

**TASMANIA**  
**LAW REFORM**  
**INSTITUTE**

**A Comparative Review of National  
Legislation for the Indefinite  
Detention of ‘Dangerous Criminals’**

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## **Information about the Tasmania Law Reform Institute**

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000. The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself. The Institute's Director is Associate Professor Terese Henning of the University of Tasmania (appointed by the Vice-Chancellor of the University of Tasmania). The members of the Board of the Institute are: Associate Professor Terese Henning (Chair), Professor Margaret Otlowski (Dean of the Faculty of Law at the University of Tasmania), the Honourable Justice Helen Wood (appointed by the Honourable Chief Justice of Tasmania), Simon Overland (appointed by the Attorney-General), Dr Jeremy Prichard (appointed by the Council of the University), Craig Mackie (appointed by the Tasmanian Bar Association), Rohan Foon (appointed by the Law Society) Ann Hughes (appointed as community representative), Kim Baumeler (appointed at the invitation of the Board).

## **Acknowledgments**

This Research Paper was prepared for the Institute by Ms Taya Ketelaar-Jones, under the supervision of Dr Helen Cockburn. Feedback was provided by Greg Barns who referred this issue to the Institute and by the Institute's Director, Associate Professor Terese Henning, and members of the Board.

## Abstract

Courts in Tasmania have long had the power to detain prisoners indefinitely. The Tasmanian dangerous prisoner regime, contained in the *Sentencing Act 1997* (Tas), has never been reviewed. This is despite it receiving criticism from various quarters, including the Supreme Court bench. There are several differences between the Tasmanian indefinite detention provisions and those of other Australian jurisdictions. The implications of these legislative anomalies have not been explored. This paper examines the operation of the Tasmanian scheme by undertaking a cross-jurisdictional analysis of dangerous prisoner legislation in Australia. Problematic aspects of the current provisions are examined, and potential areas for reform are identified. This is done so with a view to the modernisation of the law and a shift towards uniformity with other Australian jurisdictions.

This paper first provides a brief history of indefinite detention regimes and outlines the nature of the exercise of the discretion to impose an indefinite sentence. The paper proceeds with an assessment of the various problematic aspects of the Tasmanian indefinite detention regime contained in the *Sentencing Act 1997* (Tas). The first section considers the issues associated with the making of a dangerous criminal declaration, including the test and standard of proof for imposition of a declaration and whether separate indefinite detention provisions applying specifically to sex offenders should be introduced. The paper recommends that the test for the imposition of a declaration in the *Sentencing Act 1997* (Tas) be amended to reflect the common law test. In addition, it recommends that the Act should explicitly provide for the standard of proof and provide a comprehensive and mandatory list of factors to be considered when determining whether to make a dangerous criminal declaration. Further, the Act should be amended to clarify that it is intended to operate as a post-sentence preventative detention regime, as well as an indefinite (at the time of sentencing) regime. Finally, the introduction of separate indefinite detention provisions for sex offenders is not recommended.

The second section considers the issues associated with the discharge of a dangerous criminal declaration. Key issues discussed in this section are the test for the discharge of a dangerous criminal declaration, the inability of the court to impose conditions upon discharge, and the absence of provisions for periodic review of a declaration. The key recommendations are that the *Sentencing Act 1997* (Tas) be amended to mandate a system of periodic review of a dangerous criminal declaration. On a review of a declaration, or on an application for discharge of a declaration, the prosecution (rather than the offender) should retain the onus of proof. The assessment should be guided by the same principles applicable to the exercise of the discretion to impose the declaration at first instance. Finally, the court should be empowered to impose conditions upon the discharge of a dangerous criminal declaration.

## **Director's Foreword**

This Research Paper, which provides a comparative review of national legislation for the indefinite detention of 'dangerous criminals', is the Tasmania Law Reform Institute's (TLRI) fourth research paper. It was prepared following a request received from Tasmanian Barrister, Mr Greg Barns to review the Tasmanian legislation particularly with respect to the Supreme Court's inability to impose pre-and/or post-release conditions on discharge of dangerous criminal declarations. Preparation of the paper was undertaken initially as a Supervised Research Project by Taya Ketelaar-Jones under the supervision of Dr Helen Cockburn. It was subsequently developed by Ms Ketelaar-Jones as a TLRI Research Paper. At the outset of the project, the Attorney-General, the Hon Vanessa Goodwin, indicated her intention to refer a broad-based review of the Tasmanian dangerous criminal legislation to the Institute. After the project had begun, however, the Institute was advised that the Government intended to review the dangerous criminal legislation in-house but that it remained interested in receiving a research paper from the Institute for consideration in undertaking that work. It was decided that the Institute would publish Ms Ketelaar-Jones's work as a stand-alone research paper. Research papers provide background information relevant to particular or emerging areas of law reform. Their preparation does not involve the preparation of an Issues Paper or the undertaking of community consultation prior to preparing a Final Report containing consultation based recommendations for reform.

This paper provides a comprehensive review of deficiencies in the Tasmanian dangerous criminal legislation and a detailed comparative analysis of legislation in other Australian jurisdictions. It provides much valuable information that it is hoped will help inform the State Government's own review of the Tasmanian legislation. It details the many deficiencies in the current statutory regime and the implications of those deficiencies for the operation of the legislation and its application by the court.

The Institute would like to thank Taya Ketelaar-Jones for her work on this paper. Unlike other research papers prepared by the Institute, this research paper contains recommendations for reform that have been reviewed by the TLRI Board. Those recommendations are summarised at the beginning of the paper and detailed in Appendix A.

Associate Professor Terese Henning  
Director  
Tasmania Law Reform Institute

# Recommendations for Reform

## Recommendation 1

That a higher threshold for the imposition of a dangerous criminal declaration be prescribed in the *Sentencing Act 1997* (Tas). The current test, that the judge is of the opinion that the declaration is warranted for the protection of the public, should be repealed. The test should instead require that the court is satisfied that the offender is a serious danger to the community. This danger may be because of the offender's character, past history, age, health or mental condition; or the nature and gravity of the serious offence; or any special circumstances. This amendment would achieve consistency with several other jurisdictions, namely Victoria, Queensland and the Northern Territory. See Appendix A for a detailed proposed amendment.

## Recommendation 2

That the *Sentencing Act 1997* (Tas) be amended to make explicit provision for the standard of proof for imposition of a dangerous criminal declaration. The recommended standard is that the court is satisfied by acceptable, cogent evidence and to a high degree of probability that the offender is a serious danger to the community. Such an express higher threshold remedies the apparent inconsistency between the current legislative standards and judicial practice. It also provides consistency with several other jurisdictions, namely Victoria, Queensland and the Northern Territory.

## Recommendation 3

That the *Sentencing Act 1997* (Tas) be amended to provide a comprehensive list of factors to be considered by the court when making a decision about whether to make a dangerous criminal declaration. The Act should require the court to consider the risk of serious harm to members of the community if an indefinite sentence were not imposed and the need to protect members of the community from that risk. Further, consideration of the listed factors should be mandatory, rather than discretionary. These recommendations ensure conformity with judicial practice, as well as uniformity with other jurisdictions.

## Recommendation 4

That the *Sentencing Act 1997* (Tas) be amended to clarify that it is intended to create both an indefinite (at the time of sentencing) detention regime, as well as a post-sentence preventative detention regime.

## Recommendation 5

That s 19 of the *Sentencing Act 1997* (Tas) be amended to provide that where a post-sentence application is made and the convicting/sentencing judge has ceased to hold office, or other special circumstances exist such that she or he is not available, another judge may hear the application for the dangerous criminal declaration. The TLRI has previously recommended that s 19 be amended to remedy the potential issues arising where the convicting or sentencing judge is not available to hear the application.<sup>1</sup>

## Recommendation 6

That, provided the current Act is modernised to remedy existing deficiencies outlined in this paper, separate provisions for sex offenders not be enacted.

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<sup>1</sup> Tasmania Law Reform Institute (TLRI), *Sentencing*, Final Report No 11 (2008) 43.

### **Recommendation 7**

Amendment is required to ensure that dangerous criminal declarations made under the *Sentencing Act 1997* (Tas) conform with human rights and criminal justice principles in relation to the onus and standard of proof. The following amendments would also ensure consistency with other jurisdictions in this regard:

- (a) It is recommended that the Act be amended to provide that the prosecution bears the onus of proof on an application for imposition of a dangerous criminal declaration, an application for discharge, as well as a periodic review of a dangerous criminal declaration.
- (b) The recommended standard of proof at each of these stages is that the court be satisfied by acceptable, cogent evidence and to a high degree of probability that the offender is a serious danger to the community. This standard conforms with that provided in Victorian, Queensland and the Northern Territory legislation. The Act should expressly provide for this standard of proof.

### **Recommendation 8**

To address the deficiency noted by Tennent J in *McCrosen v The Queen* [2016] TASSC 3 at [42], it is recommended that the Act provide for a list of factors to be considered in determining whether to discharge a dangerous criminal declaration. These factors should be the same as those to be considered when imposing such a declaration in the first instance. This ensures the court has sufficient guidance on the appropriate factors to be considered when determining whether to discharge a dangerous criminal declaration. The listed factors, therefore, should be: whether the nature of the offence is exceptional; the offender's antecedent's, age and character; any medical, psychiatric or other relevant report; the risk of serious danger to members of the community if an indefinite sentence were not imposed; the need to protect members of the community from the aforementioned risk; and any other matters that the court thinks fits. See Appendix A for a detailed proposed amendment.

### **Recommendation 9**

That the *Sentencing Act 1997* (Tas) be amended to enable the court to impose both pre- and post-release conditions on discharge of dangerous criminal declarations. Pre-release conditions would enable a court to discharge declarations, subject to offenders undergoing certain treatment programs or achieving certain results in such programs, undertaking leave pursuant to s 42 of the *Corrections Act 1997* (Tas), or participating in re-integration programs designed to equip them with the skills necessary for re-entry into the community.

### **Recommendation 10**

That the *Sentencing Act 1997* (Tas) be amended to provide for a system of periodic review of dangerous criminal declarations to ensure that the appropriateness of the ongoing detention of offenders is reviewed at reasonable intervals. A review process would operate as a safeguard against the institutionalisation of offenders who might otherwise have been entitled to release. The Act should provide for a review on application of the offender, or the Director of Public Prosecutions, one year before the expiration of the offender's nominal sentence, and subsequently at two year intervals. These recommendations are modelled on the periodic review provisions in the *Sentencing Act 1995* (NT).



## Part 1

# Introduction and Scope

1.1.1 Indefinite detention regimes have existed in Australia for almost a century.<sup>2</sup> However, this statement obscures the distinction between ‘indefinite detention’ and ‘preventative detention’.<sup>3</sup> Although the terms are at times used interchangeably, they refer to distinct forms of detention.<sup>4</sup> The term ‘indefinite detention’ is used in this paper to refer to legislation ‘that enables an order to be made *at the time of sentence* for an offender to be detained indefinitely.’<sup>5</sup> The term ‘preventative detention’ is used to describe legislation which permits individuals to be detained beyond the expiration of their sentence, by an order made during the period of the offender’s incarceration.<sup>6</sup> Beyond the temporal difference, indefinite and preventative detention are largely the same both in purpose and operation. Both are directed at protecting the community from ‘dangerous’ offenders. Both operate to detain an offender for an indeterminate amount of time, based on the potential for future offending.

1.1.2 The Tasmanian indefinite detention regime contained in Part 3, Division 3 of the *Sentencing Act 1997* (Tas) enables a judge to declare an offender a ‘dangerous criminal’. This renders the offender ineligible for release until the declaration is discharged. As this declaration is typically made at the time of sentencing, the Tasmanian regime is principally an indefinite (as opposed to preventative) detention regime. However, the relevant sections of the Act also enable a judge to make a dangerous criminal declaration at any point during an offender’s sentence.<sup>7</sup> In this way, it *can* operate as a post-sentence preventative detention scheme.<sup>8</sup> To date, all dangerous criminal declarations have been made at the time of sentencing.<sup>9</sup> Therefore, thus far, the Act has operated solely as an indefinite detention regime. Due to this limited operation, the scope of this paper is limited to a comparative analysis of *indefinite* detention regimes in other jurisdictions — an assessment of *preventative* detention regimes has not been included.

1.1.3 The use of indefinite and preventative detention regimes is a contentious and divisive issue. As this paper assesses the *operation* of the Tasmanian indefinite detention scheme, a critique of indefinite detention regimes generally is outside its scope. However, it is pertinent to note two key issues associated with such regimes. First, an assessment of the merits and the use of indefinite and preventative detention regimes necessarily involves the balancing of potentially conflicting rights of victims, offenders, and society as a whole. This conflict of rights unsurprisingly results in tensions at the policy level, as Parliament and the judiciary must grapple with the balance of ostensibly irreconcilable interests. Secondly, indefinite and preventative detention regimes are justified as a means

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<sup>2</sup> Bernadette McSherry, ‘Indefinite and Preventative Detention Legislation: From Caution to an Open Door’ (2005) 29 *Criminal Law Journal* 94, 94.

<sup>3</sup> Bernadette McSherry, Patrick Keyzer and Arie Freiberg, ‘Preventive Detention for “Dangerous” Offenders in Australia: A Critical Analysis and Proposals for Policy Development’ (Criminology Research Council, December 2006) 10.

<sup>4</sup> *Ibid.*

<sup>5</sup> McSherry, above n 2, 94.

<sup>6</sup> McSherry, Keyzer and Freiberg, above n 3, 10; McSherry, above n 2, 94.

<sup>7</sup> *DPP v Phillips* [2006] TASSC 81, [4]; TLRI, above n 1, 42; Sentencing Advisory Council, *Sex Offence Sentencing* (August 2015) 107.

<sup>8</sup> TLRI, above n 1, 42; Sentencing Advisory Council, above n 7, 107.

<sup>9</sup> This information is accurate to the best of the author’s knowledge.

of preventing future harm, but the task of predicting future dangerousness is fraught with uncertainty and predictive models have been extensively criticised for a tendency to over-predict risk.<sup>10</sup> A detailed discussion of these issues is outside the scope of this paper, however, it is necessary to be cognisant of such issues as they provide the contextual background to the operation of such schemes. Further, this contextual background provides insight into why the courts treat an order for indefinite detention as ‘a serious and extraordinary step.’<sup>11</sup>

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<sup>10</sup> *Veen v The Queen* (1979) 143 CLR 458, 463–5 (Stephen J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 623 [124]–[125] (Kirby J); *McGarry v The Queen* (2001) 207 CLR 121, 141–2 [61] (Kirby J); *Kable* (1996) 189 CLR 51, 122–3 (McHugh J); *Buckley v The Queen* (2006) 80 ALJR 605, [7], [21], [43]; *R v Carr* (1996) 1 VR 585, 592; *Director of Public Prosecutions (WA) v Mangolamara* (2007) 169 Crim R 379, [165] (Hasluck J); *Director of Public Prosecutions (WA) v GTR* [2007] WASC 318, [112] (McKechnie J); *Director of Public Prosecutions (WA) v Comeagain* [2008] WASC 235, [20] (McKechnie J); *DPP v McIntosh* [2013] TASSC 21, [50] (Wood J); Bernadette McSherry, ‘Throwing Away the Key: The Ethics of Risk Assessment for Preventative Detention Schemes’ (2014) 21(5) *Psychiatry, Psychology and Law* 779; David Ruschena, ‘Determining Dangerousness: Whatever Happened to the Rules of Evidence?’ (2003) 10(1) *Psychiatry, Psychology and Law* 122; Jessica Black, ‘Is the Preventative Detention of Dangerous Offenders Justifiable?’ (2011) 6(3) *Journal of Applied Security Research* 317; Russ Scott, ‘Risk Assessment and Sentencing of Serious Sex Offenders’ (2008) 15(2) *Psychiatry, Psychology and Law* 188; Stephen J Morse, ‘Preventative Confinement of Dangerous Offenders’ (2004) 32 *Journal of Law, Medicine & Ethics* 56; Susan Dimock, ‘Criminalizing Dangerousness: How to Preventatively Detain Dangerous Offenders’ (2015) 9 *Criminal Law and Philosophy* 537; Kate Warner, ‘Sentencing Review 2002–2003’ (2003) 27 *Criminal Law Journal* 325; Charles Ewing, ‘Preventative Detention and Execution: The Constitutionality of Punishing Future Crimes’ (1991) 15 *Law and Human Behavior* 139; Tamara Tulich, ‘Post-Sentence Preventive Detention and Extended Supervision of High Risk Offenders in New South Wales’ (2015) 38(2) *University of New South Wales Law Journal* 823; Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) 201.

<sup>11</sup> *McGarry v The Queen* (2001) 207 CLR 121, 141–2, [61] (Kirby J).

## Part 2

# History and Origins of Indefinite Detention Regimes

## 2.1 Generally

2.1.1 The origin of indefinite detention regimes can be traced to 1890 and the Congress of the International Union of Criminal Law at St Petersburg.<sup>12</sup> Here, it was first proposed that such regimes were necessary to render habitual offenders ‘incapable of inflicting harm for as long as possible.’<sup>13</sup> In Australia, the first dangerous offender laws were introduced at the beginning of the 20<sup>th</sup> century.<sup>14</sup> Early indefinite detention regimes served the same purpose as today’s, namely, the protection of the community from ‘dangerous offenders.’<sup>15</sup> However, conceptions of ‘dangerousness’ have changed from principally contemplating habitual offenders,<sup>16</sup> to include professional criminals and those committing property offences.<sup>17</sup> Post 1970, the concept of ‘dangerousness’ shifted again and those who committed offences against the person became the target of dangerous offender laws.<sup>18</sup>

2.1.2 Despite the longevity of indefinite detention schemes, Pratt notes that they have seldom been used.<sup>19</sup> In Western society the only jurisdictions to make significant use of indefinite detention were Soviet Russia, Fascist Italy and Nazi Germany.<sup>20</sup> Since the 1990s, however, there has been a ‘renaissance’ of indefinite detention regimes, particularly in countries such as Australia.<sup>21</sup> Today, legislation enabling indefinite detention exists in six Australian jurisdictions.<sup>22</sup>

## 2.2 Tasmania

2.2.1 Tasmanian indefinite detention provisions were originally contained in ss 392 and 393 of the *Criminal Code Act 1924* (Tas) (‘*Criminal Code*’), which empowered a court to detain an offender under the *Indeterminate Sentences Act 1921* (Tas). These sections, intended to operate concomitantly, had two key purposes: s 392 was directed at protecting the community from dangerous habitual criminals, while s 393 was directed at rehabilitation of these offenders in a ‘reformatory prison’. Warner notes, however, that the regime was principally applied to ‘petty recidivists’ and young offenders.<sup>23</sup> Further, ‘[d]isillusionment with indeterminate sentences as a reformatory measure lead to the repeal of the

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<sup>12</sup> John Pratt, ‘Dangerousness, Risk and Technologies of Power’ (1995) 28 *Australian and New Zealand Journal of Criminology* 3, 4.

<sup>13</sup> Ibid, quoting Ancel M, *Social Defence* (Routledge & Kegan Paul, 1965) 47.

<sup>14</sup> Tulich, above n 10, 825. See, for example, *Habitual Criminals Act 1905* (NSW); *Indeterminate Sentencing Act 1908* (Vic).

<sup>15</sup> Tulich, above n 10, 825.

<sup>16</sup> Pratt, ‘Dangerousness, Risk and Technologies of Power’, above n 12, 4; John Pratt, ‘Criminology and History: Understanding the Present’ (1996) 8(1) *Criminology and History* 60, 65; Tulich, above n 10, 825.

<sup>17</sup> Tulich, above n 10, 825.

<sup>18</sup> Ibid.

<sup>19</sup> Pratt, ‘Criminology and History: Understanding the Present’, above n 16, 68.

<sup>20</sup> Ibid.

<sup>21</sup> Pratt, ‘Dangerousness, Risk and Technologies of Power’, above n 12, 8–20.

<sup>22</sup> *Sentencing Act 1997* (Tas); *Sentencing Act 1991* (Vic); *Penalties and Sentences Act 1992* (Qld); *Sentencing Act 1995* (NT); *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1995* (WA).

<sup>23</sup> Kate Warner, *Sentencing in Tasmania* (Federation Press, 2<sup>nd</sup> ed, 2002) 218.

section and the introduction of more narrowly defined dangerous offender provisions.<sup>24</sup> Section 392 was then redrafted in terms almost identical to the current provisions contained in the *Sentencing Act 1997* (Tas). In 1998, s 392 of the *Criminal Code* was repealed and replaced with the current provisions.

2.2.2 Since the introduction of Tasmanian indefinite detention provisions contained first in the *Criminal Code*, and subsequently in the *Sentencing Act 1997* (Tas), there have been 12 applications for dangerous criminal declarations. Of these, nine applications were successful, resulting in dangerous criminal declarations being made. There have been three unsuccessful applications, the most recent being in 2013. Of those offenders declared dangerous criminals, four have made applications for the discharge of their dangerous criminal status, of which, only one was successful. Table 1 below provides a chronological summary of applications to date.<sup>25</sup>

**Table 1: Summary of dangerous criminal declaration applications**

Name	Year of application	Declaration made	Application for discharge of declaration
Jamie Gregory McCrossen	1991	Yes	Application in 2013 – rejected 2016 Second application to be heard 2017
Mark Brandon Read	1994	Yes	Application in 1997 – accepted and released
Thomas Hueston	1995	Yes	No application made
IRS	1995	Yes	Application in 2012 – rejected in 2013
Colin John Sparkes	1997	Yes	No application made
James Maxwell Evans	1999	Yes	No application made
Kevin Richard Bell	1999	Yes	Application in 2010 – rejected in 2011 Application in 2015 – rejected in 2016
Anthony John Minney	2003	No	N/A
Ian Brumby	2003	Yes	No application made
Brendan James Freeman	2004	Yes	No application made
Paul Vincent Phillips	2006	No	N/A
Gavin Raymond McIntosh	2013	No	N/A

<sup>24</sup> Ibid.

<sup>25</sup> This information is accurate to the best of the author’s knowledge. Changes to data storage systems in the Office of the Director of Public Prosecutions mean that the possibility of additional cases cannot be categorically excluded.

## Part 3

# Overview of the Legislation

### 3.1 Section 19

3.1.1 Section 19 of the *Sentencing Act 1997* (Tas) empowers a judge to make a declaration that an offender is a dangerous criminal. A judge before whom an offender is convicted or sentenced may make the declaration.<sup>26</sup> A declaration may only be made if:<sup>27</sup> the offence for which the offender is convicted is one involving an element of violence; the offender has a prior conviction for a crime involving an element of violence;<sup>28</sup> the offender is at least 17 years old; and the declaration is warranted for the protection of the public. Section 19(2) provides a non-exhaustive list of factors that the judge may have regard to in exercising this discretion. These are: the nature and circumstances of the crime; the offender's antecedents or character; medical and other opinion; and any other relevant material.<sup>29</sup> Once a declaration has been made the offender is subject to indefinite incarceration and is ineligible for release until discharge of the declaration.<sup>30</sup> In addition to the declaration, the judge must sentence the offender to a term of imprisonment for the offence.<sup>31</sup> The period of incarceration resulting from the dangerous criminal declaration may extend beyond the expiry of this sentence.<sup>32</sup>

3.1.2 Section 19(1) reads, 'a judge before whom an offender is convicted or brought up for sentence after being convicted' may make a dangerous criminal declaration. To date, every application for a declaration has been made at the time of sentencing.<sup>33</sup> However, although not stated expressly, it is settled that a consequence of the wording of s 19(1) is that a dangerous criminal declaration application may be heard at any time during the offender's sentence, provided it is heard by the judge before whom the offender was convicted or sentenced.<sup>34</sup> Consequently, although the legislation has not yet been used in this manner, it *can* enable a post-sentence preventative detention order to be made.<sup>35</sup>

3.1.3 In determining whether a crime is one involving violence or an element of violence, as required by ss 19(1)(a) and (b), it is not necessary that violence is an essential ingredient of the crime.<sup>36</sup> The phrase 'involving an element of violence' does not refer to the ingredients of an offence, but rather to the associated circumstances of criminal activity.<sup>37</sup> Thus, the particular facts of the case may weigh in favour of, or against, a conclusion that the crime involved an element of violence.<sup>38</sup> Sexual offences such as rape and indecent assault have been held to be crimes necessarily involving an element of

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<sup>26</sup> *Sentencing Act 1997* (Tas) s 19(1).

<sup>27</sup> *Ibid* ss 19(1)(a)–(d).

<sup>28</sup> *Ibid*; Previous convictions include convictions in other states or territories: s 19(6).

<sup>29</sup> *Ibid* ss 19(2)(a)–(c).

<sup>30</sup> *Ibid* s 19(4).

<sup>31</sup> *Ibid* s 19(3).

<sup>32</sup> *Ibid* s 19(5).

<sup>33</sup> To the best of the author's knowledge.

<sup>34</sup> *DPP v Phillips* [2006] TASSC 81, [5]; TLRI, above n 1, 42; Sentencing Advisory Council, above n 7, 107.

<sup>35</sup> TLRI, above n 1, 42.

<sup>36</sup> Warner, above n 23, 219.

<sup>37</sup> *Gill* Serial No 52/1989 14–15; *R v McCrossen* [1991] Tas R 1, 4; *Hueston* (1995) 5 Tas R 210, 213.

<sup>38</sup> *Gill* Ser. No 52/1989 14–15.

violence, irrespective of the particular circumstances of the case.<sup>39</sup> So too have crimes involving threats to apply force, such as a threat to murder.<sup>40</sup> Burglary, where committed for the purpose of infliction of violence (regardless of whether violence is in fact inflicted), is a crime of violence.<sup>41</sup> Setting fire to property has been deemed to be a crime involving an element of violence as it carries a substantial risk of injury to persons and is a deliberate act of property damage.<sup>42</sup>

## 3.2 Section 20

3.2.1 Section 20(2) provides that an offender may apply for the discharge of a dangerous criminal declaration after having served a term of imprisonment equal to the non-parole period of her or his sentence. The court must discharge the declaration if satisfied that it is no longer warranted for the protection of the public.<sup>43</sup> If the application is unsuccessful, a further application may be made after two years, or a lesser period accepted by the court.<sup>44</sup> In making the application for the discharge of the declaration, the offender bears the onus of proof.<sup>45</sup> This requires a demonstrable change in circumstances before a judge may be satisfied that the offender is no longer a danger to the community.<sup>46</sup>

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<sup>39</sup> *Evans* (1999) 8 Tas R 325; TLRI, above n 1, 206.

<sup>40</sup> *R v McCrossen* [1991] Tas R 1.

<sup>41</sup> *Sparkes* (1997) 7 Tas R 227.

<sup>42</sup> *Hueston* (1995) 5 Tas R 210.

<sup>43</sup> *Sentencing Act 1997* (Tas) s 20(3).

<sup>44</sup> *Ibid* s 20(6).

<sup>45</sup> *Bell v Tasmania* [2016] TASSC 46, [11]; *Mark Brandon Read* (1997) 94 Crim R 539, 540; *McCrossen v The Queen* [2016] TASSC 3, [40]; *IRS v Tasmania* [2013] TASSC 66, [33].

<sup>46</sup> *Mark Brandon Read* (1997) 94 Crim R 539, 540.

## Part 4

# Nature of the Exercise of the Discretion

4.1.1 Both indefinite and preventative detention regimes have been upheld as constitutionally valid.<sup>47</sup> However, the human rights implications of such regimes is a matter of ongoing debate.<sup>48</sup> This is particularly so given the decision by the United Nations Human Rights Committee that the preventative detention regimes prescribed by both the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) and the *Crimes (Serious Sex Offenders) Act 2006* (NSW) breach the prohibition on arbitrary detention in Article 9 of the *International Covenant on Civil and Political Rights* ('ICCPR').<sup>49</sup> Thus, the High Court has emphasised the need for restraint in the use of orders for indefinite and preventative detention, cautioning that their use should be reserved for exceptional circumstances.<sup>50</sup> McSherry suggests that 'judges are wary of imposing indefinite sentences, given the inroads into civil liberties such sentences require.'<sup>51</sup> These civil liberties are reflected in international human rights instruments and established as principles of law. For present purposes, the most relevant principles are the principles of proportionality and finality in sentencing and the principle against double punishment.<sup>52</sup> It is outside the scope of this paper to explore in detail the human rights implications of indefinite and preventative detention regimes generally, however it is necessary to canvass them briefly as they provide context to the exercise of judicial discretion in such cases.

4.1.2 At common law, the principle of proportionality prevents a judge from imposing a sentence which is not commensurate with the offence for which the offender is convicted.<sup>53</sup> Indefinite and preventative detention regimes such as that prescribed by the *Sentencing Act 1997* (Tas) operate as statutory exceptions to the proportionality principal.<sup>54</sup> As Wood J noted in *DPP v McIntosh*, indefinite detention is 'contrary to the common law which does not sanction preventative detention, and also, contrary to the fundamental principle of the criminal law that punishment must not be disproportionate to the crime.'<sup>55</sup> The principle of finality in sentencing 'provides that an offender should be released at the end of his or her sentence without the sentence being subsequently extended (other than by an

<sup>47</sup> *R v Moffatt* (1998) 2 VR 229; *McGarry v The Queen* (2001) 207 CLR 121; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

<sup>48</sup> Patrick Keyzer and Bernadette McSherry, 'The Preventive Detention of Sex Offenders: Law and Practice' 38(2) *University of New South Wales Law Journal* 792, 803–4.

<sup>49</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'); Human Rights Committee, *Views: Communication No 1629/2007*, 98<sup>th</sup> sess, UN Doc CCPR/C/98/C/1629/2007 (10 May 2010) 8 ('*Fardon v Australia*'); Human Rights Committee, *Views: Communication No 1635/2007*, 98<sup>th</sup> sess, UN Doc CCPR/C/98/D/1635/2007 (10 May 2010) ('*Tillman v Australia*').

<sup>50</sup> See, for example, *Chester v R* (1988) 165 CLR 611, 618–619; *McGarry v The Queen* (2001) 207 CLR 121, 129 [21]; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, see dissenting judgment of Kirby J; *R v Moffatt* (1998) 2 VR 229, 255; *Thompson v The Queen* (1999) 165 ALR 219, 220 [2]; *Pollentine v Bleijie* (2014) 311 ALR 332, 337 [22]; *Buckley v The Queen* (2006) 80 ALJR 605, [40], [42]; Keyzer and McSherry, above n 48, 799.

<sup>51</sup> McSherry, above n 2, 105.

<sup>52</sup> TLRI, above n 1, 213–214; Sentencing Advisory Council, above n 7, 107; McSherry, Keyzer and Freiberg, above n 3, 79–82.

<sup>53</sup> TLRI, above n 1, 213; Warner, above n 23, 76.

<sup>54</sup> TLRI, above n 1, 205; Sentencing Advisory Council, above n 7, 41; Mirko Bagaric, 'Proportionality in Sentencing: Its Justification, Meaning and Role' (2000) 12(2) *Current Issues in Criminal Justice* 145, 146; *Chester v R* (1988) 165 CLR 611, 618; *DPP v McIntosh* [2013] TASSC 21, [7]–[9].

<sup>55</sup> [2013] TASSC 21, [9]. See also *McGarry v R* (2001) 207 CLR 121, [60]–[61] (Kirby J) and *R v McCrossen* [1991] Tas R 1, 7 (Green CJ) for discussion regarding tensions with the criminal justice system.

appeal).<sup>56</sup> In the case of post-sentence preventative detention, an order is made at the end of the offender’s sentence. Consequently, there is uncertainty as to the duration of the offender’s incarceration after the expiration of the sentence.<sup>57</sup> Accordingly, some commentators suggest that post-sentence preventative detention orders offend the principle of finality in sentencing.<sup>58</sup>

4.1.3 Article 14(7) of the *ICCPR* provides for the principle against double punishment. At common law the principle against double punishment prevents an offender from being punished twice for overlapping elements of two or more offences.<sup>59</sup> In addition to a determination of guilt, the principle applies to the quantification of punishment.<sup>60</sup> If preventative detention amounts to punishment, such orders may be contrary to the principle as, having been sentenced once, a post-sentence order extending the duration of detention amounts to a second punishment for the same conduct.<sup>61</sup> The High Court dismissed this argument in *Fardon v Attorney-General (Qld)*, holding that such orders are not characterised as punishment when made for non-punitive purposes.<sup>62</sup> However, it is pertinent to note that this approach does not accord with the approach subsequently taken by the United Nations Human Rights Committee.<sup>63</sup> The Committee ultimately found that the preventative detention regime prescribed by the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) was contrary to the Article 9 prohibition on arbitrary detention.

4.1.4 In *McGarry v The Queen*, Kirby J observed that the reason the Australian criminal justice system ‘treats an order of indefinite imprisonment as a serious and extraordinary step’ is, in part, due to an acknowledgement of the limitations associated with predicting future dangerousness.<sup>64</sup> Predictive models have been extensively criticised due to their unreliability and their tendency to over-predict future violence.<sup>65</sup> While an exploration of such criticisms is outside the scope of this paper, it is necessary to be cognisant of the limitations of predictive behavioural modelling as this contributes to the contextual framework in which indefinite and preventative detention orders operate. Courts are understandably cautious about predicting future criminality and consequently the discretion to declare an offender a dangerous criminal is exercised only in exceptional circumstances.<sup>66</sup>

4.1.5 In *Read v R* (1994) 3 Tas R 387, at 395, the Court of Criminal Appeal accepted that the general principles enunciated by the High Court in *Chester v R* (1988) 165 CLR 611 at 618–619 were applicable

<sup>56</sup> TLRI, above n 1, 213.

<sup>57</sup> Ibid; McSherry, Keyzer and Freiberg, above n 3, 80.

<sup>58</sup> TLRI, above n 1, 213; McSherry, Keyzer and Freiberg, above n 3, 80; Warner, above n 10, 338.

<sup>59</sup> *ICCPR*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); TLRI, above n 1, 214; *Pearce v The Queen* (1998) 194 CLR 610.

<sup>60</sup> *Pearce v The Queen* (1998) 194 CLR 610, 628; *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119, 128–9.

<sup>61</sup> TLRI, above n 1, 214; McSherry Keyzer and Freiberg, above n 3, 81–2.

<sup>62</sup> (2004) 223 CLR 575, 592 [20], 597 [34], 610 [74], 654 [216]–[217]; Keyzer and McSherry, above n 48, 800–1.

<sup>63</sup> Human Rights Committee, *Views: Communication No 1629/2007*, 98<sup>th</sup> sess, UN Doc CCPR/C/98/C/1629/2007 (10 May 2010) 8 (*Fardon v Australia*); Human Rights Committee, *Views: Communication No 1635/2007*, 98<sup>th</sup> sess, UN Doc CCPR/C/98/D/1635/2007 (10 May 2010) (*Tillman v Australia*).

<sup>64</sup> (2001) 207 CLR 121, 141–2 [61].

<sup>65</sup> *Veen v The Queen* (1979) 143 CLR 458, 463–5 (Stephen J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 623 [124]–[125] (Kirby J); *McGarry v The Queen* (2001) 207 CLR 121, 141–2 [61] (Kirby J); *Kable* (1996) 189 CLR 51, 122–3 (McHugh J); *Buckley v The Queen* (2006) 80 ALJR 605, [7], [21], [43]; *R v Carr* (1996) 1 VR 585, 592; *Director of Public Prosecutions (WA) v Mangalamara* (2007) 169 Crim R 379, [165] (Hasluck J); *Director of Public Prosecutions (WA) v GTR* [2007] WASC 318, [112] (McKechnie J); *Director of Public Prosecutions (WA) v Comeagain* [2008] WASC 235, [20] (McKechnie J); *DPP v McIntosh* [2013] TASSC 21, [50] (Wood J); McSherry, above n 10; Ruschena, above n 10; Black, above n 10; Scott, above n 10; Morse, above n 10; Dimock, above n 10; Warner, above n 10; Ewing, above n 10; Tulich, above n 10.

<sup>66</sup> *DPP v McIntosh* [2013] TASSC 21, [9].

to the *Criminal Code* s 392. Section 392 of the *Criminal Code* has since been repealed and re-enacted in s 19 of the *Sentencing Act 1997* (Tas) in near identical terms. The principles in *Chester v R* have subsequently been applied to s 19.<sup>67</sup>

The essential principles in *Chester v R* (1988) 165 CLR 611 are:

- ‘[I]t is now firmly established that our common law does not sanction preventive detention. The fundamental principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender.’<sup>68</sup>
- Consequently, any sentence of indefinite detention ‘should be confined to very exceptional cases where the exercise of the power is demonstrably necessary to protect society from physical harm.’<sup>69</sup>
- ‘The stark and extraordinary nature of punishment by way of indeterminate detention ... requires that the sentencing judge be clearly satisfied by cogent evidence that the convicted person is a constant danger to the community.’<sup>70</sup>

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<sup>67</sup> *R v Minney* (2003) 12 Tas R 46, [32]; *DPP v Phillips* [2006] TASSC 81, [9]–[11]; *DPP v McIntosh* [2013] TASSC 21, [7]–[9].

<sup>68</sup> *Chester v R* (1988) 165 CLR 611, 618.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid* 619.

## Part 5

# Summary of Other Jurisdictions

5.1.1 Table 2 summarises the indefinite detention regimes in all Australian jurisdictions.<sup>71</sup>

**Table 2: Summary of Australian indefinite detention regimes**

Jurisdiction	Act	Imposition of sentence	Discharge of sentence
Tasmania	<i>Sentencing Act 1997</i>	Section 19: offender convicted of a violent crime, with one previous conviction for a violent crime, where warranted for the protection of the public.	Section 20: on application by offender, having served a term equal to the non-parole period of sentence, if satisfied declaration is no longer warranted for protection of the public.
Victoria	<i>Sentencing Act 1991</i>	Section 18B: offender convicted of a serious offence and court satisfied to high probability that offender is a serious danger to the community.	Section 18M: on review of sentence (initiated by offender, DPP, or periodic), unless satisfied to high probability that offender is still a serious danger to the community, subject to 5-year re-integration program.
Western Australia	<i>Sentencing Act 1991</i>	Section 98: superior court may impose where, if released, offender would pose a danger to society.	Section 101: at any time, by means of parole order under Part 3 of <i>Sentence Administration Act 2003</i> (WA).
Queensland	<i>Penalties and Sentences Act 1992</i>	Sections 163, 170: violent offender who presents serious danger to the community, court satisfied by acceptable cogent evidence and to high degree of probability.	Section 173: on review of sentence (initiated by offender or periodic), unless satisfied offender is still serious danger to community, must discharge sentence and impose finite sentence. Section 174: offender may apply for parole (not less than 5 years) if finite sentence imposed.
	<i>Criminal Law Amendment Act 1945</i>	Section 18: sex offender incapable of exercising control over sexual instincts.	Part 3A: conditional release of offenders as under the <i>Corrective Services Act 2006</i> (Qld).

<sup>71</sup> Table adapted from McScherry, above n 2, 95–6.

Part 5 – Summary of other jurisdictions

Northern Territory	<i>Sentencing Act 1995</i>	Section 65: violent offender convicted of crime for which a life sentence may be imposed, where Supreme Court considers prisoner to be serious danger to the community.	Section 74: on review of sentence (initiated by offender or periodic) unless satisfied to high degree of probability that offender remains serious danger, must discharge sentence and impose finite sentence. Section 75: offender may apply for release subject to 5-year re-integration program.
South Australia	<i>Criminal Law (Sentencing) Act 1988</i>	Section 23: sex offender incapable of controlling or unwilling to control sexual instincts.	Section 23A: unconditional discharge of declaration on application by offender or DPP, following medical assessment. Paramount consideration is safety of community. Section 24: release on licence on application by offender or DPP, following medical assessment. Paramount consideration is safety of community.
New South Wales	No equivalent provisions.		
Australian Capital Territory	No equivalent provisions.		

5.1.2 The Tasmanian provisions governing dangerous criminal declarations can be distinguished from other jurisdictions in a number of respects. The following sections (Part 6, Making the Declaration and Part 7, Discharging the Declaration) provide a comparative inter-jurisdictional analysis of the major differences, consider the case for reform, and the merits of uniformity in the legislation. Appendix A contains a table with detailed proposed amendments.

## Part 6

# Making the Declaration

### 6.1 Prerequisites to the exercise of the discretion

#### *The current law*

6.1.1 As outlined above (see [3.1.1]), s 19(1) of the *Sentencing Act 1997* (Tas) provides that a judge may declare an offender a dangerous criminal only if the offence for which the offender is convicted is one involving an element of violence, the offender has a prior conviction for a crime involving an element of violence, the offender is at least 17 years old, and the declaration is warranted for the protection of the public. These factors form the prerequisites to the exercise of the discretion.

6.1.2 In Victoria, s 18A of the *Sentencing Act 1991* (Vic) provides that an indefinite sentence may only be imposed on a person (other than a young person) convicted of a serious offence.<sup>72</sup> Section 18B provides additional prerequisites to the imposition of an indefinite sentence. That sections reads:

- (1) A court may only impose an indefinite sentence on an offender in respect of a serious offence if it is satisfied, to a high degree of probability, that the offender is a serious danger to the community because of—
  - (a) his or her character, past history, age, health or mental condition; and
  - (b) the nature and gravity of the serious offence; and
  - (c) any special circumstances.

6.1.3 In Queensland and the Northern Territory, the prerequisites are, in substance, the same as those in Victoria.<sup>73</sup> The Queensland case of *R v Garland* [2014] QDC 3 provides a useful explanation of the operation of the legislation in that jurisdiction. The court stated that,

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<sup>72</sup> ‘Serious offence’ is defined in s 3 of the *Sentencing Act 1991* (Vic) by an exhaustive list of offences, including murder, rape, armed robbery, and causing injury intentionally.

<sup>73</sup> In Queensland, an indefinite sentence may only be imposed where an offender has been convicted of a ‘qualifying offence’ (*Penalties and Sentences Act 1991* (Qld) s 163(1)). A ‘qualifying offence’ is defined as an indictable offence against a provision of the *Criminal Code* mentioned in schedule 2, or counselling or procuring the commission of, or attempting or conspiring to commit, such an offence (*Penalties and Sentences Act 1991* (Qld) s 162). Schedule 2 provides an exhaustive list of offences including murder, rape, sexual assault, and acts intended to cause grievous bodily harm. Section 163 then provides additional prerequisites to the imposition of an indefinite sentence. That section reads:

- (3) Before a sentence is imposed under subsection (1), the court must be satisfied—
  - (a) that the *Mental Health Act 2000*, chapter 7, part 6, does not apply; and
  - (b) that the offender is a serious danger to the community because of—
    - (i) the offender’s antecedents, character, age, health or mental condition; and
    - (ii) the severity of the qualifying offence; and
    - (iii) any special circumstances.

In the Northern Territory, s 65(2) of the *Sentencing Act 1995* (NT) requires that the offender is convicted of a violent offence. A violent offence is defined as ‘an offence that, in fact, involves the use, or attempted use, of violence against a person; and for which an offender may be sentenced to imprisonment for life’; or an offence against s 127 (sexual intercourse or gross indecency involving child under 16 years), s 128 (sexual intercourse or gross indecency involving

[u]nder s 163(3) the court cannot impose an indefinite sentence unless it first reaches a state of satisfaction which includes that the offender is a serious danger to the community. The phrase “must be satisfied” is used and clearly indicates the mandatory nature of that requirement.<sup>74</sup>

6.1.4 The court continued at [56] stating that, ‘one could characterise the issue in s 163(3), whether the offender is a serious danger to the community, as being a jurisdictional issue, without which the court cannot impose an indefinite sentence.’ These comments are equally applicable to the Victorian and Northern Territory legislation.

6.1.5 The South Australian legislation differs from other jurisdictions in that it applies only to sex offenders and not to other violent offenders. The preconditions to the exercise of the discretion, found in s 23 of the *Criminal Law (Sentencing) Act 1988* (SA), provide that indefinite detention may only be ordered for a sex offender incapable of controlling, or unwilling to control, his or her sexual instincts.

### ***Problematic aspects***

6.1.6 There are a several differences between the *Sentencing Act 1997* (Tas) prerequisites to the exercise of the discretion and those in other jurisdictions. Consequently, the test in Tasmania for the imposition of an indefinite sentence is different to other jurisdictions. In Tasmania, the operative prerequisite to the exercise of the discretion in s 19(1) of the Act is that ‘the judge is of the opinion that the declaration is warranted for the protection of the public’. This arguably sets a less prescriptive test than in other jurisdictions. The Victorian, Queensland and New South Wales legislation all require that the offender must be ‘a serious danger to the community’ before an order may be made.<sup>75</sup> This is arguably a higher threshold than the ‘warranted for the protection of the public’ test in Tasmania.

6.1.7 In *Carolán v The Queen* [2015] VSCA 167, a Victorian case concerning an application for discharge of an indefinite sentence under the *Sentencing Act 1991* (Vic), the court commented on the ‘serious danger to the community standard.’ In that case, the court was also required to consider a separate test prescribed by the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic). This test provided that a supervision or detention order may be made if the court is satisfied that the offender ‘poses an unacceptable risk of committing a relevant offence’.<sup>76</sup> The court stated that ‘[t]he “unacceptable risk” test plainly sets a lower bar than the “serious danger to the community” test for an indefinite sentence.’<sup>77</sup> By analogy, the ‘warranted for the protection of the public’ test is also likely to set a lower threshold than the ‘serious danger to the community’ test.

6.1.8 Further, the prerequisites to the exercise of the discretion in other jurisdictions require the court to justify on what grounds the offender is considered a serious danger to the community. In Victoria,

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child over 16 years under special care) or s 192 (sexual intercourse and gross indecency without consent) of the *Criminal Code (Sentencing Act 1995* (NT) s 65(1)). Section 65(8) provides the additional prerequisites before an indefinite sentence may be imposed. That section reads:

- (8) The Supreme Court must not impose an indefinite sentence on an offender unless it is satisfied that the offender is a serious danger to the community because of any of the following:
- (a) the offender’s antecedents, character, age, health or mental condition;
  - (b) the severity of the violent offence;
  - (c) any special circumstances.

<sup>74</sup> *R v Garland* [2014] QDC 3, [55].

<sup>75</sup> *Sentencing Act 1991* (Vic) s 18B(1); *Penalties and Sentences Act 1992* (Qld) s 163(3); *Sentencing Act 1995* (NT) s 71.

<sup>76</sup> *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 42; *Carolán v The Queen* [2015] VSCA 167, [81].

<sup>77</sup> *Carolán v The Queen* [2015] VSCA 167, [82].

Queensland and the Northern Territory the court must be satisfied that the offender is a serious danger to the community *because of* the offender’s antecedents, character, age, health or mental condition; or the severity of the qualifying offence; or any special circumstances.<sup>78</sup> In Tasmania, there is no legislative requirement to provide justification as to why the declaration is warranted for the protection of the public. In practice, the court justifies the need for the declaration when applying the discretionary factors listed in ss 19(2)(a)–(d). These factors may be considered when determining whether to make a dangerous criminal declaration. Other jurisdictions also require courts to consider similar factors, however, the court may only do so having first addressed whether the offender is a serious danger to the community. The operation of these factors is discussed below at [6.3].

### ***Recommendations for reform***

It is recommended that a test requiring a higher threshold for imposition of a dangerous criminal declaration should be set down in the *Sentencing Act 1997* (Tas). This might be achieved by altering the prerequisites to the exercise of the discretion. The current test, that the judge is of the opinion that the declaration is warranted for the protection of the public, should be repealed. The test should instead require that the court is satisfied that the offender is a serious danger to the community. This danger may be because of the offender’s character, past history, age, health or mental condition; or the nature and gravity of the serious offence; or any special circumstances. This amendment would achieve consistency with several other jurisdictions, namely Victoria, Queensland and the Northern Territory. See Appendix A for a detailed proposed amendment.

## **6.2 Standard of proof for imposition**

### ***The current law***

6.2.1 In Tasmania, the *Sentencing Act 1997* (Tas) does not explicitly provide for the standard of proof for the imposition of a dangerous criminal declaration. Section 19(1), the lead provision empowering the court to make a dangerous criminal declaration, requires that the judge be ‘of the opinion that the declaration is warranted for the protection of the public.’ This ostensibly prescribes the standard of proof as being ‘of the opinion’.

6.2.2 In Victoria, the standard of proof derives from the lead provision, requiring the court to be satisfied ‘to a high degree of probability’ that the offender is a serious danger to the community.<sup>79</sup> Where

<sup>78</sup> *Sentencing Act 1991* (Vic) s 18B; *Penalties and Sentences Act 1992* (Qld) s 163; *Sentencing Act 1995* (NT) s 65(8). In Western Australia, the court must be satisfied that the offender would be a danger to society because of one or more of these factors:

- (a) the exceptional seriousness of the offence;
- (b) the risk that the offender will commit other indictable offences;
- (c) the character of the offender and in particular –
  - (i) any psychological, psychiatric or medical condition affecting the offender;
  - (ii) the number and seriousness other offences of which he offender has been convicted;
- (d) any other exceptional circumstances.

<sup>79</sup> *Sentencing Act 1991* (Vic) s 18B(1). See *Nigro v Secretary to Department of Justice* (2013) 234 A Crim R 1, [71]–[73] where the court discussed an identical provision in the *Serious Sex Offenders Monitoring Act 2005* (Vic). Section 11 of that Act provided that a court may make an extended supervision order ‘if it is satisfied to a high degree of probability that the offender is likely to commit a relevant offence.’ The court noted at [73] that ‘cases concerned with that legislation

this standard of proof has been adopted by other legislation, it has ‘consistently been construed as requiring a standard of proof higher than the civil standard but lower than the criminal standard of proof.’<sup>80</sup> It is pertinent to note that the standard of satisfaction relates to the *factum probandum* (that the offender is a serious danger to the community) and not to the quality or sufficiency of the evidence supporting that conclusion.<sup>81</sup> This distinction is important as it may be a matter of contention in other jurisdictions.

6.2.3 The legislation in Queensland and the Northern Territory explicitly provides for the standard of proof for the imposition of an indefinite sentence.<sup>82</sup> The relevant provisions in these jurisdictions are identically worded and read:

A court may make a finding that an offender is a serious danger to the community only if it is satisfied—

- (a) by acceptable, cogent evidence; and
- (b) to a high degree of probability;

that the evidence is of sufficient weight to justify the finding.

6.2.4 The inclusion of the concluding sentence ‘that the evidence is of sufficient weight to justify the finding’, is problematic. The same wording is used in several Acts authorising post-sentence preventative detention and supervision for sex offenders.<sup>83</sup> Judicial commentary on these Acts is therefore relevant.

6.2.5 *Nigro v Secretary to Department of Justice* (2013) 41 VR 359 concerned the *Serious Sex Offenders (Detention and Supervision Act 2009)* (Vic). Under that Act, the court was empowered to make a supervision order if satisfied that the offender posed an ‘unacceptable risk of committing a relevant offence.’ The standard of proof was identical to the standard in the indefinite detention regimes of Queensland and the Northern Territory. The court was therefore required to be satisfied by acceptable, cogent evidence, and to a high degree of probability, that the evidence was of sufficient weight to justify the finding.<sup>84</sup> The inclusion of the concluding sentence gave rise to significant issues of construction. The court noted at [141] that ‘the question of construction that arises is whether the standard of proof in s 9(2) relates to the ultimate issue of unacceptable risk or only to the level of persuasion that the evidence must attain which will support the ultimate conclusion.’ In several other Acts, such as the Victorian *Sentencing Act 1991* (Vic) (discussed above), this concluding sentence is omitted. In the absence of this concluding sentence, the section has been interpreted to require the degree of probability to relate to the ultimate issue and not merely to the level of persuasion that the

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approached the task of construction on the basis that the legislature had made provisions for the fact that there would be an infringement of personal liberty by requiring satisfaction “to a high degree of probability”.’

<sup>80</sup> *Nigro v Secretary to Department of Justice* (2013) 41 VR 359, [139] see also cases concerning the Victorian *Serious Sex Offenders Monitoring Act 2005* (Vic): *RJE v Secretary to Department of Justice* (2008) 21 VR 526; 192 A Crim R 156, [23]–[25]; *TSL v Secretary to Department of Justice* (2006) 14 VR 109; and cases concerning the New South Wales *Crimes (Serious Sex Offenders) Act 2006* (NSW): *Attorney-General (NSW) v Tillman* [2007] NSWSC 605, [27]; *Cornwall v Attorney-General* (NSW) [2007] NSWCA 374, [21]; *New South Wales v Richardson* (No 2) (2011) 210 A Crim R 220; *New South Wales v Ellmore* [2011] NSWSC 837, [3]; *New South Wales v Reed* [2012] NSWSC 308, [36]; *New South Wales v Le* [2013] NSWSC 348, [36]; and cases concerning the Western Australian *Dangerous Sexual Offenders Act 2006* (WA): *Director of Public Prosecutions (WA) v GTR* (2008) 38 WAR 307, [28]–[29]; *Director of Public Prosecutions (WA) v Narkle* [2010] WASC 7, [7] (Hall J); *Director of Public Prosecutions (WA) v AMT* (No 3) [2012] WASC 485.

<sup>81</sup> *Nigro v Secretary to Department of Justice* (2013) 41 VR 359, [139].

<sup>82</sup> *Penalties and Sentences Act 1992* (Qld) s 170; *Sentencing Act 1995* (NT) s 71.

<sup>83</sup> For example, *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(3), and *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 9(2).

<sup>84</sup> *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 9(2).

evidence must attain which will support that conclusion.<sup>85</sup> The court in *Nigro v Secretary to Department of Justice* (2013) 41 VR 359 was therefore required to determine whether the inclusion of the final sentence altered the test by requiring the degree of probability to relate to the facts relied upon, not the ultimate judgment.

6.2.6 In addressing this question, the court considered other legislation, namely the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), which included the final sentence. The court noted that there was conflicting case authority in Queensland as to whether the degree of probability relates to the *factum probandum* (whether the offender poses an unacceptable risk),<sup>86</sup> or to the sufficiency of the evidence used to support the ultimate decision.<sup>87</sup> In these cases, however, the facts in issue did not relate to the standard of proof. Similarly, in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, the observations by the judges on the standard of proof were made in the context of a different issue and are therefore probably not ‘seriously considered *obiter dicta*.’<sup>88</sup> However, it is pertinent to note that McHugh, Callinan and Heydon JJ understood the standard of proof of a high degree of probability to apply to the ultimate question (the finding of unacceptable risk).<sup>89</sup>

6.2.7 Ultimately, the court in *Nigro v Secretary to Department of Justice* concluded that the degree of probability related to the *factum probandum*.<sup>90</sup> The standard of proof, therefore, requires that ‘the judge must be satisfied by the evidence to a high degree of probability that there is an unacceptable risk.’<sup>91</sup> As to what this standard of proof means, the court stated: ‘that involves a standard well above the civil standard and approaching the criminal standard.’<sup>92</sup> The court further noted that the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336, that ‘the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove’,<sup>93</sup> applies to the standard of proof under that Act. Hence, despite the standard being higher than the civil standard, the court was of the opinion that there was a ‘legislative recognition that the evidence itself should attain a sufficiently high standard of proof before there could be a justifiable interference with the human right of liberty.’<sup>94</sup> Therefore, the court concluded that the *Briginshaw* principle was ‘relevant in evaluating the quality and sufficiency of the evidence.’<sup>95</sup>

6.2.8 The discussion in *Nigro v Secretary to Department of Justice* is apposite to the standard of proof in Queensland and the Northern Territory. Although the issue has not been specifically addressed, it appears courts are interpreting the respective sections in accordance with the ratio decidendi in *Nigro*

<sup>85</sup> *Director of Public Prosecutions (WA) v GTR* (2008) 198 A Crim R 149; *Director of Public Prosecutions (WA) v Lyddieth* [2012] WASC 246; *Director of Public Prosecutions (WA) v Corbett* [2012] WASC 438.

<sup>86</sup> *Attorney-General (Qld) v Hynds* [2010] QSC 436; *Attorney-General (Qld) v Ellis* [2011] QSC 382; *Attorney-General (Qld) v Larry* [2011] QSC 120.

<sup>87</sup> *Attorney-General (Qld) v Williams* [2010] QSC 248; *Attorney-General (Qld) v AB* [2010] QSC 418; *Attorney-General (Qld) v Lawrence* [2012] QSC 386; *Attorney-General (Qld) v Jerome* [2013] QSC 69; *Attorney-General (Qld) v Inkerman* [2013] QSC 18; *Attorney-General (Qld) v Fardon* [2013] QSC 12; *Attorney-General (Qld) v Kanaveilomani* [2013] QSC 86.

<sup>88</sup> *Nigro v Secretary to Department of Justice* (2013) 41 VR 359, [124].

<sup>89</sup> *Ibid* [124], [151].

<sup>90</sup> *Ibid* [155]–[156].

<sup>91</sup> *Ibid* [156].

<sup>92</sup> *Ibid*.

<sup>93</sup> *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170, 170.

<sup>94</sup> *Nigro v Secretary to Department of Justice* (2013) 41 VR 359, [162].

<sup>95</sup> *Ibid* [163].

*v Secretary to Department of Justice*.<sup>96</sup> The standard of proof in Queensland and the Northern Territory therefore requires that the court is satisfied by acceptable, cogent evidence and to a high degree of probability that the offender is a serious danger to the community. The *Briginshaw* principle applies to this standard, requiring that an indefinite sentence ‘be imposed only on the basis of the most comprehensive and robust evidence.’<sup>97</sup> This standard is ‘well above the civil standard and approaching the criminal standard.’<sup>98</sup>

6.2.9 Given that the standard of proof in Victoria, Queensland and the Northern Territory is approaching the criminal standard,<sup>99</sup> it is arguable that this standard is higher than that in Tasmania.<sup>100</sup> The *Sentencing Act 1997* (Tas) requires only that the judge be ‘of the opinion’. However, it is clear from the reported decisions that the courts in Tasmania apply common law principles relating to the exercise of the discretion.<sup>101</sup> The common law principles, espoused in *Chester v R*<sup>102</sup> (discussed above at [4.15]), embrace a higher threshold than that apparently mandated by the Act. The principles in *Chester v R* require ‘that the sentencing judge be clearly satisfied by cogent evidence that the convicted person is a constant danger to the community.’<sup>103</sup> In Victoria, Queensland and the Northern Territory the standard of proof prescribed by the respective Acts derives from *Chester v R*.<sup>104</sup> Consequently, as the courts in Tasmania apply the *Chester v R* principles, the Tasmanian standard is, in effect, consistent with other jurisdictions.<sup>105</sup>

### ***Problematic aspects***

6.2.10 The *Sentencing Act 1997* (Tas) ostensibly prescribes a lower standard of proof for imposition than in most other jurisdictions. Legislation which provides courts with the exceptional power to order indefinite detention should reflect the gravitas of such orders. A legislative prescription requiring a higher standard of proof for imposition is therefore desirable, given the extraordinary nature of indefinite detention. Furthermore, the common law principles in *Chester v R*<sup>106</sup> mandate a higher standard than that apparently prescribed by the Act. Consequently, there is an apparent inconsistency between the legislative prescriptions and judicial practice. Such inconsistencies are undesirable.

### ***Recommendations for reform***

6.2.11 It is recommended that the *Sentencing Act 1997* (Tas) be amended to make explicit provision for the standard of proof for the imposition of a dangerous criminal declaration. The recommended

<sup>96</sup> *R v Hatten* [2008] QSC 320, [29]; *R v Fraser* [2001] QCA 187, [66]; *Green v The Queen* [2001] NTSC 2, [41]; *Green v The Queen* [2004] NTSC 65, [25]; *Murray v The Queen* [2006] NTCCA 09, [16].

<sup>97</sup> Mackenzie and Stobbs, above n 10, 204.

<sup>98</sup> *Nigro v Secretary to Department of Justice* (2013) 41 VR 359, [156].

<sup>99</sup> *Ibid*; see also *Carolan v The Queen* [2015] VSCA 167, [83]; *Green v R* [2000] NTCCA 1, [24]–[25].

<sup>100</sup> Western Australia arguably has a lower standard of proof. Section 98(2) of the *Sentencing Act 1995* (WA) requires that the court be satisfied on the balance of probabilities. The principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336 applies to this standard (*Pendleton v The Queen* [2002] WASCA 4, [24]; Mackenzie and Stobbs, above n 10, 204).

<sup>101</sup> *R v Minney* (2003) 12 Tas R 46, [32]; *DPP v Phillips* [2006] TASSC 81, [9]–[11]; *DPP v McIntosh* [2013] TASSC 21, [7]–[9].

<sup>102</sup> (1988) 165 CLR 611, 618–619.

<sup>103</sup> *Ibid*, 619.

<sup>104</sup> See *Green v The Queen* [2000] NTCCA 1 where the court stated at [25] that s 71 of the *Sentencing Act 1995* (NT) (the section prescribing the standard of proof) was ‘obviously influenced by the High Court’s reference in *Chester* (1988) 165 CLR 611 at 618 to the requirement for “cogent evidence that the convicted person is a constant danger to the community”’.

<sup>105</sup> Sentencing Advisory Council, above n 7, 42.

<sup>106</sup> (1988) 165 CLR 611, 618–619.

standard is that the court is satisfied by acceptable, cogent evidence and to a high degree of probability that the offender is a serious danger to the community. Such an express higher threshold remedies the apparent inconsistency between the current legislative standards and judicial practice. It also provides consistency with several other jurisdictions, namely Victoria, Queensland and the Northern Territory. The particular wording is chosen to remedy the interpretative difficulties discussed by the court in *Nigro v Secretary to Department of Justice* (2013) 41 VR 359. Hence, the concluding sentence present in the Queensland and Northern Territory Acts, ‘that the evidence is of sufficient weight to justify the finding’, has been omitted. The degree of probability relates to the *factum probandum*, that the offender is a serious danger to society, and the legislation should be worded clearly to reflect this. See Appendix A for a detailed proposed amendment.

## 6.3 Factors to be considered

### *The current law*

6.3.1 The legislation authorising indefinite detention across various jurisdictions lists factors to be considered when determining whether to impose an indefinite sentence. Sections 19(2)(a)–(d) of the *Sentencing Act 1997* (Tas) provide a non-exhaustive list of factors that the judge may consider in exercising the discretion. The listed factors are the nature and circumstances of the crime, the offender’s antecedents or character, medical and other opinion, and any other matter that the judge considers relevant.

6.3.2 In Victoria, the relevant section is s 18B(2), which provides the factors as follows:

- (a) whether the nature of the offence is exceptional;
- (b) anything relevant to the determination which is contained in the certified transcript of any proceeding against the offender in relation to a serious offence;
- (c) any medical, psychiatric or other relevant report;
- (d) the risk of serious danger to members of the community if an indefinite sentence were not imposed;
- (e) the need to protect members of the community from the risk referred to in paragraph (d); and
- (f) any other matters that the court thinks fits.

6.3.3 The Queensland and Northern Territory statutes have near identical wording. In these jurisdictions, the listed factors are the same as the Victorian legislation save for the omission of the factors set out in subsection (b) and the inclusion of an additional consideration, ‘the offender’s antecedents, age and character.’<sup>107</sup>

6.3.4 There are several important differences between the provisions in other jurisdictions and those in Tasmania. The Tasmanian section is not mandatory in that it provides that the judge ‘*may* have regard to’ the listed factors.<sup>108</sup> Other jurisdictions mandate that the court *must* consider the listed factors.<sup>109</sup> Furthermore, the legislation in other jurisdictions provides for a more comprehensive list of factors to

<sup>107</sup> *Penalties and Sentences Act 1992* (Qld) ss 163(4)(a)–(e); *Sentencing Act 1995* (NT) ss 65(9)(a)–(e).

<sup>108</sup> *Sentencing Act 1997* (Tas) s 19(2).

<sup>109</sup> *Sentencing Act 1991* (Vic) s 18B(2); *Penalties and Sentences Act 1992* (Qld) s 163(4); *Sentencing Act 1995* (NT) s 65(9); *R v Garland* [2014] QCA 3 [56].

be considered, including the risk of serious harm to members of the community if an indefinite sentence were not imposed and the need to protect members of the community from that risk.<sup>110</sup> These factors are absent from the Tasmanian legislation. In addition, although the Tasmanian provision provides that the judge may consider ‘the nature and circumstances of the offence’,<sup>111</sup> other jurisdictions require the court to consider ‘whether the nature of the offence is exceptional.’<sup>112</sup> This arguably emphasises the extraordinary nature of an indefinite sentence, reinforcing that it should only be used in exceptional cases.

### ***Problematic aspects***

6.3.5 Given the exceptionality of an order for indefinite detention, clear legislative guidance as to when such orders may be made, is desirable. A comprehensive and mandatory list of factors to be considered ensures the court is appropriately guided in the exercise of the discretion and gives effect to the intention of Parliament. The absence of this comprehensive and mandatory list of factors in the *Sentencing Act 1997* (Tas) is, therefore, undesirable. Common law requires that the power to order an indefinite sentence is exercised only in exceptional circumstances. Therefore, despite the absence of a legislative requirement of exceptionality, the ‘judiciary has indicated that the case must be exceptional for the court to override the fundamental sentencing principle of proportionality.’<sup>113</sup> However, as with the standard for imposition discussed above, it is preferable that legislation is consistent with judicial practice.

### ***Recommendations for reform***

6.3.6 It is recommended that the *Sentencing Act 1997* (Tas) be amended to provide a more comprehensive list of factors, including whether the offence is exceptional. The Act should require the court to consider the risk of serious harm to members of the community if an indefinite sentence were not imposed and the need to protect members of the community from that risk. Further, consideration of the listed factors should be mandatory, rather than discretionary. These recommendations ensure conformity with judicial practice, as well as uniformity with other jurisdictions. See Appendix A for a detailed proposed amendment.

## **6.4 Judge imposing the declaration**

### ***The current law***

6.4.1 Section 19(1) envisages that a dangerous criminal declaration need not be made at the time of conviction or sentencing. The relevant part of the section reads ‘[a] judge before whom an offender is convicted or brought up for sentence after being convicted may declare the offender to be a dangerous criminal...’ To date, every application for a dangerous criminal declaration has been made at the time of sentencing. In some cases, the application has been heard several years after the offender was

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<sup>110</sup> *Sentencing Act 1991* (Vic) s 18B(2)(d), (e); *Penalties and Sentences Act 1992* (Qld) s 163(4)(d), (e); *Sentencing Act 1995* (NT) s 65(9)(d), (e).

<sup>111</sup> *Sentencing Act 1997* (Tas) s 19(2)(a).

<sup>112</sup> *Sentencing Act 1991* (Vic) s 18B(2)(a); *Penalties and Sentences Act 1992* (Qld) s 163(4)(a); *Sentencing Act 1995* (NT) s 65(9)(a).

<sup>113</sup> Sentencing Advisory Council, above n 7, 42; *R v Minney* (2003) 12 Tas R 46, [34].

sentenced.<sup>114</sup> However, this has been due to the application (which was made at the time of sentencing) being adjourned *sine die*.

6.4.2 In *DPP v Phillips* [2006] TASSC 81, however, Underwood CJ noted at [5] that, despite the adjournment, a fresh application for a declaration had been made. His Honour noted that ‘because jurisdiction is conferred (inter alia) upon “the judge before whom an offender is convicted”, the declaration does not have to be made at the time of imposition of sentence.’<sup>115</sup> Thus, his Honour interpreted the section as providing that the judge before whom the offender is convicted or sentenced may, at any time during the offender’s period of incarceration, hear an application for a dangerous criminal declaration. This, in effect, creates a system of post-sentence preventative detention. The TLRI has further noted that ‘dangerous offender applications under s 19 of the *Sentencing Act 1997* can be made during a term of imprisonment as well as at the same time that the term of imprisonment is imposed. In effect, Tasmania already has a post-sentence preventive detention scheme.’<sup>116</sup>

6.4.3 Although the section ostensibly enables the declaration to be made at any time during the offender’s sentence, in reality its operation is limited. Currently the legislation provides that an application must be made to the judge before whom the offender is convicted or brought up for sentence after being convicted.<sup>117</sup> The Act therefore imposes temporal restraints on the availability of a declaration as it cannot be made if the convicting or sentencing judge ceases to hold office during the offender’s term of imprisonment.<sup>118</sup>

### ***Problematic aspects***

6.4.4 While it is outside the scope of this paper to conduct an in depth critical analysis of post-sentence preventative detention regimes generally, because the Tasmanian scheme establishes such a regime in addition to the indefinite detention regime, it is necessary to explore briefly the issues arising from such a dual scheme.

6.4.5 The *Sentencing Act 1997* (Tas) does not explicitly extend to post-sentence preventative detention orders.<sup>119</sup> Rather, as outlined above, the post-sentence aspect of the scheme flows from the interpretation of the wording in s 19(1). It is in the interests of justice that legislation that abrogates fundamental rights be explicitly worded and unambiguous in this regard. Post-sentence preventive detention is an extraordinary power and has been subject to extensive criticism. These criticisms are discussed in more detail above, however, to re-iterate briefly, post-sentence preventative detention offends the principles of proportionality and finality in sentencing.<sup>120</sup> It carries the associated difficulties of predicting future risk,<sup>121</sup> and some suggest it amounts to double punishment, and is inconsistent with international human rights principles against arbitrary detention.<sup>122</sup> Given the extraordinary nature of

<sup>114</sup> *DPP v McIntosh* [2013] TASSC 21; *DPP v Phillips* [2006] TASSC 81.

<sup>115</sup> *DPP v Phillips* [2006] TASSC 81, [4].

<sup>116</sup> TLRI, above n 1, 42.

<sup>117</sup> *Sentencing Act 1997* (Tas) s 19(1).

<sup>118</sup> TLRI, above n 1, 43; Sentencing Advisory Council, above n 7, 107.

<sup>119</sup> Sentencing Advisory Council, above n 7, 107, 108.

<sup>120</sup> *Ibid* 107; TLRI, above n 1, 213–214; McScherry, Keyzer and Freiberg, above n 3, 79–82.

<sup>121</sup> Sentencing Advisory Council, above n 7, 107; TLRI, above n 1, 213–214; McScherry, Keyzer and Freiberg, above n 3, 79–82.

<sup>122</sup> Sentencing Advisory Council, above n 7, 107; TLRI, above n 1, 213–214; McScherry, Keyzer and Freiberg, above n 3, 79–82.

post-sentence preventative detention, any legislation authorising such an extreme power should be explicit in its terms; anything less is undesirable.

6.4.6 Furthermore, as outlined above, the scope of the post-sentence preventative detention scheme is, in practice, limited by the wording of s 19(1) as it requires that the declaration is made by the judge before whom the offender is convicted or sentenced. This may create issues for the imposition of a dangerous criminal declaration during an offender's sentence if the convicting or sentencing judge has ceased to hold office during the offender's term of imprisonment.<sup>123</sup>

### ***Recommendations for reform***

6.4.7 It is recommended that the *Sentencing Act 1997* (Tas) be amended to clarify that it is intended to create both an indefinite (at the time of sentencing) detention regime, as well as a post-sentence preventative detention regime. If it is the intention of Parliament to retain such a dual-scheme, the Act should reflect this intention. The TLRI has previously recommended that s 19 be amended to remedy the potential issues arising where the convicting or sentencing judge is not available to hear the application.<sup>124</sup> A recommended amendment would see a sub-section inserted providing that where a post-sentence application is made and the convicting/sentencing judge has ceased to hold office, or other special circumstances exist such that she or he is not available, another judge may hear the application for the dangerous criminal declaration.

## **6.5 No distinction between sex offenders and other violent offenders**

6.5.1 Sentencing for sex offenders tends to give rise to particular public concern.<sup>125</sup> Consequently, some jurisdictions have introduced special indefinite detention schemes for sex offenders.<sup>126</sup> This section considers whether such an approach is warranted for Tasmania and how the current regime applies to sex offenders.

### ***Rationale***

6.5.2 The introduction of provisions specifically for sex offenders is often justified on the basis of high recidivism rates for sex offenders.<sup>127</sup> However, studies indicate that the base recidivism rate for sex offending is relatively low.<sup>128</sup> Even accounting for the low detection and reporting rates associated with sex offending, research indicates that sex offenders typically have lower rates of recidivism than other classes offenders.<sup>129</sup> Even without treatment, studies have indicated that the majority of sex offenders will not reoffend.<sup>130</sup> The TLRI concluded in its 2008 *Sentencing Report* that '[t]he research

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<sup>123</sup> Sentencing Advisory Council, above n 7, 107; see also TLRI, above n 1, 43.

<sup>124</sup> TLRI, above n 1, 43.

<sup>125</sup> Ibid 204.

<sup>126</sup> Queensland (*Criminal Law Amendment Act 1945* (Qld)) and South Australia (*Criminal Law (Sentencing) Act 1988* (SA)).

<sup>127</sup> TLRI, above n 1, 206; see also for example a discussion of the debate on the introduction of the *Serious Sex Offenders Monitoring Act 2005* (Vic) discussed in Kate Warner, 'Sentencing Review 2004-2005' (2005) 29(6) *Criminal Law Journal* 355.

<sup>128</sup> Denise Lievore, 'Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy' (Australian Institute of Criminology, 2004) 24.

<sup>129</sup> Karen Gelb, 'Recidivism of Sex Offenders Research Paper' (Sentencing Advisory Council, 2007) 21.

<sup>130</sup> Sentencing Advisory Council, 'Mandatory Treatment for Sex Offenders' (Research Paper No. 1, November 2016) 14.

evidence suggests that special provisions targeting sex offenders cannot be justified on the grounds that sex offenders are more likely to re-offend than other categories of offenders.<sup>131</sup>

6.5.3 A second rationale for the introduction of special provisions is the particularly devastating impact sex offending can have on victims/survivors.<sup>132</sup> Sex offending can cause significant harm to victims, in ways different to other violent crimes.<sup>133</sup> This unique harm can result in a desire for increased sentences, in recognition of the gravity of the harm caused. However, differentiating between sex offending and other violent offending in an indefinite detention regime will not result in increased sentences, or different outcomes for offenders, because the sentence will be indefinite, regardless.<sup>134</sup> Further, the majority of offenders currently subject to dangerous criminal declarations in Tasmania are sex offenders. Therefore, the introduction of a separate indefinite detention regime for sex offenders does not create any additional or different sentencing options to those currently available.<sup>135</sup>

6.5.4 Thirdly, the creation of a separate regime for sex offenders may be seen as an acknowledgment of the particular abhorrence the community typically feels towards sex offenders.<sup>136</sup> As the Sentencing Advisory Council notes, ‘recent legislative responses to sexual offending in other jurisdictions tend to be underpinned by “penal populism”, a term which describes “the way in which politicians can tap into public concerns about crime to their political advantage.”’<sup>137</sup> The Council goes on to caution however, that ‘punitive attitudes are generally linked with myths and misconceptions about crime and justice and that the desire for harsher sentencing that is evident in opinion polls needs to be heavily qualified.’<sup>138</sup> A more nuanced assessment of public opinion reveals that an informed public generally views sentencing of sex offenders, with the exception of child sex offenders, to be appropriate.<sup>139</sup> Thus, as Civil Liberties Australia notes, ‘trying to align sentences for sex offences with public opinion is highly problematic, and, potentially, ultimately fruitless.’<sup>140</sup>

6.5.5 A final justification for the introduction of indefinite detention schemes specifically directed at sex offenders is to facilitate access to treatment programs and rehabilitation. Indefinite and preventative detention regimes are generally primarily directed at protection of the public. However, a secondary purpose of such regimes is rehabilitation and re-integration of offenders.<sup>141</sup> It may be argued that, by creating an indefinite detention regime specifically directed at sex offenders, their particular rehabilitative needs may be targeted. However, it is suggested that, irrespective of whether the subject of the dangerous criminal declaration is a sex offender or another violent offender, the rehabilitative aims of indefinite detention are important. The indefinite detention regime is governed by the purposes of the *Sentencing Act 1997* (Tas), and thus dangerous criminal declarations are necessarily directed at

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<sup>131</sup> TLRI, above n 1, 207.

<sup>132</sup> Ibid.

<sup>133</sup> Sentencing Advisory Council, above n 7, 66–7.

<sup>134</sup> *Evans* (1999) 8 Tas R 325; TLRI, above n 1, 206.

<sup>135</sup> TLRI, above n 1, 42, 214.

<sup>136</sup> Ibid 207.

<sup>137</sup> John Pratt, *Governing the Dangerous* (Federation Press, 1997); Arie Freiberg, Hugh Donnelly and Karen Gelb, ‘Sentencing for Child Sexual Abuse in Institutional Contexts’ (Royal Commission into Institutional Responses to Child Sexual Abuse, July 2015) 17; Sentencing Advisory Council, above n 7, 74.

<sup>138</sup> Sentencing Advisory Council, above n 7, 64; Freiberg, Donnelly and Gelb, above n 137, 132.

<sup>139</sup> Kate Warner et al, ‘Measuring Jurors’ Views on Sentencing: Results from the Second Australian Jury Sentencing Study’ online first (July 2016) *Punishment & Society* 1, 15.

<sup>140</sup> Sentencing Advisory Council, above n 7, 74, quoting from the submission from Civil Liberties Australia – Tasmania, May 2013.

<sup>141</sup> Sentencing Advisory Council, above n 7, 106.

rehabilitation of offenders as well as protection of the community.<sup>142</sup> Sex offenders in Tasmania are currently able to participate in the New Directions program.<sup>143</sup> This program, which draws on programs from Queensland, New South Wales and Victoria, is specifically designed for sex offenders and involves a minimum nine-month participation, incorporating group and cognitive behavioural therapy treatment.<sup>144</sup>

### ***The current law***

6.5.6 Two jurisdictions (Queensland and South Australia) have indefinite detention regimes which apply specifically to sex offenders.<sup>145</sup> In Queensland, the power to order indefinite sentences for sex offenders operates alongside the power to order indefinite detention for other offenders under the *Penalties and Sentences Act 1991* (Qld). The *Criminal Law Amendment Act 1945* (Qld) empowers the Attorney-General to apply for an order to detain indefinitely a sex offender convicted of a sexual offence against a person under 16 years old where there is evidence that the offender is incapable of exercising proper control over his or her sexual instincts and that this incapacity is curable.<sup>146</sup> For an indefinite sentence to be imposed, it must also be ‘desirable’ that the offender be detained after the expiration of the sentence to continue treatment.<sup>147</sup> In addition to an indefinite detention order made at the time of sentencing, the Act enables an order to be made during the term of the offender’s imprisonment, although this power has not been exercised to date.<sup>148</sup>

6.5.7 In South Australia, s 23 of the *Criminal Law (Sentencing) Act 1988* (SA) provides that offenders may be detained indefinitely if they are incapable of controlling, or unwilling to control, their sexual instincts. Like the Queensland regime, this section enables the Attorney-General to apply for an indefinite detention order during the offender’s sentence (thus operating as a preventative detention regime). However, McSherry et al suggest that, in practice, the section is principally directed at declarations of indefinite detention at the time of sentencing.<sup>149</sup> The court is specifically empowered to make such a declaration under s 23(6). It is pertinent to note that the indefinite detention provisions in South Australia apply *only* to sex offenders, and there are no equivalent provisions for other violent offenders.

### ***Problematic aspects***

6.5.8 Legislation in other jurisdictions that provides for indefinite detention of sex offenders has been subject to criticism. Key issues are explored briefly here. The principal concern with the Queensland legislation is that the scheme does not apply to those offenders who are incapable of controlling their sexual instincts and incapable of being cured, nor does it apply to those capable of controlling their

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<sup>142</sup> Ibid 41.

<sup>143</sup> Sentencing Advisory Council, above n 130, 17.

<sup>144</sup> Ibid.

<sup>145</sup> It is pertinent to note that, while it is only these two jurisdictions which provide for indefinite detention regimes for sex offenders specifically, there are further provisions for post-sentence preventative detention in other jurisdictions. Queensland (*Dangerous Offenders (Sexual Offenders) Act 2003* (Qld)), New South Wales (*Crimes (Serious Sex Offenders) Act 2006* (NSW)), Western Australia (*Dangerous Sexual Offenders Act 2006* (WA)), and the Northern Territory (*Serious Sex Offenders Act 2013* (NT)) have all introduced such legislation.

<sup>146</sup> *Criminal Law Amendment Act 1945* (Qld) s 18.

<sup>147</sup> Ibid s 18(4)(c).

<sup>148</sup> McSherry, Keyzer and Freiberg, above n 3, 21.

<sup>149</sup> Ibid 22.

sexual instincts but who choose not to.<sup>150</sup> It applies only to a smaller subset of offenders: those incapable of controlling their sexual instincts, but capable of being cured. Research indicates that sex offenders are a heterogeneous group,<sup>151</sup> and that offenders respond differently to various forms of treatment and intervention.<sup>152</sup> Accordingly, legislation that purports to target sex offenders generally as a homogeneous group, yet applies only to a niche cohort of offenders, is problematic. Consequently, the Act was described by Queensland's then Attorney-General and Minister for Justice as being 'archaic and out of touch with community standards'.<sup>153</sup> The South Australian scheme remedies some of these concerns in that it applies to offenders unwilling to exercise control over their sexual instincts.

6.5.9 Although the South Australian regime remedies many of the deficiencies of the Queensland regime, it operates in a different context to other jurisdictions. In South Australia, prior to the enactment of the indefinite detention regime for sex offenders there was no pre-existing indefinite detention legislation for other violent offenders. Courts lacked the power to order indefinite detention and there was consequently an identifiable legislative gap. Unlike South Australia, Tasmania already has an indefinite detention regime, which undisputedly applies to sex offenders.<sup>154</sup> In fact, the majority of offenders currently subject to dangerous criminal declarations in Tasmania are sex offenders. In the absence of pre-existing powers to order indefinite detention in South Australia, the need for some form of indefinite detention regime for sex offenders was more apparent. As Tasmania already has such an indefinite detention regime, it is inappropriate to draw analogies between the two jurisdictions. The TLRI has previously recommended against introducing indefinite or preventative detention provisions which apply specifically to sex offenders, 'on the grounds that existing provisions for preventive detention and monitoring of released sexual offenders are adequate'.<sup>155</sup>

6.5.10 As outlined above (at [6.5.4]), much of the rationale for introducing separate provisions for sex offenders is based on penal populism, misinformed community attitudes about sentencing, and incorrect assumptions about recidivism rates for sex offending. The absence of a justifiable rationale for introducing separate provisions for sex offenders strongly militates against the introduction of such provisions. Furthermore, given that the current legislation has been used, in practice, largely for sex offenders, the absence of a distinction between sex offenders and other violent offenders is unproblematic.

### ***Recommendations for reform***

6.5.11 It is recommended that, provided the current Act is modernised to remedy existing deficiencies outlined elsewhere in this paper, introducing separate provisions for sex offenders is not necessary. In its 2015 report on sex offence sentencing, the Sentencing Advisory Council recommended that a separate scheme could be created.<sup>156</sup> However, the principal justification for this was the deficiencies in the existing indefinite detention provisions in the *Sentencing Act 1997* (Tas).<sup>157</sup> The Council's preliminary view was that the introduction of an entirely new replacement scheme was the preferred

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<sup>150</sup> Explanatory Memorandum, Dangerous Prisoners (Sexual Offenders) Bill 2003 (Qld), 2.

<sup>151</sup> Sentencing Advisory Council, above n 130, 31.

<sup>152</sup> Ibid.

<sup>153</sup> Queensland, Parliamentary Debates, Legislative Assembly, 3 June 2003, 2484 (Rod Welford, Attorney-General and Minister for Justice).

<sup>154</sup> TLRI, above n 1, 206.

<sup>155</sup> Ibid 215, see also 42, 211.

<sup>156</sup> Sentencing Advisory Council, above n 7, 107.

<sup>157</sup> Ibid.

approach to modernise the law.<sup>158</sup> In the alternative, the Council recommended that the current legislation should be clarified and modernised.<sup>159</sup>

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<sup>158</sup> Ibid.

<sup>159</sup> Ibid 107–8.

## Part 7

# Discharging the Declaration

### 7.1 Test for discharge of declaration

#### *The current law*

7.1.1 Section 20 of the *Sentencing Act 1997* (Tas) governs the discharge of a dangerous criminal declaration. The scheme prescribed by this section is different to that of other jurisdictions in several important respects. Firstly, the circumstances in which an application for the discharge of a dangerous criminal declaration occurs is vastly different. In Tasmania, the only means by which an indefinite sentence may be discharged is on application by the offender.<sup>160</sup> If the offender does not initiate this application process, the dangerous criminal declaration remains in place and the offender remains incarcerated indefinitely. Most other jurisdictions with equivalent legislation provide for a system of periodic review.<sup>161</sup> Generally, a review is conducted upon the offender having served 50 per cent of her or his nominal sentence.<sup>162</sup> In some jurisdictions, further reviews are undertaken at subsequent two year intervals.<sup>163</sup> Conducting such a review is mandatory and is not dependent on the offender's initiation or participation.<sup>164</sup> The purpose of the review is to determine whether the offender remains a danger to society such that the indefinite sentence is still warranted.<sup>165</sup> Thus, unlike in Tasmania, the indefinite sentence will be reviewed in the absence of any action by the offender and may be discharged. The implications of the absence of provisions in Tasmania for periodic review are discussed below at [7.1.8].

7.1.2 Secondly, in Tasmania, in making the application for the discharge of the declaration, the offender bears the onus of proof.<sup>166</sup> It is a legal burden (not merely an evidentiary burden) as the offender 'bears the risk of losing the case if there is a failure to persuade the trier of fact that a proposition has been made out.'<sup>167</sup> The offender must produce sufficient evidence to satisfy the court that the declaration is no longer warranted for the protection of the public.<sup>168</sup> The prosecution is not required to produce any evidence. If the offender fails to discharge this burden, she or he remains incarcerated. In all other jurisdictions with equivalent legislation, the prosecution retains the onus of proving that the offender remains a danger to society.<sup>169</sup> The prosecution retains this onus irrespective of whether the review is

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<sup>160</sup> Section 20(2) of the *Sentencing Act 1997* (Tas) provides that an offender, having served a term of imprisonment equal to the non-parole period of his or her sentence, may make an application for discharge of a dangerous criminal declaration.

<sup>161</sup> *Sentencing Act 1995* (NT) s 72; *Sentencing Act 1991* (Vic) s 18H; *Penalties and Sentences Act 1992* (Qld) s 171.

<sup>162</sup> *Sentencing Act 1991* (Vic) s 18H; *Penalties and Sentences Act 1992* (Qld) s 171; *Sentencing Act 1995* (NT) s 72.

<sup>163</sup> *Sentencing Act 1995* (NT) s 72; *Penalties and Sentences Act 1992* (Qld) s 171.

<sup>164</sup> *R v Fletcher* [2011] QSC 235 2; *R v Eades* [2006] QDC 171, 14; *R v Dobbs* [2015] QDC 64, [2].

<sup>165</sup> *R v Eades* [2006] QDC 171, 2; *R v Garland* [2012] QDC 228, [2].

<sup>166</sup> *Bell v Tasmania* [2016] TASSC 46, [11]; *Mark Brandon Read* (1997) 94 Crim R 539, 540; *McCrossen v The Queen* [2016] TASSC 3, [40]; *IRS v Tasmania* [2013] TASSC 66, [33].

<sup>167</sup> Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 3<sup>rd</sup> ed, 2010) 137; see also *Woolmington v DPP* [1935] AC 462, 482 (Viscount Sankey LC).

<sup>168</sup> *Sentencing Act 1997* (Tas) s 20(3); *Mark Brandon Read* (1997) 94 Crim R 539, 540.

<sup>169</sup> Specifically, in Victoria, Queensland and the Northern Territory, see: *Carolyn v The Queen* [2015] VSCA 167, [64]; *Green v The Queen* [2001] NTSC 2, [14]; *R v Eades* [2008] QDC 124, [4]; *R v Smith* (Unreported, QDC, 2008) 261, [15]; *R v Eades* [2006] QDC 171, 2; *R v Stone* [2015] QDC 310, [19]; *R v Dobbs* [2015] QDC 64, [6]; *R v Garland* [2012] QDC 228, [15]; *R v Stone* [2011] QDC [8].

conducted on a periodic basis, or whether the offender makes the application for review.<sup>170</sup> Beyond being present at the hearing, the offender is not required to participate in the review process. She or he is not required to present any evidence or to cross examine any Crown witnesses.<sup>171</sup> If the prosecution fails to discharge this burden, the indefinite sentence is discharged as of right.<sup>172</sup> If the prosecution satisfies the court that the offender is still a serious danger to society then the indefinite sentence remains in place until a subsequent review is conducted in two years' time.<sup>173</sup>

7.1.3 Finally, the test for discharge and the standard of proof on an application for discharge of a dangerous criminal declaration are different in Tasmania as compared with other jurisdictions. Section 20 of the *Sentencing Act 1997* (Tas) provides the test for the discharge of a dangerous criminal declaration. The section requires the court to be satisfied that the declaration is no longer warranted for the protection of the public. This requires that the offender 'demonstrate some alteration in the circumstances which justifies a change from [the sentencing judge] having been of the opinion that the declaration was warranted for the protection of the public to [the judge] being satisfied it is no longer warranted for that purpose.'<sup>174</sup> In subsequent applications this has been held to impose a high threshold.<sup>175</sup> The standard of proof on an application for discharge is not provided for in the Act, nor has it been enunciated by the courts. However, it can be inferred that the standard is a high one, as courts have expressed the view that applicants may face 'significant hurdles' in achieving discharge.<sup>176</sup>

7.1.4 In other jurisdictions, the test for discharge of a dangerous criminal declaration is the same as the test for the initial imposition of the declaration: the prosecution must satisfy the court that the offender remains a serious danger to the community.<sup>177</sup> If the prosecution fails to do so then the declaration is discharged.<sup>178</sup> The evaluation of dangerousness is to be made with reference to the section which governs the imposition of an indefinite sentence.<sup>179</sup> Hence, the court must consider the mandatory factors to be taken into account when determining whether to impose an indefinite sentence. These factors are:

- (a) whether the nature of the offence is exceptional;
- (b) the offender's antecedents, age and character;
- (c) any medical, psychiatric or other relevant report;

<sup>170</sup> *Carolán v The Queen* [2015] VSCA 167, [64]; *Green v The Queen* [2001] NTSC 2, [14]; *R v Eades* [2008] QDC 124, [4]; *R v Smith* (Unreported, QDC, 2008) 261, [15]; *R v Eades* [2006] QDC 171, 2; *R v Stone* [2015] QDC 310, [19]; *R v Dobbs* [2015] QDC 64, [6]; *R v Garland* [2012] QDC 228, [15]; *R v Stone* [2011] QDC [8].

<sup>171</sup> *Green v The Queen* [2001] NTSC 2, [31]; *R v Eades* [2006] QDC 171, 3, 124, [9]; *R v Fletcher* [2011] QSC 235, 2.

<sup>172</sup> *R v Eades* [2006] QDC 171, 4–5; *R v Garland* [2014] QCA 3, [60].

<sup>173</sup> *Penalties and Sentences Act 1992* (Qld) s 171(1)(b); *Sentencing Act 1995* (NT) s 72(1)(b).

<sup>174</sup> *Mark Brandon Read* (1997) 94 Crim R 539, 540.

<sup>175</sup> *Bell v Director of Public Prosecutions* [2011] TASSC 61; *Bell v Tasmania* [2016] TASSC 46; *McCrosen v The Queen* [2016] TASSC 3; *IRS v Tasmania* [2013] TASSC 66.

<sup>176</sup> *McCrosen v The Queen* [2016] TASSC 3, [36]. It is also pertinent to note that to date there has only been one successful application for discharge of a dangerous criminal declaration (*Mark Brandon Read* (1997) 94 Crim R 539), indicating that the standard for discharge is high.

<sup>177</sup> *Sentencing Act 1991* (Vic) s 18M; *Penalties and Sentences Act 1992* (Qld) s 173; *Sentencing Act 1995* (NT) s 74.

<sup>178</sup> *Sentencing Act 1991* (Vic) s 18M; *Penalties and Sentences Act 1992* (Qld) s 173; *Sentencing Act 1995* (NT) s 74.

<sup>179</sup> *Carolán v The Queen* [2015] VSCA 167, [63]; *R v Dobbs* [2015] QDC 64, [4]; *R v Fletcher* [2011] QSC 235, 2–3; *R v Eades* [2006] QDC 171, 4; *R v Garland* [2012] QDC 228, [17]–[18]; *R v Stone* [2015] QDC 310, [17]; *Green v The Queen* [2001] NTSC 2, [16].

- (d) the risk of serious danger to members of the community if an indefinite sentence were not imposed;
- (e) the need to protect members of the community from the risk referred to in paragraph (d); and
- (f) any other matters that the court thinks fits.<sup>180</sup>

7.1.5 The legislation in other jurisdictions does not explicitly provide for the standard of proof on a review of an indefinite sentence. However, it has been held to be that provided for by the section applicable to the imposition of the sentence.<sup>181</sup> Consequently, the standard is generally that the court be satisfied by acceptable and cogent evidence and to a high degree of probability that the offender is a serious danger to the community.<sup>182</sup> This standard of proof applies in Victoria, Queensland and the Northern Territory.<sup>183</sup>

7.1.6 The standard of proof across the abovementioned jurisdictions is discussed in detail above at [6.2]. However, it is pertinent to reiterate several key relevant points. The standard derives from the High Court case of *Chester v R* where the court stated that the sentencing judge must ‘be clearly satisfied by cogent evidence that the convicted person is a constant danger to the community’.<sup>184</sup> This standard is ‘well above the civil standard and approaching the criminal standard.’<sup>185</sup> The fundamental difference between Tasmania and other jurisdictions is that in Tasmania it is the offender who must discharge this high burden. In other jurisdictions, the prosecution retains the burden.

### ***Problematic aspects***

7.1.7 Incarceration infringes upon the fundamental human right to liberty.<sup>186</sup> This deprivation of liberty is only justified by a finding of criminal guilt.<sup>187</sup> It is the role of the prosecution to justify an offender’s incarceration by proving the offender’s guilt beyond reasonable doubt.<sup>188</sup> Where legislation imposes a legal burden of proof on a defendant, the standard is almost invariably the lower standard of ‘on the balance of probabilities’.<sup>189</sup> The principle of proportionality prevents a judge from imposing a

<sup>180</sup> *Sentencing Act 1991* (Vic) s 18B(2); *Penalties and Sentences Act 1992* (Qld) ss 163(4)(a)–(e); *Sentencing Act 1995* (NT) ss 65(9)(a)–(e).

<sup>181</sup> Specifically, in Queensland and the Northern Territory, see: *Green v The Queen* [2001] NTSC 2, [14], QDC 124, [4]; *R v Smith* (Unreported, QDC, 2008) 261, [15]; *R v Eades* [2006] QDC 171, 2; *R v Stone* [2015] QDC 310, [19]; *R v Dobbs* [2015] QDC 64, [6]; *R v Garland* [2012] QDC 228, [15]; *R v Stone* [2011] QDC, [8].

<sup>182</sup> *Penalties and Sentences Act 1992* (Qld) s 170; *Sentencing Act 1995* (NT) s 71; *Sentencing Act 1991* (Vic) s 18M.

<sup>183</sup> In Western Australia, the standard of proof is the balance of probabilities: *Sentencing Act 1995* (WA) s 98(2).

<sup>184</sup> (1988) 165 CLR 611, 619. See *Green v The Queen* [2000] NTCCA 1 where the court stated at [25] that s 71 of the *Sentencing Act 1995* (NT) (the section prescribing the standard of proof) was ‘obviously influenced by the High Court’s reference in *Chester* (1988) 165 CLR 611 at 618 to the requirement for “cogent evidence that the convicted person is a constant danger to the community”’.

<sup>185</sup> *Nigro v Secretary to Department of Justice* (2013) 41 VR 359, [156]; see also *Green v R* [2000] NTCCA 1, [24]–[25].

<sup>186</sup> *ICCPR*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Article 9.1; Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 101, 107.

<sup>187</sup> *ICCPR*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Article 9.1; Jeremy Gans et al, above n 186, 101, 107.

<sup>188</sup> Gans et al, above n 186, 454.

<sup>189</sup> Francine Feld, Andrew Hemming and Thalia Anthony, *Criminal Procedure in Australia* (LexisNexis Butterworths, 2015) 519; see also Bronitt and McSherry, above n 167 where the authors note at 137 that ‘[i]n exceptional cases, where the legal burden is placed on the accused (for example, the defence of mental impairment), the lower civil standard, the balance of probabilities, applies.’

sentence which is not commensurate with the offence for which the offender is convicted.<sup>190</sup> Indefinite detention regimes are statutory exceptions to the proportionality principle.<sup>191</sup> These principles mandate that it is the role of the prosecution to justify the incarceration of offenders beyond the expiration of their proportionate sentence. If they fail to do so, the offender is entitled to release as of right.

7.1.8 As outlined above, for those offenders serving indefinite sentences in Tasmania the path to discharge is vastly different to that of other jurisdictions. In other jurisdictions, this path to discharge complies with the principles outlined above as it requires the court to undertake a review of the indefinite sentence, at which point the prosecution must justify the continued incarceration of the offender.<sup>192</sup> The discharge process in Tasmania does not comply with the abovementioned principles. As outlined above, the Tasmanian regime does not provide for a periodic review system. Consequently, an offender may remain incarcerated until such time as she or he initiates the review process. At this review, the offender bears the burden of proving to the court that their continued incarceration is no longer warranted. This legal burden must be discharged at a higher standard than the balance of probabilities standard. This is unique to Tasmania. It is suggested that, as a consequence of requiring the offender to prove, to such a high standard, that their continued incarceration is no longer warranted, the Tasmanian regime is not compliant with fundamental principles of criminal justice.

7.1.9 A final concern with the Tasmanian regime is its lack of guidance for courts considering the discharge of a dangerous criminal declaration. The *Sentencing Act 1997* (Tas) does not provide the standard of proof for such applications. The Act provides that the test for the discharge of a dangerous criminal declaration is that the declaration is no longer warranted for the protection of the public.<sup>193</sup> This has been interpreted to require a ‘demonstrable change in circumstances.’<sup>194</sup> This is a vague test and there is no legislative guidance as to what constitutes this demonstrable change in circumstances.<sup>195</sup> Furthermore, as Tennent J noted in *McCrosen v The Queen*, ‘[t]he Act does not provide for any factors to be considered by the Court for the purpose of determining if it could be satisfied that a declaration is no longer warranted.’<sup>196</sup> In other jurisdictions, the court is required to consider the same mandatory factors it considers on imposition of the indefinite sentence. This provides greater guidance to the court in assessing whether to discharge the sentence.

### ***Recommendations for reform***

7.1.10 Significant amendment is required to ensure the *Sentencing Act 1997* (Tas) conforms with human rights and criminal justice principles. The following amendments would also ensure consistency with other jurisdictions. First, it is recommended that a system of periodic review be implemented (see below, [7.3.9]). It is recommended that the Act be amended to provide that the prosecution bears the onus of proof on an application for imposition of a dangerous criminal declaration, an application for discharge, as well as a periodic review of a dangerous criminal declaration. The recommended standard of proof at each of these stages is that the court be satisfied by acceptable, cogent evidence and to a

<sup>190</sup> *Hoare v The Queen* (1989) 167 CLR 348, 354; TLRI, above n 1, 213; Warner, above n 23, 76.

<sup>191</sup> TLRI, above n 1, 205; Sentencing Advisory Council, above n 7, 41; Bagaric, above n 54, 146; *Chester v R* (1988) 165 CLR 611, 618; *DPP v McIntosh* [2013] TASSC 21, [7]–[9].

<sup>192</sup> *Sentencing Act 1991* (Vic) s 18M; *Penalties and Sentences Act 1992* (Qld) s 173; *Sentencing Act 1995* (NT) s 74.

<sup>193</sup> *Sentencing Act 1997* (Tas) s 20.

<sup>194</sup> *Mark Brandon Read* (1997) 94 Crim R 539, 540; *McCrosen v The Queen* [2016] TASSC 3, [40]; *Bell v Director of Public Prosecutions* [2011] TASSC 61, [11]; *IRS v Tasmania* [2013] TASSC 66, [33].

<sup>195</sup> *McCrosen v The Queen* [2016] TASSC 3, [42].

<sup>196</sup> *Ibid.*

high degree of probability that the offender is a serious danger to the community. This standard conforms with that of Victoria, Queensland and the Northern Territory. The Act should expressly provide for this standard of proof.

7.1.11 Finally, to address the deficiency noted by Tennent J in *McCrosen v The Queen* [2016] TASSC 3 at [42], it is recommended that the Act provide for a list of factors to be considered in determining whether to discharge a dangerous criminal declaration. These factors should be the same as those to be considered when imposing such a declaration in the first instance. This ensures the court has sufficient guidance on the appropriate factors to be considered when determining whether to discharge a dangerous criminal declaration. The listed factors, therefore, should be: whether the nature of the offence is exceptional; the offender's antecedents, age and character; any medical, psychiatric or other relevant report; the risk of serious danger to members of the community if an indefinite sentence were not imposed; the need to protect members of the community from the aforementioned risk; and any other matters that the court thinks fits. See Appendix A for a detailed proposed amendment.

## 7.2 Inability to impose conditions upon discharge of declaration (s 20)

### *The current law*

7.2.1 Section 20(3) of the *Sentencing Act 1997* (Tas) provides that, where an application to discharge the declaration is brought, the court must make the order if satisfied that the declaration is no longer warranted for the protection of the public. The section does not empower the court to impose conditions upon discharge of the declaration.<sup>197</sup> This deficit is unique to Tasmania.

7.2.2 The inability of the court to impose conditions applies both pre- and post-release. The term 'pre-release conditions' is used to refer to conditions imposed upon discharge of a dangerous criminal declaration, but prior to the release of the offender. Pre-release conditions would operate most effectively in the situation where a court determines that, provided an offender completes certain programs, it is satisfied that the offender no longer poses an unacceptable risk to society. The court would be able to discharge the dangerous criminal declaration, but require that the offender remain incarcerated for a specified duration in order to undertake preparatory programs for release. Such conditions might require the offender to undertake, for example, drug and alcohol rehabilitation courses or sex offender treatment programs. Pre-release conditions might also require an offender to undertake leave pursuant to s 42 of the *Corrections Act 1997* (Tas). Section 42 leave enables a prisoner to obtain leave for various purposes, including attendance at family events, or to take part in rehabilitation programs.

7.2.3 At present, participation in any treatment programs and undertaking s 42 leave is voluntary. The court has no power to require either the offender to participate in such a program or the prison to make them available.<sup>198</sup> Pre-release conditions would empower the court to mandate participation in rehabilitation programs and ensure that an offender was released in a staged way, equipped with the necessary skills to return to society. Such conditions would assist in preparing offenders for their release from custody and support offenders in their transition from an institutional setting to community living.

<sup>197</sup> *Bell v Tasmania* [2016] TASSC 46, [46]; *R v McCrosen* [1991] Tas R 1, [53].

<sup>198</sup> *IRS v Tasmania* [2013] TASSC 66, [37].

If an offender breaches any pre-release conditions imposed, her or his release may be postponed or refused.

7.2.4 The term ‘post-release conditions’ refers to conditions imposed upon discharge of a dangerous criminal declaration, which operate post the offender’s release from custody. Post-release conditions would operate in a similar way to parole conditions and may require, for example, continued participation in treatment programs, adherence to particular accommodation arrangements, or adherence to curfews and other restrictions on mobility. In this way, post-release conditions would assist in mitigating the potential risks to the community posed by offenders upon their discharge. The availability of such conditions may assist the court in determining whether risks posed by offenders to the community remain unacceptable or whether they can be overcome.

7.2.5 The first comprehensive Australian study on the effectiveness of parole conditions on reducing reoffending was conducted in 2014.<sup>199</sup> The Australian Institute of Criminology found that there was a ‘significant difference’ in the frequency and seriousness of reoffending between the supervised and unsupervised groups.<sup>200</sup> Offenders subject to parole conditions were less likely to commit new offences, took longer to commit offences, and committed fewer offences than offenders who were released unconditionally.<sup>201</sup> Post-release conditions which operate in a similar way to parole conditions would reduce the risk of recidivism and hence help to mitigate any risks to society posed by offenders formerly subject to a dangerous criminal declaration.

### **Pre-release conditions**

7.2.6 Courts in Tasmania do not have the ability to impose pre-release conditions upon the discharge of a dangerous criminal declaration. Consequently, discharge of a declaration is not possible where a court is of the view that a dangerous criminal declaration might no longer be warranted were an offender to undertake certain pre-release programs.<sup>202</sup> As Tennent J has noted ‘[i]t is not sufficient that the Court may find that the declaration may no longer be warranted if the applicant takes certain steps.’<sup>203</sup> The court must be satisfied as at the date it makes the order, irrespective of any possible further treatment or participation in pre-release programs, that the dangerous criminal declaration is no longer warranted for the protection of the public.<sup>204</sup> It cannot be so satisfied if its view is contingent upon the offender undertaking certain further steps.<sup>205</sup> ‘There is no scope for the making of an order which might see a prisoner released in some sort of staged way to ensure, post-order, that the declaration is no longer warranted.’<sup>206</sup> This is so despite s 21(10) of the *Sentencing Act 1997* (Tas) ostensibly authorising the court to make such a postponed conditional discharge.

7.2.7 Section 21(10) provides:

If the discharge of the declaration would result in the immediate release of the applicant from custody, the court may order that the discharge is not to take effect for such time as it

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<sup>199</sup> Wai-Yin Wan et al, ‘Parole Supervision and Reoffending’ (No 485, Australian Institute of Criminology, September 2014).

<sup>200</sup> Ibid 4.

<sup>201</sup> Ibid 6.

<sup>202</sup> *IRS v Tasmania* [2013] TASSC 66, [4]; *Bell v Tasmania* [2016] TASSC 46, [33]; *McCrosen v The Queen* [2016] TASSC 3, [13].

<sup>203</sup> *IRS v Tasmania* [2013] TASSC 66, [4].

<sup>204</sup> *Bell v Tasmania* [2016] TASSC 46, [33].

<sup>205</sup> *IRS v Tasmania* [2013] TASSC 66, [4].

<sup>206</sup> *Bell v Tasmania* [2016] TASSC 46, [33].

considers necessary for the purpose of enabling the applicant to undergo a pre-release program under the supervision of the DCS.

7.2.8 In *IRS v Tasmania* [2013] TASSC 66 the applicant submitted that s 21(10) enabled an order to be post-dated to allow an offender to participate in programs designed to reintegrate her or him into the community, to undertake leave pursuant to s 42 of the *Corrections Act 1997* (Tas),<sup>207</sup> and to complete other relevant treatment programs. In reply, the respondent submitted that s 21(10) was not designed to facilitate the participation of a prisoner in a rehabilitation program. Rather, ‘[t]he section was designed to allow prisoners to undertake steps to prepare them for release into the community.’<sup>208</sup> Thus ‘the Court would need to be satisfied at the time of making any order that the applicant no longer posed a risk to the public. It was not sufficient that he might not do so at some time in the future.’<sup>209</sup>

7.2.9 The court accepted the respondent’s submission and determined that s 21(10) did not enable a court to impose mandatory pre-release conditions. This is explained further in *McCrosen v The Queen* [2016] TASSC 3. Tennent J stated that, despite s 21(10) enabling the date upon which an order is to take effect to be postponed, ‘the Court still needs to be satisfied about the issue of risk to the public before any order may be made, and cannot make an order in the hope that a pre-release program to be completed after the order is made might remove any risk.’<sup>210</sup> Given this approach, the scope of s 21(10) is extremely limited. Its operation is confined to circumstances in which, despite the court being satisfied that the declaration is no longer warranted for the protection of the public (and hence the offender is entitled to immediate release from custody), the offender voluntarily chooses to remain incarcerated to participate in prison-based programs. As Tennent J noted in *IRS v Tasmania*, the ‘[c]ourt had no power to order either the applicant to take part in any of these activities or the prison authorities to make them available.’<sup>211</sup>

7.2.10 It is unclear whether this was the intended operation of s 21(10). It is possible that Parliament intended the section to enable courts to discharge a dangerous criminal declaration, subject to an offender participating in pre-release programs. However, the section has been interpreted narrowly,<sup>212</sup> and consequently its operation is limited.

### Post-release conditions

7.2.11 The court is also unable to impose conditions post-release. As Tennent J noted in *McCrosen v The Queen*, ‘the Act does not allow the Court to make any type of conditional order which could perhaps be revoked were conditions breached. The order foreshadowed by the legislation creates an all or nothing situation.’<sup>213</sup> Her Honour also commented on this limitation in *Bell v Tasmania* where she stated that ‘[t]here is also no scope for an order with conditions which will provide support and assistance to a prisoner once in the community.’<sup>214</sup> Thus, the court is unable to impose any conditions requiring, for

<sup>207</sup> Section 42 of the *Corrections Act 1997* (Tas) enables a prisoner to obtain leave for various purposes, including attendance at family events, or to take part in rehabilitation programs.

<sup>208</sup> *IRS v Tasmania* [2013] TASSC 66, [39].

<sup>209</sup> *Ibid.*

<sup>210</sup> *McCrosen v The Queen* [2016] TASSC 3, [13].

<sup>211</sup> [2013] TASSC 66, [37].

<sup>212</sup> *IRS v Tasmania* [2013] TASSC 66; *Bell v Tasmania* [2016] TASSC 46; *McCrosen v The Queen* [2016] TASSC 3.

<sup>213</sup> [2016] TASSC 3, [13].

<sup>214</sup> [2016] TASSC 4, [33].

example, an offender to continue participating in a rehabilitation program, or to adhere to certain accommodation requirements.

### Other jurisdictions

7.2.12 All other Australian jurisdictions with indefinite detention regimes provide for the conditional discharge of a dangerous criminal declaration.<sup>215</sup> The Victorian *Sentencing Act 1991* (Vic), for example, requires that a judge discharging a declaration *must* make the offender subject to a five-year re-integration program administered by the Adult Parole Board, as well as issue a warrant to imprison in the same way as if it had sentenced the offender to a term of imprisonment for five years.<sup>216</sup> The provisions of Division 5 of Part 8 (parole) and s 112 (regulations) of the *Corrections Act 1986* (Vic) apply to a re-integration program in the same way that they apply to parole.<sup>217</sup> The re-integration period is treated as though it is a period of imprisonment during which the offender is eligible for parole.<sup>218</sup> Consequently, ‘[d]uring the five year period of the mandated re-integration program, the Board will either not release the appellant into the community or will only do so on conditions which ensure that the appellant will not pose a serious danger to the community.’<sup>219</sup>

7.2.13 As the re-integration program is administered in the same fashion as release on parole, the conditions imposed upon release are similar to standard parole conditions. The *Corrections Act 1986* (Vic) and the associated *Corrections Regulations 2009* (Vic) prescribe certain conditions which must be included in any parole order. Every parole order contains 10 mandatory conditions.<sup>220</sup> These conditions include requirements that the prisoner notify a community corrections officer of any change of address or employment,<sup>221</sup> that the prisoner is under supervision of a community corrections officer,<sup>222</sup> and that the prisoner must not leave Victoria without the written permission of the Regional Manager.<sup>223</sup> In addition to these mandatory conditions, the Board generally requires that certain conditions are subject to an intensive parole period.<sup>224</sup> This period is commonly for three to four months, however, it may be for any period the Board determines is appropriate. The typical conditions imposed for this intensive parole period include conditions requiring the parolee to report twice weekly to their

<sup>215</sup> *Sentencing Act 1995* (NT) s 75 – discharge of declaration subject to re-integration program; *Sentencing Act 1995* (WA) s 101 – release by means of parole order made under Part 3 of the *Sentence Administration Act 2003* (WA); *Criminal Law (Sentencing) Act 1988* (SA) s 24 – release on revocable licence; *Penalties and Sentences Act 1992* (Qld) ss 174, 174A, 174B, 174C – eligible for parole under the *Corrective Services Act 2006* (Qld); *Criminal Law (Sentencing) Act 1988* (SA).

<sup>216</sup> *Sentencing Act 1991* (Vic) s 18M.

<sup>217</sup> *Ibid* s 18N. The provisions of Division 5 of Part 8 (parole) and of s 112 (regulations) of the *Corrections Act 1986* apply to a re-integration program in the same way that they apply to parole but as if—

- (a) references in those provisions to parole or release on parole were references to a re-integration program or release under a re-integration program;
- (b) persons made subject to a re-integration program were serving a prison sentence of 5 years during the whole of which they were eligible to be released under the re-integration program;
- (c) references in those provisions to a parole order were references to an order made by the Adult Parole Board releasing an offender under a re-integration program;
- (d) references in those provisions to a non-parole period were omitted;
- (e) references in those provisions to the parole period were references to the period of release under the re-integration program.

<sup>218</sup> *Carolan v The Queen* [2015] VSCA 167, [70].

<sup>219</sup> *Ibid* [94].

<sup>220</sup> *Corrections Act 1986* (Vic) s 74(4)(a); *Corrections Regulations 2009* (Vic) reg 83A.

<sup>221</sup> *Corrections Regulations 2009* (Vic) reg 83A(c), (d).

<sup>222</sup> *Ibid* reg 83A(e).

<sup>223</sup> *Ibid* reg 83A(i).

<sup>224</sup> *Ibid* reg 83C.

supervising community corrections officer,<sup>225</sup> and conditions requiring the parolee to participate in programs or training,<sup>226</sup> or undertake unpaid community work.<sup>227</sup> In addition to these conditions, the Board may impose further ‘special conditions’. Such conditions include abstinence from alcohol,<sup>228</sup> adherence to accommodation requirements and curfew,<sup>229</sup> restrictions on contact with specified persons or a class of persons,<sup>230</sup> and undergoing psychiatric treatment.<sup>231</sup>

7.2.14 The Victorian case of *Carolán v The Queen* [2015] VSCA 167 highlights the importance of post-release conditions and their effect on the court’s assessment of whether to discharge an indefinite sentence. In that case, the appellant (the offender) conceded that ‘he should not be released into the community unsupervised as he would still be a serious danger to the community.’<sup>232</sup> As the appellant conceded his potential danger, ‘the only question on review was whether on release he would be so managed that he would not be a serious danger to the community.’<sup>233</sup> In determining that the appellant could be so managed and hence discharging the sentence, the court had regard to the fact that the appellant would be subject to a five-year re-integration program upon discharge of the sentence.<sup>234</sup> The court determined that it was also entitled to consider the possibility of supervision or detention under an alternative regime prescribed by the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic). Thus, despite the concession that the offender, if released unsupervised, would pose an unacceptable risk to society, the indefinite sentence was discharged because there was the ability to subject him to a management process in the community.

7.2.15 Similar conditional release provisions exist in other jurisdictions. In Queensland, s 173(1)(b) of the *Penalties and Sentences Act 1992* (Qld) provides that, upon the discharge of an indefinite sentence the court must impose a finite sentence on the offender for the qualifying offence for which the indefinite sentence was imposed. The finite sentence is taken to have started on the day the indefinite sentence was imposed.<sup>235</sup> Once a finite sentence has been imposed, an offender may apply under the *Corrective Services Act 2006* (Qld) for release on parole under that Act.<sup>236</sup> An application for parole may not be made less than six months before the period of imprisonment ends.<sup>237</sup> Subject to limited exceptions, the parole period must be five years.<sup>238</sup> The parole period may be more than five years if, at the time of application, the offender’s remaining period of imprisonment is more than five years and this is to be the parole period.<sup>239</sup> The parole period may be less than five years if the board considers that it is appropriate.<sup>240</sup> If a finite sentence has been imposed in place of an indefinite sentence, but the

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<sup>225</sup> Ibid reg 83B(1)(d).

<sup>226</sup> Ibid reg 83B(1)(k).

<sup>227</sup> Ibid reg 83B(1)(l).

<sup>228</sup> Ibid reg 38B(1)(a).

<sup>229</sup> Ibid regs 83B(1)(n), (m), (g).

<sup>230</sup> Ibid reg 83B(1)(i).

<sup>231</sup> Ibid reg 83B(1)(b).

<sup>232</sup> *Carolán v The Queen* [2015] VSCA 167, [65].

<sup>233</sup> Ibid [67].

<sup>234</sup> Ibid [93].

<sup>235</sup> *Penalties and Sentences Act 1992* (Qld) s 173(3)(a).

<sup>236</sup> Ibid s 174(1).

<sup>237</sup> Ibid s 174(2).

<sup>238</sup> Ibid s 174(7).

<sup>239</sup> Ibid s 174(8).

<sup>240</sup> Ibid s 174(10).

offender has not made a parole application six months from the expiration of the finite sentence, the board must make a parole order under the *Corrective Services Act 2006* (Qld) s 194.<sup>241</sup>

7.2.16 The existence of such parole conditions is central to the court’s assessment of the discharge of an indefinite sentence. In *R v Garland* [2014] QCA 3 the court determined that, when considering the risk to society if an indefinite sentence was discharged, the court was entitled to consider the protective effect of the parole system.<sup>242</sup> Access to the parole system of itself is insufficient to automatically overcome the potential risks to society posed by the offender.<sup>243</sup> However, the court emphasised that the Act required consideration of whether the protective element *could* be met by the normal process of the parole provisions.<sup>244</sup> *R v Dobbs* [2015] QDC 64 was the fourth review of an indefinite sentence. The court found that the offender still presented some risk that he would reoffend, however that risk was capable of being managed.<sup>245</sup> The court was satisfied that the risks to society could be sufficiently mitigated by the parole process prescribed by the Act.<sup>246</sup> Consequently, the indefinite sentence was discharged and a finite sentence was imposed in its place.

7.2.17 The case of *R v Stone* [2015] QDC 310 provides insight into the types of conditions that may be appropriate in considering the discharge of an indefinite sentence. This case concerned an application pursuant to s 171(1)(b) of the *Penalties and Sentences Act 1992* (Qld) for a review of an indefinite sentence imposed in 1988. At the time of the application the offender had been in custody for most of the last 35 years. His history of offending included very serious violent and sexual offences. The court concluded that the offender still constituted a serious danger to society and declined to discharge the indefinite sentence. In reaching this conclusion, however, the court addressed the various types of conditions that may be of assistance in mitigating the risks presented by the offender. The court considered evidence provided by several psychologists and psychiatrists who indicated that, with appropriate supervision, it was likely that the offender could, at some future date, be safely managed in the community.<sup>247</sup>

7.2.18 All the doctors consulted agreed that the offender should be required to demonstrate his ability to live in the residential unit of the prison for at least six months before any transition to community living could be considered.<sup>248</sup> In the event that the offender was released, the doctors considered that ‘his risk level could be moderated with an intensive/high level supervision programme that would need to engage curfews, GPS monitoring, abstinence from alcohol and drugs, counselling and a requirement not to engage in any activity which would give him access to vulnerable females.’<sup>249</sup>

7.2.19 One psychiatrist, Dr Reddan, expressed the opinion that, due to the length of the offender’s incarceration, the offender would need additional ‘specific pre-release training and tuition in being able to function in everyday life in society.’<sup>250</sup> This training would teach the offender certain skills such as

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<sup>241</sup> Ibid s 174A.

<sup>242</sup> *R v Garland* [2014] QCA 3 [67].

<sup>243</sup> Ibid [64]; *R v Dobbs* [2015] QDC 64, [17].

<sup>244</sup> *R v Garland* [2014] QCA 3 [67]; *R v Dobbs* [2015] QDC 64, [17].

<sup>245</sup> *R v Dobbs* [2015] QDC 64, [16].

<sup>246</sup> *Penalties and Sentences Act 1992* (Qld) [19].

<sup>247</sup> *R v Stone* [2015] QDC 310, [33], [36], [39], [43].

<sup>248</sup> Ibid [33], [40], [44].

<sup>249</sup> Ibid [36], see also [39], [40], [43].

<sup>250</sup> Ibid [45].

how to shop, cook, manage money, and use a telephone.<sup>251</sup> Dr Reddan was of the view that such training was essential in equipping the offender with the necessary skills to cope outside of an institutional setting. Such training would further mitigate any potential risk to the community as it would ‘better prepare him for life in the general community and thus reduce the potential for him to become angry because of his inability to cope.’<sup>252</sup> *R v Stone* [2015] QDC 310 provides important insight into the broad range of conditions that are available in Queensland to assist in an offender’s transition to community living and to mitigate potential risks posed by an offender.

7.2.20 Provisions similar to those in Victoria and Queensland, discussed above, exist in other jurisdictions. In the Northern Territory, the court must impose a finite sentence upon discharge of an indefinite sentence.<sup>253</sup> This sentence is taken to have started on the day the indefinite sentence was imposed.<sup>254</sup> An offender upon whom a finite sentence has been imposed in place of an indefinite sentence may apply under s 75 to be released to a prescribed program of not less than five years.<sup>255</sup> This program is designed to assist the offender to re-integrate into the community. In Western Australia, the *Sentencing Act 1996* (WA) provides that a prisoner subject to a term of indefinite imprisonment may be released by means of a parole order made under Part 3 of the *Sentence Administration Act 2003* (WA).<sup>256</sup> The *Criminal Law (Sentencing Act) 1988* (SA) provides that an offender may apply for release on a licence, which is revocable for breach of certain conditions.<sup>257</sup>

### ***Problematic aspects***

7.2.21 The problems associated with the inability of the court to impose both pre- and post-release conditions are highlighted in two recent Tasmanian cases, *McCrosen v The Queen* [2016] TASSC 3 and *Bell v Tasmania* [2016] TASSC 46.

7.2.22 *McCrosen v The Queen* [2016] TASSC 3 concerned an application for the discharge of a dangerous criminal declaration made over 25 years earlier. Jamie Gregory McCrosen (‘the applicant’) was declared a dangerous criminal in January 1991 under s 392 of the *Criminal Code*. But for the declaration, he would have been released from custody at the end of 1992, at the latest. An application for discharge of the declaration was eventually heard in 2016, 25 years after the declaration was imposed.<sup>258</sup>

7.2.23 In rejecting the application, Tennent J made a series of observations about the limitations of the Act. Her Honour remarked that, because the Act does not allow for a conditional discharge, ‘the legislation creates an all or nothing situation. In my view, the legislation relating to applications such as this is unrealistic and promotes the continued incarceration of people who might, with assistance, be perfectly inoffensive members of the community were they given the opportunity.’<sup>259</sup>

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<sup>251</sup> Ibid.

<sup>252</sup> Ibid.

<sup>253</sup> *Sentencing Act 1995* (NT) s 74(1)(b).

<sup>254</sup> Ibid s 174(3).

<sup>255</sup> Ibid s 75.

<sup>256</sup> *Sentencing Act 1995* (WA) s 101.

<sup>257</sup> *Criminal Law (Sentencing Act) 1988* (SA) s 24.

<sup>258</sup> A second application for discharge is before the court in 2017.

<sup>259</sup> *McCrosen v The Queen* [2016] TASSC 3, [13].

7.2.24 Her Honour emphasised that ‘with appropriate supports in the community and pre-release preparation, the applicant could and should be released.’<sup>260</sup> However, the Act does not enable a judge to make accessing such support systems mandatory. Consequently, her Honour was not satisfied that the risk posed by the applicant could be sufficiently mitigated and the dangerous criminal declaration remained in force.

7.2.25 Before a dangerous criminal declaration may be discharged, the court must be satisfied that the declaration was no longer warranted for the protection of the public. Of principal importance in Tennent J’s assessment of the risks posed by the applicant was the duration of his incarceration. The applicant had effectively become so institutionalised that this factor alone militated strongly against discharge of the declaration.<sup>261</sup> As Tennent J stated, ‘[t]he very fact that the applicant has spent such a huge portion of his life in custodial or quasi-custodial environments has in itself created a set of circumstances which in my view are very relevant to this application.’<sup>262</sup> The applicant’s ability to respond to the likely stresses he would be confronted with were of principal concern to Tennent J.<sup>263</sup>

7.2.26 Had the court been empowered to impose pre-release conditions requiring the applicant to participate in gradual re-integration programs and seek leave pursuant to s 42 of the *Corrections Act 1997* (Tas), this would have mitigated many of her Honour’s concerns regarding the applicant’s ability to re-integrate into the community.<sup>264</sup> Further, had the court been empowered to impose post-release conditions requiring the applicant to seek ongoing support once released, to adhere to specific accommodation requirements, and to access support services, then many of the concerns regarding the applicant’s ability to cope in society, and consequently the likelihood of reoffending, might have been mitigated.<sup>265</sup>

7.2.27 *McCrossen v Tasmania* [2016] TASSC 3 is factually analogous to the Queensland case of *R v Stone* [2015] QDC 310, discussed in detail above at [7.2.17]–[7.2.19]. In that case, as in *McCrossen*, the duration of the offender’s incarceration was of particular concern. A Consultant Psychiatrist, Dr Jill Reddan, noted that ‘[i]n addition, to manage any risk he may represent, it is also necessary to manage the effects of institutionalisation.’<sup>266</sup> Although ultimately the indefinite sentence was not discharged, the availability of an intensive post-discharge supervision program was considered a significant factor in mitigating the potential risks posed by the offender upon discharge.<sup>267</sup> Further, the availability of mandatory pre-release training to ‘better prepare him for life in the general community’ was considered an important tool to ‘reduce the potential for him to become angry because of his inability to cope’.<sup>268</sup>

7.2.28 As noted in *R v Stone*, ‘[f]or any prisoner leaving prison after a lengthy period of institutionalisation, the transition back into the community is extremely challenging.’<sup>269</sup> In Tasmania, where conditions like those discussed in *R v Stone* are not available, the court is unable to assist the offender on their path to discharge through mandatory pre-release preparatory programs and post-

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<sup>260</sup> Ibid [55].

<sup>261</sup> Ibid [35]–[36], [48].

<sup>262</sup> Ibid [47].

<sup>263</sup> Ibid [51].

<sup>264</sup> Ibid [49].

<sup>265</sup> Ibid [52]–[53].

<sup>266</sup> *R v Stone* [2015] QDC 310, [42].

<sup>267</sup> Ibid [33], [36], [39], [43].

<sup>268</sup> Ibid [45].

<sup>269</sup> Ibid [40].

release supervision. This presents as a repeated problem in applications for discharge and is ‘a significant problem with the legislation as it stands.’<sup>270</sup>

7.2.29 *Bell v Tasmania* [2016] TASSC 46 concerned a 2015 application for the discharge of a dangerous criminal declaration made in 1999. Kevin Richard Bell (‘the applicant’) was declared a dangerous criminal following several periods of incarceration for a series of sexual offences. At the time of applying for discharge of the declaration, the applicant was 68 years old. He had been incarcerated for 16 years and 5 months, of which 10 years and 5 months were beyond the expiration of his sentence. He was in poor health, having suffered a heart attack, resulting in several stents being placed in his chest. The applicant’s leg strength had deteriorated such that he could no longer walk normally. He had been diagnosed with type 2 Diabetes. He had undergone an operation on his prostate, including laser treatment. The applicant was diagnosed with Sherman’s Disease (misalignment of the spine) and had extensive arthritis in his hands and feet. He continued to experience chest pain, shortness of breath, and suffered from sleep apnoea. He reportedly could no longer achieve or maintain an erection and did not experience any form of sexual desire. Further, the applicant had participated in several sexual offender treatment programs while incarcerated. He had also undertaken 45 hours of leave pursuant to s 42 of the *Corrections Act 1997* (Tas). The aforementioned factors weighed in favour of granting the application.

7.2.30 There were, however, several factors which militated against discharging the declaration. Tennent J noted that, of principal concern were ‘the uncertainty as to the applicant’s future accommodation, the applicant’s preparedness to deceive in relation to his contact with a known sex-offender, [and] the fact that questions of risk of re-offending [were] unable to be addressed through mandated supervision and support in the community.’<sup>271</sup> Importantly, as to the last factor, her Honour considered that, had she had the ability to impose conditions upon discharge, she would likely have been satisfied that the applicant’s risk of reoffending was sufficiently slight such that he could be discharged.<sup>272</sup>

7.2.31 Tennent J accepted the evidence of Mr Damien Minehan, a psychologist with the Department of Health, who had interviewed the applicant and reviewed his medical and psychiatric files, parole records, and other historical records. Mr Minehan was of the view (and her Honour accepted this view),<sup>273</sup> that ‘it is likely risks could be acceptably managed if Mr Bell were subject to appropriate levels of supervision and therapeutic contact as well as having appropriate an [sic] accommodation option.’<sup>274</sup> He was of the opinion that, had the court been able to mandate supervision by community corrections, ongoing therapeutic treatment, monitoring of substance use, and suitable accommodation arrangements, any risk of the applicant reoffending would be sufficiently slight as to warrant the discharge of the declaration.<sup>275</sup> Indeed, Mr Minehan was of the opinion that ‘[t]he primary risk factor in Mr Bell’s case is largely the lack of any form of mandated supervision, conditions or consequences for non-compliance upon release.’<sup>276</sup> However, as with previous applications, the inability of the court to impose post-

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<sup>270</sup> *McCrosen v The Queen* [2016] TASSC 3, [53].

<sup>271</sup> *Bell v Tasmania* [2016] TASSC 46, [49].

<sup>272</sup> *Ibid* [46]–[49].

<sup>273</sup> *Ibid* [49].

<sup>274</sup> *Ibid* [35] of judgment, [78] of Mr Minehan’s report.

<sup>275</sup> *Ibid* [35] of judgment, [78] of Mr Minehan’s report.

<sup>276</sup> *Ibid* [35] of judgment, [76] of Mr Minehan’s report.

release conditions or supervision orders prevented the court from being able to mitigate risks sufficient to be satisfied that a declaration could be discharged.<sup>277</sup>

7.2.32 In dismissing the application for discharge of the declaration, her Honour noted that:

Parliament has seen fit to create a legislative framework pursuant to which an offender can be incarcerated indefinitely and has, in my view, created a system, because of the limitations on the powers of the Court in an application such as the present, whereby it can be difficult for an applicant to get over the bar authorities have established to gain release.<sup>278</sup>

7.2.33 *McCrossen v The Queen* [2016] TASSC 3 and *Bell v Tasmania* [2016] TASSC 46 provide cogent evidence that the inability of the court to impose conditions upon discharge of a dangerous criminal declaration is, to quote Tennent J, ‘a significant problem with the legislation as it stands.’<sup>279</sup>

### ***Recommendations for reform***

7.2.34 It is recommended that the *Sentencing Act 1997* (Tas) be amended to enable the court to impose both pre- and post-release conditions on discharge of a dangerous criminal declaration. Pre-release conditions would enable a court to discharge a declaration, subject to an offender undergoing certain treatment programs or achieving certain results in such programs, undertaking leave pursuant to s 42 of the *Corrections Act 1997* (Tas), or participating in re-integration programs designed to equip the offender with the skills necessary for re-entry into the community.

7.2.35 Post-release conditions would enable a court to require an offender to continue participating in drug and alcohol treatment programs, engage with psychologists, access particular services in society such as job seekers networks, comply with particular accommodation arrangements and curfews, and impose restrictions on an offender’s ability to interact with certain members of society (such as their previous target victim group). Post-release conditions would operate in a similar way to parole conditions, such that breach of particular conditions may result in the offender’s re-incarceration. It is recommended that the Act be amended to ensure that conditions are always attached to a release, as is the case in Victoria.<sup>280</sup> See Appendix A for a detailed amendment.

## **7.3 No provisions for periodic review**

### ***The current law***

7.3.1 Unlike most other jurisdictions with equivalent legislation, the Tasmanian indefinite detention scheme does not provide for a system of periodic review of a dangerous criminal declaration. Section 20(2) of the *Sentencing Act 1997* (Tas) provides for the only method of review. Under this section, an offender who has served a term of imprisonment equal to the non-parole period applicable to her or his sentence may apply to have the declaration discharged.

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<sup>277</sup> Ibid [35] of judgment, [79] of Mr Minehan’s report.

<sup>278</sup> *Bell v Tasmania* [2016] TASSC 46, [46].

<sup>279</sup> *McCrossen v The Queen* [2016] TASSC 3, [53].

<sup>280</sup> *Sentencing Act 1991* (Vic) s 18M(b).

7.3.2 Other jurisdictions mandate a periodic review system.<sup>281</sup> The Queensland *Penalties and Sentences Act 1992* (Qld), for example, provides that a court that imposes an indefinite sentence must undertake a review of the sentence within six months of the offender serving the specified period of time.<sup>282</sup> This period of time is either prescribed at set durations for specific offences, for example 30 years if the offender is serving a nominal sentence of life imprisonment for an offence of murder, or is expressed as a percentage of the offender’s nominal sentence (50–80 per cent).<sup>283</sup> In addition to the required periodic review, an offender may apply for a review at any time after the court has undertaken the first review if the court gives leave upon being satisfied that there are exceptional circumstances.<sup>284</sup>

7.3.3 The *Sentencing Act 1996* (NT) prescribes a similar process. Section 72(1)(a) provides that the Supreme Court must review the indefinite sentence not later than six months after an offender has served 50 per cent of the offender’s nominal sentence; or if the offender’s nominal sentence is imprisonment for life, 13 years of the nominal sentence. The Court must then review the sentence at subsequent intervals of not more than two years from the previous review.<sup>285</sup>

7.3.4 In Victoria, the review process is governed by s 18H of the *Sentencing Act 1997* (Vic). This section provides that the Director of Public Prosecutions must apply for a review of an indefinite sentence as soon as practicable after the offender has served the nominal sentence.<sup>286</sup> As the Director of Public Prosecutions initiates this process, the review must occur irrespective of the intention of the offender to apply for a review. Following this, the court must review the indefinite sentence on application of the offender at intervals of not less than three years.<sup>287</sup>

### ***Problematic aspects***

7.3.5 The absence of provisions for periodic review dictates that the offender must initiate the review process, or remain in custody indefinitely. In effect, this reverses the onus of proof: the onus is placed on the offender to raise the question of whether, having served their nominal sentence, their continued incarceration is warranted. It is recognised that, generally, ‘the longer someone is incarcerated the more significant the nature of the institutional transformation’, hence the more difficult re-integration into society becomes.<sup>288</sup> Furthermore, offenders will be reliant on their legal counsel (if represented) to inform them of the availability of the review process, as well as the methods by which it should be undertaken.

7.3.6 In *McCrossen v The Queen* [2016] TASSC 3 the prisoner’s first application for the discharge of the dangerous criminal declaration was made some 21 years after the offender would otherwise have been entitled to be released from custody.<sup>289</sup> In declining to discharge the declaration, Tennent J noted that a significant factor influencing her decision was the degree to which the offender had been

<sup>281</sup> *Sentencing Act 1995* (NT) s 72; *Sentencing Act 1991* (Vic) s 18H; *Penalties and Sentences Act 1992* (Qld) s 171(1).

<sup>282</sup> *Penalties and Sentences Act 1992* (Qld) s 171(1).

<sup>283</sup> *Ibid* s 171(2).

<sup>284</sup> *Ibid* s 172.

<sup>285</sup> *Sentencing Act 1995* (NT) s 172(1)(b).

<sup>286</sup> *Sentencing Act 1991* (Vic) s 18H(1)(a).

<sup>287</sup> *Ibid* s 18H(1)(b).

<sup>288</sup> Craig Haney, ‘The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment’ [2002] (Paper prepared for the ‘From Prison to Home’ Conference) 80.

<sup>289</sup> A second application for discharge is before the court in 2017.

institutionalised.<sup>290</sup> The offender’s interactions with the criminal justice system began in 1985 at age thirteen, he was declared a ward of the state approximately one year later. From 1985–91 the offender was convicted of multiple offences, subject to several parole orders, and incarcerated on multiple occasions. The dangerous criminal declaration was made in 1991, when the offender was 19 years old. But for the declaration, the offender would have been entitled to release one year later, at the latest.

7.3.7 This issue, the offender’s institutionalisation, is discussed in detail above (at [7.2.25]), however, it is valuable to reiterate her Honour’s comment at [47] that ‘it is a tragedy that the “system” has largely created the dilemma the Court now faces.’ Had the declaration been reviewed at an earlier date, the institutionalisation, which ultimately thwarted the discharge of the offender, may have been averted.

7.3.8 Due to the absence of periodic review provisions, the offender remained in custody for 21 years before an application for the discharge of the declaration was made. Had Tasmania had provisions equivalent to, for example, those in Queensland, the declaration would have been subject to periodic review after the offender had served 50 per cent of his sentence.<sup>291</sup> Consequently, the declaration would have been reviewed some six months after being made and the offender may have been released after being incarcerated for only one year.

### ***Recommendations for reform***

7.3.9 It is recommended that the *Sentencing Act 1997* (Tas) be amended to provide for a system of periodic review. A review system is essential in preventing repeat cases such as *McCrossen v Tasmania* [2016] TASSC 3. It would ensure that the appropriateness of the ongoing detention of offenders was reviewed at reasonable intervals, operating as a safeguard against the institutionalisation of offenders who might otherwise have been entitled to release. The Act should provide for a review on application of the offender, or the Director of Public Prosecutions, one year before the expiration of the offender’s nominal sentence and subsequently at two year intervals. These recommendations are modelled on the periodic review provisions in the *Sentencing Act 1995* (NT). The Northern Territory scheme is the preferred model as it prescribes the most comprehensive review process. See Appendix A for a detailed proposed amendment.

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<sup>290</sup> *McCrossen v The Queen* [2016] TASSC 3, [35]–[36], [48].

<sup>291</sup> *Penalties and Sentences Act 1992* (Qld) s 171(2)(d).

## Part 8

# Conclusion

8.1.1 How the state should deal with offenders who are considered a continuing threat to the public is a complex and multi-faceted issue. A principled legal response should be based on solid principles of fairness and justice to all — offenders, victims, and society as a whole. This paper has conducted a comparative review of national legislation for the indefinite detention of dangerous criminals. In doing so, it has identified a number of issues which severely hinder the functionality of the Tasmanian indefinite detention regime contained in the *Sentencing Act 1997* (Tas). It is evident that the judiciary has become increasingly aware of these issues, particularly the numerous barriers to discharge of such declarations. Consequently, it is suggested that courts have become increasingly reticent to impose indefinite sentences. In turn, applications for dangerous criminal declarations by the Director of Public Prosecutions may be less common, as it becomes apparent that they are unlikely to be successful. In such circumstances, the regime is evidently not operating as intended. The present deficiencies render the scheme ineffectual, highlighting a clear need for reform. Modernisation of the Act, and a shift towards uniformity with other Australian jurisdictions, may provide the most principled means of achieving a Tasmanian indefinite detention regime which is fair and just to all parties.

# Appendix A: Recommended Amendments

Table of recommended amendments

Current section number	Current wording	Proposed amendment
19(1)	<p>(1) A judge before whom an offender is convicted or brought up for sentence after being convicted may declare the offender to be a dangerous criminal if –</p> <p>(a) the offender has been convicted for a crime involving violence or an element of violence; and</p> <p>(b) the offender has at least one previous conviction for a crime involving violence or an element of violence; and</p> <p>(c) the offender has apparently attained the age of 17 years; and</p> <p>(d) the judge is of the opinion that the declaration is warranted for the protection of the public.</p>	<p>(1) A judge before whom an offender is convicted or brought up for sentence after being convicted may declare the offender to be a dangerous criminal if –</p> <p>(a) the offender has been convicted for a crime involving violence or an element of violence; and</p> <p>(b) the offender has at least one previous conviction for a crime involving violence or an element of violence; and</p> <p>(c) the offender has apparently attained the age of 17 years.</p> <p>(2) For the avoidance of any doubt, a dangerous criminal declaration may be made –</p> <p>(a) at the time of conviction;</p> <p>(b) at the time of sentencing, having been convicted;</p> <p>(c) at any time during the offender’s sentence.</p> <p>(3) If an application for a dangerous criminal declaration is made during the offender’s term of imprisonment and –</p> <p>(a) if the judge before whom the offender is convicted or brought up for sentencing has ceased to hold office; or</p> <p>(b) in other special circumstances unavailable;</p> <p>the application for the dangerous criminal declaration may be heard by another judge of the Supreme Court.</p>
19(1)(d)	<p>(d) the judge is of the opinion that the declaration is warranted for the protection of the public.</p>	<p>(4) A dangerous criminal declaration may only be made if the court is satisfied that the offender is a serious danger to the community because of –</p> <p>(a) the offender’s antecedents, character, age, health or mental condition; and/or</p> <p>(b) the severity of the qualifying offence; and/or</p> <p>(c) any special circumstances.<sup>292</sup></p>
19(2)	<p>(2) In determining whether to declare an offender a dangerous criminal a judge may have regard to all or any of the following:</p> <p>(a) the nature and circumstances of the crimes referred to in subsection (1);</p> <p>(b) the offender’s antecedents or character;</p> <p>(c) any medical or other opinion;</p>	<p>(5) In determining whether the offender is a serious danger to the community, the court must have regard to –</p> <p>(a) whether the nature of the offence is exceptional; and</p> <p>(b) the offender’s antecedents, age and character; and</p>

<sup>292</sup> For a discussion on, and justification of, the use of ‘and/or’ see *Green v The Queen* [2000] NTCCA 1 [14]–[16].

	(d) any other matter that the judge considers relevant.	(c) any medical, psychiatric, prison or other relevant report in relation to the offender; and (d) the risk of serious harm to members of the community if an indefinite sentence were not imposed; and (e) the need to protect members of the community from the risk mentioned in paragraph (d); and (f) any other relevant matters. <sup>293</sup>
N/A	N/A	(6) On an application for a dangerous criminal declaration – (a) the prosecution bears the onus of proof. (7) The standard of proof is that the court must be satisfied – (a) by acceptable, cogent evidence; and (b) to a high degree of probability; that the offender is a serious danger to society.
N/A	N/A	(8) On an application for discharge of a dangerous criminal declaration, or a review of a dangerous criminal declaration under sections 9(a), (b), (c) or (d), – (a) the prosecution retains the onus of proof; and (b) the standard of proof is the same as that in section 6.
20(2) and 20(6)	(2) A dangerous criminal who has served a term of imprisonment equal to the non-parole period applicable to his or her sentence may apply to the Supreme Court to have the declaration by which he or she acquired the status of a dangerous criminal discharged.  (6) An applicant whose application under subsection (2) is unsuccessful may submit a further application under that subsection after the expiration of a period of 2 years, or such lesser period as the court may allow, from the date on which the unsuccessful application was filed with the court.	(9) A court that imposes an indefinite sentence on an offender must review the sentence – (a) on the application of the offender, after having served a term of imprisonment equal to the non-parole period applicable to his or her sentence; (b) on the application of the Director of Public Prosecutions at any time; (c) irrespective of any application made under paragraphs (a) and (b), not less than one year before the expiration of the offender’s nominal sentence; and (d) following the carrying out of the review under paragraph (c), at intervals of not more than 2 years.
N/A	N/A	(10) On an application for discharge of a dangerous criminal declaration, or a review under sections 9(a), (b), (c) or (d), unless satisfied to the standard required by section 7 that the offender is still a serious danger to the community, the court must by order – (a) discharge the dangerous criminal declaration; and (b) make the offender subject to a 5-year re-integration program administered by the Parole Board and issue a warrant to imprison in the

<sup>293</sup> For a discussion on, and justification of, the use of ‘and’ as opposed to ‘and/or’ see *ibid*.

Appendix A: Recommended Amendments

		<p>same way as if it had sentenced the offender to a term of imprisonment for 5 years.</p> <p>(10) In making the order discharging a dangerous criminal declaration a court may, in addition to the conditions in section 10(b) –</p> <p>(a) require the offender to participate in any pre-release programs or activities that the court deems appropriate; and/or</p> <p>(b) require the offender to achieve certain results in any pre-release programs or activities prescribed by subsection (a); and/or</p> <p>(c) require the offender to participate in any additional post-release programs and activities, access particular services, adhere to certain accommodation requirements, or any other conditions the court deems appropriate.</p>
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