REVIEW FOR RELEASE: THE USE AND MISUSE OF PSYCHIATRIC OPINION

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FREQUENT AND EXTENSIVE USE IS MADE OF PSYCHIATRIC OPINION DURING the process of reviewing serious violent offenders for release, setting determinate periods for those indeterminately detained and in considering extensions to minimum sentences. This paper will consider the use made of psychiatric opinion in the cases of two prisoners whose non-parole periods were extended by the Supreme Court of South Australia after applications by the Crown.

Prisoners serving substantial terms for serious offences of violence may be subject to various forms of review prior to release. The reviewing body, the type of review and the effect on the length of imprisonment and conditions of release depend not only on the original sentence but also on the legislative and bureaucratic framework of the criminal justice system in a particular state or territory. For example, since 1983 parole legislation in South Australia has made sentencing more determinate (South Australia. Attorney-General's Department, Office of Crime Statistics 1989). 'Truth in sentencing' is having its day in New South Wales, where a 'natural life' sentence recently was imposed. Life sentences are no longer mandatory for murder in some Australian jurisdictions (for example, New South Wales, Victoria and Australian Capital Territory) so with non-parole periods from which remissions are deducted being attached to life sentences in South Australia indeterminate sentencing is to some degree in retreat. At the same time, prisoners now on life sentences in South Australia can expect to serve actual sentences 50 per cent longer than did their predecessors despite the very low recidivism rates for released murderers (South Australia. Attorney-General's Department, Office of Crime Statistics 1989).

The release of some persons convicted of murder may create public and political concern especially in notorious cases and ones for which the media
has a persisting fascination. This in turn affects the chances of release for others who could return unnoticed and uneventfully to the community.

Prisoners with lengthy or indeterminate sentences are acutely aware of the effects of such concerns on prerelease programs, day leave and prospects for release. Shah (1986) has commented on the relationship between 'newsworthy cases involving mentally disordered offenders who may have raised an insanity defence', and 'inaccurate perceptions, attitudes and beliefs' perhaps resulting in speedy but poorly based proposals for law reform.

In contrast, the release of offenders with lengthy records for violence, armed robbery and aggressive sexual offences, who thus have a high chance of re-offending in actuarial if not individual terms, rarely provokes political comment or sustained public reaction.

Newsworthiness, public concern and political sensitivity perhaps contribute to the special attention homicide offenders receive from reviewing bodies and the professionals from whom psychiatric and other assessments are sought. The seriousness of homicide, perceptions of abnormality in offenders, uncertainty about their future conduct and possibility that error will bring public criticism of responsible individuals and agencies must all play a part in the frequency with which psychiatric opinion on the question of release is sought, and the uses and misuses to which such opinion is put.

Misuse of opinion does not necessarily imply wrongdoing as it can include misunderstanding, giving the opinion undue weight or applying it in attempts to solve problems and issues it did not address. Of more concern are partial quotation, or misquotation, the transforming of professional speculations into bureaucratic certainties and the use of opinion to support actions which would have been advised against by the psychiatrist. Psychiatric opinion on serious offenders who have been long in custody is frequently inconclusive with regard to crucial issues such as individual dangerousness. This inconclusiveness at times appears to stimulate rather than inhibit further referral for assessment.

The two recent judgments of the Supreme Court of South Australia which will be examined followed applications by the Crown to extend the non-parole periods of convicted murderers. Both applications were made only shortly before the projected release dates, this timing being considered appropriate by the court as it enabled proper assessment of those matters relevant to release. Both the prisoners were men who had killed women previously unknown to them. Psychiatric assessments were carried out prior to trial and sentencing and also during imprisonment. In the first case for consideration, the prisoner had a prior record of offending and of psychiatric assessment and treatment. The other prisoner had no such record. Apart from convictions for murder and their behaviour problems in prison, what the two men had in common was the ability to cause in their custodians and others fear of what might be their conduct after release. Both had non-parole periods making release mandatory with the Parole Board's discretion being restricted to the setting of conditions for post-release supervision, a highly problematic undertaking in each case.

The judgments will be examined from a psychiatric and not a legal viewpoint although the legislative background needs to be described. The
examinations will provide a focus for discussion on the ethical implications of psychiatric participation in both assessments for review and related court proceedings; the use made by courts of psychiatric evidence when dangerousness is a central issue; the way a correctional administration interprets and uses psychiatric opinion; how administrative concerns and psychiatric opinion on dangerousness issues may originate and, in combination, produce a 'dangerous person', perhaps impeding rehabilitation and reducing the validity of predictions of future conduct.

**Conduct of the Cases**

Some mention of the conduct of each case is required as this paper draws little, if at all, on material not available in evidence during the proceedings. Also, the discussion will centre on issues raised by the cases and not enter into argument about evidence or the opinions of individual psychiatrists. The judgments are clearly reasoned with the interpretation of the law, including its intentions, appearing in the first case *R v. Addabbo* ([1990] 53 SASR 449) being confirmed by the Court of Criminal Appeal ([1990] 157 LSJS 480). These judgments were used as the basis for *R v. Wheatman* (Supreme Court SA, Olssen J, 27 March 1991, Jud No. 2787, unreported). The handling of oral and documentary psychiatric evidence at the trials and in the judgments was fair and thoughtful.

In *R v. Addabbo*, only one psychiatrist gave evidence, being called by the Crown. He was the treating psychiatrist. The court did not order independent psychiatric assessment. The documentary evidence included previous psychiatric assessments, clinical files, schedules detailing the prisoner's misbehaviour over the years and his account of each alleged incident.

In *R v. Wheatman* the respondent's representatives retained a psychiatrist and the court, at the commencement of proceedings, ordered an independent assessment. After negotiation between both parties, a psychiatrist and the prisoner, the assessment was undertaken by the psychiatrist who nine years previously had carried out the pre-trial examination and had also some knowledge of the prisoner's institutional career. The decision to undertake the task meant resolving a number of ethical issues. Documents about the murder were not extensive as a plea of guilty had been entered to the charge. The voluminous documentary evidence presented at the hearing included, among other items, previous psychiatric assessments, clinical files, departmental documents including reports of misbehaviour and, significantly, numerous letters written by the prisoner over many years.

In this case, there was much sharing of information between participants and counsel conferred with both psychiatrists. The respondent dismissed his first legal advisers after much work was done, did the same with subsequent advisers and then represented himself at trial, a daunting task. His doing so imposed additional responsibilities and burdens on not only the judge and the Crown but also the psychiatrists whom he cross-examined at length. A review of the proceedings suggests that all relevant material came to the notice of the court although if he had been legally represented some matters may have been pursued further and additional witnesses called.
Both offenders remain in custody subject to routine review by the Parole Board, with no guarantee that future applications for extension of their non-parole periods will not be made. There are therefore some constraints on what should be included in this paper so the concentration will be on the content of the judgments themselves with only limited reference to documentary evidence other than psychiatric reports.

**Legislative Background**

A brief consideration of the parole legislation in South Australia will not only assist in understanding the two cases but also may give them a broader relevance.

In 1970 South Australia's first parole laws became effective. They were embodied in s. 42 of the *Prisons Act 1936–76*.

[They] exemplified the indeterminate approach: assigning all responsibility for deciding prisoner release dates and conditions to a five member Parole Board chaired by a person with 'extensive knowledge of, and experience in, the science of criminology, penology or any other related science'. Under these provisions, unless the court had specified a minimum 'non parole' term—which in practice it rarely did—most prisoners become eligible to be considered for parole immediately they were sentenced (South Australia. Attorney-General's Department, Office of Crime Statistics 1989).

From March 1981, new legislation obliged courts to set a minimum term when imposing sentences of three months or more, including life sentences, with the Parole Board having discretion to release after the expiration of this term. This discretion was removed in legislation proclaimed in December 1983. Under this legislation the prisoners were to serve a non-parole period less remissions earned; the Parole Board was to set parole conditions and act on breaches.

Proclamation of the 1983 legislation meant that, in just fourteen years, South Australia's parole system had run the cycle from one of the most indeterminate to the most determinate in Australia. The rapidity of these changes perhaps made it inevitable that, in their wake, there would be questioning and confusion (South Australia. Attorney-General's Department, Office of Crime Statistics 1989).

Confusion there certainly was, and concern that some prisoners sentenced to fixed terms with non-parole periods would be released years before the date envisaged by the sentencing court. Also, life sentenced prisoners now formed three categories: ones sentenced before 1981 who had no minimum sentence and required one to be determined; those sentenced between 1981 and 1983 who had non-parole periods which were now determinate and would be foreshortened by remissions; and those sentenced after December 1983, the setting of whose non-parole periods became a source of much argument because of determinacy and the developing trend for the actual sentences to be served to be longer.
The two cases for discussion fell into the 1981-1983 category, resulting in legal argument about the interpretation and intent of the legislation.

These problems were dealt with in *R v. Addabbo* where the judge set out the history of the legislation and interpreted the provisions. By the time this case was heard the provisions for extending non-parole periods had moved from the Prisons Act, later the *Correctional Services Act 1982*, to the *Criminal Law (Sentencing) Act 1988*, which became effective on 1 January 1989, where it appeared as ss. 32(6) and (7). In 1986 there had been a significant provision inserted which now appeared as s. 32(7)(b)(ii). The provisions of the Criminal Law Sentencing Act were:

32. (6) The Crown may apply to the sentencing court for an order extending a non-parole period fixed in respect of the sentence, or sentences, of a prisoner, whether the non-parole period was fixed before or after the commencement of this Act.

(7) In fixing or extending a non-parole period, the court—

(a) must, if the person in respect of whom the non-parole period is to be fixed or extended is in prison serving a sentence of imprisonment, take into account the period already served;

and

(b) in the case of an application by the Crown under subsection (6), must have regard to:

(i) the likely behaviour of the prisoner should the prisoner be released on parole;

(ii) the necessity (if any) to protect some other person or persons generally from the prisoner should the prisoner be released on parole;

(iii) the behaviour of the prisoner while in prison but only insofar as it may assist the court to determine how the prisoner is likely to behave should the prisoner be released on parole;

and

(iv) such other matters as the court thinks relevant.

Although life sentences in South Australia are no longer indeterminate there is still indeterminate detention available for certain juvenile offenders, habitual criminals and those found to be incapable of their sexual instincts. Persons found not guilty on the grounds of mental illness are detained on the Governor's Pleasure. Section 32 does not apply in such cases. Those to whom it applies could, if successive applications were granted, face what would amount to a sentence of incremental indeterminacy.

**The Cases**

Each case will be dealt with by outlining the grounds of the application, the nature of the murder, the offender's history and the evidence given in relation to the issue of extending the non-parole period.
Case 1

In *R v. Addabbo* the Crown's application was on the following grounds:

- the Respondent is likely to continue to offend should he be released on parole;
- there is a need to protect the public from the Respondent should he be released on parole; and
- legislative changes with respect to the effect and operation of non-parole periods have rendered inadequate the Respondent's non-parole period.

The third ground was rejected by the trial judge who considered the effect of a change in the provisions:

> was to give a wider discretion to the court but not so wide as to include the concept of resentencing. The intention of Parliament in all of these enactments seems to be clear, and that is, that a non-parole period could only be extended where there was a necessity to protect another person or the community generally.

In supporting this interpretation, the Court of Criminal Appeal said of the relevant provision, s. 32(7)(b)(iv):

> It cannot stand alone to give an unfettered discretion to resentence the prisoner by extending the non-parole period, simply to bring it into closer conformity with the present sentencing regime.

The trial judge's decision therefore was based on the remaining two grounds which, after hearing evidence, he accepted.

The evidence with regard to the murder was, in summary, as follows. In 1982 the respondent Mr A. had observed premises with a view to breaking in and stealing and had then gained entry to the victim's home by requesting to use the lavatory. Her family were out and she was alone. Mr A.'s ruse was discovered and in the confrontation he took a knife. In defending herself the victim injured him. She received multiple stab wounds but before she died he dragged her to a bedroom where an attempt at sexual intercourse failed. He was interrupted by the return of her husband and children, whereupon he left. Two days later he surrendered to police.

The information available at the time of sentencing was outlined in the judgment. In summary, at the time of sentence Mr A. was a thirty-three year old man who had migrated to Australia with his family when he was nine. He had borderline intellectual retardation with an intelligence quotient of about seventy-four, had a long history of severe mental illness and was considered to have an antisocial personality disorder. His extensive criminal record for predominantly property offences had begun in 1965. There had been short periods of imprisonment during which he had received psychiatric treatment. His diagnosis at various times had been of schizo-affective
psychosis or manic depressive psychosis. *Mr A.* had been treated in hospitals. Even when psychiatrically well his offending continued.

In his sentencing remarks, quoted in the judgment on the application to extend the non-parole period, the judge drew attention to the terrible nature of the crime, the experience of the victim, relatives and the community and the reasons why a lengthy non-parole could be considered. The threat to the community if *Mr A.* was at large and in his then condition made it seem that 'this is one of the rare cases where preventive detention must be seriously considered as a factor in the sentencing process'. The judge went on to express concern about factors important at the time of eventual release and for the need for treatment, *Mr A.*’s non-compliance with medication and the fact that there was no suitable institution outside prison for the care of *Mr A.* or persons like him. (The lack of such institution was again remarked on in the judgment being examined).

After balancing these considerations against *Mr A.*’s personal and psychiatric history, the judge imposed a life sentence with a non-parole period of ten years.

At the hearing on the application, evidence concentrated on *Mr A.*’s psychiatric diagnosis and treatment, prison behaviour, which included threats to kill, and the possibility that after release he might reoffend in a manner putting others at serious risk.

The treating psychiatrist was quoted as saying in evidence that he tended to have 'strong and increasing doubts about the earlier diagnosis of psychotic illness' and that the prisoner's behaviour in custody was likely to be due to his antisocial personality disorder and attempts to get his own way. It was this psychiatrist's opinion that on release *Mr A.* was unlikely to commit other than 'nuisance offences', minor ones against property. His personality disorder was not treatable and as he was not psychotic, no treatment was required. Under examination the psychiatrist granted that 'nuisance offences' could result in confrontation with the public. He thought *Mr A.*’s threats to kill doctors, prison staff, a family member and others were not to be taken seriously.

The judgment reviewed the extensive evidence of violence, property damage, abusive behaviour and threats, at times involving weapons, and *Mr A.*’s refusal of medication during his custody in prison and an associated secure hospital. The judge, after considering all the evidence stated:

I have concluded that it is likely that the respondent would not observe conditions of parole unless it suited him, which is confirmed by his manipulation of the system in prison. His anti-social personality disorder, and his low intelligence, to say nothing of a psychotic disorder if he in fact has such a disorder, indicate that it would be well nigh impossible to design conditions which would ensure the protection to the public which I regard as necessary.

Addressing the psychiatrist's general view that predictions of future violent conduct were usually over-predictions, he said:

In the end it is for the court to decide, on all of the material available, whether by reason of the matters set out in Sec.32(7)(b) of the Criminal
Law (Sentencing) Act there is a need to extend the non-parole period. The very decision which the court has to make requires an attempt to predict future behaviour.

And further:

The psychiatrist's predictions as to the future conduct of the respondent, including his opinion that the respondent's threat to kill should not be taken seriously, are necessarily speculative and can be no more than his opinion as to matters which I must decide. They cannot be decisive.

These statements emphasise the nature of the proceedings, that is predicting future conduct which might put the public at risk, and the place of psychiatric opinion. After consideration of the issue of proportionality—expressing an opinion that protection of the community 'cannot lead to a sentence disproportionate to the crime'—and being unable to discern any intention that a non-parole period should not be extended because of the lack of treatment facilities, or the probability that the prisoner would not respond to treatment, the judgment was that the non-parole period be increased by three years. The judgment was upheld on appeal.

Case 2

*R v. Addabbo* established the principles to be applied a year later in *R v. Wheatman*. The thrust of the legislative provisions was the protection of the public, resentencing was not the object and proportionality was to be preserved. The second case underlined the problems of predicting future dangerous conduct in a man who had committed a single serious offence, had no established diagnosis other than of a personality disorder and whose worrying conduct in prison was open to many interpretations.

In its application to extend Mr W.'s non-parole period the Crown argued that legislative changes had rendered inadequate the period set and, in any event, it should be extended having regard to:

(i) the gravity of the offence;

(ii) the mandatory sentence of life imprisonment;

(iii) the personal circumstances and the antecedents of the respondent; and

(iv) the behaviour of the respondent whilst in prison.

The judge ruled all grounds other than (iii) and (iv) irrelevant.

The victim of this 1981 murder was a married woman aged twenty-two years who did part-time work as a demonstrator making sales to small private gatherings. On the night of the murder she left such a gathering after 10 p.m. and thirty minutes later telephoned her husband saying her motor vehicle had a puncture and a man was helping her change the tyre. The telephone went dead. When she failed to return home, family and friends
unsuccessfully searched for her. Early the next morning her body was found. It bore five stab wounds.

In the judgment on the application is an outline of the facts largely drawn from Mr W.'s statement to the police and to some extent from accounts given to psychiatrists. The salient points were that on the night of the murder a collision occurred between the vehicles of the victim and the offender. He had planned this in order to initiate a robbery. They exchanged identification particulars after which she was threatened with the knife, made to sit in her car and empty her purse. The offender said he would take some rings after he had driven her elsewhere and tied her up so he could make his escape. During the journey he made her telephone her husband. On reaching an isolated area her hands were tied, she was gagged and taken from the vehicle. It was after this that he twice saw headlights of vehicles moving on an adjacent road. The victim was made to kneel; the offender later explained that persons in a nearby farmhouse may have heard him drive past. The story was that for no accountable reason he stabbed her in the back. Believing this to be a fatal injury and wanting to spare her a slow and painful death, he turned her over and deliberately stabbed her in the region of the heart.

After a psychiatric assessment was provided counsel acted on written instructions to enter a plea of guilty to murder.

Mr W. was aged twenty-one at the time of murder, had no record of prior offences or psychiatric treatment. He worked full-time in a factory and for recreation was much involved in ten-pin bowling and chess. Little objective information is known of his background as access to his family was largely denied by him. What contact was achieved was early in his custody. However, his history and presentation have always been consistent with a schizotypal personality disorder. No major psychiatric disorder has ever been diagnosed, no psychotic symptoms complained of and there have been no conclusive signs or reports of delusional thinking despite suspicions aroused by his correspondence and general demeanour.

On remand for trial he was seen by two psychiatrists. The following quotation from one report describes him in a way still relevant:

In the ward he was generally aloof, and distant, he formed no close relationships with any other staff or patients and participated in generally solitary pursuits such as reading and chess.

His mood was usually cold, flat, and strangely distant but on occasions he would become extremely angry with minimum provocation indicating that he had difficulties in relating, and would swing from being distant and uninvolved, to becoming enraged and angry without any of the usual intermediate steps. His personal history was one of leading a generally isolated, solitary life, he had no close male or female friends, and had not established any normal heterosexual relationship.

Mr W.'s account of the crime to the psychiatrists during the pre-trial assessment suggested the original motive was robbery but as he took steps to avoid detection and spent more time with his victim tension built between them until, frightened by vehicle headlights, he stabbed her initially without
thought and then again to spare her suffering. There was no suggestion the killing was premeditated. In the period preceding the offence Mr W. was dissatisfied, depressed and had suffered important personal rejection.

Neither examining psychiatrist found any evidence whatsoever that mental illness was a possible defence or that Mr W. had ever suffered from schizophrenia. He was sentenced to life imprisonment with a non-parole period of twelve years.

The evidence presented at the application hearing covered four main areas. These were his psychiatric history and diagnosis, prison conduct, the content and nature of his correspondence to officials and members of the public and his management by the correctional authorities. There was emphasis on the offence, his motivation and mental state. Psychiatric evidence was important in each area.

Assessing the evidence on diagnosis the judge concluded the psychiatrists agreed on the general nature of his personality with the psychiatrist assessing him for the court (hereafter, court psychiatrist), being more conservative on the question of the likelihood of delusional episodes and an underlying schizophrenia. Evidence was given that Mr W.'s history did not satisfy the criteria for diagnosis of schizophrenia and that transient psychotic episodes could occur in a person with a schizotypal personality disorder. At no time in his imprisonment had Mr W. been given a proper trial of medication to clarify diagnostic and treatment issues. After the initial stages of imprisonment Mr W. normally refused psychiatric assessment and so such a trial probably could not have been done. It seemed a number of chances for psychiatric intervention had been lost in the first few years and could not be retrieved.

The respondent's psychiatrist, who had not assessed him before, received an account of the offence suggestive of delusional beliefs. This was new material and difficult to assess. As the court psychiatrist, and a colleague, had found no evidence for this before trial he thought it possible the information had been concealed but perhaps more probable that the offence had been subject to elaboration, delusional or otherwise over the years.

On the question of predicting Mr W.'s future conduct the judgment noted that the psychiatrists:

were utterly frank in their conclusion that it was quite impossible to give any reliable indication of the likely behaviour of (Mr W.) if released.

Evidence regarding his prison conduct indicated no real violence but in the judge's assessment:

His conduct has been most bizarre and unsatisfactory over a long period of time. It has been notable for its associated threats of serious injury to both prison staff and others who have no direct connection with him.

With regard to his extensive correspondence, and the equally extensive evidence and submissions on it, the judgment said:
Not only is his correspondence generally written in a strange and almost patently irrational style, but, at times, it directly or impliedly threatened serious bodily harm to others.

Mr W.'s explanation that his correspondence was aimed at 'stirring others' and that the threats had not been serious was not accepted. The view taken of his conduct during imprisonment led to the conclusion that:

His whole pattern of behaviour has simply been that of a person who, prima facie, displays a disordered mind—at times seemingly divorced from reality—and who would, indeed, present a very poor parole risk.

The court psychiatrist's report and evidence dealt in some detail with Mr W.'s management by the correctional authorities. This issue received lengthy comment in the judgment which supported the psychiatrist's views.

After nine years of imprisonment Mr W. was still in maximum security and due to a health problem was not employed. From the secure psychiatric hospital where he began his custody he quite fearfully had entered the normal prison regime after time in a segregation unit. His personality was ill-suited for prison life. From the outset his conduct had been considered by some as his way of making for himself psychological and physical space, particularly after a serious assault in which he was knocked unconscious. Worries about his correspondence began early but it was never controlled by interception, censorship or his being charged with a breach of any regulation and he was not counselled either to discontinue it or change its nature. For some years it had been assiduously collected for future use in the anticipated application for extending his non-parole period.

Evidence contained an example of the use of psychiatric opinion in rejecting a classification committee recommendation for Mr W.'s transfer to a lower security institution so that a pre-release program could commence. Documents showed that the court psychiatrist's name had become linked to a statement that Mr W. was 'highly dangerous'. The court psychiatrist had in fact rejected the idea that Mr W.'s future conduct could be predicted or that psychiatric opinion could justify detention past his release date. As to whether the link was deliberately made or resulted from paraphrasing a legal officer's report was difficult to decide from the document. Mr W. had been sent, without warning, to see another psychiatrist for an examination about his proposed transfer but had angrily refused examination. The psychiatrist reported the refusal but also stated that there were ongoing concerns about the risk the prisoner might pose to women. He had never examined Mr W. and the opinion probably arose as will be described shortly. This psychiatrist suggested there was no psychiatric reason against transfer to a lesser security. The official document quoted him about the risk to women but did not cite the opinion about transfer. Neither was there mention of a report by the court psychiatrist which explicitly stated his opinions on the role of psychiatry with regard to issues of dangerousness and further detention. He too would have supported the proposed transfer.

The oral and documentary evidence in this case afforded some insight into the development of psychiatric opinion. Except pre-trial, Mr W.'s contact
with psychiatrists had been slight throughout his custody. While he was being assessed for the application hearing more psychiatric effort was expended than in the previous nine years.

However, opinions expressed early in his imprisonment were important. At no stage was he thought psychotic. He had disclosed, perhaps in general terms as no detailed record was available, fantasies of a sexual nature to a psychiatric registrar. It could not be established during the application hearing whether these fantasies preceded or followed the offence but the concern in the registrar’s clinical note echoed through the clinical file and written reports. This was despite a referral for assessment to a psychologist interested in sexual disorders coming to nothing and no additional information being discovered. The clinical note and referral letter influenced clinical notes, psychiatric reports and, one may think, affected official and psychiatric opinion without the issues ever being clarified. The registrar, now a consulting psychiatrist, had no recollection or notes shedding further light on this important information. Mr W. had contact with another psychiatrist, before he began refusing assessments, and he too recorded misgivings, certainly based on the earlier remarks of his colleague.

Mr W.’s progress towards becoming ‘dangerous’ thus may to some extent be charted by examining clinical and departmental documents. The decision that he was dangerous, even inherently so, appears to have been bureaucratic rather than clinical. The first efforts to identify him as a dangerous individual falling within the province of psychiatry perhaps began with concern about his correspondence and the realisation that with the 1983 changes in parole legislation not only would his release be mandatory but would occur before the minimum period set by the sentencing judge. His march to becoming identified as dangerous—despite the lack of any adequate assessment or clear grounds supporting that conclusion—was well under way after four or five years of imprisonment. It proceeded unimpeded by any specific attempts to control his behaviour or to implement a pre-release program.

The final two paragraphs of the judgment indicate that court psychiatrist’s views on Mr W.’s management were considered relevant. In supporting them and dealing with related legal and correctional issues the judge stated:

However, like (the court psychiatrist), I strongly condemn any attitude which is simply based upon maintaining Wheatman in a high security area and permitting him to have opportunities to behave in an unacceptable manner without appropriate counselling and positive attempts to rehabilitate him. In particular, it seems to me, that simply to permit him, as has apparently been done, to write all manner of bizarre and threatening letters to a variety of recipients without let or hindrance, is to encourage him to continue to do so.

It must be pointed out that, short of there being a positive and unequivocal diagnosis of a psychiatric condition in relation to Wheatman which justifies his continued detention, there must, in any event, come a time at which it is inappropriate to grant additional extensions of his non-parole period, simply as a means of keeping him out of circulation.
To ultimately release him without proper pre-release programs could be disastrous to the community interest.

The non-parole period was extended by three years. There was no appeal.

Discussion

The cases described were chosen because they are recent examinations of how psychiatric opinion was used in relation to release, and have relevance outside the jurisdiction in which they were decided. As indicated earlier direct comment on the cases needs to be limited as the two offenders remain in custody and subject to further assessment. Readers with particular interest in psychiatry and law can draw their own conclusions about the use of psychiatric opinion and how legal issues were resolved in each case.

In *R v. Addabbo* psychiatric opinion on key issues had much to offer because of the prisoner's history, his intellectual disability and psychiatric disorders. His history of offending and disturbed behaviour in itself provided grounds for predicting that his conduct could put others at risk whenever he returned to the community. The nature of the proceedings necessarily involved a prediction of future conduct; psychiatric opinion given in evidence was not decisive.

In *R v. Wheatman* there was comparatively little information of predictive value, no diagnosis of a major psychiatric disorder and no history of treatment. In some ways Mr A.'s institutional career, continuation in maximum security and the administrative responses to his conduct and his perceived dangerousness, confused the picture, making prediction difficult not only in terms of his conduct or should he be released but also how he would manage in a prison of lower security. His letter writing introduced further confusion and it can be wondered whether if it had been stopped or controlled instead of being tacitly encouraged there would have been sufficient grounds for an application to extension of his non-parole period.

Mr W. became, by virtue of the way his personality and behaviour was responded to by the administration, a prisoner best described as 'dangerous to the administration'. During the remainder of his imprisonment and for a long time after his release, any unfortunate action on his part is likely to result in criticism of the responsible politician and administrators. It is important to avoid having prisoners enter this particular category of dangerousness as their management henceforth is unduly difficult.

The assessment of prisoners with personality disorder is difficult within the correctional system. Briscoe (1970) considered this problem from the point of view of a forensic psychiatrist dealing with personality disorder. Kropp et al. (1989) studied the perceptions of correctional officers towards mentally disordered offenders. The comparison groups were prisoners and mentally ill patients. Patients were perceived more favourably than mentally disordered offenders with the only item contributing significantly to this difference being dangerousness. Mentally disordered prisoners in comparison to ordinary prisoners were rated as less predictable, rational and understandable and thus 'more mysterious'. That mentally disordered offenders were perceived in
the least favourable light provides some explanation for the particular problems met in their assessment and management within prison. The lack of facilities for dealing with this particular group in Australian correctional systems has been commented on for many years, for example, Potas (1982), and there is little reason to believe that there has been substantial change in services for this particularly disadvantaged group.

Although the psychiatrists in *R v. Wheatman* did not express particular attitudes or beliefs in relation to dangerousness as such, it needs to be remembered that psychiatric attitudes on the subject and about the disposition of offenders are important (Brooks 1984). Both cases illustrated the long-term influence of psychiatric opinion on the management and eventual release of serious violent offenders. Influence arises not only from lengthy assessments and reports but also brief clinical notes which may include little support for opinions there expressed. Great reliance may be placed on opinion but also on details of personal and psychiatric history and on descriptions and explanations of particular incidents. The future use of particular opinions and pieces of information cannot be predicted and a heavy responsibility, not always recognised, rests on any psychiatrist or medical officer making assessments or recording personal or medical information.

Although much has been written which will assist with assessment and report writing, little mention is made in the literature of the long term influence of assessment and opinions. Even the mere fact of having been assessed may label an offender, so influencing some prisoners to avoid assessment and treatment. Also, there seems to have been little analysis of the scope and content of reports as compared to their usefulness. Campbell (1981) reviewed the use and efficiency of psychiatric pre-sentence reports and, in New Zealand, Hall (1984) examined how psychiatric reports were used in the sentencing of mentally disturbed offenders, making some analysis of report contents while concentrating on their influence. Pfäfflin (1979) in a paper provocatively entitled 'The contempt of psychiatric experts for sexual convicts', quotes examples of psychiatric opinions so prejudicial one would prefer they were works of fiction.

The central issue in *R v. Addabbo* and *R v. Wheatman* was determination of the likelihood of future behaviour which would put the public at risk. Psychiatrists gave evidence in each case and previous reports and clinical notes were used in evidence. For a number of reasons such use of psychiatric opinion may be controversial. The remainder of this discussion reviews the important issues and the conclusion will suggest ways of reducing professional difficulties and ethical conflicts, and how to improve the use of psychiatric opinion by administrations and courts while protecting the rights of offenders. By ensuring assessments are soundly based and properly used the interests of justice, the rights of individual offenders and the community should be better served.

In writing on the question of defining the dangerousness of the mentally ill, in the context of civil commitment, Brooks (1984) noted that 'the legal determination that a mentally ill person is dangerous may have drastic consequences'. The consequences to the mentally ill offender of a similar finding is likely to be harsher, including the conditions of confinement and
the possibility of an indeterminate period of detention. His review of legal and psychiatric issues in the defining of dangerousness includes the following comment relevant to this discussion.

Because legislatures and courts, during the early years of dangerousness jurisprudence, abdicated their responsibility, the burden devolved upon psychiatrists and other mental health professionals to give meaning to the terms dangerousness, harm, and injury. Since in psychiatry and in other mental health circles there is no generally accepted legal, psychiatric, or medical meaning of such terms and since it is not a part of psychiatric training to evaluate dangerousness, each expert provided his own personal, subjective definition. These definitions tended to implement the expert's idiosyncratic legal views, his personal set of values about the protection of persons and society, and his hidden agenda about appropriate dispositions for the mentally ill (Brooks 1984).

In proposing his seven factor model for defining dangerousness Brooks suggested the components were often explicitly used but seldom articulated. The factors were:

- the nature of the harm involved;
- its magnitude;
- its imminence;
- its frequency;
- the likelihood or unlikelihood that it will occur;
- situational circumstances and conditions that affect the likelihood of harm occurring; and
- the substantive due process interest balancing between the alleged harm on one hand and the nature of society's intervention on the other.

The seventh brings together the preceding six, balancing them against the question of societal intervention.

The now extensive and growing literature on dangerousness, particularly in relation to the mentally disordered, is readily accessible and does not require review here. Almost any publication on major aspects of the subject leads one to important studies and commentaries. Brooks (1984), Bowden (1985), Craft and Craft (1984), and Pollock and Webster (1990) all review matters relevant to the assessment of dangerousness in the mental health and criminal justice systems. Verdun-Jones (1989) and Freeman and Roesch (1989) in a special journal issue concentrate on mentally disordered offenders, sentencing and the criminal justice system. The contents of this issue are reviewed by Shah (1989). All these authors provide guidance to the forensic psychiatrist undertaking the clinical assessment of dangerousness.
For a psychiatrist requested to participate in proceedings involving the
determination of dangerousness, the crucial decision is whether to do so. The question
then is in what role and on what basis. The criminal justice system offers not only a
wide range of issues on which psychiatric opinion may be important but also a number
of roles such as independent assessor, treating psychiatrist, administrator or adviser all
of which can generate professional and ethical conflicts, particularly if a number of
issues are addressed and several roles played out at the same time or in sequence. True
independence in any one role is hard to achieve due to the structure of services, the
relatively few psychiatrists available and limited funds. There are few guidelines to
assist with the resolution of conflicts in roles and interests.

Taking as a starting point the withdrawal of a colleague from forensic psychiatric
practice following an unpleasant experience of what was, in retrospect, an ethical
misjudgment, Appelbaum (1990) addresses a central issue for forensic psychiatrists, the
possibility of doing harm and not being able to abide by the established medical ethical
principles of doing good and avoiding harm. Appelbaum concludes examination of the
problem by deciding that in forensic psychiatry the normal medical ethics cannot
always apply. He acknowledges the rarity of ethical guidelines for forensic psychiatry,
and the inadequacy of most, before stating:

What then of the psychiatrists who agonize over the harms their testimony may
cause the persons they have evaluated? Although their anguish is understandable,
particularly when the harms are severe, it cannot justifiably be ascribed to a failure
to conform to ethical norms. For psychiatrists operate outside the medical
framework when they enter the forensic realm, and the ethical principles by which
their behaviour is justified are simply not the same . . . But the possibility of failing
to do good and of contributing to harm—while serving other, valid ends—is an
inherent and justifiable element of forensic work.

The American Psychiatric Association's Task Force on the Role of Psychiatry in the
Sentencing Process (Halleck 1984) made comments relevant to this discussion:

We recognize that one legal and medical value must be given primacy in pre-sentencing
evaluations—the need to determine the truth. Agreeing to participate in the sentencing
process therefore obligates the psychiatrist to make a good faith effort to conduct a
thorough examination. It also precludes withholding any relevant information. Having
thereby satisfied the obligation to society, however, the remainder of the psychiatrist's
behaviour should adhere to an individual-centred orientation.

Even with these guidelines individual decisions to participate in proceedings where
dangerousness is the issue may be difficult. Non-participation may disadvantage an
offender by excluding relevant information and opinion, permitting misuse or
misinterpretation of earlier and perhaps no longer relevant opinions. Courts and review
bodies may lack the time, skills and advice to evaluate clinical information and
diagnostic opinions properly. Participation on the other hand may legitimise
proceedings allowing use of psychiatric information even if the opinion is that the
offender is not
dangerous or that prediction is not only impossible but clinically and scientifically illegitimate. Pollock (1990) considers this last issue, dealing with the problems of clinical and actuarial approaches to prediction.

There may be other advantages in participating as even if the psychiatrist cannot resolve the central issue there is the opportunity to influence judicial or other comments or recommendations which themselves may affect a prisoner's classification and management, so aiding future evaluation and rehabilitation. The final comments in the judgment in *R v. Wheatman* may be a case in point.

Without a good knowledge of the context in which the psychiatrist and the offender to be assessed are placed, it is difficult to predict the usefulness and effect of psychiatric involvement; it may be hard to prevent the gratuitous harm which can flow from apparently innocuous opinions and discussion. Where there is uncertainty about diagnosis, for example, it is best to be conservative as bodies charged with making final decisions may find it useful to turn possibilities into probabilities and speculation into certainty. The commentaries of Bowden (1985), Brooks (1984) and Shah (1989) concentrate attention on context of evaluations. Uncertainties about diagnosis in *R v. Wheatman* may point the way to future argument about release.

The question arises as to what is misuse of psychiatric opinion. Some of the uses to which opinion is put are simply inappropriate in that it is used out of context, when out of date, is given undue weight or is not fully understood. Lack of knowledge about how opinion should be used can result in distortion by partial quotation or paraphrasing; these along with misattribution of opinion shade into deliberate misuse, perhaps with the intention to support a particular opinion or decision. The repeating of an opinion over the years can contribute to the creation of myths about particular individuals and play a part in the manufacture of a 'dangerous person'. Perceptions of correct use, inappropriate use and misuse depend on one's perspective. The two cases discussed illustrate the use of opinion in ways which would be regarded differently by the prisoners, the courts, the psychiatrists and the correctional administration.

**Conclusion**

There is a need to avoid some of the difficulties which have been illustrated and discussed. Psychiatric opinion will continue to be sought and used in determination of dangerousness in the criminal justice system and mental health services. It is important for all parties to understand the difficulties, ensure that justice is done, protect the public, and avoid untoward and perhaps unanticipated harm to those about whom hard decisions must, of necessity, be made. There are a number of levels where steps can be taken. They can perhaps be listed as personal, professional, procedural and judicial, structural or administrative and legislative.

At the personal level the psychiatrists must make individual decisions about their approach to the issues. The ethical basis for participation will always be to some extent personal; most forensic psychiatrists probably feel that in undertaking endeavours which are not therapeutic but serve legal ends they are
engaged in something differing importantly from normal medical practice. Independence is needed to avoid actual or perceived bias or conflicts of interest. A principle espoused by the American Public Health Association Jails and Prisons Task Force (1986) may be difficult for some to practise but it emphasises the importance of professional independence and the separation of functions. The essence of the Task Force's position is as follows:

Mental health professionals who participate in administrative decision-making processes such as, but not limited to, parole and furlough relating to inmates, should be other than those mental health professionals providing direct therapeutic services to those inmates.

... when any administrative board is addressing the affairs of an individual inmate who is in therapy, the treating mental health professional must not sit on that board. Whenever such a board requires that appropriate mental health input be provided, it shall be provided by an independent mental health professional who is not treating the individual.

At the professional level, bodies such as the Royal Australian and New Zealand College of Psychiatrists should where possible move to the setting of standards, as specifically as can be achieved, for forensic psychiatry practice. In addition, advice should be available about procedures appropriate to various tasks, such as the preparation of pre-sentence and other assessments. Allowances would have to be made for the different legislation, criminal justice systems and mental health services operating across Australia.

At the administrative and structural level, adequate services need to be provided to offenders, in particular prisoners, and proper standards set and followed for assessment, treatment and the provision of opinions. Adequate funding or other arrangements must be in place so independent psychiatric opinion can be obtained for purposes such as pre-trial examination, sentencing, transfer to hospital and assessment for release or continued detention. There must be appropriate legislative provisions to facilitate the psychiatric assessment and treatment of remand and sentenced prisoners.

The practices and procedures of review bodies should be as open to examination as those of the courts. The procedures of the Serious Offenders Review Board in New South Wales are a good example. The Board prepares detailed, carefully documented reports when applications are made to the Supreme Court for the setting of minimum or additional sentences. The Board's reports quote extensively from psychiatric reports, complete copies of which are attached for examination. Many of the tasks the Board undertakes are most difficult but its activities and procedures have a commendable degree of visibility. Its recommendations on sentence can be contested in court.

There is much to commend the use of the courts to determine the issue of dangerousness, especially where such a determination will have a direct effect on a person's liberty or long-term prospects for release. Verdun-Jones (1989) cites the contention of Dickins that if dangerousness continues as the basis for prolonged detention then, 'like insanity, it should be considered a legal status that should be determined by the court in accordance with due process of law'.

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The last level for consideration is legislative. Many psychiatrists in this country have lengthy experience with laws which place upon them, should they deliberately or inadvertently allow themselves to become involved, the task of forming an opinion on questions which may go beyond the difficult almost to the absurd. 'Sexual psychopath' legislation still exists in this country. For example, in South Australia psychiatrists may be asked to determine whether, under s. 23 of the Criminal Law (Sentencing) Act 1988, an offender is 'incapable of controlling his sexual instincts'. New South Wales once had the Mental Defectives (Convicted Persons) Act 1939; and the Inebriates Act 1912–49 is still in operation. In Victoria, the Community Protection Act 1990, which provides solely for Garry David, is a matter of intense controversy. In a recent article Parker (1991) treads carefully when discussing the continuing case of this prisoner, referring to the various political, law reform and legal manoeuvres and discussing the use made of psychiatric opinion.

Psychiatry and the community can well do without legislation which, even if originally well-intended, ends up being imprecise and discriminatory in its application and anti-therapeutic if not frankly harmful to individuals. Some legislation is illusory when it comes to protection of the community. Forensic psychiatrists giving evidence on poorly formulated issues and questions sometimes end up as the unwilling de facto gaolers of offenders who receive no treatment and may require none.

The Garry David case is a current focus of political public, legal and psychiatric concern. Dangerous offender legislation is already available in some Australian jurisdictions; further legislation, more open and specific in intent, if uncertain in likely costs and benefits, is expected. Its use will seriously test not only our legal institutions but the professions of law and psychiatry.

The history of preventive detention and other attempts to identify and isolate offenders dangerous to the public give no cause for optimism and no comfort to those psychiatrists upon whom unwanted responsibilities inevitably will fall.

References


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