to ensure that the highest standards of practice are being reached.

Conclusions

This thesis has examined a number of issues related to Australia's post-sentence legislation targeting sex offenders, and provided both theoretical and empirical investigations. The implications arising from the thesis' findings were wide-ranging and practical. The psycho-legal analysis revealed that the legislation was not developed based on empirical information relating to risk assessment and sex offender recidivism. Concerns as to the efficacy of the laws were raised. Future public policy in the area of sex offending must be empirically defensible, cost-effective, and collaboratively developed between policymakers and the relevant scientific communities and experts.

The major empirical investigation analysed risk assessment reports tendered to the court in post-sentence proceedings. No previous examination of clinicians' risk

assessment practices, via an analysis of their reports, had heretofore been completed. The findings were illuminating. Taken together, the investigation revealed that the standard of practice of risk assessment needed to be raised. Less than competent risk assessment reports compromised the integrity of the reputation of the mental health professions and unnecessarily complicated the decision-making task of the courts. Recommendations for maintaining a best practice approach to risk assessment were provided.

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APPENDICES

Appendix A: Approval letter from Monash University's Ethics Committee

Appendix B: Approval letter from Victoria's County Court

Appendix C: Approval letter form New South Wales' Supreme Court

Appendix D: Approval letter from Western Australia's Supreme Court

Appendix E: Coding Instrument

APPENDIX A



Standing Committee on Ethics in Research Involving Humans (SCERH)
Research Office

Human Ethics Certificate of Approval

Date: 9 October 2008
Project Number: CF08/2517 – 2008001164
Project Title: Expert opinion and post-sentence legislation in Australia
Chief Investigator: Prof James Ogloff
Approved: From: 9 October 2008 to 9 October 2013

Terms of approval

1. SCERH has granted an exemption under the Statutory Guidelines on Research issued for the purposes of HPP1.1(e) and 2.2(g)(iii) – Health Records Act 2001 (Vic) and the National Privacy Principles (Privacy Act 1988).
2. The Chief investigator is responsible for ensuring that permission letters are obtained and a copy forwarded to SCERH before any data collection can occur at the specified organisation. **Failure to provide permission letters to SCERH before data collection commences is in breach of the National Statement on Ethical Conduct in Human Research and the Australian Code for the Responsible Conduct of Research.**
3. Approval is only valid whilst you hold a position at Monash University.
4. It is the responsibility of the Chief Investigator to ensure that all investigators are aware of the terms of approval and to ensure the project is conducted as approved by SCERH.
5. You should notify SCERH immediately of any serious or unexpected adverse effects on participants or unforeseen events affecting the ethical acceptability of the project.
6. The Explanatory Statement must be on Monash University letterhead and the Monash University complaints clause must contain your project number.
7. **Amendments to the approved project (including changes in personnel):** Requires the submission of a Request for Amendment form to SCERH and must not begin without written approval from SCERH. Substantial variations may require a new application.
8. **Future correspondence:** Please quote the project number and project title above in any further correspondence.
9. **Annual reports:** Continued approval of this project is dependent on the submission of an Annual Report. This is determined by the date of your letter of approval.
10. **Final report:** A Final Report should be provided at the conclusion of the project. SCERH should be notified if the project is discontinued before the expected date of completion.
11. **Monitoring:** Projects may be subject to an audit or any other form of monitoring by SCERH at any time.
12. **Retention and storage of data:** The Chief Investigator is responsible for the storage and retention of original data pertaining to a project for a minimum period of five years.



Professor Ben Canny
Chair, SCERH

Cc: Dr Stuart Thomas; Dominic Julian Doyle

APPENDIX B

PHONE: (03) 8636 6290
FAX: (03) 9640 0119
EMAIL: mr@countycourt.vic.gov.au



CHIEF JUDGE'S CHAMBERS
COUNTY COURT
250 WILLIAM STREET
MELBOURNE VIC 3000

16 November 2007

Professor James R P Ogloff
Director
Thomas Embling Hospital
Locked Bag 10
FAIRFIELD VIC 3078

Dear Professor Ogloff,

I refer to your letter dated November 1, 2007 requesting access to the written judgments produced in relation to Victoria's *Serious Sex Offenders Monitoring Act* (2005).

This request was raised at the recent meeting of the Executive Committee of the Council of Judges and the Committee resolved that access to the judgments be granted.

Yours sincerely

Michael Rozenes
Chief Judge

APPENDIX C



25 February 2008

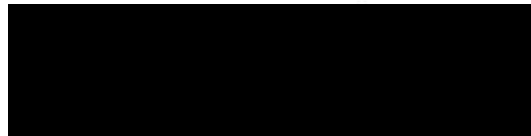
Professor James Ogloff
Director
Centre for Forensic Behavioural Science
Thomas Embling Hospital
Locked Bag 10
FAIRFIELD 3078

Dear Professor Ogloff

I refer to your letter of 13 February in which you request access to psychiatric reports produced pursuant to s7(4) of the *Crimes (Serious Offenders) Act* 2006. I note that you have been granted access under parallel Victorian legislation.

I agree that the judiciary would benefit from the kind of research that you have in contemplation. I, accordingly, agree to your request. The procedure for access should be taken up with Ms Megan Greenwood, the Chief Executive Officer of the Court. She can be contacted on Telephone 9230 8729 or Email: megan.greenwood@courts.nsw.gov.au.

Yours sincerely



The Honourable J J Spigelman AC
Telephone: + 61 2 9230 8218
Facsimile: + 61 2 9230 8810

Chief Justice
GPO Box 3, Sydney NSW 2001, Australia
DX 829 Sydney
Email: spackham@courts.nsw.gov.au
Website: www.lawlink.nsw.gov.au/sc

APPENDIX D



CHIEF JUSTICE OF WESTERN AUSTRALIA

Chief Justice's Chambers, Supreme Court of Western Australia,
Stirling Gardens, Barrack Street,
Perth, Western Australia 6000

Telephone: +(08) 9421 5337 Fax: +(08) 9221 3833
Email: chief.justice.chambers@justice.wa.gov.au

Our ref: DSOA1001

25 February 2008

Professor James R P Ogloff JD, PhD, FAPS
Director of the Centre for Forensic Behavioural Science
Monash University
Thomas Embling Hospital
Locked Bag 10
Fairfield Victoria 3078

Dear Professor Ogloff

I refer to my letter of 21 February 2008. I have now had an opportunity to consult those of my judicial colleagues who have had experience in handling applications under the *Dangerous Sexual Offenders Act 2006*.

As a result of those consultations, I am pleased to advise that this Court supports your research and will be pleased to co-operate by providing copies of expert reports tendered in evidence upon request. However, those copies will be provided on condition that you undertake to maintain the confidentiality of the identities of the offenders, any other persons referred to in the expert reports (such as victims, or members of the families of the victims or the offenders), and the identity of the expert witness.

If these terms are acceptable, I would be grateful if you would make contact with Principal Registrar Chapman, in order to make the

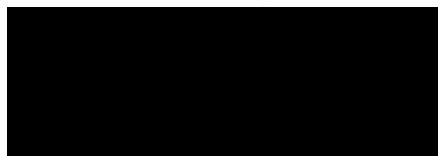
- 2 -

Chief Justice's Chambers, Supreme Court of Western Australia

25 February 2008

necessary practical arrangements for the provision of access to relevant reports.

Yours sincerely



The Hon Wayne Martin
Chief Justice of Western Australia

cc: Principal Registrar Chapman

25Feb02

APPENDIX E

Report ID: # _____

Offender ID: # _____

Evaluator ID: # _____

1. Has this offender been assessed by more than one clinician?

(As requested by the applicant)

☐ 1 Yes: ID# _____☐ 2 No**2. What authority has requested the clinical assessment?**☐ 1 Supreme Court☐ 2 Department of Justice**3. Report Date**

(If more than one date is noted, code date on which report is signed)

____/____/____

☐ 1 Reported☐ 99 Missing**4. Assessment Date(s)**

(Date[s] on which offender was assessed)

____/____/____

____/____/____

____/____/____

☐ 1 Reported☐ 99 Missing**5. Number of Assessments**☐ 1 One☐ 2 Two☐ 3 Three☐ 4 Four + _____☐ 99 Missing**6. Length of Clinical Interview**

(Code number of minutes the author reports spending in assessment)

☐ 1 Reported: _____ mins☐ 99 Missing**7. Report Length**

_____ Pages

8. Discipline of Evaluator☐ 1 Psychiatrist☐ 2 Psychologist**9. If Psychologist, then indicate level of highest qualification**☐ 1 PhD☐ 2 DPsych☐ 3 MPsych☐ 4 Honours/Grad Dip☐ 5 Other: _____☐ 55 Not Applicable

10. Referral Source and Reason for Referral

a. Does the author identify who requested the evaluation?

- ☐ 1 Yes
☐ 2 No
☐ 3 Implied

b. Does the author provide a reason for the referral?

- ☐ 1 Yes
☐ 2 No
☐ 3 Implied

11. Third Party Documentation

a. Does the author indicate that he/she engaged in a review of records?

- ☐ 1 Yes
☐ 2 No
☐ 3 Implied

b. If yes or implied, does the author list or summarise the specific documents relied upon?

- ☐ 1 Yes
☐ 2 No
☐ 55 Not applicable

12. Documentation of Notification

a. Does the author include a statement that the offender was told the nature and/or purpose of the evaluation?

- ☐ 1 Yes
☐ 2 No
☐ 3 Implied

b. Does the author include a statement that the offender was provided with an explanation of the limits to confidentiality?

- ☐ 1 Yes
☐ 2 No
☐ 3 Implied

c. Does the author include a statement that the offender understood the information contained within the notification?

- ☐ 1 Yes
☐ 2 No
☐ 3 Implied

d. Does the author include a statement that the offender agreed to participate in the evaluation?

- ☐ 1 Yes
☐ 2 No
☐ 3 Implied

13. Mental State Examination

- ☐1 Author reports administering an MSE and includes the results
- ☐2 Author reports administering an MSE but does not mention the results
- ☐3 Although author does not directly report administering an MSE, administration is implied (author mentions offender's orientation, attention/concentration etc)
- ☐4 No administered or implied MSE

14. Diagnostic Summary

a. According to the author, has the offender experienced **general psychological concerns** over their lifetime?

☐1 Yes

☐2 No

b. If yes, describe:

c. Does the author report a DSM-IV diagnosis or diagnoses over the offender's **lifetime** (i.e., excluding current diagnoses)?

☐1 Yes

☐2 No

d. If yes record the **Axis I** and **Axis II** diagnoses and their corresponding DSM-IV-TR codes. Note whether the diagnosis is provisional.

Axis I Diagnosis

DSM Code

<hr/>	<hr/>
<hr/>	<hr/>
<hr/>	<hr/>
<hr/>	<hr/>
<hr/>	<hr/>
<hr/>	<hr/>

Axis II Diagnosis

DSM Code

<hr/>	<hr/>
<hr/>	<hr/>
<hr/>	<hr/>
<hr/>	<hr/>

e. Does the author report a known **lifetime** alcohol abuse problem?

☐1 Yes

☐2 No

f. Does the author report a known **lifetime** substance abuse problem?

☐1 Yes

☐2 No

g. Does the author report a DSM-IV diagnosis or diagnoses **currently** present (excluding substance abuse)?

☐ 1 Yes

☐ 2 No

h. If yes record the **Axis I** and **Axis II** (including intellectual disabilities) diagnoses and their corresponding DSM-IV-TR codes. Note whether the diagnosis is provisional. Exclude substance abuse disorders.

Note: For all the current diagnoses listed in the report, code the extent to which the author presents the symptoms/criteria forming his/her opinion:

1. Author concretely presents symptoms/criteria forming his/her opinion
2. Author vaguely presents symptoms/criteria forming his/her opinion
3. Author describes no symptoms/criteria

Axis I Diagnosis

**DSM
Code**

**Substantiation
Code**

Axis II Diagnosis

**DSM
Code**

**Substantiation
Code**

i. If a paraphilia isn't diagnosed is there clear evidence of sexual deviance that warrants a diagnosis?

☐ 1 Yes

☐ 2 No

☐ 55 N/A

j. Does the author report a known **current** alcohol abuse problem?

☐1 Yes

☐2 No

k. Does the author report a known **current** substance abuse problem?

☐1 Yes

☐2 No

l. Does the author **link** the substance abuse to the sexual offending?

☐1 Yes

☐2 No

☐55 N/A

m. Is a paraphilia currently diagnosed?

☐1 Yes

☐2 No

n. Does the author themselves diagnose a disorder?

☐1 Yes

(i.e., paraphilia or otherwise).

☐2 No

o. Is the diagnosis linked to the offending according to the report author?

☐1 Yes

☐2 No

☐3 Implied

☐55 N/A

15. Risk Assessment Method and Communication

a. Note the method of risk assessment. Tick all boxes that apply

☐1 Clinical Judgment

☐2 Empirically Guided
Clinical Judgment

☐3 Actuarial

☐4 Adjusted Actuarial

☐5 SPJ

☐99 Missing

b. Note all risk assessment instruments used to assess risk for sexual reoffending. Tick all boxes that apply.

☐1 Static-99

☐2 SONAR

☐3 STABLE 2000

☐4 ACUTE 2000

☐5 SVR-20

☐6 RSVP

☐7 PCL-R

☐8 HCR-20

☐9 3-Predictor Model

☐10 RRASOR

☐11 Other:

☐99 Missing

c. Document the methods of risk communication for sexual recidivism based on the **Static-99**:

- ☐1 Categorical (i.e., High, Medium, Low level of risk)
- ☐2 Yes/No (i.e., Yes this offender is a risk or No this offender is not a risk)
- ☐3 Statistical (i.e., 25% likely to reoffend)
- ☐4 Proportional (i.e., 6 out of 10 individuals like this one are likely to reoffend)
- ☐5 Comparative to Individual Offender (i.e., Mr X. appears to be at a lower/higher level of risk than he has been at any other time in his life)
- ☐6 Comparative to a Population (i.e., Mr X appears at a lower/higher level of risk than other sex offenders)

Specify:

d. Does the author provide a cautionary statement regarding the **Static-99** assessment?

- ☐1 Yes
- ☐2 No

e. If yes document all reasons:

f. What is the categorical Static-99 risk assessment?

- ☐1 High
- ☐2 Moderate - High
- ☐3 Moderate - Low
- ☐4 Low

g. Is the Static-99 **score** reported?

☐ 1 Yes: _____

☐ 2 No

h. What is the coder's own Static-99 assessment? Score: _____

i. Does the author specify the time period over which the Static-99 assessment applies?

☐ 1 Yes

☐ 2 No

j. If yes record the percentages provided:

k. Is **age** considered as part of Static-99 risk assessment?

☐ 1 Yes

• Age of offender at time of assessment: _____

☐ 2 No

l. If the PCL-R is used, document score and risk rating:

m. Does the author provide a general cautionary statement regarding risk assessment?

☐ 1 Yes

☐ 2 No

n. If yes document all reasons:

o. Record the categorical risk assessment outcome(s) derived from the utilised risk assessment methods:

[illegible]

p. Method of final risk communication for sexual recidivism. Tick all boxes that apply:

- ☐1 Categorical (i.e., High, Medium, Low level of risk)
- ☐2 Yes/No (i.e., Yes this offender is a risk or No this offender is not a risk)
- ☐3 Statistical (i.e., 25% likely to reoffend)
- ☐4 Proportional (i.e., 6 out of 10 individuals like this one are likely to reoffend)
- ☐5 Comparative to Individual Offender (i.e., Mr X. appears to be at a lower/higher level of risk than he has been at any other time in his life)
- ☐6 Comparative to a Population (i.e., Mr X appears at a lower/higher level of risk than other sex offenders)

Specify:

q. If applicable, document how conflicting assessments of risk obtained through alternative methods are integrated/synthesised to form the final risk judgment:

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16. Impact of Treatment on Risk Assessment

a. Has the offender participated in any sex offender treatment?

- ☐1 Yes
- ☐2 No
- ☐99 Missing

b. Has the offender participated to completion any sex offender treatment?

- ☐ 1 Yes
- ☐ 2 No
- ☐ 99 Missing

c. Has treatment participation/attendance reduced the offender's risk and/or risk rating according to report author?

- ☐ 1 Yes
- ☐ 2 No
- ☐ 3 Unclear

d. If yes, why, if no, why not (if the offender has not participated to completion in treatment document how the author incorporates this into his/her assessment of risk):

a. Does the author list any risk factors outside of an instrument-based assessment of risk (include risk factors listed as part of an empirically guided assessment of risk)? ☐ 1 Yes

☐2 No

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b. Does the author list any protective factors outside of an instrument-based assessment of risk (include protective factors listed as part of an empirically guided assessment of risk)? ☐ 1 Yes

☐ 1 Yes

☐2 No

Protective Factors:

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18. Ultimate Issue Conclusion

a. Does the author comment on whether the offender's risk justifies a post-sentence order?

☐ 1 Yes

□2 Partial

☐3 No

Specify:

[illegible]

19. Recommendations

a. Did the author recommend further psychological treatment?

☐ 1 Yes

☐ 2 No

Why:

b. Did the author recommend a trial of anti-libidinal medication?

☐ 1 Yes

☐ 2 No

20. Did the author cite any literature?

☐ 1 Yes

☐ 2 No

21. Did the author reference the citations?

☐ 1 Yes

☐ 2 No

☐ 55 Not
applicable

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