I NDETERMINATE SENTENCES AND DANGEROUSNESS

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Statutory Preventive Detention

AN INDETERMINATE SENTENCE OF IMPRISONMENT AT THE GOVERNOR'S Pleasure, imposed in addition to or in substitution for, a finite sentence, is available in most of the Australian states and territories. These provisions override the common law requirement of proportion between the crime and the punishment (R v. Veen (No. 2) (1988) 164 CLR 465).

The provisions are of two main types. Those in Western Australia and Tasmania (Western Australia: s. 662 Criminal Code 1914; Tasmania: s. 393 Criminal Code 1924) do not tie preventive detention to any particular type of offence. However, the trial judge must have regard to the antecedents, character, age, health or mental condition of the person, or the nature of the offence or any special circumstances of the case. This extremely broad power is not restricted to violent and mentally disordered offenders, although it is clearly able to be employed in sentencing them. There are similar provisions in some other countries with a common legal heritage (Canada: s. 688 Criminal Code; New Zealand: s. 75 Criminal Justice Act 1985).

The second type of provision is that found in Queensland, South Australia and the Northern Territory, and it links the preventive detention to a conviction of an offence of a sexual nature and two reports from medical practitioners, who must both attest (Johnson [1962] QWN 37) that the offender is incapable of proper control over sexual instincts. This also enables the trial judge to order detention at the Governor's Pleasure in addition to, or in lieu of, any finite sentence (Queensland: s. 18 Criminal Law Amendment Act 1945; Northern Territory: s. 401 Criminal Code 1983). In the case of South Australia, the courts are empowered to direct that the offender be detained until further order of the Supreme Court (South Australia: s. 23 Criminal Law (Sentencing) Act 1988), and a mechanism is provided for review—by the Parole Board of South Australia—and discharge of this indefinite sentence—by the Supreme Court of South Australia. The reviewable nature of the South Australian sentence distinguishes it from the.
older counterparts in Queensland and the Northern Territory. In each of these latter models, offences of a sexual nature are not, by definition, confined to offences of violence or the use of physical force (*Ruler* [1970] QWN 44).

There is no equivalent statutory power in New South Wales and Victoria. The absence of the specific power tied to sexual offences was once decried in Victoria (*Chapman* [1947] VLR 442), but this absence is no longer felt in that state (Victorian Sentencing Committee 1988: para. 3.14.6). In these two states, the common law principle of proportion between the sentence and the crime prevails.

**Section 662 of the Criminal Code (Western Australia)**

*The origins*

The origins of s. 662 of the Criminal Code 1914 (WA), lie in the 1898 Royal Commission into the Penal System of that state, and a glimpse into the tenor and perspective of the Royal Commissioner's report can be obtained from the fact that it was recommended that decisions as to release of prisoners should be vested in a 'Board of Medical Jurists'. Although this proposal was never adopted, this patent reformative perspective and its attendant faith in medical science was influential. In 1918, s. 661 (permitting indeterminate sentences for habitual offenders) and s. 662 were inserted into the Criminal Code. The aim was to permit trial judges to order imprisonment in a reformatory prison (Western Australia. Parliament. Joint Select Committee on Parole 1991, p. 20). Needless to say, the rhetoric of reform was never matched by the reality: the creation of a reformatory prison has proved as elusive in Western Australia as it has everywhere else.

*Use of Section 662*

The indefinite sentence under s. 662 is exceptional. The total number of prisoners under s. 662 sentences is small. Limited data are available, and present a series of snapshots: only sixteen prisoners were held under s. 662 at 24 October 1988, sixteen were held at 30 June 1990 and fifteen were held at 30 June 1991, which represents less than 1 per cent of the state's average daily muster (R. Fitzgerald 1991, pers. comm., September). In dynamic terms, in the period 1982–87, there were eighteen receivals under s. 662(a), which permits an indefinite sentence to be aggregated with a finite sentence for the same offence, and eighteen under s. 662(b), which permits an indefinite sentence to be imposed in lieu of a finite sentence, for a total of thirty-six receivals for the period (Western Australia. Inter Departmental Committee 1989, pp. 93–4). This represents a minuscule 0.001 per cent of total sentenced prisoner receivals for the period. In two subsequent years, 1989–90 and 1990–91, the receivals have dropped to one and none respectively (R. Fitzgerald 1991, pers. comm.). This effect may be the fallout from the High Court's decision in *Chester* ((1988) 165 CLR 611), apparently curtailing the use of s. 662 sentences, about which more will be said later.

The Canadian equivalent, although not offence-specific, has been largely used for the indeterminate detention of sexual offenders (Jakimiec et al. 1986; Sorochan 1988). The same can be said of Western Australia. Sexual offences
feature prominently in the offences for which s. 662 sentences are imposed (R. Broadhurst 1991, pers. comm.). Of the sixteen offenders held under s. 662 at 30 June 1990, the most serious offences for which they were convicted was breach of Governor's Pleasure (2), breaking and entering offences (3), rape or sexual assaults (8), armed robbery (1), going armed in public (1) and attempted murder (1). More interestingly, with one exception, all the s. 662 prisoners had been simultaneously convicted of multiple crimes. The multiple ranged from twenty-nine offences down to three offences. The average was nine offences for which the offenders were sentenced at the time when the indeterminate Governor's Pleasure sentence was imposed. Some of these offences may have been quite minor, but among the three most serious offences were deprivation of liberty (5), sexual assaults (11), breaking and entering offences (6), armed robbery (3), other offences against the person (2), child stealing (1) and a Prisons Act offence (1).

What is notable about these data is that rape and sexual assault has featured very prominently in judges' decisions to impose a s. 662 sentence. The eleven sexual assaults were rape, aggravated sexual penetration, aggravated sexual assault, aggravated indecent assault and indecent assault. The prominence of these offences is exacerbated if deprivation of liberty charges and breaking and entering charges are also taken into account as part of the transaction of sexual violence. All but two of the s. 662 prisoners who had been convicted of deprivation of liberty or breaking and entering offences were simultaneously convicted of a sexual offence.

Furthermore, in so far as it is possible to draw a distinction between violent and non-violent sexual offences (West 1984), the s. 662 sentence appears to have been invoked for those of a violent nature rather than for those which are usually not accompanied by violence.

Problems with Section 662

Treatability

The first of the fundamental problems with s. 662 is that there is no pretence that the sentence is reformative or rehabilitative, or to be invoked only when there is a genuine prospect of treatment of psychiatric illness. Despite the reformative euphoria which influenced the enactment (Western Australia. Parliament. Joint Select Committee on Parole 1991, p. 20), this was not carried over into the legislative drafting.

The assumption of the courts has always been that the s. 662 sentence is purely incapacitative. Like counterparts in Tasmania and South Australia, Western Australian judges may impose preventive detention upon taking into account the 'mental condition' of the offender. This does not signify treatability of that condition, however. This phrase has been interpreted to refer to any 'state of mind' (Kiltie [1986] 41 SASR 52, 61, 71), or the 'mind's activities in all its aspects' (Kiltie, supra 66), and is not confined to recognised illnesses.

Comparison with indeterminate life sentences in England. This might be compared with the position in England, where the courts have developed a
common law principle which enables a disproportionate life sentence to be imposed for
sexual offences and offences of violence where it appears from the nature of the
offences or from the defendant's history that he is a person of unstable character likely
to commit such offences in the future (Hodgson (1967) 52 Cr App R 113). The
warrant for the sentence is the instability of the mental condition of the offender
(Picker (1970) 54 Cr App R 330; Spencer (1977) 1 Cr App R (S) 75; Headley (1979)
1 Cr App R (S) 158; Pither (1979) 1 Cr App R (S) 209), and the resultant danger
which the offender represents.

Like the Western Australian, Tasmanian and South Australian statutory equivalents,
the English disproportionate life sentence is not linked to treatability of the mental illness.
The lack of cooperation in treatment (Aarons [1964] Crim L R 484; Saunders [1965]
Crim L R 250; Woolland (1967) 51 Cr App R 65; Glasse (1968) 53 Cr App R 121), or
untreatability because of the nature of the disorder (Ashdown [1974] Crim L R 130;
Thornton [1975] Crim L R 51; Skelding (1974) 58 Cr App R 313) does not inhibit the
courts from imposing a disproportionate life sentence.

Contrast with hospital orders. The s. 662 sentence is to be contrasted with the hospital
order, which can be made in Victoria and Tasmania, inter alia, if the person is mentally
ill and should be detained in hospital for treatment (Victoria: s. 15 Mental Health Act
1986; Tasmania: s. 51(1) Mental Health Act 1963). The gravamen of the hospital
order is not the presence of mental disorder, but the treatability of it (Gills [1967]
Crim L R 247; Woolland (1967) 51 Cr App R 65). Instability of personality short of a
treatable mental disorder will not suffice to ground a hospital order (Woolland, supra).
Moreover, a judge is obliged to obtain the views of the hospital with regard to the
course of treatment proposed by the psychiatrist, and obtain the consent of the hospital
to the admission of the offender for that purpose (Victoria: s. 15(2); Tasmania:
s. 51(3); see also Tutchell [1979] VR 248).

Hospital orders have one major drawback. They are regarded as unsuitable for
mentally disordered offenders who are predicted to be dangerous, unless the hospital is
willing to provide security for the offender (Morris [1961] 1 QB 237; Higginbotham
[1961] 3 All ER 616; Cox [1986] 1 All ER 386; Tutchell, supra). The making of a
hospital order by the court does not ensure that the detainee will receive the
contemplated treatment or be detained for any specified period (Great Britain.
judges lack the power to make an order restricting the release of the offender from
hospital, unlike their counterparts in Tasmania who may make a restriction order to
protect the public if the trial judge is satisfied of the need to detain the offender in
conditions of strict custody (Tasmania: s. 48(2) Mental Health Act 1963). An
equivalent order is available in England and New Zealand, where the power to restrict
release can be exercised to prevent danger from the offender (Elliot [1981]
1 NZLR 295, p. 302; Clarke (1975) 61 Cr App R 320, p. 323; Ex parte H. [1981]
Tas R 194, p. 204). Unlimited restriction orders may be imposed on the basis of mental
disorder and dangerousness, even though the offender may have been convicted of a
3 Cr App R (S) 330).
The result is that superimposed on the hospital order is an indeterminate preventive mechanism, imposed incongruously on supposedly therapeutic detention in a hospital. The absence of a power to make a restriction order, under the predecessor of the Mental Health Act 1986 has prompted the Victorian Full Court to the view that if the offender is likely to represent a danger, or possibly not cooperate in treatment, then a hospital order should not be made, and that the need to ensure the safety of the community dictates a prison term (Judge Rapke; Ex parte Curtis [1975] VR 641, p. 643; Carlstrom [1977] VR 366, p. 367–8; Tutchell, supra 255; see also Clay (1979) 22 SASR 277, p. 282). The lack of restriction orders had the effect that hospital orders were rarely used in that state (Fox & Frieberg 1985, p. 424). Under the Mental Health Act 1986, a patient detained under a hospital order may only be discharged by order of the Mental Health Review Board or the authorised psychiatrist, and regard must be had to the criteria for involuntary detention in making that order (Victoria: ss. 36, 37 Mental Health Act 1986), and these restrictions upon discharge give reason for confidence in the use of hospital orders by the Victorian courts.

**Behind the labels.** Despite the fact that the s. 662 sentence is incapacitative in philosophy, behind that label, treatment and remediation may be at work.

Transfers from prison to Graylands Hospital in Perth enable psychiatric treatment to be administered where it is appropriate (Western Australia: s. 27 Prisons Act 1981). The procedures for transfer are unavailable for offenders who are personality disordered or intellectually impaired (Western Australia. Inter Departmental Committee 1989, p. 88). Some tension has been felt, however, in that the Department of Corrective Services may maintain responsibility for security even after reception at Graylands Hospital, if the transferred prisoners are rated strict security (the sentence category) or maximum security (the prison category). Although prisoners are detained in the locked wards of Ashburton House in Graylands Hospital, it is not unknown for leg-shackles or handcuffs to remain on and for Department of Corrective Services officers to remain in attendance. There is no standard practice in this respect, however. Negotiation between hospital staff and Corrective Services can reduce the omnipresence of security.

There are no complete data on the extent to which transfers are used for s. 662 prisoners, although in the planning processes for the new Graylands Secure Unit, it was recommended to, and has been accepted by, the Department of Health that five beds should be available at any particular time for such prisoners (Western Australia. Inter Departmental Committee 1989, p. 94), and a further ten beds should be available at any time for transfers from the general prison population (Western Australia. Inter Departmental Committee 1989, p. 95). Whatever their status, prisoners admitted to Graylands Hospital tend to be short-stay patients. Some staff members of Graylands have estimated that prisoners are usually only detained in Graylands for a maximum of about six weeks.

Non-psychiatric disabilities of s. 662 prisoners may be catered for within the prison system. Since sexual offences feature so prominently among their number, it might be expected that specific sexual offender programs might be directed at s. 662 prisoners.
The Department of Corrective Services introduced in 1987 a Sexual Offenders Treatment Program in Fremantle Gaol. It operated as a therapeutic community, in a separate part of the prison, serving up to twelve offenders at a time for programs of twelve months based on behaviourist-cognitive principles. For this reason, seriously psychiatrically disturbed, intellectually handicapped and some Aboriginal offenders are regarded as unsuitable participants (Hacket 1989). The program was available to the general prison population, and was not confined to prisoners sentenced under s. 662. The program ceased amidst acrimony over resources and philosophy in 1989 and, while it has been revived in a varied form, clearly no long-term evaluation has yet been possible, even if appropriate criteria by which to evaluate success could be agreed (Genders & Player 1989).

What is significant, however, is that this sexual offender program is designed for the offender who is motivated or who can be persuaded to recognise a problem with his behaviour. Whether by design or not, it has been the non-violent sex offender who has largely benefited from the program, which purports to equip the offender with the social skills to enhance relationships with the opposite gender, family therapy, anger management, and drug and alcohol education and control. The violent and aggressive sexual offenders appear rarely to meet the criteria for participation. It was noted earlier that the s. 662 sentence has been largely directed at the violent and aggressive sex offender. A s. 662 sentence appears to have carried no guarantee of participation in such a program.

These procedures and programs provide a fuller picture than the label attached to the sentence of indeterminate imprisonment might otherwise suggest, but, apart from hospital transfers, there is no particular program by which the s. 662 prisoners are targeted. Hospital transfers are short-term palliatives and the sexual offenders program rarely attracts those who receive s. 662 sentences. The s. 662 sentence has operated, and continues to operate, as a purely incapacitative prison sentence.

The meaning of dangerousness

According to Bottoms and Brownsword (1982, p. 240) dangerousness has three constituent elements of the predicted act, viz. (i) seriousness; (ii) temporality, with two ingredients of frequency and immediacy (or recency); and (iii) degree of certainty about the future conduct. These elements can be employed for analysis of the s. 662 sentencing practice in Western Australia.

Seriousness. Trial judges in Western Australia have been admonished to employ a s. 662 sentence only in exceptional situations, and only if the offender is shown to be dangerous to others (Chester (1988) 165 CLR 611, p. 618); Tunaj [1984] WAR 48, p. 51; Cooper (1987) 30 A Crim R 19, p. 21), even though the legislature has not so limited the sentence. Until recently, the courts have had little guidance as to what dangerousness actually means, but the High Court in Chester (supra 618) has indicated that the indeterminate sentence should only be imposed when the offender was ‘... so likely to
commit further crimes of violence (including sexual offences) that he constitutes a constant danger to the community'.

This reflects the common law requirement in England that the risk must be the commission of an offence of serious violence, whether of a sexual nature or not (Spencer (1977) 1 Cr App R (S) 75; Johnson (1982) 4 Cr App R (S) 143; Wilkinson (1983) 5 Cr App R (S) 105). The High Court in Chester specifically rejected the state of Western Australia's submission that the powers under s. 662 could be exercised for any serious offence, and ruled that it should be confined to very exceptional cases where the predicted offending is of crimes of violence, including sexual offences (Chester, supra 618).

However, it would be wrong to imagine that the High Court's decision in Chester represented a significant departure from the previous practice of the Western Australian courts. Violent sexual offenders appear to have been targeted previously. For example, most of the s. 662 prisoners detained on 30 June 1990 (thirteen out of sixteen) had been sentenced before the High Court delivered its judgment in Chester.

Since there has been such an emphasis upon violent sexual offenders in the imposition of s. 662 prisoners, it is noteworthy that, regardless of sentence type, the recidivism risk of sexual offenders in Western Australia appears to be high, and that the probability of ultimate recidivism is slightly but significantly higher for violent sexual offenders than for non-violent sexual offenders (Broadhurst & Maller 1991, pp. 63–4, p. 91; Broadhurst & Maller 1992). However, recidivism among sexual offenders in Western Australia has been found to be best predicted by the usual actuarial factors of race, gender and youth, regardless of type of sexual offending (Broadhurst & Maller 1991, p. 63).

These data indicate that the use of the s. 662 sentence as an incapacitative tool is highly selective and, given the slight differences in the rates of recidivism of violent and non-violent sexual offenders, somewhat value-laden.

Recency and frequency. The Western Australian Court of Criminal Appeal court has required evidence of 'constant danger' of the offender (Tunaj [1984] WAR 48, p. 51; Yates (1987) 27 A Crim R 361, p. 364–5) and the High Court has indicated that the courts must require 'cogent evidence that the convicted person is a constant danger to the community' before the indeterminate sentence is imposed (Chester, supra 618). However, s. 662 provides that that must appear from the antecedents, character, age, health, mental condition, the nature of the offence and any special circumstances.

Of all the listed factors, two stand out as having critical weight. The requirement that courts have regard to antecedents enables them to require overt behavioural manifestations of danger. The overt act requirement is one which is common to many statutory schemes of civil commitment in the United States of America (Brooks 1984, p. 284; Mestrovic & Cook 1986). Many explicit statements by courts and legislatures require that any psychiatric prediction of dangerousness be anchored by a proven recent act of violence to the person (Lessard v. Schmidt (1974) 379 F Supp 1376, 1379). New South Wales at one stage adopted this requirement for civil admission criterion (New South Wales: s. 5 Mental Health Act 1983; but see now s. 9 Mental Health Act 1990).
It has also been employed as a statutory requirement for indeterminate sentencing provisions for dangerously violent offenders in Canada (Canada: s. 688 Criminal Code), and in New Zealand (New Zealand: s. 75(1) Criminal Justice Act 1985). The Canadian provision, paraphrasing the relevant parts, requires that it be established beyond reasonable doubt (Kirkland [1957] SCR 3) that the person has engaged in conduct (of which the instant offence is a component) which is:

- a pattern of repetitive behaviour . . . showing failure to restrain his behaviour and a likelihood of his causing death or injury to other persons, or inflicting severe psychological damages upon other persons . . .

- a pattern of persistent aggressive behaviour . . . showing a substantial degree of indifference . . . to the reasonably foreseeable consequences to other persons of his behaviour . . .

- any behaviour . . . of such a brutal nature that as to compel the conclusion that the person is unlikely to be inhibited by normal standards of behavioural restraint.

The Canadian provision provides a statutory meaning of dangerousness, makes plain the need to anchor any determination of dangerousness in the demonstrable facts of a past criminal offence as part of a pattern of conduct unless the brutality of the offence speaks for itself. Pattern is established by two or more offences of the same type (Langevin (1984) 11 CCC(2d) 336). The New Zealand scheme is similar, in that the offender must have been convicted of at least one offence on a prior occasion since the age of seventeen. A similar indeterminate sentencing provision was proposed for England by Floud and Young (1981) and for the United States of America by the American Law Institute's Model Penal Code, Proposed Official Draft 1962, s. 703(3).

The overt act requirement has had some impact under s. 662 of the Western Australian Criminal Code. Burt CJ, in dissent in the Western Australian Court of Criminal Appeal in Yates ((1987) 27 A Crim R 361, pp. 364–5), has stated that the absence of any patterned conduct of the offender, or the fact that the instant offences were the first involving any violence to the person, militated against a s. 662 sentence. This gives expression to an overt act requirement. This view was mirrored in the judgment of the High Court of Australia in Chester, in which it was considered that a preventive detention sentence should be quashed because the prisoner's criminal record was not such as to permit the judge to be clearly satisfied that the prisoner was a constant danger to the community (supra 78–9). However, neither decision goes so far as to make a pattern of similar conduct an essential prerequisite of the s. 662 sentence.

On the other hand, Brinsden J in Yates, with whom Smith J concurred, focused on clinical factors, principally the lack of insight of the offender and the lack of response to previous treatment, as the primary indicators of dangerousness (supra 369). Interestingly, the judgment of Brinsden J in Yates suggested that the situational quality of dangerousness could not be ignored.
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Brinsden J took the obligation of the judge to take into account the nature of the offence to permit consideration of the situational factors of the sexual violence, namely that it was committed against a young child and that it was committed in a particular location—a suburban shopping centre—to which both the offender and people in the class of his victim had habitual resort.

Nonetheless, in light of the approach of the High Court in *Chester*, clinical factors alone cannot provide a satisfactory factual predicate for courts to act upon predictions of dangerousness, and it is certainly consistent with the approach being taken to the question of the prediction of dangerousness in most of the common law world.

Since the prediction of dangerousness must be anchored in overt, patterned and seriously violent criminal conduct, an observer is compelled to ask why there is any need for an indeterminate sentence at all if the patterned multiple offences can be the subject of sentencing under determinate sentencing principles. Patterned offending can attract cumulative sentences, if preventive effect is desired. Indeed, there has been a recent suggestion that a prior record should serve to render an offender more culpable than a first offender might be, and thereby attract a greater punishment (Von Hirsch 1985). This view does not reflect judicial orthodoxy that a prior record should merely cancel out mitigating factors but cannot increase the culpability for an offence and thereby extend the tariff range (*Cameron v. Josey* [1970] WAR 66; *Clark* (1972) 4 SASR 30; *Cook-Russell* [1976] Qd R 35; *Lemass* (1981) 5 A Crim R 230), but even under this orthodoxy, there is proper scope for consideration of dangerousness within the confines of a finite sentencing regime.

**Degree of certainty about dangerousness.** It is unnecessary to review the well-thumbed pages of the literature on the fallibility of predictions of dangerousness. The false positives and false negatives in predictions of dangerousness continue to be observed, despite some high true positive rates well above chance for some particular offender groups. It suffices to note that the ineradicability of false positives has signalled, for some, the need to abolish or at least limit to the greatest possible extent any form of preventive sentencing based upon fallible psychiatric judgments (Radzinowicz & Hood 1981a, 1981b).

However, the expectation that predictions of dangerousness need to be completely valid and reliable, or of a much higher order of validity and reliability than has been observed to date, before they can be acted upon is disingenuous. Dworkin has written, for example, that speculation as to what might happen is no basis for abridgment of the rights of one predicted to be dangerous, but that abridgment could be justifiable in the case of a genuine emergency. Borrowing from Holmes J in *Schenck v. United States* ((1919) 249 US 47, 52), Dworkin has suggested that a genuine emergency is one which is a ‘... clear and present danger, and the danger must be of some magnitude’ (1985, p. 195). In the same vein Rawls has written that:

> Justice does not require that men must stand idly by while others destroy the basis of their existence. Since it can never be to men's advantage, from a general point of view, to forgo the right of selfprotection, the only question then is whether the tolerant have a right to curb the intolerant
when they are of no immediate danger to the equal liberties of others (Rawls 1971, p. 218).

However, it is difficult to translate 'clear and present danger' or 'immediate danger' into operational terms of an acceptable rate of error before a community might regard itself as acting justly in abridging the offender's rights by a prediction of dangerousness which has a one in three chances of being wrong.

The comment has been made by Burger CJ in the United States Supreme Court decision in *Addington v. Texas* ([1979] 441 US 418, 429) that, in view of the invalidity of predictions of dangerousness, '... there is a serious question as to whether the state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous'. Some commentators have suggested that such a standard would require a degree of satisfaction lying between 70 per cent and 90 per cent or more (Simon & Mahan 1971, p. 319; Simon & Cockerham 1977, p. 57; Eggleston 1983, pp. 118–19).

However, not all disputes regarding issues of fact need to be established beyond a reasonable doubt for sentencing. Certainly, the essential legal ingredients connoted by the verdict or plea of guilty must be established by the Crown beyond a reasonable doubt (Morse [1977] WAR 151, 156; Chamberlain (1982) 14 A Crim R 67, pp. 69–70; Perre (1986) 41 SASR 105, 116–17; O'Neill [1979] NSWLR 582, pp. 588–9). However, the issues need only be proven beyond a reasonable doubt where they constitute the nature of the crime itself for which the offender stands to be sentenced. It is the offence or offences proven against the accused which govern the punishability of the offender, and the limits of that punishment.

If the dispute concerns issues which are outside the essential legal ingredients of the offence, such as part of the narrative or matters personal to the offender, for example age, occupation, marital status, mental disorder and so on, then they too must be proven if the trial judge is to act on them, but these issues do not have to be proven beyond a reasonable doubt, even if part of the Crown's submissions, but merely to the satisfaction of the court (Chamberlain (1982) 14 A Crim R 67, pp. 70–1; Welsh (1982) 7 A Crim R 249, pp. 251–2; Xiao Dong Liu (1989) 40 A Crim R 468, pp. 474–5). It need only be established as more probable than not that the offender is likely to be dangerous for a sentencer to act upon such a prediction, where that prediction is considered within the range of tariff sentences marked out by the seriousness of the offence.

The High Court of Australia in *Chester* has indicated that the likelihood that the offender will be dangerous is enough to activate the indefinite sentence. The court stated that the judge must be ‘... satisfied by acceptable evidence that the convicted person is ... so likely to commit further crimes of violence (including sexual offences) that he constitutes a constant danger to the community ... [This] ... requires that the sentenc ing judge be clearly satisfied by cogent evidence ... ’ (supra 78). The courts of England have addressed the required degree of risk, stipulating that the degree of dangerousness must be a 'substantial risk of repetition' (*Laycock* (1981) 3 Cr App R (S) 104, p. 106).
In other contexts, the meaning assigned to 'likelihood' has been that something 'may well happen', 'it may not happen, but there is a good chance that it will', and that there is the underlying notion that there is a substantial or real chance that an event will occur, and not merely a possibility, without equating the meaning with a better than 50 per cent chance or odds-on chance of the event occurring (Boughey (1986) 60 ALJR 422, pp. 426–7). This sort of assignment to proof of mathematical chances is done frequently in civil matters, determining and apportioning damages (Eggleston 1983, chapter 15), but, for preventive detention of dangerous offenders, what appears to emerge is that the courts do not regard themselves as inhibited by the chance of a prediction being wrong in sentencing upon a prediction of dangerousness, even though this may appear to be fatal to a formula which demands proof of something as more probable than not.

However, there is another way of regarding this issue of standard of proof of dangerousness for the s. 662 sentence, which is consonant with the opinion expressed by Burger CJ in Addington v. Texas and with the Canadian requirement of proof beyond reasonable doubt under Kirkland ([1957] SCR 3). At stake under s. 662 is a different level of punishment for an offence, and hence proof of dangerousness under s. 662 is not the same thing as proof of dangerousness with the tariff cap of finite imprisonment for the offence. Since a finding that the offender is a likely danger does determine the level of punishment which might be imposed under s. 662, by lifting the range of sentencing options from a tariff-capped to an indeterminate sentence, then the chances that a future offence will be committed ought to be established beyond reasonable doubt under current sentencing doctrine, adverted to earlier.

With a requirement that the trial judge must be persuaded beyond reasonable doubt that the offender would re-offend when set at liberty, there is a considerably reduced scope for s. 662 to be utilised, given the level of uncertainty in predictions of dangerousness. Of course, it does not mean that s. 662 could never be used, but it does mean that there should be an even greater reluctance to employ an indeterminate sentence.

**Review of Section 662 Prisoners**

The Parole Board of Western Australia must report initially one year after the s. 662 detention commenced (Western Australia: Offenders Community Corrections Act 1962, s. 34) and thereafter annually (Western Australia: s. 34(2)), or at any time upon request by the Minister of Corrective Services. However, the decision as to release is made by the Governor on the Parole Board's recommendation (Western Australia: s. 40C(1)(b)). This is made difficult by the fact that some s. 662 prisoners may be held in a psychiatric hospital. That Board does not review hospital patients. It has not been the practice for the forensic psychiatric staff at Graylands Hospital to review transferred prisoners with the sort of regularity which governs the Parole Board, for fairly pragmatic reasons. The turnover of prisoners on transfer is such that six weeks is estimated to be the longest period in hospital.

It has been recommended that the Parole Board should continue to be the monitor of all s. 662 prisoners, although it has also been recommended that the
Parole Board ought to have power to order release of any person detained under s. 662, rather than simply make recommendations to the Governor as is now the case, and that the terminology of the sentence be accordingly altered from 'Governor's Pleasure' to 'indeterminate sentence' (Western Australia. Inter Departmental Committee 1989, pp. 84–5). The Law Reform Commission of Western Australia has agreed with these proposals, adding that the sentencing court should also have power to review the sentence upon application by the person (Law Reform Commission of Western Australia 1991, pp. 86–7). The Western Australian Working Party to Review the Mental Health Act has also resolved that no special review mechanism under that Act is required for s. 662 prisoners, and that they ought to remain the responsibility of the Parole Board.

To determine whether the review process works constructively relies upon some guesswork. The available data present the barest of pictures. For the s. 662(a) receivals over the 1982–87 period, the shortest duration in prison was fourteen months (of which fourteen months was the finite term, and the Governor's Pleasure period had not commenced), and the longest duration was 203 months (eighteen months finite period and a stunning 185 months of Governor's Pleasure detention). The average duration was sixty-eight months (of which thirty-seven months was the finite sentence and thirty-one months was the Governor's Pleasure detention) (Western Australia. Inter Departmental Committee 1989, p. 93). It is significant that the finite terms for which prisoners have been sentenced under s. 662 appear to have been relatively short—the average finite sentence being just over three years. This suggests two possible explanations. One is that the s. 662 sentence was being used for some relatively minor offences, at least before the High Court's decision in Chester. However, this possibility seems unlikely, for reasons outlined earlier. Another, more probable, explanation is that the finite term was adjusted downwards, knowing that the s. 662 sentence was also to be imposed.

It is also notable that for the prisoner who had been detained for the longest time, the Governor's Pleasure detention was a multiple of ten times the finite sentence. This demonstrates the potential for gross disproportion to which provisions such as s. 662 lend themselves. The average length of time in custody under the indeterminate sentence was almost as much again as the time in custody under the finite sentence, thereby doubling the length of time served in prison.

The s. 662(b) prisoners received over the same period were often required to serve concurrent finite sentences for other offences. For this group, the shortest duration in prison was twenty days (a finite period of six days and fourteen days Governor's Pleasure), about which one can only wonder at the utility of such a sentence; the longest was 197 months (twenty-four months finite sentence and 173 months Governor's Pleasure detention). The average period in prison was fifty-one months (the average finite period being twenty-nine months and the Governor's Pleasure detention being twenty-two months). The same patterns emerge under s. 662(b) as for s. 662(a), and the same observations might be made.
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The Future of Section 662

The 1991 Parliamentary Joint Select Committee on Parole called for review of the provision (Western Australia. Parliament. Joint Select Committee on Parole 1991, pp. 95–6), seemingly unaware that such a review process has been under way for some years. Section 662 has been under scrutiny over the past decade or so. Both the Murray Report (Murray 1983) and the Inter Departmental Committee report (Western Australia. Inter Departmental Committee on the Treatment of Mentally Disordered Offenders 1989) recommended that s. 662 should be retained. The Law Reform Commission of Western Australia has considered whether it ought to make any recommendation for repeal of s. 662, and has noted the considerable difficulties with and injustice of the provision, but has decided to make no such recommendation (Law Reform Commission of Western Australia 1991, p. 86).

However, that may not be the last word on the matter. As part of a report commissioned earlier this year by the Crown Law Department of Western Australia for final polishing of many of the Murray Report's proposals for Code amendment, it has been recommended that s. 662 should be repealed. The future of s. 662 is still open.

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