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‘A SENTENCE OF LAST RESORT’: THE ORDER FOR LIFELONG RESTRICTION AND THE SENTENCING OF DANGEROUS OFFENDERS IN SCOTLAND

A thesis submitted in fulfilment of the requirements of the degree of Ph.D.

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ABSTRACT

This thesis is a critical analysis of the order for lifelong restriction (OLR). The OLR is a risk-based indeterminate sentence of imprisonment. It is imposed when the offender satisfies certain statutory risk criteria for the protection of the public. This thesis has four main aims: (1) to identify an appropriate theoretical basis for the imposition of preventive detention that is capable of supporting an ethically defensible model of preventive sentencing, and of serving as an analytical model for application to the OLR; (2) to give a detailed and critical account of the OLR's operational framework; (3) to assess the extent to which the current statutory framework conforms to the requirements identified in the analytical model proposed in relation to the first aim; and (4) in light of this to propose amendments to the relevant legislation.

The thesis concludes that preventive sentencing is best conceptualised as a punitive form of societal self-defence, the right of which is engaged when an offender exercises his autonomy such as to violate the rights of others in a way that threatens lasting physical or psychological harm. Since the need to consider preventive detention has arisen from fault on the offender's part, it is morally permissible to require him to bear the burden of any uncertainty as to repeat offending. The derogation from the principle of desert-proportionality requires to be tempered with threat-proportionality. This means that the offences to which preventive sentences may apply must be restricted to serious offences against the person, or other offences which threaten physical harm to persons – this has the effect of excluding property offences that do not endanger others. Finally, it is concluded that, while the OLR is, in general terms, an ethically defensible model of preventive detention, some modifications to the procedural framework ought to be considered in order to restrict its scope.

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LIST OF ABBREVIATIONS

AIR	Annual implementation report
CJ(S)A	Criminal Justice (Scotland) Act 2003
CJA	Criminal Justice Act 2003
CJS	Criminal justice system
CJSWR	Criminal justice social work report
CM	Case manager
CO	Compulsion order
CORO	Compulsion order with restriction order
CTO	Compulsory treatment order
DLS	Discretionary life sentence
ECHR	European Convention on Human Rights and Fundamental Freedoms
EC*t*HR	European Court of Human Rights
ES	Extended sentence
FOI(S)A	Freedom of Information (Scotland) Act 2002
HCJ	High Court of Justiciary
HD	Hospital direction
HO	Hospital order
HORO	Hospital order with restriction order
ICO	Interim compulsion order
MAPPA	Multi-agency Public Protection Arrangements
MHA 1984	Mental Health (Scotland) Act 1984
MHA 2003	Mental Health (Care and Treatment) (Scotland) Act 2003
MHTS	Mental Health Tribunal for Scotland
MLS	Mandatory life sentence
OLR	Order for lifelong restriction
PBS	Parole Board for Scotland
RAO	Risk assessment order
RAR	Risk assessment report
RMA	Risk Management Authority
RMP	Risk management plan
RMT	Risk management team
RO	Restriction order
SMI	Severe mental illness
SOPO	Sexual Offences Prevention Order
SPJ	Structured professional judgement
SPS	Scottish Prison Service
TTD	Transfer for treatment direction
UPJ	Unstructured professional judgement

Author's Declaration –

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signed: Elaine Ferguson

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1. INTRODUCTION

1.1 THE PROJECT

This thesis presents a critical analysis of the order for lifelong restriction (OLR), which is a 'uniquely Scottish'[1] indeterminate prison sentence. It is available in respect of certain "dangerous" offenders in cases where determinate sentences are considered inadequate to manage the risk they present to the public.[2] The OLR is one of two risk-based indeterminate sentences available in Scotland, the other being the compulsion order with restriction order (CORO),[3] which is a mental health disposal allowing for detention in hospital without limit of time. As will be discussed later, both the OLR and the CORO are part of what might be called Scotland's dangerous offender sentencing framework, and the intention had been to consider both sentences in detail. In the process of bringing the thesis together, however, it became apparent that there simply was not space within the confines of a PhD thesis to give both the attention that they warrant. The decision was therefore made to focus on the OLR for two reasons. First, because it *is* a unique sentence in terms of its scope and operation; and second because it is both explicitly punitive and explicitly preventive in nature.

1.1.1 A UNIQUE SENTENCE

The Criminal Procedure (Scotland) Act 1995 ('the 1995 Act') identifies the OLR as an indeterminate sentence,[4] but it is in practical terms a life sentence:[5] there is a minimum period of imprisonment – the 'punishment part' – that must be served before eligibility for parole arises; the decision as to whether to release the offender is based on the manageability of risk in the community as determined by the Parole Board for Scotland; and, if release occurs, the offender will be subject to the conditions of a licence which will remain in force for life. It is 'a sentence of last resort'[6] imposed when all other disposals are considered to be inadequate

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[1] Y. Gailey *et al.*, 'An Exceptional Sentence": Exploring the Implementation of the Order for Lifelong Restriction' in K. McCartan and H. Kemshall (Eds.) *Contemporary Sex Offender Risk Management,* Vol. 1 (London, 2017), 119.
[2] See section 6.3.
[3] See section 6.4.2.B. Although, as will be seen, the OLR most closely resembled the mandatory life sentence for murder, as will be seen, it is not classed as a life sentence by the legislative framework.
[4] s. 210F(2).
[5] See section 6.5.2.
[6] *McFadyen v HM Advocate* 2011 S.C.C.R. 759, at 13.

for the protection of the public. As it stands, there is no mechanism for review of the sentence itself. Unlike its nearest comparator – the mandatory life sentence for murder (MLS) – however, the OLR is imposed, not because of the specific offence for which the offender falls to be sentenced, but in virtue of his meeting statutory 'risk criteria' set out in the 1995 Act. In brief, these require that the offender, if at liberty, would 'seriously endanger the lives, or physical or psychological well-being' of the public.[7] The 1995 Act provides for a very specific procedure to be followed where the court considers the risk criteria might be met, and to establish whether they are met. This pre-sentencing framework is the OLR's most distinguishing feature.

The court must instruct the preparation of a risk assessment report (RAR). Although consideration of risk assessments at sentence is routine, the RAR is a creature of statute and associated with the OLR specifically.[8] The RAR must be prepared to standards and guidelines set by a specialist body called the Risk Management Authority (RMA),[9] by a person accredited by the RMA specifically for this task.[10] It is the most comprehensive of any risk assessment report considered by courts in Scotland,[11] and its purpose is to assist the judge in determining whether the risk criteria are met. One of the OLR's key features is that, if the criteria for imposing it are met, it *must* be imposed.[12] The judge has no discretion. The only exception is where a compulsion order is made instead.[13]

The provisions governing the OLR's operation are extremely complex. Despite this, and the extensive deprivation of liberty the OLR entails, it has received relatively little academic attention,[14] and most of that is descriptive. In particular, the statutory risk criteria which are

[7] s. 210E.
[8] s. 210C.
[9] CJ(S)A 2003, s. 5(1).
[10] *Ibid*, s. 11(2).
[11] *Ferguson v HM Advocate* 2014 S.L.T. 431, at 90.
[12] s. 210F(1).
[13] *Ibid*.
[14] See Gailey *et al*. (2017); R. Darjee and K. Russell, 'The Assessment and Sentencing of High-Risk Offenders in Scotland' in B. McSherry and P. Keyzer (eds.) *Dangerous People: Policy, Prediction, and Practice* (London, 2011); I. Fyfe and Y. Gailey, 'The Scottish Approach to High-Risk Offenders: Early Answers or Further Questions' in B. McSherry and P. Keyzer (eds.) (2011); B. McSherry and P. Keyzer, *Sex Offenders and Preventive Detention: Politics, Policy and Practice* (Sydney, 2009), 14-17; C. Mitchell and C. Connelly, 'Finite sentences, extended sentences, discretionary life sentences and orders for lifelong restriction', (2015) 137 *Criminal Law Bulletin* 1; Lord Carloway, *The Lifelong Restriction of Serious Offenders and the Role of Risk Assessment in Scotland.* Paper presented at the International Society for the Reform of Criminal Law's 27th International Conference, 26 June 2014; R. Darjee and J.H.M. Crichton, 'The MacLean Committee: Scotland's answer to the "dangerous people with severe personality disorder" proposals?' (2002) 26:1 *Psychiatric Bulletin* 6; L. Tuddenham and J. Baird, 'The Risk Management Authority in Scotland and the forensic psychiatrist as risk assessor', (2007) 31:5 *Psychiatric Bulletin* 164; J.H.M. Crichton *et al*. 'Mental Health (Public Safety and Appeals) (Scotland) Act 1999: detention of untreatable patients with psychopathic disorder', (2001) 12:3

central to the OLR's operation have yet to be subject to detailed treatment. In providing a comprehensive account of the statutory pre-sentencing risk framework,[15] and in offering an in-depth analysis of each element of the risk criteria,[16] this thesis is original.

1.1.2 Preventive Detention and Punishment

A sentence of imprisonment is clearly a punishment and, therefore, so is the OLR.[17] However, it is a risk-based sentence, meaning – as was said above – that it is imposed in virtue of the risk an offender poses rather than for whatever offence he was convicted of; the offence is a manifestation of that risk,[18] but it is not the reason an OLR was selected. This means that it is, in effect, a sentence of preventive detention: its purpose is to protect the public from the offender's future offending behaviour, and he will be detained until such time as the risk he presents can be managed in the community. The difficulty is that – from a theoretical perspective at least – punishment for what has been done, is *prima facie* incompatible with detention to prevent what has yet to be done. Chapter two addresses this dichotomy in detail, and little else will be said of it here; but the OLR is of interest because it is a punishment that explicitly presents itself as a form of preventive detention. This may be contrasted with, for example, the aforementioned CORO which, though it is a disposal on conviction[19] – a sentence – is not considered a form of punishment, but an alternative to it.[20] The OLR may also be contrasted with determinate prison sentences, which account for the majority of custodial disposals and are 'basically retributive in character',[21] their duration being constrained by the seriousness of the offences for which they are imposed.

To the extent that a critical literature base exists, it is confined to procedural analysis. Thus, the OLR is under-theorised. The discussion of punishment and prevention therefore takes place in the context of a search for a principled basis for preventive detention. This theoretical framework is constructed in chapters two and three and is the basis for analysis of the

Journal of Forensic Psychiatry 647; P. Ferguson, 'Orders for lifelong restriction', (2014) 13 *Scots Law Times* 60; and F. Crowe, 'Orders for Lifelong Restriction', (2014) 59:4 *Journal of the Law Society of Scotland* 24.

[15] See ch. 5.

[16] See section 6.3.

[17] *McCluskey v HM Advocate* 2013 J.C. 107, at 18.

[18] ss. 210B, 210E, and 210F(1)(d). See chapters 5 and 6 for detailed discussion.

[19] And also acquittal on the grounds of the defence set out in s. 51A of the 1995 Act: see s. 57 of the 1995 Act.

[20] *McFadyen v HM Advocate* 2011 S.C.C.R. 759, at 10; the requirement for punishment can override the medical recommendation that a compulsion order be made: Scottish Executive, *Mental Health (Care and Treatment) (Scotland) Act 2003: Code of Practice vol. 3 – Compulsory Powers in Relation to Mentally Disordered Offenders* (Edinburgh, 2005), 121, para. 3 (Hereafter 'MHA 2003 Code').

[21] *Petch and Foye v HM Advocate* 2011 J.C. 210, at 43.

legislative framework governing the OLR's operation, though procedural analysis takes place throughout the thesis. Its evaluation of the OLR against a theoretical framework constructed specifically for this purpose is another way in which this thesis is original.

1.1.3 AIMS

The thesis has four main objectives:

1. To identify and develop a theoretical framework of preventive detention capable of supporting a principled, workable model of indeterminate sentencing;
2. To provide a detailed, critical account of the procedural framework that supports the OLR's operation;
3. To assess the extent to which the current statutory framework conforms to the requirements identified in the analytical model set out in relation to the first aim; and
4. On the basis of the foregoing to identify areas where consideration should be given to amending the relevant legislative provisions.

Conclusions reached in relation to each of these will be set out as the thesis progresses and summarised in the final chapter. The overall structure of the thesis is outlined at section 1.3 below, but before proceeding a note about the use of data to support the discussion is appropriate. Statistical data from various sources is drawn upon where relevant. One of these sources is the RMA which *inter alia* has responsibility for certain key aspects of the OLR's operation.[22] The author of this thesis has been employed by the RMA since October 2020. It should, however, be made clear that no data to which the author had special access in the course of her employment was included in the thesis. Where unpublished RMA data is cited, this was obtained in the usual way: via a request submitted by email; such data would have been made available on the same basis to any researcher who requested it. Colleagues' assistance in this has been greatly appreciated.[23]

[22] For reasons of space it has not been possible to provide a full account of this organisation and its role, but see chapters 4, 5, and 6 which highlight some of its functions.
[23] Particular thanks are due to Emma Harley and Rachel Webb.

1.2 Terminology in the Thesis

Before proceeding, it is worth clarifying what is meant by certain terms that are employed. It is acknowledged that the use of certain terms is controversial, and where this is thought to be the case an explanation for the choice is offered.

'Preventive detention': this was chosen over the variant 'preventative detention' for no other reason than it was the most common permutation observable in the literature. Whilst capable of applying to any period of detention for the prevention of some occurrence, such as a period of pre-trial remand, when it is used here it is generally used in reference to indeterminate detention following conviction for an offence. It is the term most commonly used in the more theoretical literature.

'Indeterminate sentence': this is the form of preventive detention with which the thesis is specifically concerned. That is, a sentence imposed on conviction which renders the offender liable to imprisonment/detention for an indeterminate period.

'Index offence': this term is sometimes used to mean the most serious offence of which someone is convicted on a single indictment but is used in this thesis and in the OLR case law generally to mean the offence in respect of which an OLR is, or may be, imposed.

'Mental disorder': it is appreciated that this is somewhat controversial terminology, and that alternatives some consider to accord greater respect and better reflect the lived experience of people who experience mental ill health have proliferated in recent years. The language of mental disorder has, however, been retained here since it is the term used in law. It is inclusive of mental illness (e.g. depression, schizophrenia), personality disorder, and learning disability.[24]

'Personality disorder': this term refers to an enduring pattern of thinking, feeling, and behaviour that can, to some extent at least, be distinguished from mental illness.[25] The language of personality disorder is considered offensive and stigmatising by a number of patient/service

[24] MHA 2003, s. 328(1).
[25] See, for example, International Classification of Diseases version 11 (ICD-11), code 6D10. Available at: https://icd.who.int/browse11/l-m/en#/http%3a%2f%2fid.who.int%2ficd%2fentity%2f941859884 Accessed 21/11/2020.

user groups and some professionals.[26] The validity of the construct itself has also been questioned over time.[27] Like mental disorder, however, it is the term contained in legislation.

'Dangerousness': this is used to refer to the propensity for serious offending in respect of which preventive detention may be necessary. It is also used, somewhat reluctantly, as a shorthand for the offender group with which the thesis is concerned. Aside from the reasons set out in section 3.3.1, the terminology adopted elsewhere of 'high-risk serious violent and/or sexual offenders' is simply not descriptive of the offender group the OLR captures.[28]

Finally, the use of 'he' has been preferred over 'he or she' or 'they'. This is primarily a stylistic choice, but as is discussed later, at the time of writing, all offenders who have been made subject to an OLR are male.

1.3 Structure and Outline of the Thesis

The thesis proceeds as follows.

Chapter two is concerned with the moral permissibility of specifically post-conviction preventive detention. In particular it considers the objection from the principle of autonomy, i.e., that preventive detention is always unjustifiable because it (a) fails to respect the offender as a rational moral agent; (b) amounts to punishment of an innocent person; and (c) reduces the offender's status to that of means to society's ends. It is argued that, whilst preventive detention to prevent intentional conduct is properly characterised as punitive, it is not punishment of an innocent person based on presumed future criminal conduct. Nevertheless, it does entail derogation from the principle of proportionate punishment and this should be acknowledged. It is contended that a prediction of what someone will do does not amount to a claim that they lack the capacity to choose to do otherwise. It is suggested preventive detention is best conceptualised as a form of societal self-defence in which a culpability constraint is the

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[26] See MIND's guide to personality disorders for those directly or indirectly affected: https://www.mind.org.uk/information-support/types-of-mental-health-problems/personality-disorders/why-is-it-controversial/ Accessed 21/11/2020.

[27] See, for example, L.A. Clark *et al.* 'Personality Disorder Assessment: The Challenge of Construct Validity', (1997) 11:3 *Journal of Personality Disorders* 205; and more recently L. Johnstone and M. Boyle, *The Power Threat Meaning Framework* (London, 2018) available at: https://www.bps.org.uk/sites/www.bps.org.uk/files/Policy/Policy%20-%20Files/PTM%20Framework%20%28January%202018%29_0.pdf This is produced by leading members of the British Psychological Society's Division of Clinical Psychology. It is a rejection of the premise of mental disorder and psychiatric diagnosis in general, but is especially critical of personality disorder.

[28] See section 6.2.2.

basis for an ethically defensible redistribution of the burden of uncertainty as to how the offender will behave in future, in favour of potential victims.

Chapter three considers the concepts of dangerousness and risk to try to construct an account of the kinds of offences it is reasonable to claim protection from by way of an indeterminate sentence, and of the offenders who are properly within the scope of such a sentencing regime. It is submitted that the use of preventive detention to prevent violations that carry the risk of serious and long-term physical and psychological harms may be permissible. Property offences that do not, either in themselves, or in the manner of their commission, threaten physical harm to people should be excluded from scope. This is, it is admitted, somewhat arbitrary but regard must be had to the impact of the sentence upon the individual offender: lack of culpability-proportionality must be tempered by ensuring, so far as is possible, that the sentence is proportionate to the threat.

Chapter four considers the legal background and policy development of the OLR. Particular attention is paid to the recommendations of the MacLean Committee on Serious Violent and Sexual Offenders.

Chapter five considers the statutory pre-sentencing procedures that must be followed when an OLR disposal is contemplated. The role of specialised risk assessment is central to this process and is considered in-depth with reference to legislation, case law, and the standards and guidelines produced by the RMA.

Chapter six carries on the discussion in chapter five, from the point at which the statutory risk criteria are to be applied by the sentencing judge. These criteria are broken down into their constituent elements and examined in detail. Some discussion of other orders to which offenders may be made subject (a) when an OLR is made; and (b) when it is not made, is undertaken. This is to place the OLR in context and to permit some assessment of its relationship to those other orders and disposals. The chapter then proceeds to evaluate the framework as a whole against the analytical framework proposed in chapters two and three. It is concluded that, while the OLR broadly conforms to the principles identified, there is scope for consideration of reform. These points for consideration are then set out before the chapter, and the thesis, concludes.

The law is discussed as it stood on 31st October 2020.

2. Theoretical Basis of Preventive Detention

2.1 Introduction to Chapter Two

This chapter is concerned with the moral permissibility of the practice of imposing preventive – specifically indeterminate – custodial sentences upon offenders considered to be especially dangerous. Its purpose is to describe and critique key approaches to overcoming the more philosophical objections to preventive detention (PD) in order to begin to construct an account of why such a policy may be justified, as well as to place this thesis within the broader literature. The highly influential report of the Working Party on Dangerous Offenders in England and Wales[1] identified the fundamental objection to protective sentencing as being that it amounts to the punishment of an innocent person.[2] For some theorists, the problem is essentially empirical. They hold that PD is morally impermissible because our risk assessment methodologies are not precise enough to ensure only truly dangerous individuals are singled out.[3] For others, the objection is rooted in the principle that those capable of choosing whether or not to conduct themselves in conformity with the law ought to be permitted to so choose. To pre-empt that choice, they argue – even when the person concerned has been convicted of a serious offence – is to deny that person's moral agency, reducing his status to that of means to society's ends.[4] Thus, a refusal to detain a potentially very dangerous agent is *always* morally preferable to detaining him.

If such a principle were to be accepted, it would amount to an injunction on detention to prevent very serious harms. The search for an ethical basis on which PD may *sometimes* be permissible

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[1] J. Floud and W. Young, *Dangerousness and Criminal Justice* (London, 1981), hereafter referred to as 'The Floud Report' which is the convention in the literature. Presumably the reason for this is that while Floud and Young co-authored the report, Jean Floud chaired the committee. The working party was established in 1976 by the Howard League for Penal Reform to review the law and practices concerning the management of dangerous offenders in England and Wales. Along with the MacLean review in Scotland, discussed in chapter 4, it remains one of the most comprehensive investigations of this nature undertaken in the United Kingdom.
[2] *Ibid,* 39. See also R. Lippke, 'No Easy Way Out: Dangerous Offenders and Preventive Detention' (2008) 27 *Law and Philosophy* 383; D.J. Baker, 'Punishment Without a Crime: Is Preventive Detention Reconcilable with Justice?' (2009) 34 *Australian Journal of Legal Philosophy* 120, at 122.
[3] This is mentioned later and discussed more fully in Chapter Three.
[4] Floud Report, 39.

is therefore necessary, because the alternative is to accept that it is *never* permissible and that, to most people, is intuitively ethically unacceptable.[5]

There is an obvious overlap between the empirical argument and the argument from the principle of autonomy. However, the latter presents a more formidable obstacle to the justification of PD: regardless of how sophisticated our predictive capabilities may become, it will never be possible to determine with absolute certainty how a person will conduct himself in the future. Since the principled objection is that it is morally impermissible to pre-empt a choice to conduct oneself unlawfully, it would follow that PD can never be justified. If this is so, questions regarding the role and accuracy of risk assessment in identifying dangerous people are redundant. Objections to PD in principle will therefore be dealt with in this chapter, leaving discussions of risk assessment efficacy until chapter three.

The chapter proceeds as follows. Section 2.2 addresses – and rejects – formulations of PD as civil confinement and argues that a culpability constraint is necessary. Section 2.3. argues that PD bears the characteristics of punishment, and ought to be conceptualised as such. Approaches that characterise PD as punishment for a specific offence (i.e., retributive-type approaches) are discussed, and largely rejected, in sections 2.3 to 2.6; and section 2.7 offers a critique of approaches which view PD as being permissible where an individual's conduct creates a situation where PD must be considered. Those approaches discussed at section 2.7 are then used to begin to formulate an indeterminate sentencing model which conceptualises PD as a form of societal self-defence.

2.2 AUTONOMY AND THE RIGHT TO BE PUNISHED

The autonomy objection to PD is – at least loosely – based on a Kantian conceptualisation of the person, central to which is a unique capacity to rationally evaluate reasons for action (or inaction).[6] Since this rational agency is the defining characteristic of personhood, failure to

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[5] See for example, S.J. Morse, 'Blame and Danger: an essay on preventive detention', (1996) 76 *Boston University Law Review* 113, at 116; R.A. Duff, 'Dangerousness and Citizenship' in A. Ashworth and M. Wasik, *Fundamentals of Sentencing Theory: essays in honour of Andrew von Hirsch* (Oxford, 1998), 151, N. Walker, 'Ethical and Other Problems' in N. Walker (Ed.) *Dangerous People* (London, 1996), 7.

[6] I. Kant, *Grounding for the Metaphysics of Morals.* Translated by A.W. Wood (London, 2002); M. Davis, 'Arresting the White Death: Preventive Detention, Confinement for Treatment, and Medical Ethics' (1995) 94:2 *American Philosophical Association Newsletter on Philosophy and Medicine* 92; J.T. Murphy, 'Moral Death: A Kantian Essay on Psychopathy', (1972) 82:4 *Ethics* 284, 291-292.

respect it would be tantamount to a denial of that individual's humanity.[7] This includes respect for a choice to conduct oneself wrongfully, and to do harm to others. The only appropriate response to such wrongdoing is punishment according to desert, which is viewed as recognition of this choice. If we are to pre-empt a person's decisions – as would be the case if they were preventively detained – then, it is said, it is as if we are denying their capacity to direct their own conduct. Should this be accepted, it would seem to preclude PD completely, whether conceptualised as purely preventive, or as a form of punishment lacking a culpability-proportionality constraint. This requirement to treat persons as rational moral agents by refraining from assuming failure to conform to the law, has been expressed as a right to be punished. It will be apparent that the construction of this objection as a right is problematic but, although this is touched on below, it should be noted that this approach is of interest because it constitutes an extremely robust, and absolute rejection of PD, rather than because of the rights formulation itself.[8]

Although the concept of the person on which it is based is Kantian, the doctrine of the 'right to punishment' itself is generally attributed to Hegel:[9]

> [W]hat is involved in the action of the criminal is not only the concept of crime…but also the abstract rationality of the individual's *volition*. Since that is so, punishment is regarded as containing the criminal's right and hence by being punished he is honoured as a rational being.

Hegel considered that all persons are fundamentally moral beings, and that their essential nature could be awakened by being subjected to punishment for what should be presumed to be a temporary failure of moral reasoning. In other words, the offender was to be addressed as having the potential to revert to a state of being in which he recognised the wrongfulness of the sin he had committed, and so resolving not to sin again.[10] Hegel, like Kant, rejected

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[7] See, for example, Murphy (1972); H. Morris, 'Persons and Punishment', (1968) 52:4 *The Monist* 475 (this paper is discussed in detail below).
[8] Although the conception of rights on which it is based is a compelling one. See Deigh (1984) for a full critique.
[9] W.H. Hegel, *The Philosophy of Right.* Translated by T.M. Knox (Oxford, 1942) at section 100. Emphasis in original. It can apparently be traced at least as far back as Fichte's *Foundations of Natural Law*. This is not entirely surprising given the overlap between the right to punishment, and social contract theory. Fichte's account is unusual though, in the sense that punishment is not justified for breach of the social contract, but for the irrationality presumed to underpin it. In other words, the offender is punished for his personal characteristics. This is discussed later, but see M.D. Dubber, 'The Right to be Punished: Autonomy and Its Demise in Modern Penal Thought' (1998) 16:1 *Law and History Review* 113.
[10] J. M. E. McTaggart, 'Hegel's Theory of Punishment' (1986) 6:4 *International Journal of Ethics* 479, at 483-484.

consequence as a justification for action in itself:[11] the intrinsic value of punishment is in the opportunity afforded to the offender to consider his own rational moral status which, should he recognise it, would lead him to desist. Implicit in the extension of this opportunity is that he is treated as a rational agent, with the capacity to engage in such an exercise. Therefore, although crime reduction may result as an incidental benefit, punishment has a value independent of any particular outcome, since it is seen as a recognition of personhood.

Even if it were to be accepted that punishment affirms moral autonomy in this way, it is still difficult to envisage why anyone should ever *want* to be punished.[12] One of the best known modern defences of the right to punishment is that of Herbert Morris.[13] His approach is to contrast a backward-looking system of punishment with a system of commitment. In doing this, he aims to demonstrate that a rational agent would have reason to prefer punishment. In his model jurisdiction, order is maintained by a system of 'primary rules' which equate broadly to the 'core' of criminal law and which forbid, among other things, violent and dishonest conduct.[14] These rules represent constraints placed on the conduct of individuals which, if adhered to by all members of the community, confer certain protections on all of them. [15]

Crime occurs when an individual chooses not to observe these restrictions, conducting himself as he pleases, to the detriment of others. Quite apart from any gains he may make at the expense of a victim, Morris argues that the offender gains an unfair advantage against society as a whole since he has enjoyed the protections conferred by others' compliance with the rules while renouncing that burden himself. Punishment, he says, redresses this imbalance in the distribution of benefits and burdens, and 'induce[s] compliance with the primary rules among those who may be disinclined to obey'.[16] In the classical Hegelian formulation of the right to punishment, crime reduction is regarded as a desirable, incidental benefit that may inform the *type* of punishment;[17] but here, it appears that Morris is willing to admit deterrence as a justification. This distinction is potentially quite significant since it appears to allow for what might be considered to amount to the use of a person as means to achieving a crime reduction

[11] But see D. Moyar, 'Consequentialism and Deontology in the Philosophy of Right', in T. Brooks (Ed.), *Hegel's Philosophy of Right* (Oxford, 2012) for a discussion of the blending of consequentialism and deontology in Heglian ethical theory.
[12] J. Deigh, 'On the Right to be Punished: Some Doubts' (1984) 42:2 *Ethics* 192.
[13] Morris (1968)
[14] *Ibid*, 447.
[15] *Ibid*.
[16] *Ibid*, 477-478.
[17] See above.

objective.[18] If, on this account, an offender really can be considered to have chosen or consented to his use in this way, then the distinction between punishment and commitment as being grounded in the affirmation of personhood seems slightly more difficult to make out.

The preventive/therapeutic model that we are asked to compare with punishment is, by Morris's own admission, something of a caricature. In this system, every aberrant behaviour is looked upon as if it were some form of dysfunction or disease:[19]

> With this view of man the institutions of social control respond, not with punishment, but with either preventive detention, in the case of 'carriers', or therapy in the case of those manifesting pathological symptoms. The logic of sickness implies the logic of therapy. And therapy and punishment differ widely in their implications.

While punishment is directed at restoring a balance of burdens and benefits distorted through the fault of the person to which it is addressed, the good of therapy is, Morris says, a benefit conferred on the individual quite apart from any social interest: it is about helping. When the subject has recovered from whatever illness or dysfunction he is thought to be suffering, there is no value in continuing the treatment or detention; punishment, by contrast, is warranted by what has been done already. Crucially, since punishment is imposed in order to restore a balance, it is subject to proportionality constraints; but in the case of detention which has as its focus the correction of some disease-like state, proportionality has no place.[20] In addition, detention for treatment is generally associated with fewer safeguards than punishment since it is considered to be in the interests of the patient to be treated.[21] The therapeutic system may therefore place a more onerous burden on the individual compared to that which he may have suffered as punishment. Confronted by a stark choice between imprisonment (which is strictly time-limited), and detention for an indefinite period (which presumes lack of capacity to conform one's conduct to law), it is not unreasonable to suppose that a rational agent might – as Morris contends – prefer to be punished.

One of the difficulties with the right to punishment argument is, however, the extent of the role it claims that an offender's choice plays. It relies on a quasi-contractarian 'opt-in' on the part

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[18] R.A. Duff, *Punishment, Communication, and Community* (Oxford, 2001) 13-14; J.G. Murphy, 'Marxism and Retribution' (1973) 2:3 *Philosophy and Public Affairs* 217, at 219; D. Boonin, *The Problem of Punishment* (Cambridge, 2008), for example, though this view of deterrence has been challenged: see, for example, Z. Hoskins, 'Deterrent Punishment and Respect for Persons' (2011) 8:2 *Ohio State Journal of Criminal Law* 369.
[19] Morris (1968), 482.
[20] *Ibid,* 484.
[21] *Ibid,* 485.

of the person subject to it:[22] the individual, in choosing to offend, chooses to be punished. The appeal of this line of reasoning is readily apparent. The deprivations inherent in punishment self-evidently require justification[23] and, if the offender can be conceived of as having actively chosen to be punished, such justification seems less difficult and the exercise less distasteful. In reality it would seem to overstate quite significantly the role an individual's decisions play in his punishment.[24] A responsible agent who commits an offence – if he is convicted – leaves himself *liable to be* punished, but punishment is, by definition, coercive.[25] It is imposed by others on behalf of the state, and the offender's wishes are irrelevant.[26] If the offender can really be considered to have chosen anything it is, paradoxically, to relinquish at least some of his autonomy.[27]

Even if the claim about the extent to which punishment is an autonomy-respecting institution is so qualified, it could still be contended that it is more respectful of rational agency than PD, and therefore morally preferable. It thus presents a problem for theorists who would wish to justify PD as a civil measure. Ferdinand Schoeman has, however, argued that civil PD need not violate the autonomy principle.[28] This account conceptualises PD as a kind of quarantine for dangerous people and is worthy of some attention because it has been attributed significance in the theoretical literature.[29]

2.2.1 Preventive Detention and Quarantine

Schoeman's central thesis is that 'no more serious problems arise in defending *civil* PD, suitably qualified, than arise from the practice of quarantine as a measure for protecting public health'.[30] His threshold is one of 'moral certainty',[31] established by the application of hypothetical risk assessment methodologies that can attain whatever standard of proof we

[22] Dubber (1998), 115. According to Dubber, though most commonly associated with retributivism, the right to punishment has at various times also been associated with contractarianism and rehabilitationism.
[23] This is not to suggest that deprivations that are (at least ostensibly) non-punitive do not require justification. This is discussed later.
[24] Dubber (1998), 197.
[25] A. Ashworth and L. Zedner, *Preventive Justice* (Oxford, 2014), at 14.
[26] See the discussion at 2.2.1.
[27] But see the discussion on the right to be punished and pardons in Deigh (1984), 196-201. Also, McTaggart (1986).
[28] F.D. Schoeman, 'On Incapacitating the Dangerous', (1979) 16:1 *American Philosophical Quarterly* 27
[29] See, for example: *Floud Report*, 40; A. von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (London, 1987); Davis, (1995); M. Corrado, 'Punishment, Quarantine, and Preventive Detention' (1996) 15:2 *Criminal Justice Ethics* 3; M. Davis, 'Preventive Detention, Corrado, and Me' (1996) 15:2 *Criminal Justice Ethics* 13.
[30] Schoeman (1979), 27.
[31] *Ibid*, 29.

determine: Schoeman suggests that comparable accuracy to that of verdicts returned by jury in criminal trials may be satisfactory.[32] The value of presently available risk assessment processes in predicting criminal conduct is discussed in chapter three, but for the purposes of the present discussion it should be noted that the objection Schoeman is concerned with overcoming is philosophical, rather than empirical.[33]

Schoeman argues that the ethical distinction that seems to be drawn between quarantine and PD is based on an erroneous belief that they are imposed for different purposes. For Schoeman, people are not, as is often assumed, quarantined because they are ill: they are quarantined because they are dangerous.[34] What makes them dangerous is not the disease itself; it is that they are likely to conduct themselves in such a way that others become exposed to the risk of acquiring it. In this regard, he contends – levels of certainty aside – the quarantined individual is much like the potential offender preventively detained: both practices have the effect of preventing those subject to it from making choices that place others at risk and so, if we object to PD, we must also object to quarantine. This is important because the argument does not, as contended elsewhere,[35] rest on a disease-dangerousness comparison, but on a comparison between different forms of dangerous conduct. As was discussed above, the objection from autonomy essentially holds that PD, unlike punishment, is morally impermissible because it fails to respect the person subject to it as an autonomous moral agent. Schoeman's approach is to refute the claim implicit in the objection that a decision to preventively detain is a statement about the person rather than his conduct. As Floud and Young put it:[36]

> The analogy with quarantine is persuasive; but it seems to carry the obnoxious implication that 'dangerousness' is a disease-like condition. It is, of course, nothing of the kind; as critics are quick to point out…to advocate special sentences for dangerous offenders would be to advocate punishing them for what they *are* rather than what they have done; and that would be, if anything, a shade worse than punishing them for what they *may* do.

Although quarantine is a particularly burdensome practice which has the effect of significantly curtailing a person's freedoms, it at least appears much less controversial than PD.[37] In part,

[32] *Ibid*, 28.
[33] Davis (1995), 92.
[34] Schoeman (1979), 30.
[35] Davis (1995), 92.
[36] Floud Report, 40. Emphasis in original. See also the discussion above on Morris's therapeutic model.
[37] *Ibid*.

this might be because its necessity in any individual case is apparent and that it tends to be strictly time-limited. The problem for the quarantine analogy is that the need for quarantine is limited by the disease. At some stage, either the patient will have recovered sufficiently to return to the community, or he will have died. Either way, the risk he presents will have been eliminated or satisfactorily reduced. Dangerous persons are significantly more complex. As is discussed in chapter three, even if one accepts that some people must be preventively detained, it is harder to identify them. Treatment and rehabilitation may take years or may be lifelong; and just as it is difficult to identify dangerous persons at the point they are detained, it is difficult to identify those who have sufficiently "recovered".[38] The risk constraint which limits quarantine is therefore quite different to that which limits PD.

If quarantine and civil PD are truly comparable in this way, then it seems that the issue is not whether PD is permissible, but *when* it is permissible, and what safeguards it should be subject to.[39] But, as Floud and Young point out, acceptance of quarantine and PD as ethically equivalent requires that the role of choice in each is equivalent. It is not clear that this is so.[40]

> Anyone who accepts the practice of quarantine must acknowledge that it may be permissible, in some circumstances, to detain legally sane and innocent persons for the protection of others from *unintentional* harm; but he is in no way committed to the proposition if it is *wilful* harm that is envisaged.

One of the difficulties surrounding PD is that the individual made subject to it may fully intend, at the point he is identified as dangerous, to conduct himself lawfully and may believe quite genuinely that he presents no risk of harm. This may cause the detention to seem to be particularly unfair. However, as Schoeman observes, a prediction of dangerousness may be just as much about the circumstances in which a person is likely to find themselves, as it is about his character.[41]

To illustrate this, he gives the slightly odd example of a man who has given an express undertaking to refrain from using the telephone for a given amount of time but who, upon the discovery that his child has become severely unwell, uses the phone to summon emergency assistance. Schoeman's point is that there are sometimes good reasons to justify disregarding

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[38] See section 6.4.1.B and C on offender release and risk management.

[39] Floud Report at 41.

[40] *Ibid.* Emphasis in original. But see N. Walker, *Sentencing in a Rational Society* (London, 1969), 137 where the rationality of the distinction between unintentional harm and wilful harm is questioned. This is considered further in section 3.3.2.A of the thesis.

[41] The role of situational factors and their interaction with personality traits is the subject of an extensive body of literature. See section 3.3.2.D for further discussion.

someone's sincerely offered assurances about how they will behave in future;[42] he intends to show that the problem with predictions of this nature is not necessarily that a person is unable to refrain from acting in a particular way, but that he will not refrain. The example itself remains problematic, however. There is nothing about the circumstances themselves over which the man has control, and he could not reasonably be expected to remove himself from them. The situation is unavoidable. Though it is conceivable that people may find themselves in social contexts which make it extremely difficult for them to refrain from offending, it is difficult to imagine one in which the conduct he wishes to refrain from, and which risks criminal punishment or civil detention, is also compelled by some legal or moral obligation. Surely the people we are concerned about are those who disregard social norms, and it is this disregard that suggests to us that they may be unable or unwilling to submit to ordinary social constraints on conduct. Finally, detention imposed for intentional conduct that is effectively compelled by circumstances someone could not reasonably be expected to avoid, or withdraw from, would remain ethically problematic even where the conduct was criminal or otherwise harmful.

2.2.2 Preventing Intentional Harm

The fundamental difficulty for the quarantine analogy, therefore, is that PD and quarantine are imposed to prevent different kinds of harms. Although there may be some people who would deliberately infect someone, quarantine is not designed for those people:[43] for the most part, the activities that would place others at risk would be ordinary activities. For the dangerous but responsible agent, it is different. Simply choosing, e.g., to go outside or answer the door to someone is not sufficient in itself for harm to occur; he must make a further choice to engage in some additional (abnormal) conduct for that to happen. PD therefore occurs earlier in the sequence of events that might lead to harm than quarantine does. Further, if the decision to preventively detain is completely isolated from any notion of culpability, as Schoeman suggests it should be, detention rests on purely consequentialist considerations. There would be no principled restriction on its use.[44] Those who are quarantined for infection have no opportunity to avoid the situation; blame does not enter into the equation, and they are quarantined because they cannot manage the risk they pose to others unless they are segregated. Those who would be detained over fears about their future criminal conduct *do* have the

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[42] Schoeman (1979), 32-33.
[43] Floud Report, 41.
[44] *Ibid*, 43-45; see also A. von Hirsh, 'Prediction of criminal conduct and preventive confinement of convicted persons', (1972) 21:3 *Buffalo Law Review* 717.

opportunity to avoid causing harm, and so they ought also to have an opportunity to avoid detention. As will be argued, it is this opportunity to avoid the preventive measure by refraining from blameworthy conduct – or lack of it – that is instrumental in determining whether the measure conforms to the autonomy principle.[45]

The intention here is not to advocate an approach in which people are simply left to choose to cause harm to others, but given that dangerousness is not like an infection, and there is no simple medical test that can be done to confirm it, it would seem essential to have regard to past conduct. This is where assistance from the principle of autonomy may be sought. Since either punishment or detention involves a restriction upon freedom, then the autonomy argument makes – at best – a claim that an agent's choice should be respected as far as possible: and that means being given the chance to *avoid* punishment. In other words, however sceptical one may be of the existence of a right to punishment, it constitutes a robust argument in favour of a culpability constraint.

2.3 The Punitive Nature of Preventive Detention

The foregoing section has argued that PD cannot be justified as a form of civil confinement, and it is therefore necessary to consider other accounts of it. As was mentioned in the introduction, there are a number of theories of PD which seek to conceptualise, and therefore justify, PD as a form of punishment, but there is disagreement as to what, precisely, it is punishment for. Sections 2.4 to 2.6 discuss these approaches. But before considering what PD might be punishment for, it must be established that it is, in fact, punitive. H.L.A. Hart remarked that a detainee told that his continued detention at the end of a prison sentence was a preventive measure, and not a punishment, 'might think he was being tormented by a barren piece of conceptualism – though he might not express himself in that way'.[46] The recognition that PD is likely to be experienced as punitive is perhaps one reason that much of the core literature seeks to evaluate it as such, and a substantial proportion of this chapter is therefore devoted to discussing approaches that defend PD as a form of punishment. It is however worth considering the theoretical basis for claims that PD is inherently punitive; that is, to try to establish why the justification of PD should be a question of the operation of the criminal law, and why that matters. Section 2.3.1 discusses the characteristics of punishment, and section

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[45] See section 2.3 below.

[46] H.L.A. Hart, *Punishment and Responsibility,* 2nd Edn. (Oxford, 2008), 166-167.

2.3.2 considers what may be termed ‘punitive preventive measures’, i.e., punishments imposed for the purposes of preventing some form of conduct. Finally, section 2.3.3 argues that PD ought to be considered a punishment, but that problems arise in justifying it as such.

2.3.1 THE CHARACTERISTICS OF PUNISHMENT

Arguably the best-known definition of punishment is that of Hart,[47] who identifies five essential characteristics: (1) [it] must consist of pain or other elements normally considered unpleasant; (2) [it] must be for an offence against legal rules; (3) [it] must be of an actual or supposed offender for his offence; (4) [it] must be intentionally administered by human beings other than the offender; (5) [it] must be imposed and administered by an authority constituted by a legal system against which the offence is committed’.[48] This definition emphasises what others have termed ‘deprivation’ or ‘hard treatment’,[49] but it has been criticised for lack of explicit reference to censure,[50] which a number of theorists consider to be an essential element of punishment, alongside deprivation or hard treatment.[51] ‘Censure’ (or ‘stigma’)[52] in this context refers to the expressive function of criminal punishment:[53] the hard treatment communicates disapproval to the person being punished, but also to victims and the public.[54] Theoretical constructions of criminal law as communicating disapprobation through punishment are complex, and no attempt to provide a comprehensive analysis will be made here;[55] but for the purposes of the present discussion two things are of interest.

First, the concept of censure engages desert considerations. It is a backward-looking construct, since logically it requires the person to have done something to be censured for. This is one of the reasons a tension arises in the literature between retributive accounts of punishment and the consequentialist considerations which underpin *preventive* detention.[56] Distinctions between different types of offences must be made if the censure is to be meaningful in any sense; this

[47] Ashworth and Zedner (2014), 14.
[48] Hart (2008), 4-5.
[49] See for example, Ashworth and Zedner (2014), 14; and D. Husak, ‘Lifting the Cloak: Preventive Detention as Punishment’ (2011) 48 *San Diego L. Rev.* 1173, 1181-1182.
[50] Ashworth and Zedner (2014), 14. Although this “omission” might be explicable in the context of Hart’s theoretical approach which draws a distinction between what punishment is, and what its purpose is. See Hart (2008), at 4.
[51] See for example, Husak (2011), 1182; Baker (2009), 131; A. von Hirsch and A. Ashworth, *Proportionate Sentencing* (Oxford, 2005), 6; Ashworth and Zedner, *ibid*.
[52] Husak (2011), 1181.
[53] Ashworth and Zedner (2014), 14; A. von Hirsch, *Censure and Sanctions* (Oxford, 1996), 10-11.
[54] Ashworth and Zedner, *ibid*.
[55] But see R.A. Duff (1998); also more generally Duff (2011).
[56] Duff (1998), 145-146.

means the deprivation or hard treatment by which it is communicated must vary in severity commensurate to the offence.[57] As Hart put it: [58]

> [P]unishments for different crimes should be proportionate to the relative wickedness or seriousness of the crime. For though we cannot say how wicked any given crime is, perhaps we can say that one is *more* wicked than another and we should express this ordinal relation in a corresponding scale of penalties.

Custodial sentences are the harshest punishments available, and therefore convey the most forceful censure,[59] and the most onerous are indeterminate sentences. If indeterminate sentences can be regarded as respecting any sort of proportionality constraint at all, it is one of threat or risk-proportionality rather than culpability-proportionality.[60] These sentences are therefore vulnerable to criticism from a retributivist perspective, since they could be considered to communicate more censure than is warranted.[61]

Second, censure has a definitional as well an expressive function. It distinguishes between punitive deprivations, and deprivations imposed by the state upon its citizens other than as punishment;[62] examples of these non-punitive deprivations include taxation, the stoppage of state benefits, and licence revocation.[63] Perhaps the most relevant of these examples to the present discussion is the driving licence revocation, since, although it is most obviously a preventive measure, it could also be punitive. For instance, although driving licences may be revoked for reasons other than wrongdoing on the part of the licence holder, such as when the holder develops a disqualifying medical condition, they may also be revoked because the holder has been convicted of an offence such as dangerous driving.[64] It would seem strange to argue that someone who had been disqualified for an offence ought not to consider it a

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[57] *Ibid*.
[58] Hart (2008), 162.
[59] Baker (2009), 128. This is of course only true in jurisdictions that do not permit capital punishment, although Beccaria, whose social contract theory of punishment led him to reject the death penalty, considered that lifelong imprisonment was worse than execution. He nevertheless considered it justified in cases where the offender could be deemed to have "chosen" the punishment. See Dubber (1998); this was discussed above.
[60] Ashworth and Zedner (2014), 18. It could, of course, be considered that some offences are so grave that they do warrant lifelong punishment in retributivist term. However, the focus here is on special sentences for dangerous offenders, as outlined in the introduction.
[61] Duff (1998), 146.
[62] Husak (2011), 1181-1182; Baker (2009), 122; von Hirsch (1996), 9.
[63] Husak, *ibid,* 1182.
[64] Road Traffic Offenders Act 1988, Sch. 2, para. 1, and the Road Traffic Act 1988, s. 2.

punishment. Censure is inherent in the removal of a freedom because of blameworthy conduct.[65] This is so even when the measure is underpinned by a preventive rationale.

One of the claims that is made of PD by those who object to it is that it 'blurs the boundaries' between civil and criminal law.[66] This is because what has been termed the 'standard' (i.e. the retributive) account of criminal law is that it addresses only intentional wrongs done by responsible persons and does this by punishing them in proportion to their culpability.[67] In contrast, the PD of those who are thought likely to cause harm to others at some point in the future is the domain of civil law, and is legitimate only in the case of those who lack the ability to direct their own conduct.[68] Detention to prevent future offending must either involve the use of criminal punishment to prevent future harm, or the subjection of a morally autonomous agent to civil commitment; the boundaries between civil and criminal law are, therefore, blurred. Regardless of which approach is taken, the argument is that if a rational agent is subjected to hard treatment which is not proportionate to the gravity of his offending behaviour, he is treated as though he lacked moral autonomy, and that this is morally impermissible.[69]

The objection that PD collapses the distinction between criminal and civil law is very much one of abstract principle, and one that depends on holding to an almost deontological view of punishment that centres on a Kantian construction of autonomy. Little else will be said of it here, since it was discussed in detail at section 2.2. That being said, it is worth noting that the classification of a period of detention as criminal punishment or civil containment is of some practical significance. It was argued earlier that the autonomy principle should be construed as giving rise to the requirement for some degree of culpability constraint; what is of concern at present, however, is what Hart termed the 'definitional stop': that is, an abuse of definition employed to circumvent the need to justify punitive measures by classing them as something other than punishment.[70] The human rights implications of PD are discussed more fully in

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[65] For example, as von Hirsch has pointed out, the experience of being fined is not the same as that of being taxed, and that is because the deprivation is imposed in recognition of the individual's culpability. See the discussion in von Hirsch, (1996) at 9.
[66] See, for example, S.J. Morse (1996); P.H. Robinson, 'Cloaking Preventive Detention as Criminal Justice' (2001) 114:5 *Harvard Law Review* 1429; M.L. Corrado, 'Punishment and the Wild Beast of Prey: The Problem of Preventive Detention' (1996) 86:3 *Journal of Criminal Law and Criminology* 778.
[67] Morse (1996), 117.This claim is both normative and descriptive.
[68] Morse, *Ibid*.
[69] Ashworth and Zedner (2014), 19. See also the discussion above.
[70] Hart (2008), 6. Hart was speaking specifically about instances where the definitional stop was engaged to allow proponents of utilitarian penal philosophy to side-step questions about its lack of constraints on the punishment of innocent people in the interests of general deterrence.

chapter six, but the practical significance of the punishment/prevention distinction in terms of the ECHR is worth brief consideration at this point.

2.3.2 Punitive Preventive Measures

As has been pointed out elsewhere, modern retributivism really only exists in an "impure" form where consequentialist considerations are given *some* weight, whilst culpability is still regarded as the essential constraint.[71] Preventive rationales for punishment are therefore generally accepted as providing at least partial justification for its imposition, such as deterrence, rehabilitation and incapacitation.[72] Preventive offences such as attempts, inchoate, and pre-inchoate crimes, though not entirely uncontroversial, seem somewhat less controversial than PD. As such, one of the approaches to justifying PD is to aim to construe it as punishment for some kind of preventive offence. Some of these approaches are discussed later in section 2.5. Preventive devices that operate through hard treatment are what Ashworth and Zedner have termed 'coercive preventive measures':[73]

> [A] measure is preventive if it is created in order to avert, or reduce frequency or impact of, behaviour that is believed to present an unacceptable risk of harm. It is coercive if it involves state-imposed restrictions on liberty of action, backed by a coercive response, or the threat of a coercive response, to the restricted individual.

However, it was said earlier that the punitive/preventive classification was of more than just theoretical significance; and although this chapter does focus on the more philosophical aspects of the literature, it is worth taking brief account, at this stage, of the approach to the definitional stop that has been taken by the EC*t*HR. As established earlier, punishment involves hard treatment and censure. The approbatory nature of punishment means that it is generally considered to require more substantial justification than similar deprivations that might be imposed by civil law.[74] As such, punishment generally attracts more robust safeguards; for example, the presumption of innocence, and the requirement for proof beyond reasonable doubt.[75] The EC*t*HR has determined that 'penalty' in the context of the ECHR has an

[71] Ashworth and Zedner (2014), 17.
[72] *Ibid.*
[73] *Ibid,* 20.
[74] *Ibid,*19.
[75] *Ibid.* Of course these sorts of safeguards, though making it harder to impose a punishment, would have no place in a civil process where conceptions of guilt and culpability have no place.

autonomous meaning; this is to prevent states circumventing safeguards by labelling punitive measures as preventive.

In *Welch v United Kingdom*[76] the Court considered whether the retrospective imposition of a confiscation order under the Drug Trafficking Offences Act 1986 violated article 7 of the Convention. The critical question was whether the order was preventive or punitive in nature. If it was punitive, then Article 7 protections would apply; if it were preventive, as the UK Government argued, then the order's retrospective application might be permissible. Although the Court accepted that the order was intended to discourage further criminal activity, that was not in itself enough to prevent the measure being held to be punitive. One of the factors taken as an indicator of the punitive nature of the measure was that the judge had discretion to weigh the offender's culpability in fixing the amount to be seized: censure was a distinguishing feature. Also of relevance was the statutory presumption that any sums or goods of value acquired at any time during the six years preceding his conviction were proceeds of drug trafficking.[77] The Court's overall impression of the order – even if they did accept the preventive rationale – was that it amounted to a penalty,[78] and as such the protections of Article 7 were engaged.

This approach was followed in *M v Germany*.[79] Germany operated a 'dual track' system of incapacitation in which certain offenders who had completed a prison sentence could be moved onto the civil track, where they would be subject to PD. During PD, people were held on dedicated prison wings that differed cosmetically in certain respects from those on which offenders were held as punishment. The Court held that minor differences such as these were insufficient to distinguish the period of PD from imprisonment; and since the measure was punitive, it amounted to a retrospectively imposed penalty in breach of Article 7. This case is returned to in section 6.2.1.[80] For the purposes of the present discussion, it is sufficient to note two things: first, that in determining whether detention is preventive or punitive, the extent of the deprivations it imposes is more significant than its stated purpose; and second, that where

[76] (1995) 20 E.H.R.R. 247.
[77] Drug Trafficking Offences Act 1986, s. 2(2)
[78] (1995) 20 E.H.R.R. 247, at para. 33.
[79] (2010) 51 E.H.R.R. 41.
[80] But see also K. Drenkhahan *et al.* 'What's in a name? Preventive Detention in Germany in the Shadow of European Human Rights Law' (2012) *Criminal Law Review* 167.

a measure exhibits both preventive and punitive features, then the punitive aspects appear to override preventive aspects in determining its ultimate character.[81]

2.3.3 Preventive Detention as Punishment

In the preceding discussion, censure was identified as punishment's distinguishing characteristic. Non-punitive measures, such as confinement for treatment, may involve deprivation of rights and freedoms, but they are not *intended* to communicate disapproval. The distinction matters, because punitive deprivations are generally subject to more stringent safeguards than those imposed by the civil justice system. It has also been established that, contrary to objections that insist a measure must amount to criminal punishment, *or* civil prevention, these features may well be present together; outwith the context of justifications for PD, this is not particularly controversial. Husak, whose retributivist construction of PD is discussed in detail later,[82] argues that PD should be considered punishment. This is, he says, because 'on any plausible account, the persons we hope to preventively detain have *done* something that leads us to want to detain them'.[83] He then goes on to say that this 'something' should be construed as a crime. This is problematic; but given that most retributivist theorists will have regard to consequentialist considerations in justifying a particular type of punishment, Husak's approach of distinguishing between what the detention is imposed for,[84] and its purpose seems to accord substantially with the EC*t*HR's approach.[85]

PD is, at the very least, what Ashworth and Zedner term a coercive preventive measure, and the approach that has been taken by the EC*t*HR emphasises the nature of the deprivations involved. The detail of particular models of post-conviction PD is discussed later,[86] but it will be apparent that detaining someone for an indefinite period involves substantial deprivation of freedoms; this is so regardless of whether it is called detention or imprisonment. For these reasons, it is submitted that PD ought to be considered punishment. However, as will be argued

[81] But not universally: see *United States v Salerno* 481 U.S. 739 (1987), and discussion in M.L. Corrado (1996), 778. In this U.S. Supreme Court pre-trial detention case the intention of the legislature was found more important in determining the detention's essential characteristics than its effect.
[82] Section 2.5.1. below.
[83] D. Husak, 'Preventive Detention as Punishment? Some Possible Obstacles' in A. Ashworth *et al.* (Eds.) *Prevention and the Limits of the Criminal Law* (Oxford, 2013), 179. Emphasis in original.
[84] *Ibid*, at 184.
[85] And also Hart's approach. See 2.3.1. above.
[86] Sections 2.5 and 2.6.

throughout the remainder of the chapter, the lack of culpability-proportionality inherent in these sentences is problematic for justifying its use.

2.4. Punishment for a Future Offence

Having established that PD *is* a punishment, the chapter moves on to consider what it might be punishment *for*. This section considers approaches which conceptualise PD as punishment for a crime that has not yet been committed, in particular the approaches of New[87] and Statman.[88] Although they accept that evidential constraints render their approaches impractical, they are worthy of consideration because if the conditions they identify can be satisfied they may, to some extent at least, overcome criticisms of PD that are founded on objections to the punishment of a person who has not yet committed a crime.

2.4.1 New's "Pure" Pre-Punishment Model

New conceptualises pre-punishment as something similar to the pre-payment of goods in a commercial transaction: the buyer knows that the seller will in fact make delivery, and therefore it makes no difference whether payment precedes or follows it: 'Equally, if it is known to all involved that [someone] intends…and will eventually carry out his intention to commit [an offence], we should have no reason to prefer postpunishment to prepunishment.'[89] He presents us with the following scenario.[90] The police are satisfied beyond reasonable doubt that at 10.31 the following morning, a particular driver will exceed the speed limit on a remote road. We are asked to accept that it will be impossible to issue a penalty after the incident. The driver contacts the police and offers to pay the fine for the offence before he commits it; we are told it is also impossible for the police to intervene to prevent it. The fine is issued, paid by the absent driver's wife with money he left for this purpose and, at 10.31 the offence is committed exactly as intimated. In these circumstances, New contends that neither deterrence theorists nor retributivists can properly object to punishment in advance.

The deterrence theorist cannot object because pre-punishment could conceivably have the same deterrent effect on potential offenders as punishment following the crime and, besides, in the

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[87] C. New, 'Time and Punishment', (1992) 52:1 *Analysis* 35.
[88] D. Statman, 'The Time to Punish and the Problem of Moral Luck', (1997) 14:2 *Journal of Applied Philosophy* 129.
[89] New (1992), 37-38.
[90] *Ibid*, 35-36.

example given it could not have deterred the driver from speeding.[91] If it had done so, we could not have the requisite knowledge that the offence would be committed which would justify pre-punishment. He argues the retributivist objection fails because, although the desert requirement must be satisfied for punishment to be justified, it does not in itself preclude punishment prior to the commission of a crime: a person who definitely will commit an offence is not, he argues, innocent.[92] The problem of justification is, for New, one of knowledge, and not moral principle.[93]

This is problematic: in order to justify pre-punishment, we must be satisfied beyond reasonable doubt that the offence will be committed – presumably with the level of accuracy concerning time and place exemplified in the scenario since his whole account is built around it. If the form of pre-punishment chosen will prevent that offence, we cannot be certain that the crime will be committed and therefore the punishment cannot be justified. In short, on this account, the state is committed to allowing an offence to take place in the same way as a seller is committed to the delivery of goods for which he has been paid in advance. In fact, one could go further and suggest that it is implicit in such an account that the offender becomes *entitled* to carry out his offence;[94] perhaps the offender is even morally obliged to offend, since it is the certainty of the crime that justifies the punishment.

New's reply to this is that the pre-payment analogy should not be considered in contractual terms: it does not, therefore, give rise to entitlement or obligation to offend.[95] This is rather unconvincing. If the decision to hand over money in advance of receipt of the goods is a reasonable one, it is only because there is a level of certainty that delivery will follow. In the context of pre-punishment, we are simply told that this certainty exists; in the context of pre-payment, that (relative) certainty is derived from an enforceable obligation upon the person receiving payment. It therefore seems strange to argue the contractual element can be disregarded, or that entitlement can be isolated from certainty. A marginally more persuasive defence of this aspect of New's thesis is outlined by Williams who concedes, for the purposes of argument, the possibility that pre-punishment may not be an intrinsically backward-looking construct:[96] pre-punishment might simply be punishment that is given at an unusual point in

[91] *Ibid,* 38.
[92] *Ibid,* 37.
[93] *Ibid*. Emphasis in original.
[94] F. Feldman, 'Desert: Reconsideration of Some Received Wisdom', (1995) 104 *Mind* 63. at 77.
[95] New (1992), 38.
[96] J.N. Williams, 'Beyond Minority Report: Pre-Crime, Pre-Punishment, and Pre-Desert', (2012) 17 *TRANS: Internet Journal for Cultural Sciences* 3, at 6.

the chain of events, its normal place being determined by our lack of contact with the sort of scenario presently under consideration.[97] That being so, we can evaluate it on the same terms as 'post-punishment' and could argue that if pre-punishment were to justify subsequent criminal conduct, that it must also be the case that post-punishment justifies the conduct in respect of which it has been imposed.[98]

2.4.2 'Moral Luck' and Pre-Punishment

If it is nevertheless accepted that pre-punishment, if it can be justified at all, requires the state to possess knowledge that a particular offence *will* occur, then preventive punishments must be precluded because they can never amount to justifiably imposed pre-punishment. Statman, however, disagrees.[99] New's account is, he argues, better understood as a 'Kantian rejection of moral luck',[100] but one that does not follow the implications of this rejection through; to this extent the account is incomplete, and this is why New arrives at the conclusion that preventive pre-punishment cannot be justified. Broadly, the concept of moral luck concerns the relationship between intentions and outcomes, which are regarded as (largely) immune to circumstances and can therefore be considered to derive from moral character.[101] Proponents of moral luck, most notably Bernard Williams[102] and Thomas Nagel,[103] hold that moral character cannot be insulated from factors outwith an agent's control.[104] The 'problem of moral luck' is therefore one of whether, and to what extent, a person's blameworthiness may be influenced by chance occurrences.[105]

New's account holds that punishment is justified once the agent has formed the intention to offend but before the crime is committed, provided that there is certainty that it *will* be committed. Statman argues that New's approach is predicated upon separation of moral status and luck. If this is so, and we are satisfied that someone has formed a particular criminal intention, and that they will indeed go through with that intention, then that is all we need to justify punishment: 'the objection to moral luck assumes that character is both a necessary and

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[97] *Ibid*.
[98] *Ibid,* 9.
[99] Statman, (1997), 129.
[100] *Ibid*, 131.
[101] For a comprehensive discussion of the concept see D. Statman (Ed.), *Moral Luck* (New York, 1993).
[102] See B. Williams, *Moral Luck* (Cambridge, 1981), especially chapter 2.
[103] See, for example, T. Nagel, *Mortal Questions* (New York, 1979), especially chapter 3.
[104] Also N. Hanna, 'Moral Luck Defended', (2014) 48:4 *NOÛS* 683.
[105] See S. Sverdlik, 'Crime and Moral Luck', in Statman (Ed.) (1993), 181.

sufficient condition for moral responsibility'.[106] If we accept the account of pre-punishment advanced by New is, in fact, founded on a rejection of moral luck as articulated by Statman, then that account must indeed be incomplete. This is because the significance of the actor's conduct relative to his intentions is that it is an expression of his moral character. In other words, if the pre-punishment is justified on the grounds of moral character, the need for certainty that the conduct will occur is an artificial, unnecessary, and unjust constraint:[107]

> If we knew for sure that somebody would kill her husband if she found out that he was not loyal to her, why not put her in prison now? She, first of all deserves it, since she is the sort of person who would commit murder in these circumstances, and secondly, such prepunishment might be rather helpful; not least to her husband…

This formulation of pre-punishment, though presented by Statman as a reinterpretation of New's argument, is something quite different. New requires that intention precede punishment, but on Statman's account knowledge of intention and of future conduct are proxies for knowledge of character type. We are no longer focused solely on the individual; instead, we are engaged in identifying classes of persons to which our hypothetical offender may be assigned and consequently punished.

It is notable that, at the point the discussion moves from 'pure' punishment to preventive punishment, the emphasis shifts rapidly from the individual to the group. Membership of a class is used to justify punishment, albeit for a specific future crime rather than class membership itself. There is an extensive body of research on the efficacy and appropriate application of predictive assessments of offending behaviour, most of which rely on group characteristics to some degree, and it is touched upon later;[108] however it is not generally used to justify punishment itself. Rather, in the context of what might be termed the 'deserved prevention' theories discussed at sections 2.5 and 2.6 of this chapter, punishment is justified on the basis of something that has occurred, but the nature or severity of the punishment is justified on the grounds that shared traits indicate a propensity to cause future harm.[109] In reliance upon traits as predictors which justify conviction for a specific future offence, Statman's defence of preventive action appears to be unique within the literature. However, for the reasons given in section 2.4 below, both these approaches must be rejected.

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[106] Statman (1997), 133.
[107] *Ibid.*
[108] See section 3.4.2 of the thesis.
[109] See, for example, Duff (1998); and von Hirsch (1987).

2.4.3 KNOWLEDGE AND PRE-PUNISHMENT

The first obstacle to making the pre-punishment approaches workable would be establishing that there is, in fact, a group of people who – despite being fully capable of complying with social norms – will *invariably* form and act upon criminal intentions in certain circumstances. These circumstances would also need to be known.[110] It would then be necessary to accurately identify the individual concerned as belonging to that group. The objection raised here is framed as an empiric one. Lippke agrees with New and Statman that the barrier to justifiable pre-punishment is one of knowledge;[111] the deficiency, he argues, is in our predictive methodologies. Numerous competing claims have been made about the value of attempts to predict future offending behaviour, and about their appropriate place in the criminal justice system. This is returned to in chapter three. However, the claim that Smilansky makes against New – that pre-punishment is unjust because it fails to respect the actor as a moral agent – is not one that can be overcome by advances in predictive capabilities and it is equally applicable here.

It is worth acknowledging that in introducing considerations of practical assessment of future offending risk Lippke shifts the discussion somewhat. It is apparent from their discussions that neither New nor Statman actually intend that the arguments they construct be used to underpin a system of pre-punishment, and it is also apparent that they are assuming a level of certainty that could not conceivably be attained. What these authors are concerned to do is to establish the validity of the concept of justifiable pre-punishment. For New, this is punishment based on certainty of future conduct; for Statman, it is punishment based on certainty about the type of individual that would perpetrate that future conduct. The critical distinction between these accounts is that the former precludes punishment which prevents the crime, whilst the latter explicitly permits it. New's account is of interest because it aims to establish the validity of justifiable pre-punishment as a philosophical construct and, if successful, this would go some way to answering principled objections to PD that assume the unjustifiability of punishment for future crimes. Statman's account is worthy of consideration because he assumes the essential validity of New's argument, and constructs what appears to be the only explicit defence of preventive pre-punishment in the literature base. However, both accounts ultimately fail for the same reason.

[110] Lippke (2008), 390.
[111] *Ibid*, at 389.

An acceptance that there is no meaningful distinction between pre-punishment and post-punishment entails acceptance that criminal wrongs are righted by punishment. The logical consequence of this, as Williams points out, means abandoning a desert-based model: punishment could never be justified from a desert perspective because the conduct amounting to a crime is no longer wrongful.[112] It is not at all clear, however, that one can dispense with the conceptual distinction between pre and post-punishment. As Smilansky has argued, punishing someone for conduct they have not yet begun to perpetrate denies them the opportunity to make a different choice.[113] This failure to respect moral autonomy means that pre-punishment always amounts to the punishment of an innocent person;[114] it is to adopt a hard-line determinist stance in which the distinctions between persons deserving of punishment and persons not are overridden by a sense that their conduct has been predetermined.[115] In other words, Smilansky's objection to pre-punishment is that it requires that the emphasis be placed so heavily on factors outwith the agent's control that its imposition can never be just. New's reply to this is that knowing what someone will do does not require denying their capacity to choose to do otherwise.[116]

It appears, then, that in addition to having knowledge of an agent's future conduct we must also have knowledge of a range of other factors not directly addressed by New which allow us to reach the determination that he had the capacity to control and direct his own conduct, but that he would choose not to. New's defence of pre-punishment is offered as a means of demonstrating that the barriers to its justifiable operation are merely evidential, but it does not seem that what he calls the empiric objection can so easily be set apart from the principled objection that a person ought only to be held responsible, and therefore punished, for what is within his control. If it were possible – by whatever means – to ascertain unerringly a sequence of future of events then, as Smilansky and others have said, it is contrary to moral intuition that punishment is deserved.[117]

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[112] *Ibid.* Perhaps also, as Williams suggests, from the point of view of the deterrence theorist, presumably because the routine use of unjustified punishments would be thought to result in a loss of behaviour modifying authority. See Williams (2012), at 9.
[113] S. Smilansky, 'The Time to Punish', (1994) 54:1 *Analysis* 50. See also L. Alexander and K.K. Ferzan, 'Danger: The Ethics of Preventive Detention', (2011-2012) 9 *Ohio State Journal of Criminal Law* 637.
[114] *Ibid.* See also H.L.A. Hart, *Punishment and Responsibility* (Oxford, 1968) pages 21-24, and 181-183; and R.A. Duff, 'Choice, Character, and Criminal Responsibility', (1993) 12 *Law and Philosophy* 345.
[115] Smilansky (1994), at 53.
[116] This line of reasoning is similar to Schoeman's quarantine defence discussed in the last section.
[117] Smilansky (1994); Williams (2012); G. Yaffee, 'Prevention and Imminence', (2011) 48 *San Diego Law Review* 1205.

Although New and Statman attempt to frame their arguments so as to insulate them from practical considerations, their accounts serve to emphasise the inseparability of the empirical question from the principled: we cannot justly punish for future crime, because we can never properly establish that an individual will refuse to exercise their autonomy to refrain from the offending behaviour. If we try to, and we base a decision to punish – preventively or otherwise – on a prediction that the agent will choose to offend, then at the very least we deny that person the opportunity to remain a law-abiding citizen. At worst, these accounts could be regarded as treating those concerned as if they lacked altogether the capacity to conform their behaviour to law. Since the premise of these arguments is that the future is essentially predetermined, it is difficult to see how, in the context of circumstances yet to arise and conduct yet to take place, one could meaningfully distinguish between choice and compulsion. Statman's preventive pre-punishment is particularly vulnerable to this objection, since on his account it is not necessary for the future offender to foresee, intend, or plan, for the necessary conditions to obtain: punishment is justified at the point a person who *will* formulate such plans or intentions is identified.[118]

2.5 Punishment for Dangerousness

The last section considered punishment for a specific future crime and whether it is capable of supporting a system of PD. Such an approach was ultimately rejected on the basis that – even if one could be absolutely certain of what someone would do – it would require a view of human conduct as being so completely pre-determined as to be incompatible with the concept of punishment. The chapter now turns to consider a different set of approaches to the justification of PD as punishment. In these, the *propensity* for doing harm is conceptualised as a substantive offence, and PD as a deserved punishment for that offence. Two such approaches are discussed here: punishment for personality traits predictive of offending (in section 2.5.1); and punishment for committing a reckless endangerment type offence (in section 2.5.2).

2.5.1 "Possession" of Dangerous Personality Traits

A number of accounts of PD contain elements of trait criminalisation – even if the theorists refuse to characterise it as such[119] – Husak, however, has constructed an account that is

[118] This is of course assuming such identifiable traits exist and can be reliably found to predict behaviour as these accounts suggest.

[119] See, for example, Morse's reckless endangerment account discussed in section 2.5.2.

explicitly formulated as such an approach. He argues that people who are considered candidates for PD have done 'something' that has led to their being considered dangerous. Detention in such a case would convey stigma or censure and would therefore amount to punishment. In order to avoid the objection that such punishment would be disproportionate, and therefore unjust, Husak seeks to accommodate it within a retributivist framework. If this can be accomplished, the imposition of PD can be evaluated according to the normative standards against which the operation of criminal law is ordinarily assessed.[120] This matters because if PD simply *is* punishment, and if it cannot be justified on the same terms as retributive punishment generally, then it cannot be justified at all.

Husak argues PD cannot amount to the punishment of an innocent person if it is imposed for an offence; and so his solution is to create one.[121] The offence he proposes is of possession of (hypothetical) personality traits that serve as an accurate predictor of future offending. Once it is established that an individual possesses these traits, the offence is complete. It should be noted that, in common with other approaches described here, Husak is concerned to isolate the empirical question from the discussion of principle.[122] Though he declines to offer an example of how such an offence might operate in practice, he does address some of the likely objections to such a system.

Perhaps the most obvious objection is that what is being proposed is a status offence which violates the criminal law's act requirement. Husak, however, rejects the premise of the objection: possession offences, he contends, criminalise states of affairs rather than acts and, although he considers that some of these offences are controversial enough to warrant repeal, many are not. If the law, in any context, can impose criminal liability in respect of states of affairs – and do so uncontroversially – then this is, he argues, sufficient to declare the claim that the law contains an act requirement as a general principle false in both normative and descriptive terms.[123] It is worth considering this further since establishing that punishment for what might be considered a state of being is (1) an ordinary consequence of the operation of

[120] Husak (2011), 1174.
[121] *Ibid,* at 1184.
[122] Husak fully acknowledges that risk assessment methodologies could not identify such traits; he is clear that he is concerned only with the hypothetical.
[123] Husak (2013), 189-190.

criminal law; and (2) not necessarily unjust, would take us some way to establishing that punishment for dangerousness is not *necessarily* unjust.[124]

Although criminal law's requirement for a culpable act has had general acceptance,[125] Husak notes that an increasing number of theorists have queried the true nature of the principle that the term 'act requirement' describes.[126] The requirement as generally understood derives from a complex set of philosophical theories of action,[127] detailed analysis of which is outwith the scope of this thesis; however in practical terms its role is to limit the reach of criminal liability to circumstances in which its imposition might generally be regarded as justified: [128]

> The act requirement has been invoked to question or reject liability for (1) *omissions*; (2) *nonvoluntary actions*; (3) *status of states*; and (4) *thoughts.* When liability has been proposed for any of these four categories, courts and commentators are bound to object that liability would violate the act requirement. Punishment is said to be objectionable *because* it would violate the act requirement.

The difficulty for those who hold that the act requirement renders these types of offences unjust, is that these categories may include conduct which in intentional, within the agent's control,[129] and uncontroversially immoral.

Corrado offers a hypothetical scenario in which he is driving on a straight road, with his car on cruise control, and his steering wheel is held in place with some sort of locking device. [130] We are not told what the nature of the device is, but that 'some positive bodily movement is required' to disengage it and release the wheel. At some stage the driver becomes aware that a long-time enemy is in the middle of the lane in which he is driving; her back is turned to him,

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[124] There is, of course, a second necessary step which is to establish that an offence of dangerousness could conform to the requirements for just punishment in these circumstances. This is discussed later.
[125] D.N. Husak, 'The Alleged Act Requirement in Criminal Law', in J. Deigh and D. Dolinko, *The Oxford Handbook of Philosophy of Criminal Law* (Oxford, 2011), 107; see also M. Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* (Oxford, 1993); and J. Dressler, *Understanding Criminal Law* 4th edn. (New York, 2006).
[126] For example A. Duff, 'Action, the Act Requirement and Criminal Liability', in J. Hyman and H.C. Stewart (Eds.) *Agency and Action* (Cambridge, 2004), esp. 69; A.P. Simester, 'On the So-Called Requirement for Voluntary Action', (2008) 1 *Buffalo Criminal Law Review* 403; V. Chiao, 'Action and Agency in the Criminal Law', (2009) 15 *Legal Theory* 1.
[127] See M. Corrado, 'Is There an Act Requirement in the Criminal Law?' (1994) 142:5 *University of Pennsylvania Law Review* 1529; H.L.A. Hart, 'Acts of Will and Responsibility', in *Punishment and Responsibility* (Oxford, 2008). Moore (1993) distinguishes between classical or virtue-based morality, and a non-classical view of morality governed by norms which compel or prohibit certain behaviours.
[128] Husak (2011), 110-111.
[129] As Corrado (1994) points out, intention does not necessarily entail any meaningful control over ones actions, such as in cases where an individual can avail themselves of one of the "affirmative" defences, such as necessity or duress/coercion. See p. 1458. This concept of forced choice will be returned to later in the chapter.
[130] *Ibid*, 1538.

and she does not see the car coming. There is sufficient distance between the car and the woman in the road to allow for Corrado to retake control of the car, but he chooses not to. He looks to his passenger and instructs him to pay close attention so he can give evidence that Corrado did not move in order to cause the car to hit the woman. After this, he makes no further movement, the car collides with his old enemy, and she is killed. That it was an intentional killing is beyond dispute – an act, he says, without 'volitional movement'.[131] In this scenario, while punishment would, most likely, not be controversial, Corrado argues, his conduct could not be criminalised if the requirement really was for an overt, voluntary *act*. Indeed, he goes further to argue that its criminalisation is not even permissible as a generally accepted exception to the rule, namely, as a criminal omission arising from failure to rectify a dangerous situation unjustifiably created by the driver. This is based on his contention that the danger was not created by the driver, but by the victim standing in the road.[132]

This is absurd. It is impossible to conceive of circumstances in which locking the steering wheel of a moving and otherwise fully operational vehicle could ever be considered justifiable; nor could it fail to create a dangerous situation. This is true regardless of the characteristics of the road. Indeed, in the circumstances Corrado describes, it would seem unnecessary to resort to omissions liability since it is entirely foreseeable that one may cause death through the acts of securing the car's wheel and relinquishing direct control of its speed. However, accepting for the purposes of argument Corrado's insistence that this is an example of an intentional killing caused by a failure to act in circumstances in which no duty of positive action exist, then it seems as though the scenario described falls foul of the act requirement as he and others argue it is commonly understood.[133] Whether one actually accepts it or not, Corrado is arguing that there are circumstances which sit uneasily with a requirement for an act, but which intuitively appear to warrant punishment. His conclusion, however, is that it does not actually matter much.

The explanation that he gives is that what is commonly termed the 'act requirement' is really a requirement that conduct only be criminalised where the agent could have chosen otherwise and was expected to have chosen otherwise.[134] Husak's position is similar to Corrado's: [135]

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[131] *Ibid*.
[132] *Ibid*, 1359.
[133] See, for example, Hart (2008), 'Acts of Will and Responsibility' and Moore (1993)
[134] Corrado (1994), 1529. This has been articulated elsewhere as a 'practical agency condition'. See Chiao (2009). See also *Kilbride v Lake* [1962] NZLR 590 where a conviction for a strict liability offence of failure to display a vehicle warrant was quashed on the basis that the loss of the warrant, after being properly displayed, was not within the appellant's control.
[135] Husak (2011) in Deigh and Dolinko (eds.), 118.

> What is important to our theory of criminal responsibility…is not action itself, but something that actions typically presuppose. The identity of this "something" must relate to practical agency, our ability as autonomous beings to guide our behaviour by our reasons.

Even Moore, whom Husak credits as one of few theorists who has characterised the act requirement as a requirement for action, agrees that the agent's choice is key. His account is one which rests on a dichotomy of 'views of morality'.[136] The first is a classical conceptualisation derived from virtue-based ethical theory; the second is a norm-based 'nonclassical' approach. The first is principally concerned with the character of the individual and has no particular external relevance. The non-classical view is concerned with compelling or prohibiting certain conduct. Moore's contention is that the act requirement is an extrapolation of the latter, and that this explains why punishment for conduct is warranted, but not for thoughts or character traits which – on the classical account – are relevant only to the good of the individual's internal moral character; they are not properly subject to criminal sanction because they have *done* nothing wrong.[137]

Both Corrado and Husak are dubious about Moore's account. There is no reason, Husak argues, to suppose that wronging oneself through a failure to cultivate virtuous attributes should be distinguished from wrongdoing in this way. [138] Corrado's approach to Moore's classical/non-classical dichotomy is slightly different. He argues that a thought, in itself, is capable of causing harm without being accompanied by some action.[139]

> [Suppose] that pornography tends to change our opinion of the subjects of the pornography. If I knowingly listen to a pornographic broadcast and my view of women changes for the worse, is that not harm to women? If we refuse to punish the consumption of pornography (in this example limited to listening to pornography, so that there are no volitional movements involved), surely it is not because there can be no injury without physical conduct. It is more likely that we do not punish because there are some types of injury we will live with rather than countenance the sort of invasion necessary to prevent them.

This example is a strange one not least because it is difficult to imagine how lowering the status of women in the mind of a consumer of pornography causes harm if his change of view is genuinely not, *in any way whatsoever*, reflected in his conduct.

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[136] Moore (1993), esp. 49-53.
[137] *Ibid*, 53.
[138] Husak (2011) in Deigh and Dolinko (eds.), 118. Emphasis in original.
[139] Corrado (1994), 1529.

Husak arrives at a similar conclusion as regards liability for omissions, and his example concerns the private possession of nuclear weapons.[140] Its criminalisation is, he points out, as uncontroversial as any could be. The difficulty with criminalising *some* offences is not, he argues, that they do not contain an act as commonly understood, but that – as Corrado suggests – the imposition of liability in those cases would place a more onerous burden on liberty than when imposed for an act.[141] The CJS does in fact punish people in the absence of an act, as commonly understood, and in at least some circumstances it ought to do so. Thus, Husak concludes that the claim that the criminal law contains an act requirement is both normatively and descriptively false, and this can be explained by a reinterpretation of the requirement for an act, as a requirement for control over the conduct or set of circumstances which is to be criminalised. If the act requirement is indeed better understood as a control requirement, the criticism that punishment for character amounts to punishment for who someone *is* may be circumvented by ensuring that only the possession of traits over which an individual had control would be criminalised.

The obvious difficulty with this is that it would prohibit the reliance on traits over which the individual does not have control[142] but that are nevertheless thought to occupy a correlative relationship to future offending behaviour (this is a limitation that Husak acknowledges explicitly)[143] which has the potential to limit preventive efficacy. As Husak himself admits, the inadequacy of predictive techniques is problematic for PD generally. Husak's construction of PD as punishment imposed in the ordinary course of the CJS invites an additional layer of controversy: possession of the relevant traits would have to be proven beyond reasonable doubt, and the traits themselves would have to be accurately identified as being those which (1) accurately predict future criminal conduct of a serious nature; and (2) can genuinely be controlled by the application of the individual's moral agency and practical reasoning. Since PD is imposed for the possession of traits at a particular time, it may not be just to impose it in respect of those traits which can only be amended through prolonged contact with specialist forensic rehabilitative services, since the likelihood is that these will not be accessible to the individual prior to his incarceration – for the imposition of punishment to be truly deserved, he must have had the opportunity of avoiding it.

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[140] Husak (2013), 190.
[141] Husak (2011) in Deigh and Dolinko (eds.), 116.
[142] Age, unemployment, some personality traits etc. This is revisited briefly in chapter 3.
[143] Husak (2013), 190.

In summary, the strength of Husak's account is its honesty in the sense that no attempt is made to disguise or otherwise work around what amounts to the criminalisation of the "possession" of a personality trait of dangerousness;[144] though it will be apparent that his account – like others considered in this chapter – makes no substantial attempt to define precisely what this term means.[145] It is also apparent that it fails to resolve the tension between culpability-proportionality and risk-proportionality: there must be a trade-off between one value and the other. Further, it is by Husak's own admission unworkable in practice, at least as a unitary theory. This is not offered as a criticism of the account itself – Husak is clear that it is a wholly theoretical work – but since this thesis is concerned with formulating a model which could sustain a legal framework to support the PD of dangerous offenders, it is a necessary observation. To the extent that it can be taken as a restatement of the importance of ensuring a culpability/responsibility constraint in any legitimate system of PD, though, Husak's approach has value for the purposes of constructing a system with principled limitations, which leaves scope for the offender to avoid the imposition of the penalty, which is why such detailed consideration of it is appropriate.

2.5.2. Reckless Endangerment

The next approach to be considered is one in which dangerousness is conceptualised as a form of reckless endangerment and PD is the punishment for it. Attempts to justify PD on this basis have been offered by Morse, and by Davis.[146] Of the two, Morse's defence is the most comprehensive, and the one that has garnered most attention;[147] and therefore most of the discussion that follows will be focused on that account. The objective of the reckless endangerment approach attempts to reconcile the intuition that PD is punitive in nature, with the intuition that people should not be free to harm others. It aims to permit the incapacitation of those who may do harm to others, but to build in a culpability constraint so that they are not subject to indeterminate – and therefore unjust – detention.[148] What is proposed is a kind of pure omissions liability based on a presumption of risk, and the criteria for its imposition are as follows: [149]

[144] See, for example, the accounts discussed immediately below for comparison.
[145] The thesis discusses the concept of dangerousness at section 3.3.2.
[146] Morse (1996); Davis (1995); and Davis (1996).
[147] See for example also Lippke (2008).
[148] Morse (1996), 147.
[149] *Ibid*, 152.

> (1) prior conviction of at least one serious crime of violence, or at least one prior occurrence of involuntary civil commitment for actual serious violent conduct; (2) conscious awareness of an extremely high risk that the agent will in the immediate future cause substantial unjustified harm; and (3) failure to commit oneself voluntarily or to take other reasonably effective steps to avoid causing future harm.

An offence of reckless endangerment would be committed every time a dangerous agent refused to take steps to prevent himself harming others in the future and would be punished by a short determinate period of imprisonment.[150]

Morse identifies the general (and unsatisfactory) justification offered for PD as being the right of persons not to be subject to unwarranted harm, and the corresponding lack of a right to inflict such harm upon others.[151] More specifically he argues PD is employed (1) because a potentially harmful agent lacks responsibility; or (2) in circumstances where, although the agent is responsible, he presents an extreme danger to society.[152] The intrusion into individual liberty is therefore warranted on the grounds of the agent being a greater potential threat to the liberty of others. The difficulty with these categories of dangerous, detainable person, Morse argues, is that many dangerous people do not fall under them, even though their detention may well be justified. Morse's account, as set out above, aims to find a way to close this loophole by finding a basis upon which to criminalise their conduct, and use the criminal law to detain them.

Two examples of Morse's 'dangerous undetainables' are as follows: the convicted serious offender about to be released from prison who admits he intends to return to a life of crime upon his liberation; and the mentally disordered patient with a history of violence who is likely to stop taking his medication upon his discharge from hospital.[153] Civil PD is morally impermissible, he says, because it would blur the boundaries of civil and criminal law in violation of the autonomy principle. His suggested approach is somewhat attractive for two reasons: first, it would engage the stringent safeguards associated with criminal law. Second, it incorporates a culpability constraint. In requiring persons who are consciously aware of the risk they pose to take reasonable steps to mitigate that risk this account should, in theory at least, represent an improvement upon those who hold that mere dangerousness is sufficient to

[150] *Ibid*, 153.
[151] *Ibid,* 116.
[152] *Ibid*, 117.
[153] *Ibid,* 113-114. See also S.J. Morse, 'Fear of Danger, Flight From Culpability' (1998) 4 *Psychology, Public Policy, and Law* 250.

warrant punishment.[154] Yet, as Morse himself admits, it would be extremely difficult to prove these offences.[155] Although he is at pains to emphasise that what he proposes is not thought liability,[156] the lack of the requirement for any form of (otherwise) criminalisable conduct leaves the theory vulnerable to his own criticisms of punishment for dangerousness. Simply stating that the new crime is complete at the point at which the person fails to take reasonable steps does not overcome this objection because this offence is one of failing to take steps not to be dangerous. This is especially true of the prisoner, since merely stepping outside of prison upon his release, but with the intention to reoffend in his head amounts to a complete offence. However, perhaps the most fundamental problem, from a theoretical perspective, is that this is not a retributivist account of preventive sentencing despite its presentation as such.

Insofar as it seeks to characterise a period of incarceration as deserved and proportionate punishment for past conduct it appears quintessentially retributivist – in fact it could be considered to represent the hard-line of retributivist theory in that blameworthiness is taken as both a necessary and a sufficient condition to warrant the imposition of punishment. Since the subject's mere existence outside of conditions of confinement (be it physical containment, as in the case of the career criminal, or chemical, as in the case of the patient) is enough to complete the crime when the other conditions are met – specifically the requirement of conviction for a prior crime of a certain type – it might well be considered that it is little different to an assumption about future conduct. Although the offence could not be made out in the absence of proof of knowledge of dangerousness, the threshold is set extremely low in that it requires that the individual intends that he will do (or fail to do) something in the future which will place others at risk. It does not, therefore, amount to knowledge that harm will be done but a prediction by the subject that, at some point, the subject will conduct themselves in such a way that harm is threatened, and it does not allow for the possibility of the exercise of free-will in order to avert that outcome at any stage. In fact, as Lippke points out, '[the] reckless endangerment argument makes sense only if the offenders in question are prepared to take a fatalistic view of themselves'[157]and assume their own lack of ability to determine their conduct. The reason for this may be surmised to be that, whilst the author is concerned to produce an account upon which such incarceration may be justified as punishment, and his own retributivist sentiments preclude him from advocating anything other than proportionate

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[154] See the discussion of punishment for dangerous character traits at 2.5.1.
[155] Morse (1996), 153.
[156] *Ibid*.
[157]Lippke (2008), 404.

punishment for prior conduct, his real concern is to construct a principled basis for a coercive, preventive intervention. The difficulty is that, because the offence depends to such a great extent on processes that are internal to the individual, on this account the culpability constraint can only be purchased at the expense of preventive efficacy.

The next section considers approaches which seek to demonstrate that PD can be justified as proportionate punishment of past offending. This is achieved either by conceptualising desert as encapsulating a range of just punishment, such as Morris' 'limiting retributivism' approach (discussed in section 2.6 below); or by conceptualising blameworthiness as capable of aggregation, such as von Hirsch's 'no conflict' thesis (discussed in section 2.7).

2.6. Incapacitation as Desert

This section considers approaches which seek to justify PD as punishment for past offending but base the justification on a conceptualisation of desert and prevention as compatible, rather than conflicting, constructs. Identifying a normative principle mediating the relationship between a finding that punishment is due, and a determination that it should take the form of a preventive sentence, is one of the more difficult tasks for philosophical defences of PD. Simply put, although theoretical works may tell us something about when a punishment may legitimately be imposed on a dangerous offender, they struggle to make the leap from desert-proportionality to future-focused PD. Most of the approaches discussed in this chapter address this by resorting to abstraction, insulating themselves from any and all practical considerations that would be necessary for those accounts to form the basis for a workable model of PD in practice. There is, however, another approach to reconciling desert and prevention which is identifiable in the literature, most notably in the work of Morris, and von Hirsch. This approach is to argue that the apparent tension between these concepts is entirely illusory as a matter of principle. If this is true, then there is no ethical dilemma in the incapacitation of persons to prevent future offending. Although it will be argued that these accounts must fail, they are worthy of note since they represent rare attempts at overtly reconciling prevention and desert. They also come *somewhat* closer to functional models since they advocate adjustment of a penalty for dangerous offenders, but still require conviction for a serious offence, rather like some dangerous offender frameworks in operation.[158] The first approach to be considered in this section is based on a 'limiting retributivist' account of punishment which attempts to create

[158] For example, the Scots legal framework discussed in later chapters.

scope for the use of PD by construing desert as a rather broader concept than most of those accounts discussed so far.

2.6.1 Limiting Retributivism and 'No Conflict'

Classic formulations of retributivism hold that desert is necessary and sufficient for both the imposition of punishment, and the form and severity of that punishment.[159] However, Morris argues that desert proportionality, rather than determining the punishment an offender receives, merely delineates the boundaries of permissible penalties; this he terms 'limiting retributivism'.[160] The conceptualisation of desert as limiting a range of penalties, rather than determining a particular penalty,[161] is based on the nature of moral intuition: when we say that a punishment is deserved, we mean simply that it is not undeserved, i.e. too harsh or too severe.[162] On this account, the maximum and minimum sentence is determined by the seriousness of the offence, but consequentialist considerations such as the risk and the need to protect the public would be used to 'fine-tune' it. Two offenders convicted of the same offence may, therefore, receive quite different sentences even though their blameworthiness in relation to that particular offence may be assessed as being no different. For example, an offender who might otherwise be dealt with by a non-custodial sentence might find themselves subject to a period of imprisonment because the risk they present is regarded as 'tipping the scales' in the direction of the need to prevent reoffending. In the context of a model that, whilst holding desert to be indispensable, is concerned to permit a sentencer sufficient latitude to prevent reoffending, the possibility of such an outcome must be regarded as a feature, rather than an accidental oversight. A defender of the doctrine might, however, argue that the potential for such a result is less likely than suggested, because for a custodial sentence to be in contemplation the desert constraint would (should) ensure that the offender's conduct had been sufficiently serious.

Another approach is to argue that special incapacitative sentences for dangerous offenders are, in fact, culpability constrained because prior offending aggregates to increase blameworthiness: 'The dangerous offender may be punished more severely, according to this

[159] von Hirsch (1987). Though it is doubtful that such ultra-Kantian retributivism really exists in contemporary penal philosophy: see section 2.3. above, and also, for example, Hart (2008); Duff (2001); Morse (1996).
[160] See N. Morris, *The Future of Imprisonment* (Chicago, 1974), chapter 5; N. Morris, *Madness and the Criminal Law* (Chicago, 1984), chapter 3; and the discussion in von Hirsch (1987) beginning at 38.
[161] Morris (1984), 199.
[162] Ibid, 198. Emphasis added.

view, because his dangerousness makes him also deserving of more punishment.'[163] Certainly, it is not entirely uncontroversial amongst retributivists that prior offences may have *some* bearing on punishment;[164] but on this account an offender's prior convictions serve as a proxy for dangerousness, shifting the emphasis away from future offending and onto his past offences. If the offender's criminal record can be considered to disclose factors relevant to the risk he poses,[165] and also his blameworthiness then, the argument goes, no conflict arises between the requirements of desert, and the need for incapacitation. He is not punished for his dangerousness, or what he might do, but for what he has already done.[166] If incapacitation really could be deserved as Morris and von Hirsch suggest, it would resolve at least some of the ethical concerns regarding the choice to preventively detain. The difficulty for these approaches is, however, is that desert-proportionality cannot really be preserved where protective utility is required over the long-term. This is discussed next.

2.6.2. Proportionality and Practicality

The most persuasive objection to these kinds of approaches was mentioned earlier, but is essentially that this approach fails to respect the requirement for ordinal proportionality: that is, the requirement that crimes of comparable severity be treated comparably. von Hirsch identifies two key elements of ordinal proportionality: parity and rank ordering.[167] There are proportionality requirements that require offenders convicted of like offences, demonstrating similar degrees of blameworthiness, receive similar punishments; and that punishments convey disapprobation appropriate to individual crimes, and so distinguish between greater and lesser offences. The problem with limiting retributivism is, according to von Hirsch, that treating desert as though it circumscribes a range of acceptable penalties is to disregard the censuring function of punishment. If consequentialist considerations determine the actual punishment, an offender deemed higher risk may receive greater punishment than one who is of lesser risk but more blameworthy.[168] Or, as Duff puts it, punishments determined by risk,

[163] *Ibid*.
[164] See below.
[165] The value of past convictions to predictions of dangerousness is discussed in chapter 3, however a RAND Corporation study published in 1982 found that prior convictions held better predictive value than the index offence but, curiously, they were of less value than offender self-reports. See P.W. Greenwood and A. Abrahamse, *Selective Incapacitation* (1982), esp. 89 available at: https://www.rand.org/pubs/reports/R2815.html Accessed 10/11/2020; also J.M. Chaiken and M.R. Chaiken, *Varieties of Criminal Behaviour* (1982), available at: https://www.rand.org/pubs/reports/R2814.html Accessed 10/11/2020; and von Hirsch, (1987), 107-112.
[166] M.H. Moore *et al.*, *Dangerous Offenders: The Elusive Target of Justice* (Harvard, 1985), 114-115.
[167] von Hirsch (1987), 40.
[168] *Ibid*. Emphasis added.

whether or not tied to a conceptualisation of blameworthiness, will communicate a degree of censure that is not appropriate to the crime for which the individual is to be punished.[169]

On von Hirsch's account, his own model escapes this criticism because it is based on the principle that culpability may accumulate to justify harsher sentences than would otherwise be warranted for the most recent offence alone. However, even if it were accepted that an offender's criminal record might legitimately justify some increase in punishment it would not, as Duff points out, generally be held to justify any grossly disproportionate increase in sentence;[170] that is, it would not permit the sentencer to exceed the upper boundary of what is deserved for the most recent offence. It is more a matter of failing to reduce the sentence as might be the case when sentencing a first time, or infrequent offender, who lives a generally law-abiding life. [171] This would seem to sacrifice a great deal of preventive efficacy.[172] This is, of course, unless one takes the view that imprisonment for an indeterminate period of time could be considered proportionate punishment in conventional desert terms, although it is very difficult to envisage a system of ordinal distinctions between different offences (or offenders) delineated by periods of time which may – but will not necessarily – be determined by the natural life span of the offender.

It must also be pointed out that in practical terms, both Morris and von Hirsch's models presuppose the ability to accurately identify those who present the requisite degree of risk, whether cloaked as aggregate blameworthiness, or acknowledged openly as a consequentialist consideration. In Morris' limiting retributivism, risk directly impacts upon the severity of sentence; and, according to von Hirsch's no conflict model, desert aggregates across offences and serves as an approximation of dangerousness. This makes no sense unless prior offending can be taken as a reasonable indicator of reoffending risk. Risk determination is one of the most controversial aspects of PD; this is because there is uncertainty at the point PD is imposed as to whether the offender made subject to it really would go on offending if not detained. Approaches to risk and dangerousness assessment are considered briefly in the next chapter. For the purposes of the present discussion, it is sufficient simply to note that for these

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[169] Duff (1998), 146. See also 2.3.1.
[170] *Ibid*.
[171] Although the punishment part or tariff element of the life or indeterminate sentence is intended to fulfil this function, the duration of these sentences in themselves are unknown at the point at which they are passed. See part 6.4.1.A of the thesis.
[172] Duff (1998), 146.

approaches to be workable in any practical sense, they require an ability to identify dangerous offenders.[173]

In summary, the approaches of Morris and von Hirsch both aim to demonstrate that it is possible to create an incapacitative model in which the incapacitation is deserved as proportionate punishment, rather than simply a desirable ancillary benefit. The punishment-centred approaches all have in common a conceptualisation of PD as being a response to some sort of culpable conduct,[174] but the link is often tenuous. In seeking to elucidate the normative relationship between culpability and detention, and in using it to propose an operational sentencing model,[175] Morris and von Hirsch make a unique and valuable contribution to the literature. However, in their conceptualisation of detention as so directly limited by desert, the tension between prevention and desert remains evident. In order to operate as a constraint, the scope of the concept of desert must also be constrained. Whether this is on the basis of cumulative blameworthiness or pre-determined upper and lower limits for certain offences, there is a trade-off between the desert constraint and preventive efficacy. In other words, these models might serve well in most cases where a custodial sentence is being considered, but they cannot ground a system of indefinite PD for the most dangerous offenders. If indeterminate sentences for the protection of the public are to be justified, they cannot be justified as deserved punishment in the way these authors propose.

Two things have been concluded thus far. First, that PD bears the hallmarks of punishment, and should be conceptualised as such. This means that it must be imposed only where an individual is culpable, and that PD must be subject to the safeguards of criminal procedure. Second, that even though PD *is* punishment, there are difficulties in justifying it *as* punishment. The next section addresses approaches that might be considered to represent honest and pragmatic compromise between the need for a culpability constraint and the need to protect the public from the consequences of future offending. These are the 'forced choice' approaches which regard PD as something rather like self-defence occurring at the societal level.

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[173] The 'no conflict' thesis is perhaps less vulnerable to this, *assuming* one accepts that blameworthiness can aggregate as von Hirsch argues. But since its purpose is to serve as a principled basis for incapacitation, and incapacitation's value is in what it prevents from occurring, it cannot be accepted as an alternative to those models which do require risk evaluation.

[174] Or blameworthy state of affairs as in Husak's trait liability approach discussed in 2.5.1.

[175] See von Hirsch (1987), especially chapter 14 on 'Strategies for Synthesis' of desert and incapacitation.

2.7. FORCED CHOICE

Most of the approaches considered thus far have sought in some way to get around the inherent incompatibility of the principle that punishment must only be imposed when and to the extent warranted by conduct already exhibited, with the need to protect the public from a small class of high-risk offenders. The approach considered here entails a different conceptualisation of the relationship between incapacitation and blameworthiness. This 'forced choice' approach views PD as being permissible in circumstances where an autonomous agent has chosen to conduct himself in way that gives rise to a reasonable fear he may go on to cause serious harm. Barnett[176] characterises this as a sort of societal or 'extended' theory of self-defence, and it will be argued here that this offers the most convincing explanation as to why PD may be morally permissible in certain circumstances. The purpose of this part of this chapter is to evaluate these approaches and build upon them to begin to construct a theoretical framework capable of supporting a defensible, workable model of PD.[177]

2.7.1. COLLECTIVE SELF-DEFENCE AND THE JUST DISTRIBUTION OF BURDENS

Bartlett's starting point is the nature of the CJS which, on his account, exists primarily in order to prevent harm-doing: what is experienced by the offender as punishment is just the means through which this crime reductive purpose is achieved.[178] There is no requirement that we wait for harm to be done in order to obtain incidental protective benefit from a punishment proportionate to the wrongdoing; instead, the state may take pre-emptive measures where a credible threat has been communicated.[179] These measures are, he argues, properly conceptualised as an exercise of a general right of societal self-defence by the CJS on behalf of the public. The right of societal self-defence is extrapolated from an individual's entitlement to protect himself; but Barnett goes further than conventional self-defence doctrines by dispensing with the requirement for immediacy in the societal context[180] arguing that it would

[176] R.E. Barnett, 'Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction', (1996) 76 *Boston University Law Review* 157.
[177] This task will then be taken forward in chapter 3.
[178] Barnett (1996), 166.
[179] *Ibid,* 163.
[180] Some theorists who have argued that imminent risk of harm ought not to be a requirement of individual self-defence either, since it denies the defence to those who may have no practical alternative course of action available to them. See, for example, J. Dressler, 'Battered Women Who Kill Their Sleeping Tormentors:

not be wrongful for an individual who is threatened to proactively seek out the would-be attacker in order to prevent the threatened harm. However, one of the reasons that the comparison with self-defence of the individual is not entirely apposite is that, in circumstances where the threat is not immediate, citizens are expected to seek the state's intervention rather than taking direct action. For the purposes of Barnett's argument, though, we must assume this option does not exist.

Barnett is concerned with the *moral* permissibility of taking pre-emptive action where the threat is not immediate – his argument is not that private individuals have a legal right to seek out and attack those they are afraid will harm them at some stage in the future; it is that, if someone could be *sure* they were the target of a credible threat of serious harm, it would not be unethical for them to take proportionate steps to protect themselves. He gives the examples of the threat that would be communicated if he pointed a gun at a colleague and issued a verbal warning that he intended to kill him; if he pointed the gun without saying anything at all; and finally if, instead of presenting an immediate threat accompanied by such a gesture, he simply posted a full page advertisement in a newspaper that stated his intention. Barnett contends that in all of these sets of circumstances his colleague would be morally justified in taking proportionate preventive action provided that the threat could be considered to be credible.[181] The threat itself can take the form of words or gestures but, so long as the threat is clear enough, and is believable in its context, it is enough to trigger the right of the person to whom it is communicated to defend himself.[182] From this general principle he extrapolates a justification for what he terms 'extended' or 'collective' self-defence. It should be noted that, while Barnett does require that the subject has committed at least one crime,[183] its significance is to the communication of the threat; he is not seeking to justify the collective self-defence (detention) as a form of punishment.

It will be recalled that Morse, in his reckless endangerment account, gave two examples that he considered fell outwith the established parameters of the civil and criminal justice systems. The first was the criminal who, at the point of his release from prison, indicates his intention to engage in further criminal conduct; the second was the patient with a psychiatric disorder

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Reflections on Maintaining Respect for Human Life while Killing Moral Monsters', in S. Shute and A. Simester, *Criminal Law Theory: Doctrines of the General Part* (Oxford, 2002); J. Horder, 'Killing the Passive Abuser: A Theoretical Defence', *Criminal Law Theory;* see also the discussion in F. Leverick, *Killing in Self-Defence* (Oxford, 2006), chapter 5.

[181] Barnett (1996), 163.

[182] *Ibid*.

[183] *Ibid*, 167.

that predisposed him to violence, who regularly stopped taking his medication and was highly likely to do so when released from hospital.[184] These cases were problematic for Morse because of his conception of what the criminal law is and what it may legitimately be expected to do; but Barnett considers that the primary purpose of the criminal law is to protect people from harm, and therefore it is forward-looking in nature. Since it is the threat a person communicates that is of concern, rather than his culpability, the dangerous agent in either scenario becomes an appropriate subject of PD. It is no objection that the person concerned presents a risk because of an illness over which they may have no (or very little) control; an inability to control one's conduct, Barnett argues, makes one more of a threat than a fully rational moral agent.[185] Collective self-defence (PD) is therefore justified when: (a) a fully-responsible, non-mentally disordered person communicates a credible threat of harm to the community (or presumably any group or individual, since that should be of concern to the general public); or (b) where a person has a mental disorder that makes it highly likely that he will violate the rights of others.[186] However, since this thesis is concerned with the sentencing of dangerous offenders, consideration is restricted to (a).

Barnett's conceptualisation of the CJS contrasts sharply with retributivist accounts. In his model, any punitive effect of the measures imposed is incidental to the aim of improving the victim's situation. His reasoning is that (1) rather than waiting until harm is done and trying to mitigate its impact, it is morally permissible for someone – or the state in their place – faced with a credible threat of unjustified harm (a rights violation) to take steps, proportionate to the harm threatened, to avert the risk; (2) the legal system is, contrary to common misconception, orientated towards protecting individuals from the effects of rights violations, and protective intervention may legitimately include pre-emptive action as well as impact mitigation; (3) the distinction that retributivists seek to make between civil and criminal law is therefore false and, as such; (4) culpability-proportionality can be dispensed with in favour of threat-proportionality, in order that the CJS may intervene on behalf of a potential victim or group of victims.

Even if Barnett's assertion that such direct action in the individual case is morally permissible is accepted, in a societal context the attack and its potential targets are hypothetical. In

[184] Morse (1996), 113-114. See 2.5.2 above.
[185] Barnett (1996), 165. Although at the point at which Morse was seeking to justify intervention, the patient was, he considered, blameworthy and responsible because he was at the stage of deciding to stop taking the medication that was preventing his condition from deteriorating.
[186] *Ibid.*

response, he points to the existence of a presumption of harmlessness which can be rebutted when there is sufficient evidence to indicate that the individual can no longer be trusted to refrain from harming others.[187] This is his general justification for pre-emptive action.[188] His account of the nature and purpose of the criminal law, at the very least, significantly diminishes the need to consider issues of blameworthiness, and instead the focus becomes whether or not there is evidence to rebut this presumption of harmlessness. In the case of the prisoner in Morse's first example, his prior offences plus the credible communication of a threat provide enough evidence to rebut the presumption. The agent, by his chosen conduct has forfeited his right to be presumed harmless and so, Barnett contends, if we reach the wrong determination about him, that is his fault; not ours.[189] He does, however, stop short of equating forfeiture of the right to be presumed harmless directly with forfeiture of liberty. Rather he is arguing that rebuttal of the presumption of harmlessness excuses the mistake that would be made if someone who would not have gone on to do harm is preventively detained. This is returned to later. Even if one accepts the position that the imminence requirement is better understood as a requirement for a credible communication – and that the imminence of an attack simply increases the credibility of the threat – Barnett's account still does not explain *why* intervention is (or might be) justified in the face of a threat.

This issue is addressed by Montague.[190] He observes that one reason we might consider preventive action justifiable is that we regard the restriction on the subject's freedom as being a lesser harm than that which would be done to the subject's victims if his liberty were not infringed.[191] But, as he points out, proportionate intervention and even lesser restrictions of liberty require justification. He also requires the commission of an offence, but as a signifier of culpability. Blameworthiness is, for Montague, what justifies the intervention; not the threat itself. He asks us to consider a scenario in which *x* will do something which results in (innocent) *y*'s death unless *z* intervenes. *x* does not intend to cause *y*'s death but knows his intended conduct will cause it; he does not care. In this situation *z* is, we are told, presumptively justified in intervening.[192] Accepting, for the purposes of the discussion, that we know that *x* will cause

[187] Barnett, 167.
[188] *Ibid*.
[189] *Ibid*, 165. See also N. Walker, 'Ethical and Other Problems', in N. Walker (Ed.) *Dangerous People* (London, 1996), 7.
[190] Montague (1999).
[191] *Ibid*, 178.
[192] *Ibid*, 178.

y's death,[193] the reason that *z* is justified in taking this action is, according to Montague, that this is a 'forced-choice situation'[194] which has arisen through *x*'s fault: *x* has chosen to place *y* at risk, and so created burdens which must now be distributed. Given that *x* is to blame, *z* is presumptively justified in redistributing those burdens in favour of the innocent party who was *x*'s intended victim. Because it turns on culpability, Montague's account cannot be used to justify quarantine or other forms of civil confinement, though he is clear he is not concerned with punishment. The action described in the scenario would, however, seem to bear the hallmarks of punishment identified in section 2.3.1. This aside, Montague's 'just distribution of burdens' goes some way to explaining why preventive action may be justified where there is a credible communication of a threat by a culpable agent.

As both authors acknowledge, there are problems of prediction associated with extended self-defence. At the collective level, the threat is further removed and therefore likely to be less certain than that encountered in a more usual self-defence scenario: at the point at which an *individual* has the right of self-defence an attack is in progress; the colleague in Barnett's example would have the option of seeking police assistance. It would be neither necessary, nor desirable, that he should seek out his would-be attacker himself. But this is less problematic for PD than it is for individual self-defence. PD is a measure taken by the state to protect citizens: analogies aside, it is state action with which we are concerned and that occurs in a different context and timescale than an individual's self-defensive strike. A court's reliance upon prior offending – or, as Bartlett suggests, perhaps multiple incidences of prior offending[195] – to inform the decision as to whether a preventive sentence is appropriate is not the same as an individual's reliance on an historical threat to justify seeking out his would-be assailant.

2.7.2. Forced Choice as a Principled Foundation for Preventive Detention

Of the approaches this chapter has considered, a conceptualisation of PD as an exercise of societal self-defence based on the just distribution of culpably created burdens is the most

[193] Though in practical terms it is impossible to *know*, at least in the societal context, that someone will cause harm. It will, however, be argued later predictability is not quite such a problem for this account as for the others covered in this chapter.
[194] *Ibid*.
[195] Barnett (1996), 167.

persuasive, for several reasons. First, and most straightforwardly, it recognises PD for what it is: a pre-emptive restriction on an individual's liberty to protect others from harm. That is, as Barnett says, essentially what (individual) self-defence is. In recognising this, and that the existence of a right of self-defence is – though we might reasonably disagree on its precise requirements – generally accepted, it must also be recognised that the basic principle underpinning both is that we do not, and ought not, require persons to accept the preventable infliction of harm by an aggressor. Second, whilst not conceptualising PD as punishment, it recognises that what is imposed as a preventive measure is experienced as punitive by the subject. It is therefore compatible with the view, taken here, that PD – however intended – *is* punishment; though, on such an account, it cannot be justified *as* punishment because the basis for its imposition is the protection of potential victims from future harm. PD may be morally permissible, but it will always require a departure from the retributive principle.

Third, it nevertheless recognises the requirement for a culpability constraint. For Barnett, this is achieved by the requirement for an offence which serves to communicate a threat such that our (potential) aggressor can no longer be presumed harmless. For Montague, however, the culpability has moral significance in itself because it is the choice to create the burden (risk of harm) that must then be 'distributed'. The significance of this is that it recognises that PD does not create the burden; it responds to it. The ethical considerations associated with the decision whether to detain someone do not disappear if we choose not to intervene and let the chips fall where they may, so-to-speak. We are simply granting freedom to one individual to choose to harm others in circumstances where we could have protected them. It is difficult to see how a system which respected the autonomy of persons to create victims could be considered respectful of autonomy as a matter of principle; the essence of being a victim is the lack of choice in what is done to you.

If there were nevertheless doubt as to the morality of preferring the freedom of potential victims *from* harm, to the freedom of would-be assailants *to* harm, Montague's 'just distribution of burdens' offers a rational, albeit imperfect, explanation. Pre-emptive action is, he says, justified because the agent's choice to cause harm is a wrongful one. This brings us to the fourth, and final, reason that 'forced choice' is most persuasive: it explicitly acknowledges and accounts for the potential for error while allowing for the protection of the public. The offender, however clearly a threat is deemed to be communicated, may ultimately choose not to act. We cannot know for certain. But the burden created by his choices means that, when we are forced to consider action, we may resolve that uncertainty in favour of those who have no choice as to

whether they will be harmed. If in doing so, we make a mistake because he would not, in fact, have gone on to cause harm, the responsibility lies with the offender. This line of argument is of particular interest when the problem of 'false positives' is considered. This is considered in the next chapter but, as mentioned earlier, one of the more common criticisms of PD is that we are not sufficiently precise in our identifications of individuals as dangerous to operate such a system. The requirement that an offence is necessary – though not, as will be argued, sufficient – to rebut the presumption of harmlessness may go some way to ameliorating those concerns, though it cannot – and should not – dispense with them entirely. This is so even though, as will be argued in section 3.3.2 of the thesis, the problem of the false positive is not as acute as is often assumed. Whether this is accepted or not, in a model where the individual presenting a culpable threat bears the burden of uncertainty the empirical question is cast in rather a different light.

Finally, before this chapter concludes it is worth saying something of the terminology of justification. Black has argued that there is a difficulty in holding that PD may be *justified as* punishment, and it is perhaps here that the culpability requirement is most useful. She argues that, while the terminology of justification is employed almost universally by PD theorists, it is more accurate to say that they are concerned with the *defensibility* of PD, which she defines as something less than justifiability.[196] Her argument is that, given the scope for error in these determinations, the language of justification is inappropriate; that instead, it is better to think in terms of a decision to preventively detain being considered 'defensible' or not. As she points out, it seems intuitively more acceptable to think of decisions to detain in terms of whether or not that they are defensible, rather than whether they are justified. Certainly, 'defensible risk practice' is recognised as the goal of practitioners in the fields of risk assessment and management.[197] Whether or not there is a theoretical significance to the language of justifiability *versus* defensibility it would seem to have little, if any, practical import. Nevertheless, the language of permissibility or defensibility is generally preferred in this thesis because the uncertainties surrounding future conduct have costs that ought to be kept in mind; and because, as Black says, there is something intuitively unsatisfactory about the claim that the imposition of a measure with such serious consequences for its subject was justified when,

[196] J. Black, 'Is the Preventive Detention of Dangerous Offenders Justifiable?' (2011) 6:3 *Journal of Applied Security Research* 317.
[197] See, for example, Risk Management Authority, *Framework for Risk Assessment, Management and Evaluation: FRAME* (Paisley, 2011); and the discussions in chapters 3 and 4.

at the point the decision was made, the true necessity of that measure could never be known.[198] Imprisonment is a harm in itself not to be understated. In recognition of that insurmountable knowledge limitation, the best we can aim at is, as Black and others have said, defensible decision-making.

2.8. Conclusion to Chapter Two

This chapter has argued that PD should be conceptualised as a form of punishment and ought therefore to be subject to the same safeguards. A variety of approaches to justifying PD as punishment were discussed. It was noted that retributivist formulations of PD are all but unworkable, both in terms of knowledge requirements, and the loss of preventive efficacy. PD cannot, therefore, be justified in retributivist terms because the need to protect the public from dangerous offenders cannot be satisfied by those approaches which seek to impose proportionate punishment for wrongdoing. The most persuasive approaches to PD were identified as those which conceptualised it as something approximating societal self-defence. An analytical model based on an extended theory of self-defence was proposed, in which the culpability constraint was satisfied by a requirement for an offence (i.e., that PD ought to be a sentence for a crime). It was argued that this, together with other information – which may include prior offending history, and risk assessment – can legitimately serve as the basis for the imposition of PD when they indicate that the presumption of the offender's harmlessness has been rebutted. Crucially, the power to avoid PD rests with the offender, since it can only be considered permissible where he has chosen to conduct himself in such a way as to communicate a threat that he will cause serious harm if not detained. The next chapter builds on this, exploring the concepts of 'risk' and 'dangerousness' to establish when the presumption of harmlessness can be considered to have been rebutted.

[198] It may, in fact, be justified; but this cannot be known at the point the decision to detain was made because, as New points out, the detention removes the opportunity for the harm to be done.

3. Dangerousness and Risk

3.1 Introduction to Chapter Three

The previous chapter addressed the philosophical position that PD is ethically impermissible because it fails to respect the offender as a rational moral agent. It was argued that the practice of imposing indeterminate custodial sentences is defensible where an individual by his own voluntary conduct has forfeited his right to be presumed harmless, and that in such circumstances resort to preventive sentencing can be considered to be analogous to a form of societal self-defence. This chapter considers the rebuttal of the presumption of harmlessness in more detail; that is, it seeks to determine who the "dangerous offender" is, and how such dangerousness must be demonstrated before a preventive sentence can be considered an acceptable option. The terminology of dangerousness and risk is prolific. It is used in the literature concerning PD and sentencing,[1] in legal frameworks which support such detention,[2] and extensively in the media.[3] Despite this, there is a lack of agreement as to what, precisely, these terms mean. Dangerousness is often looked upon as a character trait or disposition that someone possesses;[4] others regard it as a mere social construct that lacks any objective substance.[5] The more broadly accepted view, however, is that it is a combination of character traits and circumstances, the interaction of which may lead to harmful conduct.[6] As is

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[1] For example, K. Harrison, *Dangerousness, Risk and the Governance of Serious Sexual and Violent Offenders* (London, 2011), especially chapters 1 to 3; Ashworth and Zedner (2014), esp. chs. 6 and 7; McSherry and Keyzer, (eds.) *Dangerous People: Policy, Prediction, and Practice* (London, 2011); McSherry and Keyzer (2009); Floud Report; N. Walker (Ed.), *Dangerous People* (London, 1996); J. Peay, 'Dangerousness' – ascription or description?' in P. Feldman (ed.) *Developments in the Study of Criminal Behaviour, vol. 2: Violence* (New York, 1982); L. Harkins *et al.* 'Treating Dangerous Offenders' in G.M. Davies and A.R. Beech (Eds.) *Forensic Psychology: Crime, Justice, Law, Interventions* (Chichester, 2018); M. Brown and J. Pratt (Eds.) *Dangerous Offenders: Punishment and Social Order* (London, 2000); Y. Rennie, *The Search for Criminal Man: The Dangerous Offender Project* (Toronto, 1978).

[2] See, for example, the Australian Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), and Dangerous Sexual Offenders Act 2000 (WA); the NHS England and National Offender Management Service Offender Personality Disorder Pathway Strategy (Policy document available at: https://www.england.nhs.uk/commissioning/wp-content/uploads/sites/12/2016/02/opd-strategy-nov-15.pdf), the Criminal Justice Act 2003; the Criminal Procedure (Scotland) Act 1995, and Mental Health (Care and Treatment) (Scotland) Act 2003.

[3] Peay (1982), 201; J. Bennet, *The social costs of dangerousness: prison and the dangerous classes* (London, 2008), 5 – 8.

[4] Peay (1982), 211; Floud Report, 24.

[5] See, for example, T.R. Sarbin, 'The Dangerous Individual: An Outcome of Social Identity Transformation', (1967) 7 *British Journal of Criminology* 285.

[6] See, for example, R. MacLean, *Report of the Committee on Serious Violent and Sexual Offenders* (Edinburgh, 2000), 7, para. 2.4; and R.A. Butler, *Report of the Committee on Mentally Abnormal Offenders* (London, 1975), 57 – 58, para. 4.5.

discussed below, this has implications for the management of risk,[7] and for one of the major objections to PD which was touched on in chapter two: that is, the objection that PD is always unjust because we cannot know what someone will or will not do in the future. This is what was termed the 'empirical objection'. Risk and dangerousness are bound up in the concept of harm, and it is perhaps unsurprising that there is some disagreement as to the nature and degree of harm that must be threatened in order for PD to be considered an appropriate measure.[8] For example, whether physical harm to persons is necessary, or whether psychological harm is sufficient, and whether or not such harm must have been manifest in prior offending. There are also questions as to how dangerousness and risk should be evidenced, and what the role of risk assessment should be.

This chapter aims to construct an account of: (1) the offenders that ought to be considered dangerous for the purpose of indeterminate sentencing; (2) the harms which are serious enough to warrant societal protection in the form of an indeterminate sentence; (3) the threshold of certainty of future offending that is necessary to impose an indeterminate sentence; and (4) the way in which a societal claim to protection must be evidenced. This, alongside chapter two, will form the framework against which the OLR will be critiqued in the remainder of the thesis. Section 3.2 discusses the evolution of the concept of the dangerous offender and introduces the argument that, although classifications have shifted over time, it cannot be dismissed – as some theorists have asserted – as a wholly arbitrarily defined construct independent of the threat of objective harms.

Section 3.3 discusses different elements or characteristics of dangerousness that can be identified in the literature, noting that it is most commonly associated with violent and sexual offending, and that repetition of intentional harmdoing seems to be at the construct's core. It will be argued that dangerousness is a present status, distinguishable from risk which is a forward-looking construct concerned with future behaviour. This, it is contended, casts the 'empirical objection' introduced in chapter two in a somewhat different light.

Section 3.4 considers the nature of the harms identified in section 3.3 in more detail. It will be argued that indeterminate sentencing is only morally permissible in the prevention of serious crimes against the person. Further, though such reoffending must be considered likely, a

[7] See section 3.4.2.
[8] See sections 3.3.2 and 3.4.

determination of dangerousness is not necessarily invalidated if a prediction of future offending is falsified. In other words, our inability to attain a threshold of absolute certainty does not preclude ethically defensible indeterminate sentencing. Instead, formalised risk assessment should be part of the risk management process, designed to ensure that – so far as we are capable – we are judging the offender accurately, and that the best possible interventions to help him reduce his risk can be offered. Finally, section 3.5 draws together the arguments made in this chapter, and chapter two, to propose a model of indeterminate sentencing which allows for the burden of uncertainty to be borne by the offender where he has intentionally conducted himself so as to give rise to a reasonable and defensible conclusion that, if not detained, he will go on to cause serious harm to others. This, it is contended, represents the least morally objectionable of the available options.

3.2 The Evolution of the Dangerous Offender

It will be apparent from the preceding chapter that the literature concerning the moral permissibility of PD is diverse. Even amongst those theorists who consider that some form of special incapacitative measure may be justifiable in respect of some offenders, there is significant disagreement as to the proper nature and scope of those measures. Consequently, although the terminology of dangerousness is almost universally employed, definitions – if offered at all – differ. As Floud and Young point out, '[at] the heart of the controversy over dangerousness in criminal justice is the ambitious, historically shifting and essentially political notion of justifiable public alarm'.[9] This variability of definition has implications for the understanding, analysis and, crucially, the application of legal frameworks which support detention of dangerous offenders.[10] The first task for this chapter, therefore, is to establish a working definition of the "dangerous offender" that will inform the discussion throughout the remainder of the thesis. The starting point for this is a brief overview of the evolution of the concept of the dangerous offender,[11] before a discussion of more recent debates in section 3.3 below.

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[9] Floud Report, 4.
[10] See Harrison (2011), ch. 1; also Peay (1982).
[11] For a more comprehensive account see Rennie (1978), esp. chapters 1, 4 and 8; P. O'Malley, 'Risk societies and the government of crime', and J. Pratt 'Dangerousness and modern society', both in Brown and Pratt (eds.) (2000); and A.E. Bottoms, 'Reflections on the Renaissance of Dangerousness', (1977) 16:2 *Howard Journal of Criminal Justice* 70.

3.2.1 From Political Classes to Criminal Classes

Sarbin has argued that the concept of dangerousness is wholly socially constructed to represent persons over whom the state wishes to exercise control at any given time.[12] Likewise, Rennie describes the dangerous offender as 'a protean concept, changing its colour and shape to suit the fears, interests, needs, and prejudices of a society. It is an *idea*, not a person'.[13] There is at least some degree of truth in this. For most of the nineteenth century, dangerousness was considered an attribute of the lower social classes, to whom a propensity for property offences and civil disobedience was ascribed:[14] 'Membership of the dangerous classes was based on a lack of wealth rather than behaviour, with the premise being that the labouring class…would inevitably have some lapse in moral integrity due to their economic state and dispossess honest citizens of their money'.[15] Dangerous persons were, at this time, those who were considered to present a political threat. People who would, it was feared, seek to increase their social status by depriving others of wealth and property.[16] They were, as Dinitz and Conrad put it, 'feared not because of their power but because of the lack of it'.[17] Pratt explains this further: [18]

> [It] was as if the very structure on which modern society was being built was still, at this early stage of its development, a very fragile affair, with roots that still had to be firmly embedded in the social fabric. In these respects… the framework of modern society seemed to be regularly put at risk from disparate groups – trade unionists, urban masses, political agitators, dispossessed agricultural workers, criminals…and the like who, in unity, seemed to possess the power of destruction.

Thus, although the dangerous included those who were thought to present a risk of criminal behaviour that might result in harm to other people or damage to their property, that risk acquired its significance because it was regarded as symptomatic of a much more general threat to the new social order.[19]

It was not until the 1860s that the conceptualisation of dangerousness began to lose its political class associations.[20] According to Pratt, 'ameliorative social reforms' and, simply, the passage

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[12] Sarbin (1976).
[13] Rennie (1978), xvii. Emphasis in original.
[14] O'Malley (2000), 21; and Pratt (2000), 36-37.
[15] Harrison (2011), 4.
[16] Pratt (2000), 36.
[17] S. Dinitz and J.P. Conrad, 'Thinking about Dangerous Offenders', (1978) 10:1 *Criminal Justice Abstracts* 99, at 129 cited in Harrison (2011), 4.
[18] Pratt (2000), 36.
[19] *Ibid*.
[20] Harrison (2011), 5.

of time had improved acceptance of social restructuring, which in turn had greatly reduced the perception of the threat posed by those classes.[21]

> [Dangerousness] is a quality that is no longer possessed by a class but by individuals or small groups of criminals; it is a quality that no longer threatens to tear down the portals of the state itself in an orgy of blood and destruction; instead, it is targeted at the quality of life of its individual subjects; it is not a quality that threatens their physical existence, but insidiously puts at risk all by which their worth as citizens is judged – their property.

Risk to the state was no longer the determinant of dangerousness. Instead, dangerous offending was considered in terms of a risk to property-owning individuals from recidivist offenders. This evolution of the construct of dangerousness was taking place in a context where developments in record keeping, and in procedures for the detection of crime and supervision of offenders, made it made it harder for repeat offenders to relocate, or to assume new identities.[22] For example, a statutory consolidated register of offenders in England was created in 1869 and kept in London by the Metropolitan Police Commissioner.[23] It included a range of qualitative and quantitative data such as occupation, marital status, physical attributes, distinguishing features, literacy, religion, educational background, number and type of prior convictions, observations about character, and behaviour while in custody.[24] Subsequently, the Prevention of Crimes Act 1871, which applied to the whole of the United Kingdom, made it a requirement that detailed records – including photographs of offenders[25] – be kept for each of the jurisdictions.[26] Schoemaker and Ward, who carried out detailed research relating to the contents and the development of these registers note that – although this sort of information was already being collected regionally – the statutory regulation and centralisation was of immense significance for the study of criminology.[27] These developments were reflective of a broader drive toward more purportedly scientific classifications of offenders by certain social and biological trait associations. Of particular significance at around the same time as the 1871 Act was passed, was the Italian positivist school of criminology.

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[21] Pratt (2000), 37; see also J. Davies, 'The London Garrotting Panic of 1862', in V. Gatrell *et al*. (eds.) *Crime and the Law: The Social History of Crime in Western Europe Since 1500* (London, 1980)

[22] Pratt (2000), 37.

[23] Habitual Criminals Act 1869 c. 99, section 5.

[24] R. Schoemaker and R. Ward, 'Understanding the Criminal: Record-Keeping, Statistics and the Early History of Criminology in England', (2017) 57:6 *British Journal of Criminology* 1442.

[25] Prevention of Crimes Act 1871 c. 112, s. 6(6).

[26] Section 6(1). Registers for England would be kept in London (s. 6(2)), those for Scotland in Edinburgh (section 6(3)), and for Ireland in Dublin (s. 6(4)).

[27] Schoemaker and Ward (2017), 1443.

3.2.2 THE INFLUENCE OF POSITIVISM

In 1870 Cesare Lombroso, an Italian psychiatrist, had – based on studies of prisoners and psychiatric patients – declared that certain particularly problematic criminals could be identified from amongst general criminal populations and the "insane" on the basis of the shape of their skulls, size of their ears, and lines on their hands.[28] These features, he contended, marked them out as 'atavistic' men belonging to some earlier human evolutionary stage.[29] These 'primitive' traits were causally connected to a number of psychological defects which he contended were characteristic of this group such as 'a love of orgies, and the irresistible craving of evil for its own sake, the desires not only to extinguish life in the victim, but to mutilate the corpse, tear its flesh, and drink its blood'.[30] However, Raffaele Garofolo, a criminologist working alongside Lombroso, disagreed with his sharp distinction between this particularly worrisome group of offenders and those who suffered from severe mental or neurological disorders.[31] These states were not, Garofolo argued, mutually exclusive: a criminal could be 'a savage and at the same time a sick man'.[32] He used *temibilità* – 'fearsomeness' or 'frightfulness' – to describe this class,[33] and has been credited as the originator of the term 'dangerous offender';[34] but it was another colleague of Lombroso, lawyer Enrico Ferri, who changed *temibilità* to *pericolosità*, or 'dangerousness'.[35]

Lombroso, Garofolo, and Ferri belonged to the Italian positivist school of criminology[36] which was distinguishable from the traditional schools of jurisprudence by its near complete disregard of the culpability constraints by then typically associated with dominant retributivist narratives of punishment.[37] As Bottoms explains:[38]

> Positivists were and are committed to the application of natural science methods in every respect to the study of man in society…the positivist is concerned only with the elimination of anti-social conduct, [and so] he is

[28] Rennie, 67.
[29] *Ibid*.
[30] Cited in Rennie, *ibid*.
[31] *Ibid*, 71.
[32] *Ibid*. This view of the dangerous offender as both 'mad and bad', and therefore difficult to place in the coercive social framework, would predominate the positivist conceptualisation – see Dinitz and Conrad (1978), 105; also M. Foucault, *Discipline and Punish: The Birth of the Prison* (London, 1978).
[33] Harrison (2011), 6. Garofolo was also the first to give a name to the discipline which would become known as criminology – see Rennie (1978), 71.
[34] See, for example, Bottoms (1977), 75.
[35] Rennie (1978), 72; Harrison (2011), 6.
[36] Harrison (2011), 6; Bottoms (1977), 75.
[37] See, for example, Rennie (1978), 73 – 75; Harrison (2011), 6; Bottoms, *ibid*.
[38] Bottoms (1977), 74 – 75.

> impatient with the principle of limiting retribution, which he sees as frustrating his legitimate desire to protect society by applying appropriate measures of social defence to the offender, even if these exceed the penalty based on the seriousness of harm which [other schools of criminal jurisprudence] would impose. The positivist also… sees no reason why society should not intervene compulsorily in the lives of potential offenders even though they have as yet committed no anti-social act.

This was the beginning of an approach targeted at 'pathological' persons,[39] though it was not based on a therapeutic or rehabilitative philosophy and did not represent the individualisation of the dangerous offender. Rather, the dangerous were conceived of as something of a uniform group of habitual criminals that could be distinguished both from respectable members of the community, and from most other criminals.[40] Plint describes this category of offender as being 'in the community, but neither of it, nor from it… completely isolated from the other classes in blood, in sympathies, in its domestic and social organisation – as it is hostile to them in the "ways and means" of temporal existence'.[41] They were considered to be irredeemable characters from whose risk society could only be protected by their confinement.[42] This, according to Harrison, was the beginning of sentencing offenders as dangerous people, rather than for a particular offence.[43] It would not, however, be until the first half of the twentieth century that risk to persons, rather than property, would be the marker of the dangerous offender.

3.2.3 From Crimes Against Property to Crimes Against Persons

The shift in emphasis from crimes against property to crimes against persons is evident in the 1932 report of the Home Office's Departmental Committee on Persistent Offenders which included within its definition of the dangerous 'certain sexual offenders… particularly those who commit repeated offences against children or young persons and those who corrupt children'.[44] The reasons for this change are not immediately clear, but it has been suggested that the co-occurrence of the rising availability of insurance, and of increasing placement of children with non-familial carers as people travelled inwards to cities to find employment, was

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[39] O'Malley (2000), 16.
[40] Pratt (2000), 37.
[41] T. Plint, *Crime in England* (London, 1851), 153.
[42] Schoemaker and Ward (2017), 1456.
[43] Harrison (2011), 6 – 7.
[44] J.C. Dove Wilson *et al. Report of the Departmental Committee on Persistent Offenders* (London, 1932), 18.

at least partially responsible for facilitating the change.[45] This meant that at the same time as property was becoming more replaceable, awareness of the risks of children being abused by carers not well known to their family was rising.[46] Thus, according to Sutton, the concept of the dangerous offender became sexualised for the first time.[47] By the mid-twentieth century the term had generally ceased to be used in relation to property offenders.[48] By the 1970s the definition had been expanded to incorporate those whose offending was considered to have arisen from 'personal inadequacies' such as drug abuse,[49] with the 1975 *Report of the Committee on Mentally Abnormal Offenders* including an observation that the public had come to associate mental disorder with dangerousness;[50] and in 1981 Floud and Young noted that 'violence is almost universally the hall-mark of dangerousness. Dangerous offenders are presumed to be violent and violent offenders are presumed to be dangerous.'[51] These reports, amongst others, were instrumental in shaping the modern concept of the dangerous offender and will be discussed in more detail at section 3.3. For the time being, however, it is sufficient to note the emergence of the concept of the individual dangerous offender as both violent and disordered, and an appropriate subject of both treatment and incapacitative punishment to prevent harms it is thought they would otherwise likely cause.[52]

3.2.4 Conclusion to Section 3.2

At the beginning of this section, it was said that there is at least some truth in the claim made by Rennie, Sarbin and others that the dangerous offender is essentially a political construct.[53] However, although the particulars of the classes of persons identified as such have varied over time, as have the means used to classify them, it is apparent that that the concept has maintained *some* consistency. Whether targeted at property or persons, the feared classes of offender have

[45] Pratt (2000), 39; Harrison, (2011), 6.
[46] Harrison (2011), 7.
[47] A. Sutton, 'Drugs and dangerousness: Perception and management of risk in the neo-liberal era', in Brown and Pratt (eds.) (2000), 167.
[48] Harrison (2011), 7.
[49] Sutton (2000), 167
[50] Department of Health and Social Security, *Report of the Committee on Mentally Disordered Offenders* Cmmd. 6244 (London, 1975), para. 4.4.
[51] Floud Report, 7.
[52] This could appear somewhat contradictory, however, it is worth noting at this stage some theorists consider that preventive confinement is not necessarily in opposition to rehabilitative principles in that it may encourage a therapeutic approach whilst permitting the decision-maker the security of knowing that detention/imprisonment is available as a 'fail-safe' should treatment be unsuccessful: A. von Hirsch and A. Ashworth, 'Incapacitation', in A. von Hirsch *et al*. (Eds.) *Principled Sentencing: Readings on Theory and Policy* 3rd Edn. (Oxford, 2009), 75. This is discussed later.
[53] See also The Floud Report, 4 – 9, and the discussion at 3.3.2 below.

been those who are thought to display a pattern of behaviour which manifests itself in the repeated violation of the rights of others,[54] and which has been taken to imply possession of certain characteristics associated with dangerousness. As will be discussed in section 3.4.2, although the methods for determining dangerousness have improved somewhat, modern day approaches still generally rely upon the incapacitation of individuals identified as dangerous based on traits they share with a reference group which itself founds the basis of the dangerousness determination. Additionally, although the primacy of risk of harm to persons did not assert itself until the middle of the last century, it is clear that dangerousness did carry associations with violence from at least the 1850s,[55] even though the state's focus was on preventing insurrectionism, rather than harm to individual citizens.[56] Nevertheless, it remains the case that there is no universally agreed upon precise definition of dangerousness, and that public perceptions and associated political pressures impact its nature and scope. No claim to offer a precise and all-encompassing formulation is made here. However, it will be necessary to consider modern constructions that have been offered, and from this to establish a working definition to support discussion of the existing preventive legal frameworks in subsequent chapters.

3.3 Dangerousness as an Operational Construct

The previous section of this chapter sought to demonstrate that the concept of the dangerous offender, despite having evolved over time, is not quite as arbitrarily defined as some theorists have argued. It was suggested that such consistency as it possesses may be considered to refer to the threat of repeated violations of the rights of others.[57] That said, it is apparent that there remains a lack of clear agreement on precisely who is properly subject to preventive measures, and the harms from which the public may reasonably demand such protection.[58] This lack of consensus is evident even amongst those who agree such protections are legitimate in principle; for example, whether conviction for one or more specific offences is sufficient for an offender to be considered dangerous, or whether it is necessary to consider other factors such as the

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[54] Although this does depend on what one considers to be a right. This is discussed further at 3.4.3.
[55] As discussed in section 3.2.1.
[56] Pratt (2000), 36 – 37, and see above at section 3.2.1.
[57] Although not all theorists would accept that such circumstances can, or should, be approached as a matter of competing rights claims, it is assumed here that retaining one's bodily integrity can generally and uncontroversially be considered of value, however such value is conceptualised. For a rights-based analysis, see R. Dworkin, *Taking Rights Seriously*, (London, 1977).
[58] See, for example, the Floud Report, 3-15.

psychological characteristics of the offender, or perhaps his social circumstances.[59] However, if there is to be any merit in using the label 'dangerous offender' – or whatever shorthand one might choose to substitute for it – in the context of preventive sentencing, it must be descriptive of persons against whom we consider it defensible to deploy such measures.[60] This part of the chapter evaluates different constructions of dangerousness that have been offered in both the theoretical material, and the reports of influential committees that have considered preventive measures in England and Wales, and Scotland.[61] Once a working definition of the dangerous offender has been offered, the chapter will proceed to consider the ways in which such a status should be evidenced.[62]

3.3.1 Terminology

The terminology of dangerousness, risk and harm permeates law and the literature.[63] These are distinct, but interrelated concepts:[64] it is not possible to define dangerousness without reference to risk, and any discussion of risk is meaningless unless we specify the harms we are concerned to prevent. An offender may be considered more likely to reoffend than not, but a high risk of repeated minor property offending is plainly not as serious as a high – or perhaps even some lesser – risk of serious sexual or violent offending. Therefore, the nature of the harm that must be threatened to qualify a potential recidivist as dangerous requires consideration alongside the degree of risk.[65] Dangerousness, applied as it is in this context to a person or persons, is the most controversial of these concepts, with some doubting that the construct holds any validity whatsoever. Radzinowicz and Hood, for example, say that 'the concept of "dangerousness" is so insidious that it should never be introduced in penal legislation';[66] and Tanay argues that '[the] quality of "dangerousness", even if capable of definition, could only be analogised with some arbitrarily agreed upon standard'.[67] Others appear to accept that dangerousness is an

[59] This is discussed further at 3.3.2 below.
[60] Floud Report, 20.
[61] The Floud Report, MacLean Report and the Butler Report.
[62] See section 3.4.
[63] See the examples in footnotes 1 to 3 above, and the remainder of this chapter.
[64] Although Floud and Young come close to arguing that the perception of risk is a harm in itself – p. 4.
[65] It seems generally to be accepted that the severity of threatened harm should be inversely proportional to the degree of risk required to authorise preventive measures: see, for example, A.E. Bottoms and R. Brownsword, 'Dangerousness and Rights' in J.W. Hinton (ed.), *Dangerousness: Problems of Assessment and Prediction* (London, 1983). Though what qualifies particular examples of violent or sexual offending as 'serious' is itself a matter for discussion. These points are addressed later.
[66] L. Radzinowicz and R. Hood, 'A dangerous direction for sentencing reform', (1978) *Criminal Law Review* 713 at 722. See also Sarbin (1967) who argues that dangerousness has no meaningful definition because it is wholly socially constructed as a means of controlling and dehumanising persons of low status.
[67] E. Tanay, 'Law and the Mentally Ill', (1976) 22:3 *Wayne Law Review* 781 at 786.

appropriate descriptor for *something*, but consider that it is too imprecise to operate as a constraining device in terms of research and legislation.

Birgden has argued that the term 'serious high-risk offenders' should be used in preference to 'dangerous offenders', the former being regarded as more descriptive of the class of individuals concerned.[68] The MacLean Committee on Serious Violent and Sexual Offenders in Scotland, which is discussed in detail later,[69] also chose a risk-based definition because it considered that dangerousness suggested that violence was something endogenous rather than the result of interaction between the individual and the environment.[70] Labelling such persons 'serious high-risk offenders' rather than dangerous offenders was regarded as more reflective of this complexity. The point about the context of violence is an important one and shall be returned to shortly.[71] However, dangerousness's validity as a construct depends on how we define it. In the context of discussions about the PD of dangerous people, dangerousness refers to the class of persons who do – or who ought to – fall within the scope of those measures. When Birgden, the MacLean Committee, and others[72] substitute risk-based descriptors for dangerousness, they are simply indicating that they regard people who fit those descriptors as the relevant class. Leaving to one side the need to define 'serious' and 'violent' for the time being,[73] there is no obvious reason why 'dangerous offender' should not be used as a shorthand for 'serious violent or sexual offender'. There is perhaps an argument that the label of dangerousness is highly stigmatising, and that it carries with it an expectation that such conduct will be repeated in future,[74] but, as will be argued later, no individual should be subject to indeterminate sentencing as a dangerous offender *unless* they are regarded as more likely than not to place others at risk of serious harm.

Regardless, it does seem doubtful that labelling someone a serious violent or sexual offender is less stigmatising. As alluded to in part 3.2, the position adopted here is that the concept of dangerousness does have some substance, even if there is not universal agreement on what it ought to include (and what it ought not to). Further, risk and dangerousness are not synonyms and, as is discussed later, failure to distinguish these concepts has led to the erroneous reduction

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[68] A. Birgden, 'Assessing Risk for Preventive Detention of Sex Offenders: The Dichotomy Between Community Protection and Offender Rights is Wrong-headed', in P. Keyzer (Ed.) (2013), 227.
[69] See section 4.5.1.
[70] *MacLean Report*, 7, para. 2.4
[71] See 3.3.2D below.
[72] For example, the Millan Report, ch. 27.
[73] See sections 3.4.1 and 6.3.4.
[74] See, for example, P.D. Scott, 'Assessing Dangerousness in Criminals', (1977) 131:2 *British Journal of Psychiatry* 172; Peay (1982), 211; the Butler Report, 57 – 58, para. 4.5

of the defensibility of PD to a question of predictability of future behaviour.[75] This thesis therefore employs the terminology of dangerousness alongside risk, first, because it is reflective of the language of much of the literature; second, because there are no inherent advantages to substituting some other label or descriptor; and, third, because it is necessary to establish and maintain the conceptual distinction between dangerousness and risk. The reasons for retaining the language of dangerousness having been briefly set out, the chapter now turns to the criteria that must be met for someone to be considered dangerous. This is, as indicated above, somewhat contentious, and no claim to resolve that controversy is made here; rather, the objective is to offer a working definition to serve as a starting point for the critique of the indeterminate sentences which follows in subsequent chapters.

3.3.2 What Makes Someone Dangerous?

A. Presenting 'Unacceptable Risk'

As was discussed above, the concept of the dangerous offender is a politicised one because despite possessing something of a stable core it shifts over time, and because governments cannot afford simply to disregard the public's perception of crime and its demands for protection from it. The relationship between dangerousness, risk, public policy and public opinion is, therefore, worthy of some consideration. Floud and Young describe it in the following terms: [76]

> Dangers are unacceptable risks: we measure or assess the probability and severity of some harm and call it a risk; but we speak of danger when we judge the risk unacceptable and call for preventive measures…Risk is a matter of fact; danger is a matter of opinion. Judgements of danger are not objective in the sense of being perfectly commensurate with risk; but for the purposes of public policy they must be rational in the sense of being principled.

Floud and Young regard risk as objectively measurable, and properly the domain of experts.[77] What is dangerous, on the other hand, is subjective and substantially informed by emotion and intuition.[78] This view of risk assessment as an objective, scientific endeavour is discussed later.[79] However, public perceptions of dangerousness do not arise in a vacuum; they are created and reinforced by high-profile cases, primarily of violence and sexual offences, and the

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[75] This was referred to earlier as the 'empirical objection'.
[76] The Floud Report, 4
[77] *Ibid*, 5.
[78] *Ibid*.
[79] See section 3.4 below.

role of the media in reporting these sorts of cases is well recognised.[80] In what has been termed the 'fear of crime feedback loop'[81] the media responds to public interest in sexual and violent crime by providing more crime-related content for people to consume, and governments respond with policy designed to assuage the public's fears arising from the 'disproportionate' focus; the result is that these perceptions of danger appear validated and the cycle is perpetuated.[82]

This is problematic in that, as Floud and Young point out, it would be unethical to formulate public policy concerning the management of dangerous offenders on the basis of what the preponderance of the general population considered to be desirable.[83] Nevertheless, they recognise that public opinion cannot simply be brushed aside:[84] it must be a factor, though they do not say how it should be weighed. Public perspectives on what is dangerous and what is not, they say, may diverge somewhat from that of policy-makers but, despite the emotional nature of the judgement, they are not quite so irrational as is sometimes portrayed: [85]

> Fear converts danger into risk and it tends to be inversely proportional to time and distance. This is understandable, for personal vulnerability diminishes with time and distance: the longer the timespan and the greater the distance separating use from predicted harm, the greater the scope for chance and personal initiative to frustrate the harm or shift its incidence. As for clustering, multiple deaths convert an accident into a disaster and this seems to be a different kind of event. It does not seem altogether irrational to fear death by disaster more than death by simple accident, even if the probability is the same in either case; for the circumstances of a disaster are more fearful in themselves for the sense of helplessness is greater.

Intentionally harmful conduct is also intuitively less acceptable to most people than equivalent – or perhaps even greater – harm caused unintentionally, and therefore a person who acts intentionally is, Floud and Young suggest, more likely to be regarded as a danger.[86] When we decide on the appropriate punishment for someone in respect of their past behaviour, we consider their intentions and their motives; if these considerations in punishment are rational,

[80] *Ibid*, 9; J. Bennett, *The social costs of dangerousness: prison and the dangerous classes* (London, 2008) 5 – 8; A. Maden, *Treating Violence: a guide to risk management in mental health* (Oxford, 2007), 1– 2. See also the discussion of the case of *Ruddle v The Secretary of State for Scotland* 1999 G.W.D. 29 – 1395 (Sh. Ct.) in part 4.3 of chapter four.
[81] M. Lee, *Inventing the Fear of Crime: Criminology and the Politics of Anxiety* (Portland, 2007), 113 - 114
[82] Bennett (2008), 8.
[83] The Floud Report, 4.
[84] *Ibid,* 5.
[85] *Ibid*, 6.
[86] *Ibid*, 7.

then it must also be rational to consider them when the question is one of prevention of future harms.[87]

It may be that people are more likely to consider those who act intentionally to be dangerous because they consider the conduct to be the expression of the individual's essential characteristics.[88] It might also be the sense that the person had a choice as to whether or not to cause harm, and in these respects the judgement of dangerousness may be bound up in judgements about punishment: as Floud and Young, and Redmayne, point out, these considerations are relevant both to questions of punishment and of prevention.[89] The extent to which the general public's perceptions of who is and is not dangerous are determined by intentionality is, however, unclear. As the Butler Committee on Mentally Abnormal Offenders noted in 1975, there is a tendency for the public to associate dangerousness and mental disorder, regardless of the degree of illness.[90] That association persists.[91]

The relationship between violence and mental disorder is, however, considerably more complex. Since the 1980s, an expansive literature on the subject has developed,[92] which has consistently demonstrated a 'modest, yet statistically significant relationship between severe mental illness (SMI) and violence'.[93] This is true of disorders involving psychosis, such as schizophrenia,[94] and some personality disorders.[95] It is, however, also true that most violent offending is carried out by people who do not have mental disorders,[96] that the single biggest risk factor for violence in those that do suffer from mental disorder is alcohol and substance

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[87] *Ibid,* 9.
[88] See section 3.3.2.D.
[89] *Ibid*; M. Redmayne, *Character and the Criminal Trial* (Oxford, 2015), 255.
[90] Butler Report, 57, para. 4.4.
[91] See, for example, M. Varshney *et al.* 'Violence and mental illness: What is the true story?' (2016) 70:3 *Journal of Epidemiology and Community Health* 233; B.A. Pescosolido *et al*. 'A Disease Like Any Other'? A Decade of Change in Public Reactions to Schizophrenia, Depression and Alcohol Dependence' (2010) 167:11 *American Journal of Psychiatry* 1321; and The Mental Health Foundation 'Stigma and Discrimination' web resource: https://www.mentalhealth.org.uk/a-to-z/s/stigma-and-discrimination
[92] Maden (2007), 22.
[93] R. Van Dorn *et al*. 'Mental disorder and violence: is there a relationship beyond substance use?' (2012) 47 *Social Psychiatry and Psychiatric Epidemiology* 487.
[94] S. Flynn *et al*. 'Serious Violence by People with Mental Illness: National Clinical Survey' (2014) 29:8 *Journal of Interpersonal Violence* 1438.
[95] P.G. Nestor, 'Mental Disorder and Violence: Personality Dimensions and Clinical Features' (2002) 159 *American Journal of Psychiatry* 1973.
[96] Van Dorn *et al.* (2012), 487.

misuse,[97] and that people with SMI are far more likely to be victims of serious violence than perpetrators of it.[98]

Perhaps contrary to the view advanced in the Floud Report, belief that mental disorder causes a person to be dangerous seems to suggest that, in some circumstances at least, a *lack* of control or of choice is regarded as a marker of dangerousness.[99] PD is, it appears, least controversial when it is deployed in respect of persons suffering from mental disorder whose capacity to consent to hospitalisation and treatment is impaired, and who present a risk of harm to themselves or to others. What is important in the context of preventive sentencing though is, as argued in the last chapter, that people who are subject to indeterminate *sentences* for the protection of the public had an opportunity to avoid the sanction; this means that an offender must have chosen to do what he did.[100]

Consistent with the concept's development as outlined in section 3.2 above, dangerousness remains difficult to define with any precision. Public perceptions of dangerous offenders tend to exaggerate the problem, and this perception is – at least in part – created and reinforced by the way the media report violent and sexual crime. Judgements of what is dangerous are not necessarily objective; they are strongly influenced by emotion, especially fear. Nevertheless, it is wrong to view these perceptions as wholly irrational, even if the focus is upon incidences and types of harm, such as homicides, which are much rarer than harms we more readily accept the risk of: it is not unreasonable to find the possibility of death or serious injury – however remote – at the hands of a violent offender more distressing and fearful than that resulting from a road accident. The difficulty, however, remains that whilst societal demands for protection cannot be ignored entirely, it is not possible to base a rationally defensible system of preventive sentencing on public attitudes alone.[101] Thus, though dangers *may* be conceived of as risks society deems unacceptable, and what is acceptable depends on the context, 'what [the public]

[97] See, for example, Van Dorn, *ibid*; Maden (2007), 22; Flynn *et al*. (2014), 1450.
[98] Varshney *et al*. (2016), 223; J.Y. Chloe *et al*., 'Perpetrating violence, violent victimisation, and severe mental illness: balancing public health outcomes' (2008) 59 *Psychiatric Services* 153, at 161; R. Maniglio, 'Severe mental illness and criminal victimisation: a systematic review' (2009) 119 *Acta Psychiatrica Scandinavica* 180, at 186; and D.J. Sells *et al*. 'Violent victimisation of persons with co-occurring psychiatric and substance abuse disorders' (2003) 54:9 *Psychiatric Services* 1253, at 1255.
[99] This might go some way to explaining why high-profile campaigns aimed at getting the public to recognise mental illness as a neurophysiological disease process, rather than as a character weakness or a choice, was found to *increase* stigma towards people with severe mental disorders: Pescosolido *et al*. (2010), 1324.
[100] See section 2.3.
[101] N. Walker, *Sentencing in a Rational Society* (Middlesex, 1972), 171.

actually have to put up with is decided by government and the agencies of law enforcement and is in this sense a political matter'.[102]

B. (Insufficiency of) Propensity to Harm

Because in practical terms the definition of dangerousness is ultimately a matter of policy, one of the major objections to dangerousness as a construct is centred on exclusions; that is, on what policy-makers determine dangerousness is *not*.[103] The argument runs as follows:[104]

> [The] category of 'dangerous offender' is said to be arbitrarily and unfairly defined: it excludes many persons responsible for deaths, serious and lasting injuries and extensive loss and destruction of property, either because the harmful conduct of such persons is not made punishable or because, though punishable, it is viewed and treated leniently so that even a substantial risk of repetition does not make them eligible to be classed as 'dangerous'. It is unreasonable from the point of view of the public interest and inequitable from the point of view of those already under control as being 'dangerous' that persons such as, for example, habitually drunken drivers and keepers of unsafe factories should be excluded from the class of high-risk, serious offenders.

These are what Floud and Young term the 'hazards of modern societies'.[105] Other examples offered elsewhere include environmental polluters;[106] perpetrators of financial offences;[107] and 'refusal of compulsory benevolence' such as the failure of a parent to ensure that their child attends school,[108] or otherwise to provide an adequate standard of care.[109]

In at least some of these cases, any harm that might arise will have been unintentional, even if the risk of it seems obvious and, it does seem to be the case that we are reluctant to respond to unintentional harms with special sentences for dangerous offenders.[110] It is also possible that the fact of harm being done might disincentivise repetition quite apart from any sanction imposed.[111] Cases where repetition *is* likely are potentially more complicated, though, especially where there are incentives to continue with the conduct to which harm done or

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[102] Floud Report, 50.
[103] *Ibid*, 10; Harrison (2011), 9; Walker (1972), 170.
[104] Floud Report, *ibid*.
[105] *Ibid*.
[106] Harrison (2011), 9.
[107] *Ibid*; and Walker (1972), 169.
[108] Walker, *ibid*.
[109] Harrison (2011), 9.
[110] Walker (1972), 169; Floud Report, 43; Harrison (2011), 8. Though we do, of course, subject them to "pure" PD in certain circumstances: see chapter six for further discussion.
[111] See section 3.3.2E below for further discussion on the significance of repetition.

threatened is incidental; for example, where an employer consistently fails to provide adequate training or personal protective equipment to his employees in order to save money in a struggling business. Likewise, the dangerous driver who, for whatever reason, is repeatedly motivated to drive when it is not safe to do so because of intoxication, or even inexperience.[112] As Walker, and Floud and Young, note such individuals may be effectively prevented from presenting a risk by means other than a preventive sentence,[113] e.g., by preventing the employer from carrying on business, or revocation of the reckless driver's licence. This is not necessarily the case where the primary objective of the conduct is to cause harm, or where the offending is not so contextualised that exclusion from any particular environment is feasible as a means of prevention. Dangerousness is not, therefore, simply about the propensity to cause harm to others. If it were, then it would be considered appropriate to use preventive sentences far more extensively than we do, though Walker observes that since some of these cases at least will attract fairly long sentences it can be difficult to establish whether the primary purpose of the sentence is retributive or preventive.[114] It should, however, be apparent that when sentences such as (the now partially abolished) imprisonment for public protection (IPP) in England and Wales,[115] the order for lifelong restriction in Scotland,[116] or indeed the mandatory life sentence for murder, are considered, that they are not concerned with 'the hazards of modern societies', even if what they are concerned with seems difficult to state precisely. This is because the dangerousness is least controversially equated with violence.

C. VIOLENCE AS THE 'HALLMARK'

The Butler Committee heard a variety of evidence on how dangerousness should be defined. Consultant Psychiatrists used 'unwanted behaviour which is threatening or disturbing to the public and may require that the offender be placed in custody to protect the public' as the standard.[117] Whether such behaviour was tolerable was for the general public and the courts to decide. No suggestions were made to the Committee that property offences should be considered dangerous, the general sense being that dangerous offenders were 'those who would

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[112] Floud Report, 12.
[113] *Ibid*, 8; Walker (1972), 170. Though Walker does concede elsewhere that in some situations these measures may be reasonably easy to get around: see Walker (1996), 10.
[114] Walker (1972), 168.
[115] See the Criminal Justice Act 2003, s. 255 which was in force until repealed by s. 123 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The repeal was not retroactive, and more than 2,000 IPP prisoners remain in custody.
[116] See chapters 5 and 6 for detailed treatment.
[117] Butler Report, 59, para. 4.9

probably inflict harm on others'.[118] The most comprehensive account was given by psychiatrist P.D. Scott who suggested that a determination of dangerousness could be arrived at by weighting several factors: '(i) the irreversibility of the damage done; (ii) the quantity of damage (including how long it goes on); and (iii) the infectiousness of the behaviour (which may be connected with the general climate of opinion)'.[119] He also emphasised that part of the calculation included probability of repetition, there being a need for future risk in order for someone to be considered to be dangerous. The Committee itself settled on 'a propensity to cause serious physical injury or lasting psychological harm'. [120]

Floud and Young agreed. 'Violence is almost regarded as the hall-mark of dangerousness. Dangerous offenders are presumed to be violent and violent offenders are presumed to be dangerous.'[121] Their work in this area was significantly influenced by that of Kozol, Boucher, and Garofolo who, at the time, were psychiatrists at the Center for the Diagnosis and Treatment of Dangerous Persons in Bridgewater, Massachusetts.[122] The Centre dealt with offender-patients who had, in most cases, been convicted of serious sexual offences although there were a number whose offences were of non-sexual violence. One of the difficulties that these clinicians faced was that there was no satisfactory working definition of dangerousness that could guide them in accurately determining which patients required ongoing detention and treatment and which could safely be considered for release. Kozol *et al.* noted that much of the legislation concerning the detention of dangerous offenders restricted the class of offenders to perpetrators of sexual offences,[123] but they did not consider such a restriction to be appropriate. Serious violent but non-sexual crimes do, as they point out, present just as great a risk to the safety and wellbeing of their victims as do serious sexual offences. The definition of dangerousness that they settled upon was fairly simple: 'the potential for inflicting serious bodily harm on another'.[124] They did, however, make a distinction between the concept of dangerousness in itself and the concept of the dangerous person. This will be returned to shortly.[125]

[118] McGrath, at 4.9 *ibid*.
[119] The meaning of 'infectiousness' here is not quite clear; the considerations he raises of reversibility, quantity, and repetition are most interest.
[120] *Ibid*, para. 4.10.
[121] Floud Report, 7.
[122] *Ibid*, 22; H.L. Kozol *et al.* 'The Diagnosis and Treatment of Dangerousness' (1972) 18:4 *Crime and Delinquency* 371.
[123] *Ibid*, 375.
[124] *Ibid*.
[125] See 3.3.2D.

The MacLean Committee on Serious Violent and Sexual Offenders and its report are covered in detail in chapter four, and its terms of reference effectively restricted its enquiry to offences against persons. Nevertheless, it still required to give consideration to the manner in which potential subjects of the sentencing framework would be identified. One of the approaches contemplated was a qualifying offence approach. Under this approach, a list of offences would be agreed and included in legislation, and a conviction for one or more of them would be a necessary condition (though presumably not sufficient one, since an automatic life sentence approach was rejected by the Committee)[126] for the making of a preventive sentence.[127] This approach can be seen in section 210A(10) of the Criminal Procedure (Scotland) Act 1995 which specified the offences for which extended sentences may be made.[128] That list set out in section 210A(10), which (if adopted) could have been adapted for use with the OLR, was focused almost entirely on sexual offences including rape,[129] sodomy,[130] indecent assault,[131] lewd, indecent or libidinous behaviour or practices,[132] and possession of indecent images of children.[133] The Committee, however, rejected this approach on two grounds: (1) that a list approach would tend to be 'both over-inclusive and under-inclusive';[134] and (2) that the Committee's own terms of reference required an offender focus, rather than an offence focus. [135]

> While one might find general agreement that rape and assault to the danger of life are 'serious' offences, most offences against the person vary significantly in their severity according to the circumstances. This is particularly so for sexual offending. So, for example, while sexual intercourse with a fifteen year old girl is an offence…[society] would view the case of a seventeen year old youth who has sex with his fifteen year old girlfriend in quite a different light from the case of a thirty-five year old teacher who has intercourse with his fifteen year old pupil. A further problem arises from the fact that some types of offending, which might fairly be described as 'serious', and which have significant sexual motivation, might not necessarily be included in any list of 'sexual offences'. For example, sexually-motivated conduct which does not involve any overt sexual act, or any physical

[126] See section 4.5.1 of chapter four for a more detailed discussion.
[127] MacLean Report, 3 at para. 1.2.
[128] See 6.5.2.A for fuller discussion.
[129] s. 210A(10)(i) of the 1995 Act.
[130] s. 210A(10)(viii).
[131] s. 210A(10)(v).
[132] s. 210A(10)(vi).
[133] s. 210A(10(xi), that is, conviction for an offence under s. 52A(1) of the Civic Government (Scotland) Act 1982.
[134] MacLean Report, 3 para. 1.3.
[135] *Ibid*, para. 1.3.

> interference with the victim, may only be charged under some other category of offence – typically breach of the peace.

Additionally, as the Committee pointed out, many people who perpetrate serious offences against the person do not present an ongoing risk to the public.[136] The example given was of murder: some people convicted of this offence may present an ongoing risk to the public, but most do not.[137] It is also the case that there are people who present a significant risk but who have yet to be convicted of a serious offence.[138]

There is some tautology in the definition adopted by the MacLean Committee in that its terms of reference stipulated that it was to be concerned with the sentencing of 'serious sexual and violent offenders who may present a continuing danger to the public'.[139] However, the focus on *offenders* who *may* present such a risk, rather than a category of offences, is significant. The Report's first recommendation was that '[special] sentencing considerations [were] necessary for persons convicted on indictment of a violent or sexual offence, or exceptionally another category of crime, whose offence(s) or antecedents or personal characteristics indicate they are likely to present particularly high risks to the safety of the public'.[140] This meant that it would not be necessary for an offender to have caused serious harm already, or even to have perpetrated an offence that would have been likely to result in such harm. It also meant that, rather than serving as the basis for determining punishment, the offence's primary significance for the purposes of the proposed framework was as an indicator that the combination of the offender's traits and certain situational factors might result in serious harm to others.

D. A Combination of Essential Characteristics and Situational Factors

It was noted above that the MacLean Committee chose a risk-based descriptor for the group with which its proposals were concerned because it was considered to better reflect the complex causes of violence: [141]

> The term risk is preferred to "dangerousness", because the term dangerousness implies a dispositional trait, inherent in an individual, that

[136] *Ibid*, para. 1.4.
[137] *Ibid*, 3, para. 1.4. Murder, it will be recalled, was the only offence excluded from the Committee's terms of reference as it is dealt with by mandatory life sentence.
[138] *Ibid*, 3 – 4, para. 1.5.
[139] *Ibid*, 1.
[140] *Ibid*, 4, rec. 1.
[141] *Ibid,* 7, para. 2.4.

> compels him/her to engage in a range of violent behaviour across a range of settings. That approach fails to take into account the complex interaction of psychological characteristics and situational factors in the production of violent acts…The response to risk presented by individuals should, therefore, not be restricted to an attempt to modify those characteristics in order to make the individuals less of a risk, but also seek to reduce the opportunities or triggers for violence.

Three claims are made in the above excerpt. First, that dangerousness is an aspect of risk; second, that risk is a property of circumstances combined with individual personality traits; and third, that risk assessment is properly viewed as part of a risk management strategy rather than simply as means of predicting what any individual will or will not do at some point in the future. This last point is discussed below,[142] but the first two will be discussed here.

It will be recalled that one of the criticisms of PD is that it amounts to the punishment of a person for who he is, rather than what he has done.[143] That argument, and others like, it were discussed in chapter two.[144] The objection being raised in the above excerpt is somewhat different in that what is asserted is that it is wrong to imagine that there are people that just *are* dangerous, or that they are possessed of some essential characteristic which in and of itself means that they present a high risk of serious sexual or violent offending. It is not a question of whether or not we are punishing someone for being dangerous because, on this account, dangerousness is not properly conceptualised as a property of a person which can be dealt with in these terms. Floud and Young observed that there is a generally held – and deeply ingrained – belief that dangerousness is a pathological characteristic of a person that is properly identified by medical assessment and subsequently treated.[145] However, the complexity to which the MacLean Report refers was also recognised in the Butler Report:[146]

> Dangerousness depends in the majority of cases not only on the personality of the potentially dangerous offender but on the circumstances in which he finds himself. The practice of referring to some individuals as "dangerous" without qualification creates the impression that the word refers to a more or less constantly exhibited disposition…It is true that there are people in whom anger, jealousy, fear or sexual desire is more easily aroused and whose reactions are more extreme than in most people, prompting them to do extremely harmful things. But these emotions are aroused and lead to harmful behaviour in certain situations.

[142] Section 3.4.2.
[143] See chapter two, especially section 2.5.1.
[144] See *ibid*, and also section 2.2.1 which critiques justifications of PD as quarantine for dangerousness which is conceptualised in such arguments as a disease-like state.
[145] Floud Report, 22.
[146] Butler Report, 57-58, para. 4.5.

It was, however, accepted that there does exist a small category of people who are so motivated by a desire to cause pain and distress to others that they seek out victims of sexual or other violence and that these individuals, rare though they are, are appropriately considered 'unconditionally dangerous'.[147] This was recognised by Kozol *et al.* as those exhibiting 'a pathological self-serving potential for violence',[148] pathological meaning 'a primary insistence on violence where alternatives do exist and without benevolent regard for the consequences to others'.[149] They observe that their concept of the dangerous person is very like the concept of psychopathy,[150] though not all psychopaths are violent.[151]

Of interest at present is the notion that, whilst it is a valid construct, the dangerous offender label is only properly applied to those persons that actively seek out opportunities to do harm. No person exists in isolation; even the proactive serious violent or sexual offender cannot do harm unless the necessary external elements present themselves. There must be a potential victim. There must be an opportunity to follow through with the attack. Why, then, is the individual who is not proactive, but who readily succumbs to temptation or provocation in such circumstance not dangerous? The answer, when PD is in contemplation, would seem to depend – at least in part – on the nature of his "triggers". If his offending is highly contextualised we might consider that measures short of PD might be sufficient. For example, we consider that we can prevent the offender from being exposed to his triggers, i.e. that in practical terms the risk of serious violent and sexual offending is too small to warrant PD (omitting for the time being to define what degree of risk *is* sufficient). Alternatively, contextualised offending may not suggest to us the kind of generalised lack of empathy or compassion or desire to cause harm described by Kozol and colleagues, and the Butler Committee. It might also be considered that one or two such incidences were better considered individual aberrations in an individual's behaviour, rather than a course of conduct that causes us to believe he is likely to go on offending if released.[152] A very obvious difficulty, however, arises in cases where an individual can be provoked to do serious harm by ordinary, everyday occurrences the likes of which it is

[147] *Ibid*.
[148] Kozol *et al.* (1972), 397.
[149] *Ibid*.
[150] *Ibid*.
[151] Though the relationship between psychopathy and violence is recognised as a 'robust' one. See, for example, J.P. Camp *et al*. 'Psychopathic predators? Getting specific about the relation between psychopathy and violence', (2013) 81:3 *Journal of Consulting and Clinical Psychology* 467; and S.D. Hart, 'The role of psychopathy in assessing risk for violence: Conceptual and methodological issues', (1998) 3 *Legal and Criminological Psychology* 121.
[152] See Duff (1998), 162; and the discussion of the 'unexploded bomb' below.

all but impossible to avoid.[153] This is addressed further below, but it is difficult to see why the man who fails to control his violent impulses in the face of the ordinary annoyances and obstructions of daily life should be considered any less dangerous than the person who seeks those situations out.

It may be that the offender whose actions are premeditated is more blameworthy than the one who simply fails to control his impulses, but that is not a consideration that is relevant to a determination of dangerousness in itself. Such considerations may be relevant to the offender's motivation and willingness to engage with rehabilitative efforts, but they say little about the risk posed at the point the decision to preventively detain is made. In holding that the first (calculating, predatory) offender is more blameworthy than the second (impulsive) offender, we recognise that the first offender is presented with a choice to seek out victims or not. The second offender's circumstances are different. The choice he is presented with is the one to expose himself to circumstances that might precipitate violent conduct; and if those circumstances are the ordinary occurrences, his choice is tantamount to one of deciding whether to "quarantine" himself that was discussed in section 2.2 of the previous chapter. The offender who does not intend to cause harm – though perhaps less blameworthy – may be considered more dangerous if all that is necessary to give rise to the risk is exposure to the ordinary conditions of living, or at least to the living conditions that are ordinary for him.[154]

This potential for reacting "explosively" to certain situational triggers has led some to engage an analogy between the dangerous offender and an undetonated bomb.[155] Morris gives an account of post-war London in which such devices would be found from time-to-time.[156] On most occasions disposal crews would make the bombs safe; they would never explode, and no harm would be done. Nevertheless, in the period between the device's discovery and its disarming the surrounding area would be cleared of people. The 'false positives' – the bombs which could have detonated but were secured before they did so – were dangerous until they were disarmed.[157] No one could reasonably have argued otherwise. It does not therefore follow that because an individual identified as dangerous does not do harm, the classification has been

[153] Indeed, Duff argues that it is only when the behavioural triggers are very likely to arise that someone should be considered a candidate for preventive sentencing: Duff, *ibid*, 153.
[154] This is assuming we really accept the latter has *no* control over his behaviour.
[155] For example, N. Morris, 'Incapacitation Within Limits' in A. von Hirsch *et al*. (Eds.) *Principled Sentencing: Readings on Theory and Policy* 3rd Edn. (Oxford, 2009), 91; Duff (1998), 152-155.
[156] Morris, *ibid*, 91.
[157] *Ibid.*

made in error.[158] This could be considered a good analogy for the impact of PD upon an individual thought to be dangerous: PD "disarms" him by preventing him from doing harm; it is no objection to his detention that we cannot know whether he was really dangerous or not because he was denied opportunity.[159] But Morris's point is not about incapacitation; it is about the predictive exercise that precedes it.

Considerable attention has already been given to the significance of free-will as a mediator between conduct and environment.[160] However it is clear that human beings are far more complex than a device that is constructed so that it will explode when it encounters certain conditions. If determinations that an offender *will* do harm if not incapacitated could be made with comparable certainty to a determination that a bomb *will* detonate if not disarmed then the calculation would be somewhat simpler. The false positive is the offender who would – like most offenders – not have sought to repeat such an offence. This does not necessarily mean that he would not in *any* circumstances. Someone who will not reoffend because he is capable of avoiding circumstances likely to bring it about, and who will do so, could be described as a false positive. To regard as a false positive the offender who would have done serious harm to another person but for the intervention of random chance to prevent that outcome, seems intuitively unacceptable. This is why classifications of dangerousness must involve consideration of external risk factors for violence as well as the characteristics of the individual.[161] It is also why treatment of the language of dangerousness and risk as though it were interchangeable is problematic.

On this point, Duff's approach to the unexploded bomb analogy is perhaps more helpful than Morris's. He engages the analogy in his discussion of special selective detention,[162] but the primary comparison is between explosives that would detonate if not disarmed, and those that appear to be bombs but are subsequently determined to be incapable of exploding, or to be something else altogether. The determination of dangerousness is based on facts as understood at the time it was made: the limitation on knowledge means that the determination is a reasonable one and, he says, true.[163] A dangerous person is, according to Duff, one who possesses characteristics that would result in seriously harmful conduct if certain circumstances

[158] *Ibid.*
[159] See the discussion at section 2.5.2 of the last chapter.
[160] See chapter two, especially sections 2.2, 2.5.2, and 2.7.
[161] Duff (1998), 153; Butler Report, 57, para. 4.5; see also the discussion of risk assessment below at 3.4
[162] Duff, *ibid,* 152-154.
[163] *Ibid*, 153.

arose, but those circumstances must be likely to arise:[164] there must be more between the characteristics of the offender and the threatened harm than random chance. Dangerousness is therefore properly regarded as a present status rather than a mere prediction of future conduct.[165] Floud and Young agree:[166]

> [Whether] it be a person's benevolence or his dangerousness that is at issue, an assessment takes the form of a *predictive judgment*, not a simple prediction…As the term implies, both evaluation and prediction are involved in predictive judgments: an evaluation of someone's character – his disposition to behave in a certain way, and a prediction – an estimate of the probability that in foreseeable circumstances he will actually do so…For practical purposes [these elements] are inextricable: a predictive judgment is a prediction grounded in an evaluation. If the prediction is falsified, it does not at once follow that the evaluation was mistaken...

It is quite obvious that a bomb capable of exploding is dangerous until it is disarmed. There is a difficulty though in claiming a bomb that is not capable of exploding, or an object thought to be a bomb, but which transpires to be something harmless, *is* dangerous. At best, what Morris and Duff describe are conditions under which it is reasonable to treat these objects *as if* they are dangerous.

The value of the argument, though, is in demonstrating that something (or someone) can be dangerous, even if circumstances do not bring about the harm feared. Since dangerousness does not depend on someone actually doing harm, it is wrong to reduce the question to one of predictability of future conduct. This being so, the false positive does not present the degree of moral difficulty those who raise it suggest.[167] However, the limitation on knowledge to which Duff refers does not create a truth; it creates an uncertainty. When new information about the nature and capability of the devices emerges, that assessment of dangerousness is revised. This is much easier to do with regard to an object than it is with a person, especially one who has been detained to prevent the threatened harm, because we can never know what he would have done if not detained. Though the bomb analogy is useful, it cannot be allowed to obscure the real issue at hand: bombs are just objects; people experience their "disarmament" and the form of incapacitation under discussion is the most onerous of any with the exception of capital punishment. Error in either direction carries costs and it must be minimised so far as possible;

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[164] *Ibid*, 153.
[165] *Ibid,* 152; Morris (2009), 91.
[166] Floud Report, 24-25. Emphasis in original.
[167] Duff, (1998), 152-159.

but the question is one of when it is reasonable to treat someone as if they would seriously harm another, rather than whether the prediction itself is right or wrong.

E. Repetition

Aside from the requirement that the conditions for the offence must be likely to arise, there must be evidence that the individual concerned is likely to respond to them with serious sexual or violent conduct.[168] Some of the most persuasive evidence of likelihood arises where an individual has perpetrated an offence of the relevant type on more than one occasion. As Floud and Young explain:[169]

> [We] may say that a man acted "out of character" which is to give him (as well as ourselves, as judges of character) the benefit of the doubt. By the same token, fair-minded persons do not jump to conclusions about a man's disposition from a single instance of relevant behaviour: they want to be sure he is behaving "in character".

Although it is difficult to be certain that any given individual will perpetrate future serious violent or sexual crimes, it has been shown that a history of such offending greatly increases the likelihood of it.[170] Previous convictions are regarded by criminologists as being some of the most 'reliable and powerful predictors' of subsequent offending behaviour:[171] the greater the number of convictions the more likely the offender is to be reconvicted, but one individual might perpetrate a variety of different kinds of offences. A criminal record, however long, is therefore not necessarily sufficient to support a finding that an offender poses a particular risk of serious violent and/or sexual offending.[172] As such, the only prior offences that ought to be considered relevant to a determination of dangerousness are those that are serious offences against the person,[173] or, according to the MacLean Committee, less serious offences which are suggestive of a pattern of conduct that could lead to such an offence.[174] Kozol *et al*. are much more restrictive than this and consider that it is not possible to predict future episodes of violence unless there is a history of it.[175] Floud and Young insist that the offender's 'criminal conduct must have manifested the grave harm which is to be prevented' before even the risk

[168] Floud Report, 24-25.
[169] *Ibid*.
[170] See, for example, the Butler Report, 57, para. 4.5; N. Walker, 'Unscientific, Unwise, Unprofitable, or Unjust?' (1982) 22:3 *British Journal of Criminology* 276, 277; Kozol *et al.* (1972), 372.
[171] Walker (1972), 174 – 175.
[172] *Ibid*.
[173] *Ibid.*
[174] MacLean Report, 8, para. 2.7.
[175] Kozol *et al*. (1972), 372.

assessment process is justified.[176] Likewise, Duff requires that any propensity to cause serious harm is one that an offender is found to have acted on – the propensity itself is not sufficient.[177]

One of the purposes of restricting the offences which may be considered relevant to those of the kind we are concerned to prevent is to ensure that a series of minor offences can never serve as a basis for an indeterminate sentence.[178] Requiring a conviction for a serious offence is also a means of ensuring that an offender's propensity to harm others is not just hypothetical, but that he has acted upon it. As Duff puts it: [179]

> [The] connection between the character traits which make a person criminally dangerous, and the criminal conduct which would manifest those character traits, is logical, not contingent. To have those character traits *is* to be disposed to behave in those criminal ways in situations of the appropriate kind; to say that the criminal conduct manifests those character traits is to say that conduct constitutes the public actualisation of those traits.

The tautology in reliance upon conduct as evidence of disposition, and disposition as evidence that the conduct is likely to be repeated, has been commented on above,[180] but the requirement for a conviction of a serious offence against the person serves a purpose beyond prediction: it is robust evidence that the offender has made a choice to conduct himself in such a manner that we might reasonably fear the way he will conduct himself in future. As Walker points out, 'a murder or a sexual assault at least shows what a person is capable of; and…a capability is something that can be exercised more than once'.[181] Duff, however, requires that propensity is evidenced by more than a single serious offence. On his account, indeterminate sentences are only permissible where such offending is persistent:[182]

> "Persistent" offenders are not merely repeat offenders who break the law more than once (or who repeat the same kind of offence): they are those whose repeated crimes cannot, given the character and contexts of their commission, be seen merely as a succession of discrete aberrations in otherwise law-abiding lives; they rather display a *pattern* of offending, which persists despite regular convictions and punishments.

It is of some interest that Duff's repetition requirement does not seem to be weighed against severity of harm.[183] He defines serious violent offences as those of 'murder and other life-

[176] Floud Report, 59.
[177] Duff (1998), 155.
[178] Walker (1972), 175.
[179] Duff (1998), 155.
[180] Part 3.3.2D.
[181] Walker (1996), 3.
[182] Duff (1998), 141. Emphasis in original..
[183] See section 3.4 for further discussion.

threatening attacks, rape, and other serious sexual assaults';[184] and the difficulty is that, if indeterminate sentencing is only permissible in cases of persistent serious offending so defined, it means the offender must be permitted to do potentially severe harm to a succession of victims before preventive action can be taken. This would be so even if there had been offending behaviour in the interim that, whilst of lesser severity, was indicative of the sort of pattern of offending to which Duff refers. As an example, consider an offender who has been convicted of theft by housebreaking in which he stole a woman's underwear, but who also has a conviction for assault to severe injury perpetrated by breaking into his victim's home, from which he also stole her underwear.[185] It would, it is argued, be reasonable to infer that the lesser offence demonstrated an ongoing risk that the more serious offence – or some offence like it – may be repeated, or that the behaviour may otherwise escalate.

Whilst a requirement for repeated serious offences would undoubtedly increase confidence that the decision to detain is a legitimate one, it must be recognised that it places a heavy burden on the community; it amounts to a demand that potential victims accept the risk the offender will choose to cause them harm. As has already been said, the risk of being harmed by others exists all the time, and is one that the public generally accepts, for some things at least. Nevertheless, it seems morally problematic to take the view that we must simply allow severe harm to come to others, even in the face of evidence that suggests repeat serious offending is likely. There is, as Duff contends, a need to ensure that individuals who are labelled dangerous are labelled on the basis of what they have done rather than a mere prediction,[186] but this does not necessarily require that we permit repeated incidences of serious harmdoing before PD can be considered. The need to ensure that the offender has elected to run the risk that we will consider him dangerous mandates that there be a conviction for a serious violent or sexual offence and not, as the MacLean Committee argued, only a series of lesser offences suggestive of a propensity to escalate. This, however, does not mean that the index offence – i.e., the offence in respect of which the sentence of PD is imposed – must be for a serious violent or sexual offence, but that there must be a history of serious violent or sexual offending. On that basis the MacLean recommendation that a lesser offence may serve as a basis for the decision to impose an indeterminate sentence if it is part of a pattern,[187] is sustainable. This may reduce the certainty

[184] Duff (1998), 142.
[185] These facts are similar to those of *McFadyen v HM Advocate* [2010] HCJAC 120. The appellant in this case was given an order for lifelong restriction; it is discussed in more detail in chapter five.
[186] Duff (1998), 156.
[187] MacLean Report, 40, para. 6.2.

with which we can say an offender is likely to cause serious harm in the future but, as was discussed earlier,[188] the unfairness arising from that reduction in certainty is mitigated by the offender's choice to use his freedom to harm others.

3.3.3 Conclusion to Section 3.3

This section aimed to approach the concept of the dangerous offender as a constraint on PD, that is, to identify the core characteristics of people who might properly be made subject to an indeterminate sentence, and to exclude those who may not be. Despite objections that have been made to the use of the term 'dangerous offender', there are no inherent advantages in using other terms. There are definitional issues with alternatives, such as 'high-risk serious violent and sexual offender', the reality being that they are simply shorthand descriptors for the class of persons we consider potentially liable to PD, and it is still necessary to set out what is meant. Despite the ambiguity, it was noted that dangerousness is generally associated in the minds of the public and professionals with violent and sexual offending. There are many other offences that risk serious harm on a large scale that are nevertheless tolerated by society, at least to the extent that we do not seem willing to resort to indeterminate sentences to prevent them. In at least some of these cases any harm resulting will not have been intended, and recurrence may be prevented by less restrictive means: the emphasis in the literature on dangerous offenders and indeterminate sentences is the prevention of intentional (though not necessarily premeditated) harm to others.

Dangerousness should not be understood as an attribute of a person that operates in isolation. The risk of serious harm being done depends on the interaction of the person with his environment; there are very few people who are calculating predators that actively seek out victims, but this does not necessarily mean that those who are impulsively violent should be considered less dangerous. It is also possible that someone may possess character traits which make it likely that they will commit a serious offence, but that they do not do so because they never encounter the circumstances which create the opportunity or otherwise bring it about. It may be true to say that someone is dangerous even if a prediction of reoffending that supports it turns out to be false. Dangerousness is therefore properly regarded as a description of present status – that is, that someone currently possesses characteristics which mean they are likely to conduct themselves so as to harm others – rather than as a wholly forward-looking construct.

[188] See section 2.7.

Finally, past behaviour is extremely important. It is not enough to say that we believe someone has the potential to perpetrate a serious offence; he must have a conviction for such an offence. It was argued that a less serious offence may serve as the trigger for considering the appropriateness of a preventive sentence where it is suggestive of an ongoing risk of serious offending, but there must still have been a previous conviction for a serious offence. Having discussed the characteristics of the dangerous offender in this section and having noted that serious violent and sexual offending are the offence types most generally associated with it, it is necessary in the next section to say something further about how 'serious' in this context should be understood, and how certain we must be that the threatened harm will be caused or attempted.

3.4 SERIOUSNESS AND CERTAINTY

The preceding part of the chapter has involved some discussion of the harms that must be threatened in order to warrant the attribution of the label of dangerousness to a person. It concluded that we are principally concerned with offenders who present a risk of repeat serious violent and/or sexual offending. The conduct must be serious so as to ensure that an indeterminate sentence is used only in respect of the most high-stakes cases, and only in respect of the smallest minority of offenders. This is an essential safeguard.[189] This section of the chapter builds on the previous discussion to try to explain why the emphasis is – and ought to be – on serious offences against the person, before considering the degree of certainty that should be required, and how that should be evidenced.

3.4.1 WHICH HARMS?

In addressing the question of which harms might warrant PD, Floud and Young draw heavily on the work of Nigel Walker, who gave evidence to the Committee. His approach was to discard concepts such as 'seriousness' and 'gravity', in favour of what he considered a more pragmatic question: 'Against what sorts of offences is it rational…to demand a high degree of protection?'[190] This approach, he argues, removes the 'emotions and superstitions' associated with criminal law from the equation.[191] This question is subdivided into two: how difficult

[189] Walker (1972), 175; see also chapter one of the MacLean Report on definitions and scope, and the preceding discussion.
[190] Walker, *ibid*, 172.
[191] *Ibid*.

would it be to reverse the harm, if it were inflicted; and how certain are we that the harmful behaviour will occur? As regards the first, Walker argues that only if it would be 'impossible', 'probably impossible', or 'very difficult' to undo the harm, and if its occurrence was highly probable, is it acceptable to contemplate PD.[192] As regards the second, it is important to note that Walker does not require that harm is actually done in the individual case: it is sufficient that the conduct in question would be *likely* to cause harm that is difficult or impossible to reverse. The appropriateness of such a threshold depends in part upon what is meant by 'undo' in this context. People may sustain life-threatening injuries and survive with little or no physical impairment because of excellent medical care, for example. But has the harm been undone? We could certainly include the leaving of very long-term or permanent marks or scars on the body from an attack as harms that cannot be undone, but Walker is concerned with more than physical damage.

He gives the example of an offender who robs his victim with a loaded gun. It would be wrong, he argues, to say that the conduct did not threaten irremediable harm. If the circumstances are such that the impact on the victim is not readily apparent, the court should take evidence from experts and reach a conclusion on that basis. Any uncertainty should, Walker says, be resolved in favour of the offender.[193] The harm that results from the conduct in this example is psychological rather than physical and could equally result if the firearm presented was not loaded: it arises from the fear and distress at the *apparent* threat of death or serious injury and does not depend on what the victim knows of the weapon's state. It is of course true that a weapon without ammunition is incapable of firing and therefore of causing physical harm (unless it is used to create a blunt injury, but that does not seem to be what is being contemplated), and that the danger is objectively greater if the gun is loaded.[194] It might also be that reference to the weapon being loaded, in the absence of any reference to attempt to discharge it, is a means of Walker emphasising the need for a threat-of-physical-harm constraint in cases where the harm done/threatened is psychological. He does himself acknowledge that the examples he can construct are overwhelmingly those involving physical injury or sexual assault, but he is clear that the basis on which he regards sexual offending as so significant is the psychological impact, rather than any physical consequence.[195]

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[192] *Ibid.*
[193] *Ibid.*
[194] Though it might also signify a willingness to have inflicted physical harm, and/or to do so in the future.
[195] Walker (1972), 172. The other examples are of espionage and theft/destruction of unique and original artworks.

If it is personal violation, rather physical harm *per se* that is the constraint, then it should follow that psychological harm caused (or likely to have been caused) by the threat of death or serious physical injury could be sufficient to warrant PD, even when the injury the victim envisages cannot, in fact, be done. It appears that Floud and Young also regard the constraint as one of violation, rather than physical harm.[196]

> Offences such as theft, rape and kidnapping inflict personal injury – pain, suffering, shock and fear, injury to health, inconvenience – but their essential character is that they are violations of right and that they are prejudicial to the community. A society in which they were endemic but always duly compensated would not be preferable to one in which they were contained but never compensated. If prohibitions with sanctions are insufficient there is a *prima facie* case for prevention.

Requiring that psychological harm be connected to some sort of physical violation might have value in policy terms since, as was said earlier,[197] what is regarded as sufficient to warrant PD depends – to some extent at least – on what the public considers sufficient.[198] People, Floud and Young argue, tend to take for granted that there is a clear demarcation between psychological and physical harm,[199] and often regard psychological harm as of lesser significance.[200] In reality, the distinction is not so easy to maintain. An offence may deprive someone of a physical capability such as the power to talk or to walk or to see, but it is the psychological impact upon the person that makes these physical changes so utterly destructive: the harm extends to the distress and the sense of loss that accompanies the injury, whether that be loss of physical capacities or of a job or profession that can no longer be undertaken.[201] For this reason, they consider any distinction that might be made between psychological and physical harm is irrelevant.[202]

The logical conclusion of this line of reasoning, as Floud and Young recognise, is that if psychological and physical damage are harms of equal status, then the inclusion of at least some property offences becomes open to argument.[203] The loss of an object of great sentimental value may cause great suffering, and may entail a great sense of personal violation, especially if it is taken from the home. Conversely, the theft of an item of no sentimental value whatsoever can

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[196] Floud Report, 52.
[197] See above at section 3.2.
[198] Political pragmatism is a consideration which is why this is discussed, however briefly. But public opinion is clearly not a sound a basis for resolving the ethical issues with which this chapter is chiefly concerned.
[199] Floud Report, 52.
[200] *Ibid*, 50.
[201] *Ibid*, 52.
[202] *Ibid*.
[203] *Ibid*, 54.

be extremely serious, for example, the theft of a railway signalling wire.[204] On that basis, they consider the presumption that property offences should never be sufficient to warrant PD, to be inappropriate; restriction of the use of PD to offences against persons would be an 'arbitrary' limitation.[205] Their concern is the potential impact of the offending, rather than how that is brought about. Questions about the appropriateness of PD are, of course, closely bound up in considerations of what the impact may be if an individual is not detained; but the long-term and devastating impact of such a sentence must be part of the consideration. Simply put, we must try so far as possible to restrict our use of these sentences to cases where the conduct with which we are concerned threatens long-term devastation for those to whom it is directed. This is what was called threat-proportionality in the last chapter. Imprisonment places restrictions on every aspect of a person's life; it removes choices that most of us take for granted on a daily basis and creates psychological and social detriments that persist well beyond the period of confinement.[206] An indeterminate sentence leaves someone liable to these extreme restrictions indefinitely. For the reasons discussed above, psychological harm warrants, on the face of it, prevention just as physical harm does. But difficulties arise in holding that psychological harm completely divorced from threatened physical harm may warrant PD. The further we stray from offences that endanger life or otherwise significantly diminish its quality, the harder it becomes to maintain that the impact on the subject of PD is ethically acceptable. This is quite apart from any considerations of certainty of future offending. The problem with trying to identify relevant harms by reference to remediability is that it is still necessary to decide which particular irremediable harms might be sufficient. It is not, therefore, clear that irremediability places any meaningful constraint on PD's application.

Floud and Young also recognise that some violations are serious independent of whether any suffering is experienced: [207]

> [The] peculiar wrongfulness [of rape and kidnapping] cannot be explained or measured in terms of pain or hardship, though of course they may entail both. They are harmful only against the background of a certain value and respect for the person. The wrongfulness of rape does not depend on its causing mental distress – on the painful consciousness and unhappy remembrance of the victim; not upon its resulting in lasting psychological damage – though these harmful effects would bear on the seriousness of the particular offence.

[204] *Ibid*, 53.
[205] *Ibid*, 54.
[206] This is returned to in chapter 6.
[207] Floud Report, 53.

The case of rape in which no harm is done has been considered by Fiona Leverick in the context of (individual) self-defence.[208] She draws on the work of Hampton,[209] and Gardner and Shute[210] concerning the nature of the wrongfulness of rape to construct an account of why killing to prevent rape may be morally permissible even in the absence of harm, for example where the victim is unconscious and never wakes up to learn of the assault. Leverick argues the wrong of rape is not tied to the particular physical or psychological harms that might be done. Instead, it is the denial of personhood inherent in the use of the victim as an object for the rapist's gratification.[211] Whilst, as Leverick acknowledges, many crimes involve the use of a victim for the offender's own purposes, the social significance attached to the act of sexual penetration differentiates rape from those other offences.[212] On Leverick's account, this wrong approximates the wrong of killing, and so killing to prevent rape is justified.[213]

Whether lethal force can really be justified to prevent rape absent the threat of significant physical harm is doubted here, but that sexual offences – especially rape – occupy a special position in society, and therefore in the criminal justice system, cannot be disputed. Leverick's account may help to explain why; it also helps to explain why it is perhaps better to think in terms of violations than harms. In any case, this thesis is concerned with the moral permissibility of PD, not killing. As has been said, the peculiar harms of indeterminate sentences must be recognised, but people can leave custody and return to the community; indeed, as is argued later,[214] there ought to be a presumption that they *will* be managed in the community, where possible, and that every opportunity to reduce their risk to facilitate that must be extended. There are parallels between self-defence and PD, but the considerations are not quite the same as when the action of terminating the existence of another is in contemplation. Further, self-defence is concerned with an attack in progress; PD, by definition, anticipates a future attack. We may have good reason to take the view that someone who rapes unconscious women presents a threat to society and, as has already been argued, if that belief is erroneous, it is morally permissible to require that the offender bear the burden of uncertainty.

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[208] F. Leverick, *Killing in Self-Defence* (Oxford, 2007), ch. 8.
[209] J. Hampton, 'Defining wrong and defining rape', in K. Burgess-Jackson (ed.), *A Most Detestable Crime: New Philosophical Essays on Rape* (Oxford, 1999), cited *ibid*.
[210] J. Gardner and S. Shute, 'The wrongness of rape', in J. Horder (ed.), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford, 2000), cited in Leverick (2008).
[211] Leverick (2007), 157.
[212] *Ibid* 157-158.
[213] *Ibid*, 157.
[214] See section 6.5.

Even if we did not believe that such a threat was posed, a substantial custodial sentence would still be warranted.

Again, the construction of the trigger for defensive action as violation, rather than harm, only takes us so far: it remains necessary to decide which violations are sufficient since there are offences not of a sexual or violent nature that may result in a profound sense of violation. The issue of property offences raised by Floud and Young, and Walker,[215] must be addressed. Floud and Young give an example of a property offence that would satisfy both a potential harm, and a potential violation constraint: the theft of railway signalling wire.[216] The case cited is *R v Yardley*,[217] reported in 1968 and, whatever the detail of 1960s rail signalling operations, the extent to which it remains an appropriate example is doubtful. Although such thefts do still occur, Network Rail says that the network's 'fail safe' infrastructure means their impact is largely confined to passenger inconvenience caused by delay.[218] But whether it is just a matter of inconvenience – which even on a large scale, and even if considered a violation of sorts surely could not be thought to warrant PD in and of itself – or it really can lead to catastrophic injury, it is sufficient to support Floud and Young's argument that blanket exclusion of property offences is neither necessary nor desirable. What matters is violation, not the manner in which it is accomplished so, on this account, at least in principle, a property offence that placed others at risk of serious harm could serve as a basis for an indeterminate sentence.

The difficulty, after all these considerations, is that one is still left with the task of delineating scope and even when couched in terms of violation, this is extremely difficult to do without having at least *some* regard to the potential impact of those violations. If it were not for the recognition that the kinds of conduct discussed here would – apart from any special circumstances like that of the comatose rape victim – likely have physical and/or psychological impacts, we would probably not regard them as violations. Prevention of harm is, ultimately, what we are concerned with. On that basis, it is submitted that the use of PD to prevent both physical and psychological harms resulting from personal violation is legitimate. In any case, it seems that in practical terms the focus of special sentences for dangerous offenders is on crimes against persons. For example, more than half the OLRs that have been made have been

[215] Walker (1972), 174.
[216] Floud Report, 53.
[217] *R v Yardley* [1968] Crim. L.R. 48
[218] See https://www.networkrail.co.uk/running-the-railway/looking-after-the-railway/delays-explained/vandalism-and-trespass/cable-theft/ It seems also to be the case that no harm was done in *Yardley*, the consequences also being confined interruptions in service. The sentence was one of 18 months' imprisonment.

imposed for sexual offences, the majority of the remainder having been imposed for violent offences; there is a small residual category of 'other offences that endanger life', those offences that are not serious in themselves, but demonstrate a propensity to go on to perpetrate serious offences in future.[219] The nature of the offences that attract these orders is instructive as regards the nature of these sentences themselves, and is returned to later in the thesis.[220] For the purposes of the present discussion, however, it is sufficient to note that the emphasis is firmly upon offences against persons.

This is, it is submitted, the correct approach. Indeterminate sentences are the most burdensome punishments at the courts' disposal entailing, as they do, the most serious abrogation of a person's freedoms. It follows that it can only be morally permissible to subject someone to them in order to prevent the most serious violations of others. The expansion of categories of offence away from serious crimes against persons may be open to argument, but in establishing the parameters of a rationally defensible model of preventive sentencing it is appropriate to restrict the focus to serious violent and sexual offences, whilst allowing that property offences might exceptionally be included where they entail a significant threat of physical harm to others. Where psychological harm is what we are concerned with, this should be tied to the threat of violent or sexual offending. The rationale for this is: (1) because restricting PD to cases where there is a threat of physical violation tempers the lack of culpability-proportionality with threat-proportionality – the most uncontroversially serious offences fall into this category; and (2) if the use of PD is not defensible in these cases, it certainly cannot be defensible in cases where such threat is not presented.

Finally, it must be acknowledged that violent and sexual offences vary in their seriousness, whatever the basis of the wrong. We cannot, therefore, as we have seen, delimit the use of PD by creating a list of offences to which it can apply. Besides, as the MacLean Committee pointed out, that would deny the public protection where it was warranted, while simultaneously resulting in – potentially many – unnecessary detentions.[221] How, then *can* we decide what is serious enough? It may be that the somewhat unsatisfactory answer is that we do it in the way the criminal justice system does this generally. Prosecutors and judges distinguish between severity of offences as a matter of course, deciding on what is charged on indictment or complaint; and what sentence is appropriate. The sorts of violations discussed here – rape,

[219] See, for example, Fyfe and Gailey (2011), 206.
[220] See sections 6.1.5.C and 6.3.5.
[221] MacLean Report, 29, para. 4.18.

including that of the comatose, “unharmed” victim, threatening someone with gun violence, threatening life and permanent physical impairment etc. – would all warrant substantial custodial sentences even if we did not consider that an indeterminate sentence was necessary. Any determination as to what ought to be included is bound to be somewhat arbitrary and to reflect intuition. There must, however, be some kind of seriousness threshold and perhaps the best we can do is to say that PD *may* be permissible where a substantial custodial sentence would otherwise be imposed upon conviction; at the very least, the offence must be serious enough for the offender to be sentenced by a court that has the power to impose an indeterminate sentence. That, however unsatisfactory, is the view taken here and it is returned to in chapter six: the alternative to holding that PD is sometimes permissible, is to hold it is never permissible and that, for reasons discussed in chapter two, is even less satisfactory. In holding that it is sometimes permissible, we must try to balance fairness to potential subjects of unjust PD, with fairness to potential victims of personal violation; that means making a choice constrained by our abilities to determine what is a sufficient threat. It has also been argued that some degree of over-inclusivity is appropriate, to the extent that we have a moral obligation to prefer the rights of potential victims over potential aggressors. In this we can claim assistance from two things: (1) the concept of the culpable creation of a burden that forces the choice that was discussed in chapter two; and (2) the concept of certainty, i.e., the knowledge we have of how likely a repeat offence of the relevant nature is. This was discussed above and is returned to now.

3.4.2 Assessing the Risk of Future Offending

In order for an offender to be deemed a dangerous offender, it is necessary to show that repeat criminal conduct threatens serious personal violation of the nature we would expect to result in physical and/or psychological harm. It would, however, be unjust if *any* risk of a serious violation was sufficient.[222] We must have reason to believe the use of PD is necessary. The difficulty is in trying to articulate a standard that adequately constrains the use of PD, and still permits society to protect itself. It was said earlier that dangerousness does not depend on the accuracy of a prediction of future serious offending, but risk assessment cannot be ignored entirely for two reasons. First, because if past offences were sufficient then anyone who committed an offence of that type could be liable to PD – an approach that has already been rejected; and, secondly, because risk assessment has significant value in developing risk

[222] Floud Report, 585.

management strategies for the offender.[223] In other words, it can also help us identify cases in which measures short of PD may be sufficient. Detailed evaluation of different approaches to risk assessment is properly the domain of those with expertise in the application and development of risk assessment methods, and is the subject of an extensive literature.[224] Some discussion is, however, warranted since in practice risk assessments inform decisions about detention and release, because there must be a standard, and to support later discussion of risk assessment in the OLR context.[225] This section briefly covers actuarial and clinical methods of assessment before considering their role in the PD process.

Floud and Young,[226] and Walker,[227] recognise that criticisms of risk assessment methodologies are not without merit. For Duff, the objection to the use of actuarial assessment in particular is a principled one. Actuarial instruments (ARAIs) use statistically derived probabilities to predict reoffending risk by assigning an individual to a group sharing certain factors that the tool weighs in a mathematical formula.[228] They allow virtually no operator discretion. Being highly standardised, ARAIs have high inter-rater reliability,[229] but they cannot identify which members of the group will go on to reoffend. According to a meta-analysis conducted by Stephen Hart *et al*. individual-level ARAI predictions are so unreliable 'as to render the test results virtually meaningless'.[230] In any case, Duff argues attribution of dangerous based on group membership is unjust.[231] Risk assessments must be individualised, and they must be capable of informing

[223] See, for example, J. Murray and M.E. Thomson, 'Clinical judgement in violence risk assessment' (2010) 1 *Europe's Journal of Psychology* 128; G.B. Melton, J. Petrila, N.G. Poythress and C. Slobogin, *Psychological Evaluations for the Courts*, 3rd Edition, (New York, 2007) at 308; MacLean Report, 8, paras. 2.9, 2.12 and 2.13

[224] See, for example, B.J. Ennis and T.R. Litwack, 'Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom' (1974) 62 *California Law Review* 693; J.J. Cocozza and H.J. Steadman, 'The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence' (1975-76) 29 *Rutgers Law Review* 1084; H.L. Kozol *et al.*, 'The Diagnosis and Treatment of Dangerousness' (1972) 18 *Crime and Delinquency* 371; H.J. Steadman and G. Kevels, 'The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966-1970' (1972) 129(3) *American Journal of Psychiatry* 304; S. D. Hart, *et al.* 'Precision of actuarial risk assessment instruments: Evaluating the 'margins of error' of group v. individual predictions of violence' (2007) 190 *The British Journal of Psychiatry (Suppl.)* s 60; G.B. Melton *et al. Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* 4th Edn. (London, 2018); J. Monahan *et al. Rethinking Risk Assessment: The MacArthur Study of Mental Disorder and Violence* (Oxford, 2001)

[225] MacLean Report, 8, paras. 2.12 and 2.13.

[226] Floud Report, 29.

[227] Walker (1972), 177.

[228] Melton *et al.* (2018), 298.

[229] *Ibid*, 299.

[230] *Ibid,* at s. 63.

[231] Duff (1998), 156. Though one imagines this might depend, at least to some extent, on the nature of the group.

risk management practice,[232] but if the evidence they produce is to be properly evaluated there must be some element of standardisation.[233]

(Unstructured) professional judgement is the most widely used method,[234] emphasising assessor discretion and the circumstances of the individual. Lack of standardisation, however, means inter-rater reliability is the lowest of any approach and, though it is difficult to evaluate accuracy of predictions, it appears error rates are extremely high.[235] Structured Professional Judgement (SPJ) aims to address that by utilising standardised assessment tools.[236] The development of SPJ has accompanied a shift away from assessing risk in terms of binary prediction as to whether someone will or will not offend.[237] Its efficacy is therefore not considered in those terms, but on whether graded attribution of risk level is defensible. Someone might, for example, be classed as high, medium, or low risk of violent/sexual (re)offending.[238] This is discussed in more detail later. SPJ retains the individual focus of UPJ, but – while numerical accuracy values are not generally assigned – inter-rater agreement on risk level is higher than that associated with UPJ predictions.[239] Crucially, since SPJ considers dynamic (i.e. modifiable) risk factors,[240] it is capable of informing interventions and therefore supports risk management planning. For these reasons, the approach prescribed by the RMA for the assessment of individuals considered for an OLR is structured professional judgement (SPJ).[241]

Walker's 'forthright, if arbitrary' proposal is that PD be considered justified where an assessor regards that an individual is more likely than not to reoffend. [242] He argues that there is no moral wrong in engaging PD provided that decision is grounded in the best practices of which we are

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[232] Floud Report, 57.
[233] Melton *et al.* (2018), 297.
[234] D.J. Cooke *et al*., 'Evaluating risk for violence: a preliminary study of the HCR-20, PCL-R and VRAG in a Scottish prison sample. Scottish Prison Service Occasional Paper Series 5/2001
[235] See, for example, B.J. Ennis and T.R. Litwack, 'Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom' (1974) 62 *California Law Review* 693; J.J. Cocozza and H.J. Steadman, 'The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence' (1975-76) 29 *Rutgers Law Review* 1084; H.L. Kozol *et al.*, 'The Diagnosis and Treatment of Dangerousness' (1972) 18 *Crime and Delinquency* 371; and H.J. Steadman and G. Kevels, 'The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966-1970' (1972) 129(3) *American Journal of Psychiatry* 304.
[236] Not to be confused with ARAIs; that would be a clinically-adjusted actuarial approach. SPJ employs tools designed for use in an SPJ context.
[237] Melton *et al*. (2018), 292.
[238] See section 5.4.4.
[239] Melton *et al.* (2018), 298.
[240] *Ibid*.
[241] Risk Management Authority, *Standards and Guidelines for Risk Assessment Report Writing* (Edinburgh, 2018), 52, para. 88. Document available at: https://www.rma.scot/wp-content/uploads/2018/10/STANDARDS-AND-GUIDELINES-FOR-RISK-ASSESSMENT-REPORT-WRITING.pdf
[242] Walker (1972), 178.

capable.[243] It is generally accepted amongst clinicians that risk assessment is 'is a highly fallible undertaking' and that this should be acknowledged explicitly.[244] As such, the professional consensus appears to be that the emphasis should be on defensible practice, rather than on predictions which are right or wrong.[245] To be considered defensible, the decision must be reasonable which, according to Carson, is a decision that a 'responsible body of co-professionals would have made'.[246] For Murray and Thomson, the primary objective should be to identify ways of managing and reducing risk which is ultimately in the offender's interests.[247] An indeterminate sentence must be a last resort; risk assessment must be able to identify where measures short of PD will be sufficient.[248] Even if the conclusion reached is that PD is necessary, risk assessment informs opportunities that may be extended to the offender to help him rehabilitate. This is absolutely central to any ethically defensible model of PD: if the offender's exercise of autonomy is the basis of his detention, then he must be afforded opportunities to choose to reduce his risk.[249] On this basis, it is submitted that we should not conceptualise "accuracy" in numerical terms, such as Walker's 51%. Rather, PD should be considered morally permissible where, on the basis of defensible practice, it is concluded that an indeterminate sentence is necessary to manage the offender's risk. This will be returned to in chapter six.

3.4.3 Conclusion to Section 3.4

This section has argued that PD should be restricted to cases where serious violations that risk physical and/or psychological harm to members of the public is threatened. Although some theorists have suggested that offences against property (without the accompanying threat to the person) might cause sufficient psychological harm to warrant PD, this was rejected. Indeterminate sentences should generally be reserved for serious crimes against persons, and in these cases the distinction between physical and psychological harm becomes immaterial.

At the point that an offender is to be sentenced to PD, the harms of that sentence are certain; as such, it follows that *some* degree of certainty of serious violent or sexual recidivism should

[243] *Ibid*, 4.
[244] Kemshall (2002), 21.
[245] D. Carson, 'Risking Legal Repercussions' in H. Kemshall and J. Pritchard (Eds.) *Good Practice in Risk Assessment and Risk Management* Vol. 1 (London, 1996), 4.
[246] *Ibid*.
[247] Murray and Thomson (2010), 133.
[248] Duff (1998), 162.
[249] *Ibid*, 159. This is returned to below.

be required. "Accuracy" of risk assessment ought not to be considered in numerical terms, but on the defensibility of determinations about the level of intervention necessary to protect the public. Beyond the decision to inform sentence, risk assessment supports risk management and provides a more individualised approach than sentencing based on a conviction alone. It offers an opportunity to establish whether an indeterminate sentence is truly necessary, and to formulate options for rehabilitation so that an offender, when detained, may be given the chance to address his risk.

The thesis has so far considered the theoretical basis for PD, arguing that it is best understood as the exercise of societal self-defence against a culpable individual. Key concepts were then addressed with a view to delineating the scope defensible use of PD; this included an exploration of the concept of the dangerous offender, the nature of harms we might legitimately use PD to prevent, and the role of risk assessment in the PD process. Section 3.5 below draws the discussion together to sketch out a workable analytical model of PD which respects, so far as possible, the requirements that have been set out. The chapter then concludes before detailed consideration of the OLR, its development, and supporting framework begins.

3.5 Dangerous Offenders, societal self-defence, and The Presumption of Harmlessness

In the last chapter, it was argued that PD is best conceptualised as an exercise of societal self-defence which becomes permissible when a credible threat of serious harm to others is communicated by the offender.[250] In these circumstances, we can no longer presume that the offender will refrain from action likely to cause harm and can take action to protect ourselves from his behaviour. This presumption of harmlessness is a theoretical construct which is intended to explain why people generally are, and ought to be, permitted to go about their business without interference: they have a right to be regarded as responsible moral agents, and not as potential attackers.[251] The presumption of harmlessness is not irrebuttable, and is capable of being forfeited by an offender who chooses to harm others. Bartlett,[252] whose account of PD as 'extended' self-defence is set out in part 2.7, stops short of equating the rebuttal or forfeiture

[250] Section 2.7.
[251] See, for example, Barnett (1996), 157; Walker (1996), 7; Duff (1998), 152; Redmayne (2015), 268; and the Floud Report, 44.
[252] *Ibid*.

of the right to be presumed harmless directly with a forfeiture of the right to a proportionate sentence. However, an argument of this nature is advanced by Walen who contends that an offender who perpetrates one or more serious offences may justifiably be subject to 'long term preventive detention' on the grounds he can no longer be considered to be law-abiding.[253] For the reasons discussed above though, that is considered here to be too large a leap: something more than a conviction for an offence of a given type is necessary. As Walker points out, a rebuttal of the presumption of harmlessness creates a right to deviate from the principle of proportionate sentencing, not a duty,[254] and this is one of the reasons why an extra step in the form of an individualised risk assessment is necessary.

The presumption of harmlessness is useful because it not only explains why people should, as a matter of principle, not be preventively detained, but it is also capable of supporting derogations from that principle in certain cases. Ashworth and Zedner have, however, suggested that, although the presumption of harmlessness and the presumption of innocence are distinct principles, the operation of the former has implications for the latter.[255] It appears that they consider the rebuttal of the presumption of harmlessness to amount to the attribution of a general criminal character that is divorced from the context of particular offences; the presumption of innocence could therefore be undermined by presuming that the accused will harm others, and detracting from the requirement that the prosecution prove the elements of the offence.[256] They argue that 'every positive risk assessment constitutes a denial of the presumption of harmlessness and that denial cannot easily be squared with the right to be presumed innocent of future crimes'.[257]

The problem with this, as they acknowledge, is that the two presumptions relate to different things. The presumption of innocence relates to past behaviour that the individual is accused of; and the presumption of harmlessness relates to what may be done in the future.[258] A claim that someone, by his own past conduct, has lost the right to require that others presume him harmless does not amount to a claim that he will have acted harmfully in any future case where is accused of doing so, nor does it obviate the need for proof beyond reasonable doubt in any

[253] A. Walen, 'A Punitive Precondition for Preventive Detention: Lost Status as a Foundation for a Lost Immunity', (2011) 48 *San Diego Law Review* 1299.
[254] Walker (1996), 7.
[255] L. Zedner, 'Erring on the Side of Safety: Risk Assessment, Expert Knowledge, and the Criminal Court', in D. Sullivan (Ed.) *Seeking Security: Pre-empting the Commission of Criminal Harms* (Oxford, 2012), 223; Ashworth and Zedner (2014), 131.
[256] Zedner (2012), 223; Ashworth and Zedner (2014), 131-132.
[257] Ashworth and Zedner, *ibid*, 132.
[258] *Ibid.*

particular case.[259] It has been suggested that, since the presumption of harmlessness does not relate to past offending, the sufficiency of non-criminal conduct for its rebuttal is open to argument,[260] but that is not what is being suggested here. Nor does it appear to have been proposed elsewhere.[261] The accounts of the presumption of harmlessness discussed here all require that convictions are the basis of a rebuttal.[262]

The requirement for past offences of the kind we are concerned to prevent matters for two reasons. First, because it demonstrates a choice made by the offender to violate others: he has the opportunity to avoid being considered dangerous – and therefore to avoid indeterminate detention – by choosing to refrain from such offending;[263] and second, because, as was argued in the previous chapter, PD imposed to prevent voluntary conduct is punishment and therefore only ever warranted when an offence has been committed. The presumption of harmlessness must be actively forfeited; it cannot be dispensed with on the grounds of suspicion alone.[264] The offender has forced us to make a decision as to whether to allow him the opportunity to continue presenting a threat to others, or to detain him: if we arrive at the conclusion that he can no longer be considered to be harmless, that is his fault, and it is reasonable to require him to bear the burden of uncertainty as to how he will conduct himself in the future.[265] All these things considered, the following section sets out a conceptual model of PD that is ethically defensible, and will serve as the foundation for critical analysis of the procedural framework in the remainder of the thesis.

3.5.1 An Ethically Defensible Model of Preventive Detention

The analytical model which is proposed here is based on the discussion in chapters two and three. PD imposed to prevent repeated voluntary, and likely harmful criminal violation, is punishment and should therefore only be imposed following a conviction. However, people have the right to be treated as rationally autonomous individuals; this entails extending them the opportunity to direct and modify their own conduct and, in turn, creates a general

[259] Walen (2011), 1233.
[260] Redmayne (2015), 268; Zedner (2012), 221.
[261] Though acquittals and unsubstantiated allegations are considered when an order for lifelong restriction is under consideration: see section 5.4.3.
[262] Redmayne (2015), 268; Duff (1998), 159 – 162; Walker (1972), 170; Floud Report, 44; Walen (2011), 1232.
[263] Redmayne (2015), 268; Duff (1998),155.
[264] Duff, *ibid*; Walker (1998), 7.
[265] Barnett (1996), 165; and the discussion at 2.7.

requirement that punishments should be proportionate. When indeterminate sentences are imposed, that requirement is not adhered to. This is only permissible in the context of a very small minority of offenders who threaten serious harm to others. They must be repeat offenders who have been convicted of a serious violent or sexual offence, though that need not be the index offence. An indeterminate sentence may be imposed in respect of less serious offences provided they indicate, taken alongside the 'gold standard' of ethically defensible risk assessment, an offender requires PD to prevent him from future serious violation. 'Serious' should be understood to refer to physical and psychological harm that will, or is likely to, result from the offender's criminal conduct, and ought to be determined in the way that greater and lesser offences are determined in the criminal justice system generally, i.e., by the range of sentences they (aside from PD) would warrant.

The role of individual risk assessment is to consider the degree of risk the offender presents, and if PD is necessary to manage it. If it is found that the offender is likely to choose to cause harm to others in the future absent an indeterminate sentence, then he can no longer claim the right to be presumed harmless, and society is entitled to defend itself from the threat he presents. There does, of course, remain uncertainty: we can never know what someone will or will not do in the future and, as was acknowledged above, most serious violent and sexual offenders do not repeat those offences. The decision to risk either detaining someone indefinitely unnecessarily, or of permitting harm to come to future victims is an unenviable one. It does remain the case that the best predictor of future violent offending is a history of violent offending, and therefore the requirement for repetition serves the purpose of mitigating that uncertainty somewhat.[266] Grounding the right of societal self-defence on the forfeiture through criminal conduct of the presumption of harmlessness allows redistribution of the burden of uncertainty in favour of potential victims.

The offender has chosen to perpetrate serious offences and has elected to run the risk that it will be considered likely he will do it again; potential victims have no choice in the matter and so, it is submitted, it is reasonable that the burden of the uncertainty falls on the person whose conduct has forced the decision. Such detention might be considered to be justified, or alternatively we might, as some theorists have suggested, take the view that fault of the offender excuses an erroneous finding of dangerousness; but, as discussed in chapter two the decision has been taken here to use the language of moral permissibility.[267] This better reflects the nature

[266] Duff (1998), 141.
[267] See section 2.7.2.

of the decision as to whether or not to preventively detain: like the assessment of risk, it is less a matter of right and wrong, and more about establishing a principled approach to identifying the least morally objectionable of the options available. It is submitted that adopting a framework that views indeterminate sentencing as a form of societal self-defence, and to which the exercise of the offender's free agency is central, accomplishes this so far as is possible.

3.6 Conclusion to Chapter Three

This chapter has discussed the concepts of dangerousness and risk, and their development into modern concepts which describe the persons, harms, and violations that may be the subject of indeterminate sentencing. It was argued that the concept of the dangerous offender was, despite some suggestions to the contrary, possessed of some substance: it describes people whose repeated violations of the rights of others is the subject of concern to the public. Specifically, 'dangerous persons' are now considered to be repeat perpetrators of serious violent and sexual offences, who are regarded as likely to continue to offend. Dangerousness is not, in itself a trait or characteristic of a person; instead it is a combination of personality and environmental circumstances which place an individual at high-risk of serious violent and sexual offending, and potential victims at risk of serious harm. A conviction for such an offence must be part of the offender's criminal history before it is ethically permissible to consider PD. In addition, any offender for whom an indeterminate sentence is being contemplated should be subject to an individualised risk assessment that is capable both of providing an estimate of the likelihood of repeat serious offending, and of informing risk management strategies. Although the predictive element might be wrong, the risk assessment has value in that it may identify protective factors which suggest the offender's risk can be managed adequately without PD, or form the basis of interventions which extend the offender's opportunity to reduce the risk he presents while detained. Finally, the discussions in chapters two and three were drawn together to propose an analytical model in which indeterminate sentencing is regarded as an exercise of a right of societal self-defence. The right arises when the offender forfeits his right to be presumed harmless. Because his choices to harm others are the basis of that forfeiture, it is morally permissible to require him to carry the burden of any uncertainty about his future conduct. Finally, the issues surrounding dangerousness, risk, and PD are as complex as they are controversial, and no claim to have resolved that is made here. Instead the objective has been to construct a theoretical framework that is morally defensible and capable of supporting an analysis of the OLR which, as was said earlier, is Scotland's only risk-based indeterminate

prison sentence. The next chapter begins this process with a detailed account of the background to and development of the current legal framework.

4. The Dangerous Offender Sentencing Framework: Background and Development

4.1 Introduction to Chapter Four

The previous chapter discussed the development of the concepts of dangerousness and risk in the context of offending behaviour. It was argued that only those who have been convicted of a serious violent or sexual offence, or an attempted serious violent or sexual offence, are properly considered candidates for preventive detention. It must then be established, to the best of our present abilities, that the individual is liable to reoffend such that serious physical or psychological harm would be caused to members of the public if not prevented by detention. Before considering the detail of the law governing the imposition of sentences of preventive detention in Scotland, and the extent to which it complies with the requirements set out in the theoretical framework in chapters two and three, it is necessary to consider the background to the legislative reforms that brought it into being.

Most of the primary provisions governing the imposition of sentences of imprisonment and detention are found in the 1995 Act. As regards the sentencing of dangerous offenders, the most significant amendments to the 1995 Act were made by the Criminal Justice (Scotland) Act 2003 ('the CJ(S)A 2003') which introduced the OLR. These provisions are discussed in detail in chapters five and six. Also in 2003, the Mental Health (Scotland) Act 1984 (the 1984 Act) was largely replaced by the Mental Health (Care and Treatment) (Scotland) Act 2003 (MHA 2003) with implications for the management of mentally disordered offenders. Although the OLR and the mental health disposals are heavily orientated towards the protection of the public they are, in theory at least, targeted at different offender groups. The primary difference between them is that the OLR is a sentence of imprisonment, and the primary mental health disposal for mentally disordered offenders requiring treatment – the CORO – is a sentence of detention in hospital for treatment of mental disorder under conditions of security in lieu of imprisonment. However, these orders are, it is contended, best conceptualised as part of the same preventive regime. As is discussed below, the OLR – though

functioning as a replacement for the discretionary life sentence (DLS) that preceded it[1]– was developed in order to fill a perceived gap in the 1995 Act's forensic mental health provisions[2] as they applied to offenders with personality disorder. This "loophole" was brought to light by a high-profile challenge to the provisions which governed the release of patients subject to the restricted hospital orders which preceded, but were similar to, the CORO as it is now.[3] This is why the CORO is an alternative to an OLR in certain circumstances.[4]

The purpose of this chapter is twofold. First, to place the legislation in its political and public policy context so that the aims and objectives underpinning these orders may be identified and examined. Second, it permits the evolution of the OLR from the pre-existing framework which was largely concerned with the detention of mental disorder, to be demonstrated. This latter point is of some significance since the literature concerning the OLR is fairly small, and largely descriptive. Notable exceptions include the works of McSherry and Keyzer,[5] Gailey *et al.*,[6] and Darjee and Crichton.[7] These evaluate the OLR against models of preventive detention for sex offenders in different jurisdictions; critique its operation over the first decade of its implementation; and compare it to the explicitly personality disorder-focused programme that was operating in England and Wales at the time of the OLR's creation,[8] respectively. At the time of writing, and as indicated in the introduction to the thesis, there has been no attempt to produce a detailed analytical account of the OLR in its own context alongside other disposals such as the extended sentence and the CORO. The starting point for this must be a consideration of the rationale for, and circumstances, of its creation. This, in turn, requires fairly substantial consideration of mental health law as it applied to people convicted of offences prior to the OLR's coming into being.

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[1] The DLS has not been a competent disposal since the OLR became available: s. 210G; *McIntosh v HM Advocate* 2016 S.C.L. 923.
[2] The provisions which permit the detention in hospital and/or treatment of an offender, or in some cases an offender who has been acquitted. These orders are made by the criminal courts rather than by way of a doctor's application to the Mental Health Tribunal for Scotland. See section 4.2 below.
[3] *Ruddle v The Secretary of State for Scotland* 1999 G.W.D. 29 – 1395 (Sh. Ct.). This case is discussed in detail below.
[4] See section 6.4.2.B.
[5] McSherry and Keyzer (2015), 99 – 102.
[6] Gailey *et al*. (2017).
[7] Darjee and Crichton (2002). Although this relates to the proposals for the order rather than the order as implemented it represents the earliest critical literature on the OLR.
[8] The Dangerous Severe Personality Disorder (DSPD) Programme, which later became enmeshed in the heavily criticised, and later abandoned, imprisonment for public protection (IPP) scheme. See, for example, P.E. Mullen, 'Dangerous (and severe personality disorder) and in need of treatment', (2007) 190:S49 *British Journal of Psychiatry* s3; Maden (2008); and P. Tyrer *et al*. 'The successes and failures of the DSPD experiment: the assessment and management of severe personality disorder', (2010) 50 *Medicine, Science, and the Law* 95.

This chapter describes the background to the creation of the OLR, giving detailed consideration to the substantial role of the Report of the MacLean Committee on Serious Violent and Sexual Offenders.[9] Some discussion of the Millan Committee on the reform of the Mental Health (Scotland) Act 1984[10] is also undertaken, since certain of its recommendations pertained to the management of high-risk offenders. Part 4.2 considers the law as it stood prior to the substantial reforms that resulted in the legislative framework as it presently exists. Part 4.3 considers the challenges to the old law that triggered the reform process, whilst 4.4 describes the emergency legislation that served as a stop-gap measure until a more permanent solution to the problem could be proposed by the working groups commissioned to reform the law. The relevant recommendations of the MacLean and Millan Committees are outlined in section 4.5, and the reception of those reports is considered briefly in section 4.6. Finally, the chapter concludes in section 4.7 before the thesis turns to detailed consideration of the OLR sentencing framework as it presently stands in chapters five and six.

4.2 The Legal Background

Before 2003, the 1995 Act contained – as it does now – most of the key provisions on the sentencing of offenders,[11] including those to be made subject to mental health disposals. Whilst the mental health orders themselves were made under the 1995 Act, most of the provisions regarding the effect of the mental health orders, and the roles, responsibilities, and requirements for discharging functions in relation to those orders, were found in the Mental Health (Scotland) Act 1984.[12] There was no equivalent to the OLR at this stage. Although the High Court had the power to pass a discretionary life sentence (DLS) in cases for which there was no statutorily imposed maximum penalty, the DLS differed significantly from the OLR in terms of pre-sentence procedures and in its operation.[13] There is little to be said of the DLS here except to note that, whilst it appears that in practice it was used for broadly the same offender

[9] R. MacLean, *Report of the Committee on Serious Violent and Sexual Offenders* (Edinburgh, 2000)
[10] B. Millan, *New Directions: Report on the Review of the Mental Health (Scotland) Act 1984* (Edinburgh, 2001)
[11] As amended, most notably for the purposes of the present discussion, by the Prisoners and Criminal Proceedings (Scotland) Act 1993, and the Crime and Punishment (Scotland) Act 1997, although these amendments are concerned more with release or discharge from custody than with the imposition of sentence.
[12] The Millan Committee (see below) considered whether this arrangement should continue, or whether all mental health orders should be contained within one Act or other. The Committee decided to continue the division between the Acts.
[13] Specifically, the need for a standardised risk assessment process to be followed, and the manner in which post-release supervision is intended to take place. See chapter 5 for a detailed consideration of these processes.

group as the OLR,[14] its use was considered to be based on inadequate sentencing procedures,[15] and it was not thought to allow for an appropriately intensive level of management for the highest-risk offenders.[16] For offenders with mental disorder requiring treatment, the 1995 Act made provision for a range of interim orders and final disposals that would see an offender detained – sometimes indefinitely – in hospital, and which could authorise treatment for mental disorder during the period of that detention. For the purposes of the present discussion, only the hospital order with restrictions (HORO) is of interest.

The HORO was comprised of two orders: the hospital order (HO) which could stand alone; and the restriction order (RO) which could only be made with a HO.[17] The HO was available under section 58 of the 1995 Act[18] in respect of offenders convicted in the High Court or the sheriff court[19] of an offence other than murder, punishable by imprisonment.[20] The effect of the hospital order was that, rather than being sent to prison, the offender was admitted to hospital on much the same basis as if he were subject to the civil commitment provisions that would apply to a non-offender.[21] Before making a hospital order the court required to take account of the oral or written evidence of two medical practitioners approved to discharge duties under the 1984 Act.[22] This evidence had to satisfy the court that the criteria for detention in section 17(1)[23] of the 1984 Act were met.[24] These criteria were that the offender was suffering from a mental disorder, the nature or degree of which made it appropriate for him to receive medical treatment for it in a hospital;[25] that the treatment was necessary for the health or safety of the offender or for the protection of other people, and that it could not be provided if he were not detained under the Act.[26]

Mental disorder was defined simply as ‘mental illness or mental handicap however caused or manifested’[27] with no further definition of the terms mental illness or mental handicap offered.

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[14] MacLean Report, 27, para. 4.10.
[15] *Ibid,* 28, para. 4.14.
[16] *Ibid,* 16, para. 3.1.
[17] The relationship between the HO and RO and the compulsion order (CO) and RO as it is now is virtually identical and will be discussed further later.
[18] References to section 58 of the 1995 Act refer to the version in force from September 1999 until March 2002 unless otherwise specified.
[19] s. 58(1).
[20] s. 58(1)(a).
[21] 1984 Act, s. 60 as in force from April 1996 until March 2002.
[22] *Ibid*.
[23] Version in force from January 1998 until October 2005.
[24] s. 58(1)(a)(i).
[25] 1984 Act, s. 17(1)(a).
[26] s. 17(1)(b).
[27] 1984 Act, s. 1(2).

The definition was amended by the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 to emphasise that mental illness was considered inclusive of personality disorder,[28] however detention of persons with certain types of personality disorder was possible prior to this amendment. Special provision already existed for those whose mental disorder was 'a persistent one manifested only by abnormally aggressive or seriously irresponsible conduct'.[29] In these cases, the court required to be satisfied that medical treatment was available for the individual that would improve, or prevent deterioration of, his condition.[30] This 'treatability' test pertained to what might be termed antisocial or dissocial personality disorder, or psychopathy[31] and reflected a sense of therapeutic pessimism prevalent in Scotland at the time.[32] The presumption was that individuals with this form of personality disorder could not be treated effectively,[33] and therefore there was a need to establish that a particular offender represented an exception.[34] Once satisfied that the criteria for detention under the 1984 Act were met, the court required also to be satisfied that the order was the most appropriate disposal. 'Appropriateness' was determined with reference to the nature of the offender's mental disorder, his history, his character and the other options for disposal of the case.[35] Questions about the operation of the treatability and appropriateness tests applied at the point of detention, and their interaction with provisions governing discharge of a patient subject to a hospital order and a restriction order, would later give rise to the appeal which ultimately led to the introduction of the OLR. [36]

Ordinarily the hospital order would remain in effect for a period of six months, after which it would be renewable for 12 months at a time until the offender was discharged by his responsible medical officer (his psychiatrist), the Mental Welfare Commission, or by a sheriff following a successful appeal against the order.[37] If, however, the offender was found to present

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[28] 1999 Act, s. 3.
[29] s. 17(1)(a)(i).
[30] *Ibid*.
[31] *Reid v The Secretary of State for Scotland* 1999 S.C. (H.L.) 17.
[32] See, for example L.D.G. Thomson, 'Crime and Punishment (Scotland) Act 1997: relevant provisions for people with mental disorders', (1999) 23 *Psychiatric Bulletin* 68, at 68 and 69; and R. Darjee *et al*. 'Crime and Punishment (Scotland) Act 1997: a survey of psychiatrists' views concerning the Scottish 'hybrid order'', (2000) 11(3) *Journal of Forensic Psychiatry* 608.
[33] R. Darjee *et al.* (2000).
[34] This situation could arise where an offender's personality disorder is capable of giving rise to psychotic episodes of short duration; these episodes may then subside, or be successfully treated, whilst leaving an offender subject to psychiatric control. The hospital direction was introduced, in part, to address this difficulty – see the discussions below on *Reid v The Secretary of State for Scotland*, and the hospital direction.
[35] s. 58(1)(b) of the 1995 Act.
[36] *Reid v The Secretary of State for Scotland* 1999 S.C. (H.L.) 17.
[37] These arrangements were similar to those pertaining to civil commitment under Part V of the 1984 Act, although there was no right of discharge that could be exercised by the nearest relative.

a high-risk, and also made subject to a restriction order, the hospital order would continue without limit of time and only the Secretary of State could authorise the patient's discharge, transfer or a period of leave.[38] The restriction order made under section 59[39] of the 1995 Act as it was prior to the substantial amendments to the legislative framework in 2003 differs little from the order available under section 59 as presently in force, and it is returned to briefly in section 6.5.2.B of the thesis. However, it should be noted at this stage that the restriction order was (and is) attached to the mental health disposal on the basis of risk of serious harm to the public;[40] it has never existed as an order in its own right, and therefore if the criteria for detention under a hospital order (now a compulsion order) are no longer met, and the patient appeals successfully on this basis, the restriction order must also be revoked.[41] This means that the patient must be discharged. In other words, the public protective function of the restriction order is dependent for its effect on the criteria for the relevant mental health order continuing to be met. This was established in the case of *Reid v The Secretary of State for Scotland*,[42] which is discussed in section 4.3 below.

4.3 THE "LOOPHOLE" IN THE LAW

The case of *Reid* concerned an appeal against refusal of an application under section 64 of the 1984 Act for discharge from a HORO. Mr Reid was a patient at the State Hospital and had been detained there since the orders were imposed on him in 1967 following his conviction for culpable homicide. A succession of challenges followed this refusal, with the final appeal being heard in the House of Lords in 1998. At the point of his initial detention, Reid had been diagnosed as suffering from 'mental handicap' which satisfied the criteria for detention under the 1984 Act.[43] During the course of his detention, however, it emerged that he was instead suffering from what the Act termed 'a persistent [disorder] manifested only by abnormally aggressive or seriously irresponsible conduct'.[44] Stated shortly, he was, as Lord Lloyd put it, a psychopath.[45] This was critical since section 17 required that, in a case where the individual's mental disorder was a personality disorder of the type from which Reid suffered, it had to be

[38] s. 59(1) of the 1995 Act; and s. 62(1)(b) of the 1984 Act (as in force from January 1998 until October 2005).
[39] As in force between January 1996 and March 2002.
[40] s. 59(1).
[41] s. 64(1).
[42] 1999 S.C. (H.L.) 17.
[43] s. 17(1)(a)(i).
[44] *Ibid,* s. 17(1)(a)(ii).
[45] *Reid,* at 19.

the opinion of two appropriately qualified medical practitioners that treatment was available which could ameliorate its effects or prevent the patient's deterioration.[46] This was in addition to the general requirements that the mental disorder be of a nature and degree that rendered treatment in hospital appropriate[47] and necessary for health or safety of the individual, or for the safety of other people.[48] The difficulty was that the discharge provisions in section 64 did not mirror these.

An application for discharge would result in a conditional discharge under section 64(2) where the sheriff was satisfied detention was either no longer appropriate,[49] or no longer necessary[50] in the terms of section 17(1), but was *not* satisfied that recall to hospital for continued treatment would be unnecessary in the future.[51] If the sheriff was satisfied as to the first and second grounds, and also satisfied that continued liability to recall was not appropriate, an absolute discharge would be granted.[52] The sticking point was the apparent lack of an equivalent of the section 17 treatability criterion in section 64. The Court, however, found that the appropriateness test in section 64 by its nature must incorporate the treatability test since, in cases where treatability was at issue (i.e. cases in which the subject of the order had a personality disorder of the type defined in section 17), the question of treatability had to be considered by the judge before he could reach a determination about the appropriateness of making the order. Their Lordships, however, defined 'treatment' broadly such that the routine, and nature of the interaction which took place in the State Hospital between patients and staff, could be considered therapeutic if they led to a reduction in the symptoms of the disorder, such as violent and aggressive outbursts. If, however, no therapeutic benefit at all was evident, then the discharge was to be absolute rather than conditional, on the basis that there would be no purpose in recalling the offender to hospital since such a detention could not be considered appropriate.[53] Reid was once again refused discharge based on the sheriff's initial finding that the hospital environment was indeed controlling his symptoms. However, the impact of the decision was far reaching in that it rendered the detention of personality disordered offenders

[46] s. 17(1)(a)(ii) of the 1984 Act.
[47] s. 17(1)(a).
[48] s. 17(1)(b) of the 1984 Act.
[49] s. 64(1)(a) of the 1984 Act.
[50] s. 64(1)(b).
[51] s. 64(1)(c).
[52] s. 64(1).
[53] *Reid,* at 32.

of this type unlawful past the point that their disorder's lack of amenability to treatment became apparent.

The following year, Noel Ruddle – who had a personality disorder and who, like Reid, was detained in the State Hospital following a conviction for culpable homicide – applied for, and was granted, absolute discharge on the grounds that his condition was not treatable.[54] The distinction between the two cases was that, whereas the sheriff found that the behaviour stemming from Mr Reid's personality disorder was improved by his detention in a therapeutic environment,[55] Mr Ruddle derived no discernible benefit from the structure and routine of the State Hospital at all.[56] It was a high-profile case[57] that prompted the Scottish Office to establish a working group on serious violent and sexual offenders,[58] and the newly reconvened Scottish Parliament to pass emergency legislation to close the "loophole". This legislation is discussed in section 4.4 below.

4.4 The Emergency Legislation

The Mental Health (Public Safety and Appeals) (Scotland) Act 1999 ('the 1999 Act') was the first piece of legislation to be passed by the new Scottish Parliament and was granted Royal Assent in September of that year. It amended section 64 of the 1984 Act to require that the sheriff, in considering a restricted patient's application for discharge, refuse the application in any case where he was satisfied that the patient's continued detention in hospital was necessary for the protection of the public from serious harm.[59] Where the patient was found to present such a risk, there would be no need to consider questions of appropriateness or treatability as before.[60] This public safety test was therefore to take precedence over other considerations when contemplating a restricted patient's discharge. The Act attracted widespread criticism,

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[54] *Ruddle v The Secretary of State for Scotland* 1999 G.W.D. 29 – 1395 (Sh. Ct.).
[55] *Reid*, at 33.
[56] *Ruddle* at para. 10.4
[57] See, for example: BBC News, 'Legal loophole murderer freed' (http://news.bbc.co.uk/1/hi/uk/410054.stm). Published 2/8/1999. Accessed 17/11/2020; also *The Journal Online* – 'The Ruddle Case: the lawyer's view' (http://www.journalonline.co.uk/Magazine/44-10/1001722.aspx#.VQSfFcZ9vdk). Published 1/10/1999. Accessed 17/11/2020. Here, Mr Ruddle's solicitor describes the media interest and her treatment at the hands of the press in the wake of the case. The author of the article is unnamed, but is presumably Yvonne McKenna, who represented a series of patients detained in the State Hospital, including Noel Ruddle – see *The Daily Record Online*, 'The Stalker of Hollywood' (http://www.dailyrecord.co.uk/news/uk-world-news/the-stalker-of-hollywood-984544). Published 23/7/2008. Accessed 17/11/2020.
[58] The MacLean Committee on Serious Violent and Sexual Offenders. See section 4.5 below.
[59] s. 1 of the 1999 Act.
[60] MHA 1984, s. 64(1A) inserted by the Mental Health (Public Safety and Appeals) (Scotland) Act 1999, s. 1(1).

with the Faculty of Advocates, the Law Society of Scotland, the Scottish Association for Mental Health, the State Hospitals Board, and the Royal College of Psychiatrists expressing concerns about the scope of the legislation.[61] The consensus was that where the state was to detain a person solely on risk grounds, its coercive power should be exercised through the criminal justice system and not mental health legislation.[62]

As well as being the first piece of legislation produced by the new Scottish Parliament, the 1999 Act was also the first of its Acts to face legal challenge. In *Anderson v the Scottish Ministers*,[63] the three appellants, who were patients at the State Hospital, argued that the Act was in violation of Article 5 of the ECHR, and was therefore outwith the Parliament's competence. Article 5(1)(e) which provides for 'the lawful detention of persons…of unsound mind…' did not, they contended, encompass circumstances in which there was no intention to provide medical treatment and no expectation that medical treatment would be of benefit.[64] There were two key questions for the House of Lords. The first was whether the 1999 Act met the three requirements for the detention of mentally disordered individuals that had previously been laid down by the EC*t*HR in *Winterwerp v The Netherlands*,[65] and restated in *X v The United Kingdom*:[66]

> [1] the individual concerned must be reliably shown to be of unsound mind, that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; [2] the mental disorder must be of a kind or degree warranting compulsory confinement; and [3] the validity of continued confinement depends upon the persistence of such a disorder.

The second was whether, when read in conjunction with Article 18 which restricts the rights and freedoms provided for in the Convention to their intended purposes, Article 5(1)(e) was capable of permitting the detention of a person with a mental disorder in circumstances where there was no intention to provide medical treatment, and no expectation that such treatment

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[61] B. Millan, *New Directions: Report on the Review of the Mental Health (Scotland) Act 1984* (Edinburgh, 2001), 343, para. 13. ('the Millan Report'.)
[62] *Ibid,* 342, para. 12.
[63] 2001 S.L.T. 1331.
[64] *Anderson v the Scottish Ministers*, para. 28.
[65] (1979) 2 E.H.R.R. 387. Here, a patient detained under Dutch mental health legislation alleged that his detention breached his rights under Articles 5 and 6 of the Convention. The facts are of little relevance to the present discussion, however in deciding the case the Court laid down the criteria which must be met in order for detention of 'persons of unsound mind' to comply with Article 5. Interestingly, the court declined to define 'unsound mind', instead accepting that it was an evolving construct which would be redefined as medical knowledge developed. For a discussion of this see J. Bindman *et al.* 'The Human Rights Act and mental health legislation' (2003) 182:2 *British Journal of Psychiatry* 91.
[66] *X v the United Kingdom* (1981) 4 E.H.R.R. 188 at 43, restating *Winterwerp* at 39.

would be of benefit were it to be provided. Their Lordships answered both questions in the affirmative. Previously, the EC*t*HR had recognised protection of the public and protection of the individual patient as legitimate grounds for detention of persons with mental disorder.[67] The House of Lords therefore concluded that detention solely on the grounds of risk to the safety of the public was, where the *Winterwerp* criteria were met, compatible with Article 5.

Although the 1999 Act was designed as a stop-gap measure until a more comprehensive legislative response to the management of high-risk offenders had been formulated, the judgment in *Anderson* remains of significance. In the wake of *Reid* and *Ruddle,* the Scottish Office had established a Committee, chaired by Lord MacLean, to review the law regarding the management of serious violent and sexual offenders and to make recommendations for future legislation.[68] At the same time, a review of the MHA 1984 was taking place by a committee chaired by Bruce Millan.[69] However, as their Lordships in *Anderson* recognised,[70] neither of the Committees was able to find a solution to the problem of restricted patients detained on a hospital order or compulsion order and discovered subsequently to be suffering from an untreatable personality disorder.[71] An equivalent of the public safety test introduced by the 1999 Act has therefore been retained in section 182(3)(b)(ii) of the MHA 2003. Although no fix for that particular problem was found, the MacLean Committee laid the foundations of what was to become the OLR, designed to fill the vacuum in the public protective framework that had arisen in respect of offenders with a primary diagnosis of personality disorder.

4.5 THE REPORTS OF THE MACLEAN AND MILLAN COMMITTEES

The MacLean and Millan Committees, although differing significantly in their terms of reference, both contributed to the development of the current legislative framework for the detention of high-risk mentally disordered offenders. The Millan Committee's remit was

[67] *Guzzardi v Italy* (1981) 3 E.H.R.R. 333; *Litwa v Poland* (2001) 33 E.H.R.R. 53, cited in *Anderson* at 30.
[68] The Committee on Serious Violent and Sexual Offenders which reported to the Scottish Parliament in 2000.
[69] Its report, *New Directions* was published in January 2001.
[70] *Anderson,* at para. 14.
[71] This reasons for this are not explicitly stated in the reports, however it is suggested that given that one of the key differences between the hospital order, the compulsion order which replaced it, and the hospital direction which (will be discussed later), is that the HO or CO *is* the sentence, simply passing retrospective legislation to permit their transfer to prison would violate Article 5, and possibly Article 7, of the ECHR. See *New Directions* at 347, para. 40 and the MacLean Report at page 77, para. 12.3.

widest, in that it was tasked with wholesale review of the 1984 Act, and part of that included consideration of the orders to which treatable mentally disordered offenders might be made subject. It also revisited the definition of mental disorder that the criminal courts would adopt for the purposes of sentencing. In terms of impact, however, the MacLean recommendations were of greater significance. That committee had a highly specialist remit, which was to formulate proposals for a long-term solution to replace the 1999 Act's temporary fix. Although its proposals were not implemented in full, its report resulted in the creation of the OLR as part of an entirely new sentencing framework for high-risk offenders not suffering from treatable mental disorder.

As previously mentioned, the MacLean Committee was established by the Scottish Office following the decisions in *Reid* and *Ruddle*. It was convened in March 1999, and was comprised of fourteen members including forensic psychiatrists and psychologists, a Chief Constable, the Parole Board Vice Chair, the Mental Welfare Commission's Nursing Officer, a senior social worker, a prison governor, a sheriff, and a solicitor-advocate.[72] Its function was to develop a comprehensive framework for the sentencing and management of offenders with personality disorders who presented a serious risk to the public, but its terms of reference included all serious violent and sexual offenders.[73] More specifically, it was asked to address the supervision and treatment needs of this particular group of offenders and make recommendations as to how these needs could be met.[74] The report was laid before Parliament in June 2000. This section of the chapter discusses its reasoning and key recommendations in respect of the introduction of the OLR and its risk management infrastructure. The footnote citations in section 4.5.1 relate to the report unless otherwise stated.

4.5.1 The Scope of the Report

The Committee's terms of reference were as follows. [75]

> to consider experience in Scotland and elsewhere and to make proposals for the sentencing disposals for, and the future management and treatment of serious sexual and violent offenders who may present a continuing danger to the public, in particular:

[72] R. MacLean, *Report of the Committee on Serious Violent and Sexual Offenders* (Edinburgh, 2000), 89. ('The MacLean Report'.)
[73] *Ibid*, 1.
[74] *Ibid*.
[75] *Ibid*.

> to consider whether the current legislative framework matches the present level of knowledge of the subject, provides the courts with an appropriate range of options and affords the general public adequate protection from these offenders;
>
> to compare practice, diagnosis and treatment with that elsewhere, to build on current expertise and research to inform the development of a medical protocol to respond to the needs of personality disordered offenders;
>
> to specify the services required by this group of offenders and the means of delivery;
>
> to consider the question of release/discharge into the community and service needs in the community for supervising those offenders.

It will be recalled that the Committee defined high-risk offenders as 'persons convicted on indictment of a violent or sexual offence, or exceptionally another category of crime, whose offence(s) or antecedents or personal characteristics indicate that they are likely to present particularly high risks to the safety of the public'.[76] The Committee was clear that it was not concerned with achieving a measurable reduction in crime;[77] it was concerned to produce proposals for the prevention of the most serious offences against persons which would be capable of identifying and responding to high-risk offenders' needs and specific risk factors.[78] As was discussed earlier in the thesis, there is a tendency amongst those who oppose preventive detention in principle to reduce the moral dilemma inherent in any decision about whether to detain to an arithmetical one. The approach taken by the MacLean Committee was therefore, like that of the Floud Committee,[79] one which recognised explicitly the value of committing public resources to the prevention of harm from offences with extremely low rates of occurrence, and the moral defensibility of such a system.

There was some overlap between the work of the MacLean Committee and the Millan Committee – the latter of which was tasked, amongst other things, with making proposals on measures for the detention and treatment of high-risk offenders with mental disorders;[80] – and the Expert Panel on Sex Offending chaired by Lady Cosgrove which reported in 2001.[81] The

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[76] Page 4, recommendation 1.
[77] Paras. 1.13 – 1.15.
[78] Paras. 1.10 – 1.11.
[79] See the Floud Report, esp. ch. 1.
[80] See 4.5.2 below.
[81] *Reducing the Risk: Improving the response to sex offending* (Edinburgh, 2001), available at https://www.webarchive.org.uk/wayback/archive/20180516003908/http://www.gov.scot/Publications/2001/06/9284/File-1 Accessed 17/11/2020.

Cosgrove Report was largely concerned with the implementation of earlier recommendations made by the Social Work Services Inspectorate on the supervision of sex offenders in the community,[82] but the progress report on the Expert Panel's recommendations would later take account of the measures taken in the wake in of the MacLean Report.[83] It is perhaps of some significance that, although the MacLean Committee acknowledged that the overwhelming majority of offenders with which it was concerned were male, and that it regarded the particular needs of women offenders with severe personality disorder as being outwith its purview, it nonetheless considered that it had produced proposals suitable for application regardless of the offender's gender.[84] The Committee's recommendations on risk assessment did ultimately lead to the creation of a body which recognises differences in need and risk profile between male and female offenders, and which actively researches and validates tools for the risk assessment and risk management of women.

4.5.2 The Risk Management Authority

The Report recommended that a new statutory body, to be known as the Risk Management Authority (RMA) be created. The RMA would be an independent body, responsible for its own budget, and which would report to the Scottish Ministers.[85] The Committee had visited prison services in Scotland, England, and Canada, amongst other jurisdictions, and had noted that the fields of risk assessment and management were rapidly developing, but that there remained difficulties, despite the best intentions of practitioners, in devising inter-agency approaches which responded adequately to the needs of high-risk offenders.[86] In particular, the Committee found that information sharing between the various Scottish services involved in offender-management was ineffective, and that integrative approaches were hampered by fundamental differences in risk-management methodologies between those services.[87] The Committee concluded 'that a significant weakness exists in our present arrangements in that there is no authority responsible for the overall risk management of particularly problematic

[82] Social Work Services Inspectorate, *A Commitment to Protect: Supervising Sex Offenders. Proposals for more Effective Practice* (London, 1997).
[83] See Scottish Executive, *Reducing the Risk: Improving the Response to Sex Offending. Progress Report, October 2005.* Available at https://www2.gov.scot/Resource/Doc/77843/0018946.pdf. Accessed 17/11/2020.
[84] Page 6, para. 1.21. This was in relation specifically to the high rates of self-harm identified amongst imprisoned women with personality disorders, but the Committee does not attempt to account for differences in risk factors and needs except to note that special services do exist for women in some places, though they did not visit them. See Annex 4, para. 65 of the report at 119.
[85] Page 19, rec. 6.
[86] Pages 16 – 17, paras. 3.2 – 3.4.
[87] *Ibid*, para. 3.4.

offenders and for bridging the incompatibilities that clearly exist between the many agencies that have to play a part if improved protection is to be offered to the public'.[88]

The RMA would have oversight of the whole risk assessment and management process, and would be responsible for ensuring the protection of the public from high-risk offenders by the least restrictive means.[89] Its remit would be broad, encompassing the commissioning of research, accreditation of risk assessment tools and processes, and of risk assessors; it would procure services from agencies that work with offenders; and, crucially, would be tasked with the production and review of individual risk management plans.[90] Although agencies such as the Scottish Prison Service (SPS), or social work, would continue to have responsibility for delivering 'core services' to high-risk offenders,[91] the RMA could use its own budget to procure specific services for offenders that are not routinely available in prisons or in the community, such as supervision at a level of intensity that local agencies' resource constraints would ordinarily preclude.[92] Policy and standard setting would be a key area of responsibility. Agencies were operating according to their own internal standards and processes, and as a result the protective service they offered was felt to be disjointed. This also meant that it was difficult for those agencies to capitalise on advances in risk assessment and risk management being made internationally:[93]

> At a policy level, two essential functions are not being performed. First, we reached the conclusion that funding of research and the introduction of new risk management techniques is not being shaped by a clear policy priority to lessen the risk presented by the group of high-risk offenders. Second, where benefit is being derived from developments that have taken place, it is unco-ordinated. Though, within their own frames of reference, the approach to risk assessment used within the health service, social work departments, and SPS has been informed by research, their approaches are different. Reports from psychiatrists, forensic psychologists or social workers to the courts or to the Parole Board are sometimes written from confusingly incompatible intellectual positions. They may use the same words with meanings different both from each other and from the meanings that those reading them would normally use. They are based on distinctive and not always compatible explanatory models…There is a clear need, if adequate protection is to be afforded to the public, for the assessment and management of the risks presented by very violent

[88] Page 17, para. 3.4.
[89] *Ibid*, rec. 5.
[90] Page 18, para. 3.10; for further discussion of the risk management plan as implemented see section 6.5.1 of the thesis. The RMA does fulfil an oversight and approval function in relation to the RMP but does not produce RMPs.
[91] *Ibid,* para. 3.11.
[92] Page 19, para. 3.11.2.
[93] *Ibid*, paras. 3.15 – 3.16.

> offenders to be conducted within a shared framework of language and techniques.

The RMA would be the agency tasked with co-ordinating approaches to risk management across all these agencies, building upon robust practices already in place,[94] and directing changes to practice as supported by evidence from research undertaken in other jurisdictions, and that commissioned by the RMA itself. The Authority's responsibilities would include the evaluation and approval of risk assessment tools which could be used in the initial pre-sentencing risk assessment process,[95] and throughout the life of the risk management plan, and also the training, assessment and accreditation of risk assessors.[96] This is what the Committee termed the RMA's 'quality control' function.[97] Only risk assessors accredited by the Authority would be entitled to produce reports for use by the courts or the Parole Board, and only those tools which it approved would be able to be used in the production of the reports.[98] This would address the disjointed practices the Committee identified by standardising risk assessment and reporting, and ensuring that risk information was communicated in a common language.

The Committee identified what it considered to be two major operational deficiencies in relation to the sentences that were available in respect of serious violent and sexual offenders at that time. First, it took that view that those sentences were not really geared towards the management of lifelong risk. The distinction between the custodial and community components of these sentences was too sharp, with case management centred on a presumption of progressive relaxation of measures where the offender's behaviour and compliance, rather than the risk they posed, was the primary consideration.[99] Although risk assessment by relevant agencies was part of decision-making concerning the appropriate level of intervention in any given case, the Committee was of the view that robust risk assessment should be the primary determinant; it would also, they contended, reduce the 'scale of the change in circumstance that the offender faces at any point' in the transition from custody to the community.[100]

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[94] Page 22, para. 3.23.
[95] Chapter 5 discusses these processes in depth.
[96] Page 22, recommendation 8.
[97] Page 21, para. 3.19.
[98] *Ibid*, para. 3.20.
[99] Page 23, para. 3.27.
[100] *Ibid*.

The second major operational problem the Committee identified was that there was a general lack of clarity as to which agencies were primarily responsible for the management of an offender at different stages of his sentence:[101]

> At differing times, the prison service and local authority social work departments, whose responsibilities extend beyond the group we are considering, take a lead responsibility. It is our view that their objectives are less focused on the issues that concerned us than we think they should be. The police, housing departments, health services, the employment service and, very often, voluntary agencies also impact the circumstances of the group and can offer services relevant to the risk they present. With the introduction of electric monitoring, in particular, private sector organisations may also contribute…The Parole Board exercises a co-ordinating influence over these agencies. Its impact, however, is properly focused on release and recall decisions. It does not have authority to require action by any of these other agencies.

The Committee considered a range of options, including approaches which would see a unified correctional service, like those in operation in Canada, which would take the lead for the duration of the sentence.[102] However, the concern was that such an approach would have the effect of alienating the service from other social organisations.[103] It would also have failed to address the problem of lack of special focus on high-risk offenders that had been identified. There was a need for a specialist agency for the management of this group of offenders; one that had oversight of, and responsibility for, the operation of the entire sentence.[104] Consideration was given to ascribing these functions to the Parole Board, but it was determined that it would not be appropriate for the body responsible for making decisions on release from custody also to possess 'executive authority for managing restrictions on freedom'.[105] The recommendation, then, was that the RMA would fulfil this role,[106] and could do so in respect of mandatory life prisoners and patients subject to restriction orders as well as those subject to the OLR.[107]

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[101] *Ibid*, para. 3.28 – 3.29.
[102] *Ibid*, para. 3.31.
[103] *Ibid*.
[104] Page 24, para. 3.33.
[105] *Ibid*, para. 3.34.
[106] *Ibid*; page 25, recommendation 9.
[107] Page 25, para. 3.39.

4.5.3 THE INADEQUACY OF AVAILABLE SENTENCES

The starting point for the MacLean Committee in recommending the creation of a new sentence – to be called the OLR – was that risk reduction is a legitimate sentencing aim.[108] Although retribution, deterrence, rehabilitation, and incapacitation were also acknowledged as legitimate aims,[109] it seems that the Committee took risk reduction to be an independent sentencing objective. This is of some interest given that the means of risk reduction was to be control over the offender in custody, or in the community, and attempts at altering the offender's patterns of conduct;[110] that does look like another way of saying deterrence, rehabilitation and incapacitation. Surely the societal benefits derived from deterrent, rehabilitative, and incapacitative sentences are preventive. Rather than as a restatement, it seems the Committee was engaging the theoretical distinction between prevention as an acceptable beneficial side-effect of justified punishment, and punishment as being justified for prevention: the Committee adopted the latter philosophical position. On this basis, it reached the conclusion that it was legitimate to sentence serious violent and sexual offenders to longer terms of imprisonment on the grounds of the risk they presented, than they otherwise would have been.[111]

The report also concluded that the imposition of disproportionate punishment would not be justified *unless* there were attempts to assist the offender to reduce the risk he presented.[112] However, the Committee did admit to a sense of therapeutic pessimism as regards interventions for the group of offenders who would be subject to the OLR[113] – a sense that is quite consistent with psychiatric practices in Scotland in relation to the treatment of individuals with personality disorder.[114] Those with mental illness were regarded more positively, it being more likely that the risk they posed could be ameliorated by medical treatment,[115] but in all cases, since response to rehabilitative measures could not be determined with certainty, it was considered that the need for risk reduction should determine the manner in which a sentence progresses rather than

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[108] Page 26, para. 4.2.
[109] *Ibid*, para. 4.1.
[110] *Ibid*.
[111] *Ibid*, para. 4.3.
[112] *Ibid*; this is consistent with the legal position that indeterminate sentences must be accompanied by interventions designed to permit an offender to reduce his risk and demonstrate his suitability for release: see part 6.2.1.D of the thesis.
[113] *Ibid*, para. 4.4.
[114] See, for example, R. Darjee and J. Crichton, 'Personality disorder and the law in Scotland: a historical perspective', (2003) 14:2 *Journal of Forensic Psychiatry and Psychology* 394, especially 406 – 409; R. Darjee *et al*., 'Detention of Patients with Psychopathic Disorder in Scotland: "Canons Park" Called into Question by the House of Lords', (1999) 10:3 *Journal of Forensic Psychiatry* 649, 656; Darjee (2003), 12.
[115] Page 26, para. 4.4.

its length.[116] It is not clear whether the length to which the report refers is the length of the whole sentence, or the punishment part of the sentence during which the offender would definitely remain in custody.[117] Though, given that the Committee would ultimately conclude that high-risk offenders should be subject to a sentence that lasts the entirety of their lives, albeit potentially with a portion of that served in the community, it seems that it was considered that the need to manage risk should, in fact, inform the length of the sentence.

In reaching the decision to recommend the creation of the OLR, the Committee considered six other options: (1) mandatory life sentences for specified offences other than murder;[118] (2) the use of longer determinate sentences;[119] (3) greater use of extended sentences;[120] (4) changing the law relating to supervised release orders;[121] (5) changing the law regarding sex offenders;[122] and (6) changing the law on stalking and harassment.[123] Options five and six were considered properly within the remit of other working groups.[124] It had been suggested that the Committee might choose to recommend that supervised release orders (SROs) be mandatory in all sexual and violent offences cases,[125] but option four was ultimately discounted because SROs are available only in respect of short sentences[126] (i.e. those of less than four years duration)[127] and the Committee was concerned with the most serious offences which would be likely to attract longer sentences.[128] The reasons that the remaining options were rejected in favour of recommending a new indeterminate sentence are instructive, and are worthy of some consideration.

A. Mandatory Life Sentences

As is the case presently, at the time the report was prepared the only mandatory life sentence in Scotland was that which applied in cases of murder.[129] Section 1 of the Crime and Punishment

[116] *Ibid*.
[117] This is discussed in greater detail at section 6.5.1.A.
[118] Pages 28 – 30.
[119] Page 30.
[120] Page 31. Extended sentences are discussed in further detail at section 5.2 of chapter 5.
[121] Pages 31 – 32.
[122] Pages 32 – 33.
[123] Page 33.
[124] Page 33; paras. 4.40 and 4.41. Lady Cosgrove's Expert Panel on Sex Offenders was at that time considering the Sex Offenders Act 1997 and the Crime and Disorder Act 1998, and the Scottish Executive had published its Stalking and Harassment Consultation Paper in February 2000.
[125] Page 32, para. 4.36.
[126] *Ibid*, para. 4.37; Criminal Procedure (Scotland) Act 1995, s. 209(1).
[127] Prisoners and Criminal Proceedings (Scotland) Act 1993, s. 27(1).
[128] *Ibid*.
[129] s. 205(1) of the 1995 Act.

(Scotland) Act 1997 provided that the 1995 Act be amended to institute automatic life sentences for offenders of at least 18 years of age, who had been convicted of a second serious violent or sexual offence.[130] It was never brought into force, and was eventually repealed[131] in accordance with the MacLean Committee's recommendation that it should be.[132] It had, however, been suggested to the Committee by the Association of Chief Police Officers in Scotland (ACPOS)[133] that bringing this section into force might be worthy of consideration.[134] The Committee took the view that any public protective argument for increasing the use of mandatory life sentences was based on the presumptions that: (a) such sentences are a deterrent; and (b) that offenders who present a danger to the public on more than one occasion will continue to present a danger in the future.[135] The Committee rejected the first presumption on the grounds that high-risk offenders are likely to be subject to long sentences in any case and so considered that any deterrent effect was more likely to be derived from increasing detection and conviction rates, rather than sentencing.[136] As regards the second presumption, it was accepted that the powers of long-term – perhaps lifelong – imprisonment and lifelong recall to prison associated with mandatory life sentences may prevent serious offences being carried out.[137] What concerned the Committee was the effect of designated offences serving as the trigger for preventive measures.[138] It was considered to be both over-inclusive and under-inclusive. Individuals who posed a high-risk of serious violent and sexual offending may not fall within the scope of the legislation because they had not yet been convicted of a relevant offence for a second time.[139] It would also have the effect of bringing within the legislation's ambit people whose risk of reoffending was low despite the offences of which they were convicted. The examples the report gives are cases where offences are separated by long periods of time, or by very different contexts, people whose offences were not especially serious but met the statutory criteria anyway, and those where there was significant mitigation.[140] There was also a concern that

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[130] Section 1 would have inserted s. 205A into the 1995 Act and added a Schedule 5A to it. Schedule 5A would have set out the 'qualifying offences' including culpable homicide, attempted murder, rape, attempted rape and certain aggravated assaults.
[131] By the CJ(S)A 2003, s. 19(3).
[132] Page 30, rec. 10.
[133] ACPOS, along with the eight regional police forces and the Scottish Crime and Drug Enforcement Agency (SCDEA), no longer exists having been subsumed into the national force, Police Scotland, on 1st April 2013. See the Police and Fire Reform (Scotland) Act 2012, s. 6; and the Police and Fire Reform (Scotland) Act 2012 (Commencement No. 4, Transitory and Transitional Provisions) Order 2013/51 (Scottish SI), art. 2.
[134] Page 28, para. 4.15.
[135] *Ibid*, para. 4.16.
[136] Page 29, para. 4.17.
[137] *Ibid*, para. 4.18.
[138] *Ibid*.
[139] *Ibid*, para. 4.19.
[140] *Ibid*, para. 4.20.

ways of disapplying or circumventing the provisions, or reducing their impact on the offender, would be found. One of the examples given of such a measure was the defence of diminished responsibility resulting in a conviction for culpable homicide rather than murder.[141] The Committee concluded:[142]

> While it is understandable that some sections of the public would be content for such offenders to receive life sentences 'to be on the safe side', in our view this approach has two major flaws. It is potentially unfair to the offender, who may receive a more severe sentence than another offender who has committed a more severe offence or offences, but who does not meet the statutory test. Just as importantly…[it] is a waste of money and scarce professional skills to imprison and keep under supervision offenders who do not require that level of custody and control…In short, we believe that in non-murder cases the mandatory life sentence is a blunt instrument. It does not address the key aim, which is to control more effectively those who present the highest level of risk.

Since extension of the mandatory life sentence was not felt to be an appropriate means of managing risk in the target group, the Committee recommended that section 1 of the 1997 Act be repealed.[143]

B. LONGER DETERMINATE SENTENCES

The setting of mandatory minimum determinate sentences for certain offences was considered to be inappropriate for the same reasons as the mandatory life approach.[144] It could also potentially leave a gap in public protection. Regardless of how long someone is imprisoned, if a sentence is determinate, there will come a period where he will be released, and there will come a point where the licence, along with the conditions attached to it, will come to an end.[145] The view taken by the Committee was that the result of such an approach would be that people who did not require intensive risk-management would be caught by the provisions, and people who still presented a high risk would be liberated without supervision.[146] In reaching its decisions, the Committee considered the approach to high-risk offenders taken in certain states in the U.S. They found that extremely long determinate sentences were commonplace but had had been deemed to be inadequate; the result was the introduction of 'sexually violent predator' schemes which permitted the continued detention of such an offender at the end of his prison

[141] *Ibid*, para. 4.22.
[142] Ibid, paras. 4.21 – 4.23.
[143] Page 30, para. 4.23; rec. 10.
[144] *Ibid*, para. 4.25.
[145] *Ibid*, para. 4.26.
[146] *Ibid*.

term.[147] In some states, determinate sentences which exceeded the natural life expectancy of the offender were employed, but the thing that these approaches were found to have in common was that they consisted mainly of incapacitation without any substantial attempt at risk reduction.[148] A final possibility that was considered, but rejected, was increasing the proportion of the sentence served in custody. Increasing the time spent in custody means reducing the time available to community services to engage with the offender at a point where risk management and integration becomes most important.[149]

C. Extended Sentences

At the time of the report, extended sentences, provided for in section 210A of the 1995 Act, were still relatively new having been introduced by section 86 of the Crime and Disorder Act 1998. Extended sentences are a form of determinate sentence comprised of a period spent in custody and extended licenced period in the community. They are discussed further in section 6.4.2.A of chapter six. Extended sentences were intended to go some way to address the problem of managing offenders who would continue to present a risk to the public at the end of their sentence.[150] The Committee did not seek to determine the frequency of section 210A's use, but did consider that the lack of a robust framework for determining the appropriateness of its application in individual cases was problematic, and suggested this would be likely to limit its use.[151] No substantial recommendation to alter the extended sentence's use was made; instead the Committee took the view that it would serve as an 'important bridge' between standard determinate sentences and the OLR that was being proposed.[152] It was, however, recommended that the available duration of the licence for violent offences was increased from five years to ten.[153] This recommendation was accepted[154] and the section 210A extended sentence remains an option in cases where the statutory risk criteria that must be satisfied in order for an OLR to be made, are not met. The extended sentence is discussed in more detail in chapter five.[155]

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[147] *Ibid,* para. 4.27; for further information on SVP, see J. Petrila, 'Sexually Violent Predator Laws: Going Back to a Time Better Forgotten', in McSherry and Keyzer (eds.) (2011), 63.
[148] *Ibid*, para. 4.27 – 4.28.
[149] *Ibid*, para. 4.29.
[150] Page 31, para. 4.30.
[151] *Ibid*, para. 4.32.
[152] *Ibid*, para. 4.34.
[153] *Ibid*, para. 4.34; rec. 11.
[154] s. 210A(3)(b) as amended by the Violent Offenders (Scotland) Order 2003/48 (Scottish SI), art. 2.
[155] See section 6.5.2.A.

4.5.4 The Inadequacy of Risk-Based Sentencing Infrastructure

The Committee concluded that the sentences that were available at the time were inadequate for the purpose of protecting the public from high-risk offenders.[156]

> [We] have come to the view that while for many such offenders the present range is satisfactory, for a small number of others the current sentencing provisions are deficient since they do not *require* the courts to impose on exceptional individuals an exceptional sentence which both marks the gravity of what they have done and provides an appropriate level of public protection, having regard to the risk that such individuals pose.

What was needed was the power to control these individuals for the rest of their lives, initially in custody, but with the possibility of progressing to community supervision once it was safe to allow them to do so.[157] This is what necessitated the introduction of the OLR. To support this level of risk management, it would be necessary to drastically improve risk data gathering and sharing. Sources of risk information identified in the MacLean report include prior convictions laid before the court before sentencing,[158] psychiatric reports,[159] and social enquiry reports (SERs) produced by local authority social work departments.[160] It was the view of the Committee that the role of the Crown at sentencing was too restricted. A centralised database should be developed in which the Crown Office would retain information which might assist in identifying high-risk offenders who might be appropriate candidates for the OLR.[161] This would include information derived from police reports and precognitions, as well as reports from judges or sheriffs that had sentenced the offender before.[162] The prosecutor would then, based on this information in part, be able to 'flag' potentially high-risk offenders in advance of sentencing being imposed so that they may be subjected to comprehensive risk evaluation.[163] This assessment would be a statutory pre-requisite in cases where an OLR was to be imposed.[164] All this information was to be compiled and communicated as part of the mandatory risk assessment that would need to be carried out. The Committee noted certain

[156] Page 34, para. 5.1. Emphasis in original.
[157] *Ibid.*
[158] Page 35, para. 5.4
[159] *Ibid*, para. 5.5.
[160] *Ibid*, para. 5.6
[161] Page 37, paras. 5.17 – 5.18; page 38, rec. 14.
[162] Page 38, para. 5.19
[163] Page 36, para. 5.12.
[164] Page 41, para. 6.6; rec. 18. This is discussed in detail in chapter 5.

difficulties associated with SERs including inconsistencies in their production;[165] the lack of a requirement that one be obtained before passing sentence except in cases where the offender is under 21 years of age[166] or where he is receiving a custodial sentence for the first time;[167] and that SERs produced prior to conviction are regarded as sufficient for these purposes. The problem with the use of pre-conviction reports in this context is that they will not detail the offender's attitude to the offence including, for example, whether remorse has been expressed.[168] However, the Committee took the view that sentencing considerations should not be restricted to offender behaviour that had resulted in present or previous convictions.

One of the more controversial proposals[169] was that unprosecuted allegations and acquittals should be taken into consideration by the judge when deciding whether to make an OLR.[170] Although it was acknowledged that relying on allegations could be unfair,[171] it was considered that the predictive value of such information outweighed potential unfairness provided that the information was restricted to conduct admitted by the offender, or established by evidence led by the prosecutor.[172] Likewise, the Committee considered that it would be wrong to take into account previous allegations that have had resulted in acquittal, but it made a distinction between the relevant charges and the conduct that was the subject of those charges. The view was that such information should be taken account of on the same terms as allegations.[173] This was considered to be legitimate since the purpose of gathering the information was to inform judgements about risk, and it seems that the Committee considered that it could be beneficial for the offender if he was prepared to acknowledge past offences were indicative of risk which manifested in his present offence.[174]

[165] Page 35, paras. 5.6 and 5.9
[166] s. 207(4) of the 1995 Act
[167] s. 204(2A)(a) of the 1995 Act
[168] Page 35, para. 5.7
[169] See, for example, Gailey *et al*. (2017), 115; it was also identified as such by the Committee itself in the report – see page 38, para. 5.23
[170] Pages 38 and 39
[171] Page 38, para. 5.23
[172] *Ibid*. As discussed later, it was recommended that the prosecutor require to prove on the balance of probability that the Committee's proposed statutory risk-based criteria are met before an OLR is imposed. For detailed discussion of the use of allegation information in OLR sentencing, see section 5.4.3.
[173] Page 39, para. 5.25
[174] *Ibid,* para. 5.26

4.5.5 Imposing the New Sentence

The OLR was to be available in respect of offenders convicted on indictment of '(a) an offence of violence, (b) a sexual offence, or (c) any other offence which is closely related to, or reflects an offender's propensity for violent, sexual or life-endangering offending'.[175] The Committee recommended against restricting the OLR only to cases where the conviction was for a serious violent or serious sexual offence because it wanted the focus to be on offenders rather than offences.[176] It was considered that the requirement for conviction on indictment was sufficient to ensure that the trigger offence was sufficiently serious.[177]

> An OLR would be available only in cases where the High Court was satisfied that there are reasonable grounds for believing that the offender presents a substantial and continuing risk to the safety of the public such as requires his lifelong restriction. If the Court is so satisfied, it must make the order.[178]

As mentioned above, a comprehensive risk assessment would be the means of establishing whether these criteria were met. Ordinarily, this risk assessment would be ordered on the motion of the Crown, where prior notice of the intention to seek one upon conviction has been given to the accused.[179] The risk assessment order itself would only be available where the Court considers that there are 'reasonable grounds for believing that the offender may present a substantial and continuing risk to the public'.[180] In cases where the Court was satisfied on the basis of the risk assessment report that the criteria for imposing the OLR were met, it would be *required* to make that order. Where the test was not satisfied, the Court would be entitled to impose any other sentence apart from a discretionary life sentence[181] which, the Committee recommended, should be abolished.[182] It would be open to the accused to appeal the making of an OLR, and to the Crown to appeal the refusal to make an OLR;[183] however there would be no appeal against the decision to order a risk assessment for the purposes of assessing the appropriateness of the final disposal.[184]

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[175] Page 40, rec. 16
[176] *Ibid*, para. 6.2.
[177] *Ibid*, para. 6.1.
[178] *Ibid*, rec. 16.
[179] Page 42, para. 6.8; rec. 20, but 'exceptionally' the risk assessment order could be made by the Court at its own instance: rec. 20.
[180] Page 41, para. 6.7; rec. 19.
[181] Page 44, para. 6.17; rec. 25.
[182] *Ibid*, para. 6.18.
[183] Page 45, para. 6.19; rec. 26.
[184] Page 42, rec. 20.

4.5.6 Offenders with Mental Disorders

It will be recalled that the starting point for the reform process that the MacLean Committee was engaged in was a gap in the legal framework for the detention of high-risk mentally disordered offenders, and specifically those with a personality disorder. Part of the Committee's remit was to 'build on current expertise and research to inform the development of a medical protocol to respond to the needs of personality disordered offenders'.[185] However, in stark contrast to the approach being pursued at the time in England and Wales,[186] the Committee was not in favour of preventively detaining persons on the basis of personality disorder.[187] Nor, having regard to evidence provided by the Royal College of Psychiatrists, amongst others, was it particularly optimistic about the ability of available therapeutic interventions to manage the risks associated with more severely disordered individuals.[188] Indeed, it pointed to some evidence that treatment of people with more severe disorders had led to an *increase* in reoffending.[189] The Committee's only recommendation on personality disordered offenders in general, then, was that the Scottish Executive take steps to develop a strategy to prevent those in the population at risk from developing personality disorders in the first place.[190]

In relation to personality disordered offenders who had remained in detention at the State Hospital as a result of the 1999 Act's public safety test, the report merely recommended that measures taken to demonstrate the continued need for detention should meet the standards of risk assessment that had been set out in relation to the OLR.[191] The Committee had tried to find some sort of solution to these patients' predicament, but had come to the conclusion that there was no recommendation it could properly make.[192] Suggestions offered included transfer from high-security forensic services to lower security facilities using civil commitment provisions,[193] or legislating to allow for the retrospective imposition of sentences of imprisonment on people on hospital orders who had since been determined to be untreatable.[194] The former was rejected on the grounds of safety: to transfer high-risk patients to less specialist

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[185] Page 63, para. 10.1.
[186] The 'dangerous severe personality disorder' (DSPD) programme mentioned above.
[187] Page 69, para. 10.36.
[188] Page 67, paras. 10.21 – 10.26.
[189] Page 68, para. 10.26.
[190] Page 76, rec. 76.
[191] Page 77, rec. 51.
[192] *Ibid*, para. 12.3.
[193] *Ibid*, para. 12.4.
[194] Page 78, para. 12.6.

units would be detrimental to other patients[195] and reduce scope for risk management generally.[196] The suggestion that offenders who were – at the time – appropriately given hospital disposals be re-sentenced was rejected for quite obvious reasons. The retrospective imposition of a prison sentence is plainly unjust, especially given that the people concerned would most likely have spent a significant period of time in detention.[197] Since no solution could be found for the very group of offenders whose circumstances had necessitated the Committee's work, recommendations were instead made to prevent people becoming "stuck" on hospital orders at the point of sentencing.

Despite the centrality of mental disorder to the problem it was asked to address, the Committee took the view that no significant procedural distinction ought to be made between high-risk offenders with mental disorders, and high-risk offenders without.[198] The exception to this is perhaps that the view was taken that, in cases where a treatable mental disorder was suspected, an interim hospital order would be appropriate.[199] This would enable the same sort of risk assessment to be undertaken as the Committee had proposed whilst permitting medical staff to evaluate the offender's suitability for hospital treatment.[200] The Committee noted that, whilst it expected that the number of high-risk offenders that suffer from a mental disorder that necessitates hospital treatment will be rather small,[201] it is likely that such cases as do arise will be complex, probably involving a combination of mental illness and personality disorder.[202] In these cases the complexity of the mental disorder is likely to be a factor in the assessment of an offender as high-risk.[203] It was also acknowledged that there may be cases where the presence of mental disorder, whilst requiring treatment in hospital, is not causally connected to the offending behaviour, meaning that treatment of the disorder would not necessarily reduce risk posed.[204] In these circumstances a (primary) hospital disposal could be problematic, because it would mean the indefinite hospital detention of people who could not be treated, and the discharge of patients whose mental health had recovered, but whose risk had not been appropriately reduced: the difficulty that had ultimately led to the Committee being convened. The Committee's proposal, therefore, was that where an individual with a mental disorder that

[195] Page 79, para. 12.11.
[196] Page 77, para. 12.4.
[197] Page 78, para. 12.7.
[198] Page 80, para. 12.18.
[199] Page 50, para. 7.18; rec. 29.
[200] The order that replaced the IHO, the interim compulsion order, is discussed in section 5.3.
[201] Page 46, para. 7.1.
[202] *Ibid*, para. 7.3.
[203] *Ibid*.
[204] *Ibid*, para. 7.4.

was thought to be treatable also met the criteria for the imposition of an OLR, the only competent disposal would be the OLR combined with a HD.[205] This applied equally to persons with a diagnosis of mental illness, and those with a diagnosis of personality disorder. The hospital direction is discussed further in section 6.4.1.D of the thesis, but the advantage of this approach is that the disposal is primarily a sentence of imprisonment; the hospital direction authorises detention in hospital at the commencement of the sentence, and if it subsequently transpires that hospitalisation is inappropriate, or the offender recovers satisfactorily, they will be returned to prison for the remainder of the sentence. Although the Committee's remit explicitly included high-risk offenders with mental disorder, and four of the report's twelve chapters are dedicated to proposals concerning the sentencing and management of people within that group,[206] a comprehensive review of the MHA 1984 was taking place at the same time. The MacLean Committee decided that the best approach would be to feed into that process, sharing its findings and recommendations as they emerged, the hope being that a consensus could be built across the working groups.[207] There was, however, some disagreement between the Committees about the appropriate use of hospital disposals, and before progressing, it is worth mentioning the aspects of the Millan report that addressed mentally disordered offenders and how they interacted with the MacLean recommendations.

4.5.7 The Millan Committee Recommendations

In response to mounting consensus across patient, carer, and professional groups that the Mental Health (Scotland) Act 1984 was outdated and in need of reform,[208] the Minister for Health in the Scottish Office established a committee chaired by Bruce Millan.[209] It included doctors, lawyers, nurses, psychologists, and representatives of patients/service users and carers,[210] and was tasked with the wholesale review of the legislation. The Millan Committee's report – *New Directions*: *Report on the Review of the Mental Health (Scotland) Act 1984* – ran to more than 500 pages and included 411 detailed recommendations for reform and it remains the most comprehensive review of Scots mental health law ever undertaken.[211] Since the vast

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[205] Page 49, rec. 27.
[206] Chapters 7, and 10 – 12.
[207] Page 5, para. 1.18.
[208] H. Patrick and J. Stavert, *Mental Health, Incapacity and the Law in Scotland* (London, 2016), 23, para. 2.14
[209] *Renewing Mental Health Law*, 2001. Scottish Executive Policy Document, iii. Available at http://www.scotland.gov.uk/Publications/2001/10/10241/File-1 Retrieved 30/04/2019 Accessed 17/11/2020.
[210] *New Directions: Report on the Review of the Mental Health (Scotland) Act 1984* (Edinburgh, 2001). SE/2001/56, xi.
[211] *Ibid*.

majority of people subject to the powers of the Mental Health Acts are subject to civil commitment provisions,[212] the bulk of the report addresses those measures. This chapter is, however, only concerned with those parts of the report that deal with criminal justice disposals. It is worth noting at this stage that the Committee was in favour of moving all the relevant provisions from the 1995 Act to the new Mental Health Act,[213] though ultimately it stopped short of recommending that this be done, in recognition that the 1995 Act contains the majority of primary provisions on sentencing.[214] Unless otherwise stated, footnote references here are to the *New Directions* report.

A. MENTAL DISORDER

The starting point for consideration of the proper scope of the new Act was the definition of mental disorder as it appeared in the 1984 Act. It was defined as 'mental illness (including personality disorder) or mental handicap however caused or manifested'.[215] Despite some opposition which viewed the terminology of mental disorder as offensive and stigmatising,[216] the Committee resolved that the term be retained as a broad descriptor of a condition that is necessary, but not sufficient for the Act to apply.[217] It also maintained continuity with other areas of legislation which use the term.[218] Mental disorder would continue to include mental illness and personality disorder, but with its third component more appropriately termed learning disability.[219] 'Mental illness' was to be inclusive of psychotic, (non-psychotic) affective disorders, eating disorders, some neurological conditions, and the manifestations of acquired brain injury.[220] Personality disorder as a classification of mental disorder attracts some degree of controversy. The Committee recognised this.[221] It also recognised that treatability is a matter of some disagreement,[222] and that there was a substantial body of opinion that its

[212] For example, in 2018/19, 3122 people were made subject to short-term detention under the MHA 2003, and 124 to compulsory treatment orders; over the same period 317 mental health orders were made under the 1995 Act in respect of 217 individuals.
[213] Page 299, para. 14; rec. 24.1.
[214] Pages 298 and 299, paras. 13 and 14.
[215] MHA 1984, s.1 as amended by s.3(1) of the Mental Health (Public Safety and Appeals) (Scotland) Act 1999. Provision as in force until October 2005.
[216] Pages 26 and 27, paras. 9 and 12.
[217] Page 28, rec. 4.1.
[218] Page 27, para. 13.
[219] Page 28, rec. 4.2. The continued inclusion of learning disability was contentious. See pages 30 – 38, and Patrick and Stavert (2016), 176 – 177, para. 11.16 for further discussion.
[220] Pages 29 - 30, para. 27 and rec. 4.5.
[221] Page 39, para. 75.
[222] *Ibid*, para. 80.

inclusion as a distinct category of disorder mental health legislation was inappropriate or unnecessary.[223]

The 1984 Act's approach to personality disorder was somewhat confusing in that the 1999 Act had included personality disorder as a particular category of mental disorder to which the 1984 Act applied, but its relationship to the treatability test in section 17(1) was uncertain. It appeared to the Committee that any personality disorder was capable of bringing a patient under the auspices of the Act where the 'appropriateness' and 'necessity' criteria were satisfied, but that where that personality disorder was 'a persistent one manifested only by abnormally aggressive or seriously irresponsible conduct' the treatability test also applied.[224] Interestingly, the Committee's decision to include a distinct category of personality disorder was contrary to the opinion of the Royal College of Psychiatrists, the British Medical Association, the British Psychological Society, the British Association of Social Workers, and the State Hospitals Board that it was unnecessary.[225] In addition: [226]

> Several people argued that [personality disorder] was commonly used, not as a positive diagnosis, but as an exclusionary label: a means of removing people from the concern of mental health professionals. Others criticised the term itself, as one which was deeply stigmatising and unhelpful to the service user.

The Committee considered all of these objections, however it noted that the standard diagnostic manuals such as ICD-10 and DSM-IV[227] accepted personality disorder as a clinical construct. The use of personality disorder as a diagnosis of exclusion was considered a reason *for* its retention as a category of mental disorder in new legislation on the grounds that people affected had the same right to access appropriate services as others.[228] The Committee's major concern, though, was with difficulties in diagnosis. As was mentioned earlier, in practice it is not always easy to distinguish personality disorder from mental illness, which is why cases have arisen in which patients who initially had a primary diagnosis of personality disorder had subsequently been diagnosed with mental illness instead.[229] If it was not made explicit that personality disorder fell within the scope of the Act, the Committee was concerned that people who could

[223] Page 41, paras. 87 – 89.
[224] Page 40, para. 83; though it would seem an odd construction of 'appropriateness' and 'necessity' to consider they applied in cases where there was no expectation of therapeutic benefit.
[225] Page 41, paras 87 and 88.
[226] Page 41, para. 89.
[227] These have sinced been updated and replaced.
[228] Page 44, para. 109.
[229] *Ibid,* para. 91. There are also almost certainly cases where the opposite occurs.

benefit from treatment would be denied it.[230] Thus, personality disorder was retained as a distinct category of mental disorder in the Millan proposals.[231]

B. Risk

It was recommended that 'a significant risk of harm to the health or safety or welfare of the person for whom compulsion is sought, or a significant risk of harm to other persons' be one of the requirements for compulsory measures.[232] Only one of these conditions would need to be satisfied, and it did not represent much of a departure from the provisions of the 1984 Act.[233] Crucially, the risk criterion would not be capable of overriding the requirement for significant impairment of judgement or its likelihood,[234] meaning that it would not be possible to detain a patient who was clearly possessed of insight into his condition, and his need for treatment, even if they posed an imminent risk to themselves or to another person. As regards assessment of risk, the Millan Committee pointed to the MacLean recommendations on risk assessment, but took the view that the kind of detailed, specialist assessment it proposed for high-risk offenders was neither necessary or appropriate for the majority of patients.[235] The Millan report did however note that MacLean's emphasis on strengthening risk assessment practices might have benefits for risk practice more broadly.[236]

C. Criminal Justice Orders

In respect of the interim hospital order – which would become the interim compulsion order (ICO)[237] – the only significant proposal was that its use be restricted to cases in which a restricted hospital order or hospital direction was under consideration, but that it would not be confined to instances where placement in the State Hospital was thought necessary.[238] This was reflective of the proliferation of medium-secure units since the 1984 Act was brought into force; they would be capable of managing the risk posed by many restricted patients.[239] The Millan Committee agreed with the MacLean Committee's view that the IHO be renewable every 90

[230] *Ibid.*
[231] Page 42, rec. 4.11.
[232] Page 60, rec. 5.9.
[233] *Ibid*, para 53.
[234] Page 59, para. 51.
[235] Page 60, para. 55.
[236] *Ibid.*
[237] See 5.3 for detailed discussion.
[238] Page 312, para. 27; rec 26.6
[239] *Ibid.*

days up to a maximum of one year, rather than every 28 days.[240] Confining the IHO to cases where a restriction order was in contemplation was designed to limit its use to serious cases, and in so doing reduce scope for the detention of individuals who had committed more minor offences to be detained in hospital for up to one year prior to final disposal.[241]

Hospital orders (HOs) without restrictions should, as before, mirror the criteria for civil commitment; this which would include the proposed 'soft incapacity' test the Committee recommended for inclusion in those orders.[242] Although this is not explained further by the report, save to note that there were concerns that the inclusion of such criteria in forensic cases would see patients more appropriately placed in hospital sent to prison because they retained decision-making ability,[243] it was presumably the intention that competent offenders with mental disorders would simply be sent to prison. HOs would not normally be used for offenders with a primary diagnosis of personality disorder,[244] but would continue to be available consistent with the report's general recommendations for compulsory measures. The hospital direction (HD) would normally be the disposal of choice in these cases.[245] Although not addressed by the report, despite its acceptance that sharp distinctions may be difficult to draw, it could be considered that the Committee was adopting the provision that offenders with personality disorders were more deserving of punishment than those with mental illnesses that were deemed more appropriately remitted to hospital for the duration of their sentence.[246] Finally, the input of a specialist social worker would be required when the decision on whether or not to make a HO was being made;[247] beyond this very little change to the legislation on HOs without restrictions was made.

The hospital direction, as it will be recalled, has the effect of remitting an offender sentenced to imprisonment to hospital for as long as the criteria for detention under the MHA are met; if they are no longer satisfied the offender will be returned to prison for the remainder of his sentence. The HD is similar to a HO with restrictions, and the Scottish Ministers were originally responsible for authorising transfers back to prison, or leaves of absence.[248] The Committee

[240] Page 312, para. 29, rec. 26.8; MacLean Report, page 50, para. 7.19, rec. 30.
[241] Pages 311 – 312, para. 26.
[242] Page 310, para. 15. This recommendation was accepted in relation to the civil orders, but not for criminal justice orders.
[243] Page 55, para. 31.
[244] Page 310, paras. 18 – 19.
[245] *Ibid*, para. 18.
[246] The language in paragraph 31 of page 55 would seem to support this inference: 'it was suggested that the…issue was…whether the patient was more appropriately placed in a health care setting than a penal setting'.
[247] Page 310 para. 20.
[248] Page 313, para. 33.

noted that HDs were very infrequently used,[249] and might even be underused,[250] though the Scottish Association for Mental Health at consultation indicated that it opposed the use of the HD on the grounds it conflated treatment and punishment.[251] The Committee recommended, however, that the HD's availability be retained, but its criteria be altered to include either weak or absent connection between the mental disorder and the offence, or between the mental disorder and any ongoing risk such that the risk would not be significantly reduced by treatment.[252]

D. High-risk Patients

The Millan Committee gave consideration to the recommendations of the MacLean Committee in relation to mentally disordered high-risk offenders. It agreed that the Risk Management Authority, if established as proposed by the MacLean Committee, should assume responsibility for authorising leaves of absence for, and transfers of, restricted patients in the place of the Scottish Ministers.[253] The RMA would have oversight of the patient's treatment plan which would operate as a risk management plan.[254] However, it did not agree that the only competent disposal for offenders meeting the criteria for both the OLR and a hospital order should be the OLR combined with a hospital direction.[255] Its reasoning was that, although the MacLean Committee envisaged that many high-risk offenders who suffered from mental disorders would have complex mental health problems, the Millan Committee considered that the hospital order with restrictions should be available as a matter of medical and judicial discretion should a case of a high-risk offender with a fairly straightforward mental illness, causally connected to the risk they pose, arise.[256]

As regards authorising the discharge of restricted patients, the Committee recommended that this power be removed from the Scottish Ministers and instead be exercised by the Parole Board sitting as a Restricted Patients Review Tribunal.[257] This recommendation was not accepted, and decisions about discharge are instead taken by the Mental Health Tribunal for Scotland.[258] The

[249] Page 314, para. 35.
[250] *Ibid*, para. 36.
[251] *Ibid*. See 6.5.2 for further discussion of the HD.
[252] Page 315, rec. 26.9.
[253] Pages 329 - 330, recs. 27.1 and 27.3.
[254] Pages 328 – 329, para. 46.
[255] Page 323, para. 9.
[256] *Ibid*.
[257] Page 329, para. 27.2.
[258] MHA 2003, s. 26.

Millan Committee made its recommendation on the assumption that the entry and exit criteria for offenders placed on hospital orders would be the same.[259] This would mean that risk alone would no longer justify the continued detention of untreatable offenders subject to hospital orders with restrictions. As is discussed later,[260] this ought not to present a risk management problem for those subject to hospital directions: they may simply be remitted to prison. It does potentially pose more of a difficulty in cases where, as the Millan report recommended, there could be, high-risk offenders are made subject to a hospital order with restrictions and subsequently discovered to be untreatable; or it is found a mental disorder from which they have sufficiently recovered was not, in fact, causally connected to the risk presented. The effect of this would have been to return the law to its pre-1999 position. This is not directly addressed in the report, however, the Committee did pre-empt the possibility that this outcome would be avoided by the retention of the public safety test, and so it was recommended that conditional discharge should be an option for patients affected.[261] This recommendation was ultimately adopted, and so indefinite detention with no therapeutic intent remains a possible outcome for those who are placed on a compulsion order with restrictions (as the order is now known).[262]

4.6 RECEPTION OF THE REPORTS

The MacLean report attracted relatively little academic attention, as did the recommendations made in respect of the criminal justice provisions by the Millan report. However, such engagement as there was viewed the proposals favourably. Leading forensic psychiatrist Rajan Darjee said of the MacLean recommendations that '[the] Scottish proposals are clearly concerned with offences and offending, and see the responsibility for public protection from high-risk offenders lying with the criminal justice system'.[263] He also approved of the inclusion of an impaired judgement criterion, viewing it as a powerful safeguard for patient autonomy, as well as for those too unwell to take treatment decisions.[264] Most of the Millan Committee's recommendations were accepted by the Scottish Executive, and formed the basis of the Mental Health (Care and Treatment) (Scotland) Act 2003, but there were some alterations of significance. For the purposes of this thesis, however, it is sufficient to note that the report was

[259] Page 345, para. 30.
[260] See 6.4.1.D.
[261] Page 348, rec. 28.5.
[262] MHA 2003, s. 193(2)(b).
[263] R. Darjee, 'The Reports of the Millan and MacLean Committees: new proposals for mental health legislation for high-risk offenders in Scotland', (2003) 14:1 *Journal of Forensic Psychiatry and Psychology* 7, 12.
[264] *Ibid*, 21 -22.

generally well received by the Scottish Executive. The same is true of the MacLean recommendations, which were substantially implemented in the Criminal Justice (Scotland) Act 2003.

Although the implementation is dealt with later, it is perhaps useful to note that forensic psychiatric opinion on the MacLean recommendations appears to have been based substantially on a comparison with the approach to offenders with 'severe' personality disorders being piloted at the time in England and Wales. Known as the Dangerous and Severe Personality Disorder (DSPD) Programme, which involved 'third-way institutions between secure psychiatric hospitals and prisons'.[265] Later, it would become associated with the infamous imprisonment for public protection (IPP) sentences which would see offenders with personality disorders detained indefinitely on DSPD units.[266] Like IPP itself, the DSPD programme was almost universally despised.[267] Much of the opposition from health professionals was derived from the sense that it violated medical ethics by using doctors to detain patients for the protection of the public, without any reasonable prospect of that patient deriving benefit from the detention.[268] That being so, from a medical standpoint, the proposals for the OLR would seem preferable because the OLR places high-risk offenders with mental disorders in the custody of the Prison Service: there is no medical ethical consideration, because only offenders who are thought to benefit from treatment will become the responsibility of psychiatrists. It is possible that because, at least initially, the MacLean and Millan proposals attracted the attention of psychiatrists who were entirely appropriately viewing them through a medical ethical prism, the OLR in particular escaped some of the criticism levelled at DSPD/IPP. Since the OLR's inception in 2005, it has slowly begun to attract criminological and legal scholarship, but there remains a clear need for more critical engagement from academics across disciplines.

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[265] R. Darjee and J.H.M. Crichton, 'The MacLean Committee: Scotland's answer to the 'dangerous people with severe personality disorder' proposals?', (2002) 26 *Psychiatric Bulletin* 6.

[266] See, for example, L. McRae, 'Severe personality disorder, treatment engagement and the Legal Aid, Sentencing and Punishment of Offenders Act 2020: what you need to know', (2016) 27:4 *Journal of Forensic Psychiatry and Psychology* 476. Essentially, people sentenced to IPP could be placed in the DSPD programme.

[267] See, for example, Darjee and Crichton (2002); A. Feeney, 'Dangerous severe personality disorder', (2003) 9 *Advances in Psychiatric Treatment* 349; J.C. Beck, 'Dangerous Severe Personality Disorder: The Controversy Continues', (2010) 28 *Behavioural Sciences and the Law* 277; and P.E. Mullen, 'Dangerous people with severe personality disorder: British proposals for managing them are glaringly wrong – and unethical', (1999) 319 *British Medical Journal* 1146. But see A. Maden, 'Dangerous and severe personality disorder: antecedents and origins', (2007) 190 (suppl. 49) *British Journal of Psychiatry* s. 8 for a rare, or perhaps unique, assessment of the programme which identifies some perceived strengths of the approach.

[268] See *ibid*.

4.7 CONCLUSION TO CHAPTER FOUR

This chapter has described the history and development of Scotland's dangerous offender sentencing framework. The OLR, Scotland's flagship sentence of preventive detention, evolved from a need to fill a gap which emerged in the criminal justice provisions of the Mental Health (Scotland) Act 1984. At the same time as the working group which proposed the OLR was operating, a review of the Mental Health Act was taking place. The two reviews made proposals for the management of high-risk offenders, with those of the MacLean Committee being the more significant. The MacLean recommendations resulted in the creation of the OLR: a new sentence which emphasised risk rather than mental disorder, which perhaps helped the OLR escape the kind of criticism that was targeted at the alternative and overtly personality disorder-focused approach taken in England and Wales. The next two chapters discuss the OLR and the risk framework that surrounds it in detail.

5. THE STATUTORY RISK FRAMEWORK

5.1 INTRODUCTION TO CHAPTER FIVE

The previous chapter set out the background to the OLR's creation, and the proposals that were made by the Committee tasked with reviewing the law relating to the sentencing of serious violent and sexual offenders. This chapter is the first of two that consider the law relating to the OLR in detail. Its purpose is to provide a comprehensive account of the statutory risk framework which governs the OLR's operation. In particular, it sets out the procedures that must be followed before an OLR may be imposed. The OLR is, as was said earlier, an indeterminate sentence that operates, in many respects, like a life sentence. Its most distinguishing feature, however, is the requirement for a standardised risk assessment – the most robust available in the Scottish criminal justice system – which plays a central role in assisting the judge's determination as to whether the criteria for making the OLR are met. These criteria receive detailed treatment in chapter six, but it is important that the pre-sentencing process is given substantial consideration for three reasons. First, because it sets the OLR apart from other sentences; second, because despite its complexity and centrality to the OLR's operation it has received very little attention in the literature – indeed, the account presented here is believed to be the most comprehensive of its kind, and is intended to go some way towards filling that gap; and third, because although there is some critical discussion here, setting out the framework in this way helps to lay the groundwork for analysis of the OLR as a whole in chapter six.

A year after the MacLean Committee laid its report before the Scottish Parliament, the Scottish Executive published its White Paper on Serious Violent and Sexual Offenders[1] (hereafter the SVSO White Paper) intimating its intention to give effect to the majority of the Committee's recommendations, including the creation of the OLR. This was achieved by the Criminal Justice (Scotland) Act 2003 which, among other things, inserted sections 210B to 210H into the Criminal Procedure (Scotland) Act 1995. The OLR itself is made under section 210F, and it is available in respect of certain offences[2] the proceedings in respect of which commenced

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[1] Scottish Executive, *Serious Violent and Sexual Offenders White Paper* (Edinburgh, 2001). Available at: https://www.webarchive.org.uk/wayback/archive/20170701074158/http://www.gov.scot/Publications/2001/06/9262/File-1 Accessed 17/2/2020.
[2] See 5.2 below.

on or after 20th June 2006.[3] It will be recalled that the purpose of the OLR's creation was to capture 'exceptional' offenders who present a serious risk to the public, and to manage that risk. The OLR, as an indeterminate sentence of imprisonment, is clearly a punishment[4] but it is principally a means of preventing serious future offending. For this reason, the decision whether to impose an OLR rests more on the offender's risk profile than it does on the offence(s) of which he has been convicted. This is – as was said – what sets it apart from other sentences,[5] and much of the statutory risk framework introduced by the 2003 Act is concerned with the criteria that must be satisfied if an OLR is to be made, and the manner in which this must be established.

Section 5.2 considers the first of two orders that may be made by the court where it considers the criteria for making an OLR may be met: the risk assessment order (RAO). The second order – the interim compulsion order (ICO) with assessment of risk – can be made in cases where a mental health disposal, such as a CORO or hospital direction,[6] is under consideration alongside an OLR. The ICO is discussed in section 5.3. The risk assessment report (RAR) is considered in detail in section 5.4. Particular attention is paid to use of allegation information in the report,[7] and the opinion on risk which is central to the judge's determination as to whether the criteria for making an OLR are met.[8] The chapter then concludes in section 5.5 before imposition of sentence is discussed in chapter six.

All references to statutory provisions pertain to the Criminal Procedure (Scotland) Act 1995 unless otherwise stated.

5.2 The Risk Assessment Order

The OLR is a sentence in which the emphasis is on the offender, rather than the offence of which he is convicted. Rather than a list of offences like that upon which use of the extended sentence is based[9] the OLR's use is constrained by the 'risk criteria' which are set out in section 210E. The risk criteria are considered later in detail,[10] however they require the court to be

[3] Criminal Justice (Scotland) Act 2003 (Commencement No. 9) Order 2006/332 (SSI), art. 2(1) and (2).
[4] *McCluskey v HM Advocate* 2013 J.C. 107 at 18.
[5] Though there is some overlap with the extended sentence and the compulsion order, especially when combined with a restriction order. This is returned to briefly in chapter 6 of the thesis.
[6] See sections 6.4.1.D and 6.4.2.B.
[7] See 5.4.3.
[8] See 5.4.4.
[9] See s. 210A(10). Though this list is of some relevance as 'sexual offence' and 'violent offence' for the purposes of the OLR are as defined in that provision. See 5.2 below.
[10] See section 6.3.

satisfied that, on the balance of probabilities,[11] there is a likelihood that the offender – if at liberty – will 'seriously endanger the lives, or physical or psychological well-being, of members of the public at large'.[12] If the court is satisfied the criteria are met, the OLR must be made – there is no discretion.[13] This is in keeping with the recommendations of the MacLean Committee that the OLR be created to manage the risks presented by 'exceptional offenders',[14] and that an offence-based approach be rejected.[15] Because of this focus on the individual offender and the risk he presents, the legislation requires that – before the court reaches a determination as to whether the risk criteria are met – a comprehensive standardised risk assessment be undertaken by a RMA-accredited risk assessor. The opinion of the assessor as to the level of risk the offender poses will have significant weight in the judge's determination as to whether the risk criteria are met.[16] It is this statutory pre-sentencing risk framework that sets the OLR apart from other indeterminate custodial sentences such as the mandatory life and discretionary life sentences in Scotland, and imprisonment for public protection in England and Wales, and its operation is crucial to limiting the OLR's use. The risk assessment process is initiated in one of two ways: by the making of a risk assessment order, or an ICO with assessment of risk. The risk assessment order (RAO) is made under s. 210B of the 1995 Act, and the ICO with assessment of risk is made under sections 53 and 210D. This section considers the RAO, and section 5.3 considers the ICO.

The risk assessment order is available in cases where an offender is to be sentenced in the High Court of Justiciary[17] for a sexual offence;[18] a violent offence[19] other than murder;[20] an offence which endangers life;[21] or 'an offence the nature of which, or the circumstances of the commission of which, are such that it appears to the court that the person has a propensity to commit [a sexual or violent offence, or an offence which endangers life]'.[22] For the purposes of the provision, 'violent offence' and 'sexual offence' are as defined in section 210A(10),[23]

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[11] s. 210F(1).
[12] s. 210E.
[13] s. 210F(1). Unless it is open to the court to make a compulsion order, in which case it may decide to make an OLR or a compulsion order. This is returned to later.
[14] MacLean Report, 34, para. 5.1.
[15] *Ibid*, 29, para. 4.17. See also 4.5.3.A.
[16] See section 6.3 of the thesis.
[17] s. 210B(1).
[18] s. 210B(1)(a)(i).
[19] s. 210B(1)(a)(ii).
[20] s. 210B(1).
[21] s. 210B(1)(a)(iii).
[22] s. 210B(1)(b).
[23] This provision contains an exhaustive list of statutory and common law sexual offences including rape, incest, offences of possessing, taking and distributing indecent images of children, and a residual offence category for

but the remaining categories – especially the last – are very broad in scope indeed. The question of whether the risk criteria may be met can be considered on the motion of the prosecutor, or by the court at its own instance[24] and there is no appeal against the making of – or refusal to make – a RAO.[25] Over the period 2019/20, the High Court made 21 RAOs.[26] The MacLean Committee envisaged that the residual offence category would only be engaged, and that the court would only consider the risk criteria at its own instance, in exceptional circumstances;[27] and the Scottish Executive initially agreed.[28] No such qualification appears in the legislation, however.

The effect of the RAO is that the offender is remanded in custody for the purpose of allowing an accredited risk assessor to prepare a report 'as to what risk his being at liberty presents to the safety of the public at large'.[29] Section 210B(4) provides that the case will then be adjourned 'for a period not exceeding ninety days', but in practice no adjournment will be shorter than this.[30] The court may grant one further extension of up to a further 90 days on cause shown.[31] Beyond this, if there are exceptional circumstances outwith the assessor's control which mean that the report cannot be completed within that timescale, the court may grant a further extension, the duration being that which it considers appropriate.[32]

5.2.1 SCOPE

The application of section 210B is somewhat constrained by section 210E since the court must consider that the risk criteria may be met if a RAO is to be made, but if it does consider the criteria may be met it must make a RAO.[33] The only clear exceptions to the requirement to make a RAO are where an ICO is made by virtue of s. 210D(1),[34] and where the offender is

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offences not specified in subsection ten, but where the court considers there was a 'significant sexual aspect to the offender's behaviour'. In contrast, a violent offence is simply defined as an offence, which is not a sexual offence as defined in section 210A(10), and which infers personal violence.

[24] s. 210B(2).
[25] s. 210B(6).
[26] Risk Management Authority, *Annual Report and Accounts 2019/20* (Paisley, 2020), 38.
[27] MacLean Report, 4, rec. 1; and 42, rec. 20.
[28] *SVSO White Paper*, 47 and 52.
[29] s. 210B(3).
[30] Risk Management Authority, *Standards and Guidelines: Risk Assessment Report Writing* (Paisley, 2018), 6, para. 16 (hereafter '*RAR Standards*').
[31] s. 210B(5).
[32] *Ibid*.
[33] s. 210B(2).
[34] s. 210B(2)(a). 'By virtue of' is the language of the statute: s. 210D(1) requires that the ICO is made where the criteria for an ICO are met, but the ICO itself is made under s. 53. See 5.3 below.

already subject to an OLR previously imposed.[35] It is, however, worth saying something of the legislation's interaction with offences, the penalties for which are fixed by legislation. In *Henderson v HM Advocate*,[36] the appellant had been convicted of possessing a firearm without holding a valid firearms certificate in contravention of section 1 of the Firearms Act 1968. The maximum period of imprisonment applicable to that offence when charged on indictment is five years, or seven years if aggravated.[37] The appellant's criminal record was 'extensive', including several convictions for violence.[38] He had also previously served a sentence of two years' imprisonment for a prior aggravated violation of section 1. The judge raised, at his own instance, the possibility that the risk criteria were met. Counsel for the appellant argued that it was not open to the court to make a RAO because the offence did not fall into one of the categories, and that an OLR would be incompetent because the maximum sentence had been fixed by U.K. parliamentary legislation, the subject matter of which was reserved.[39] These submissions were rejected, and the judge made a RAO. He subsequently imposed an OLR with a punishment part of 1 year and 8 months.[40]

An appeal was lodged, and submissions were again made that neither the RAO nor the OLR were competent. This being so, it was argued, the 1995 Act could not be read as having extended the OLR to the firearms offence because it would be outwith the Scottish Parliament's competence to 'override' the sentence.[41] The advocate depute agreed that the OLR had not been competently imposed and invited the court to substitute a determinate sentence.[42] He declined to express a view as to whether the OLR might be competent where a sentence was limited by statute in an area of devolved competence, and the court reserved its opinion on the matter:[43] this point was addressed in a subsequent decision,[44] and it is returned to later. The court held that the OLR was not competent, quashed it, and substituted a determinate sentence of 3 years and 4 months.[45]

Henderson is authority that an OLR cannot be made where the relevant offence is subject to a reserved statutory maximum penalty lower than life imprisonment. It does not discuss the

[35] s. 210B(2)(b).
[36] 2011 J.C. 96.
[37] 1968 Act, sch. 6, part 1, para. 1.
[38] *Henderson*, at 3.
[39] *Ibid*, at 4.
[40] *Ibid*, at 5.
[41] *Ibid*, at 6.
[42] *Ibid*, at 7.
[43] *Ibid*, at 11.
[44] *McCluskey v HM Advocate* 2013 J.C. 107, at 18.
[45] *Henderson*, at 13.

competence of the RAO in those circumstances.[46] The decision does, however, invite some consideration of the relationship between the RAO and the OLR. Making an OLR requires that a RAO or an ICO with assessment of risk be made first;[47] therefore, if the criteria for making the RAO are not met, the criteria for making an OLR cannot be met. Section 210B does not mention the OLR. This is because the legislation has been drafted so that consideration of whether the risk criteria *may* be met, and later in the process consideration of whether they *are* met, serves as a proxy for the question of whether an OLR is the appropriate disposal: the RAO is the OLR's gatekeeper; not the other way around. So, if an offender falls to be sentenced for an offence of the type specified in section 210B(1)(a), and the court considers the risk criteria may be met, the RAO *must* be made;[48] if, having considered the RAR and other reports before it, the court finds that the risk criteria are met, then an OLR *must* be imposed.[49] The only exclusion from the requirement to make a RAO (or a section 210D order), is where the offender is already subject to an OLR; the only offence that is excluded from the auspices of 210B is murder. This lack of discretion is a core feature of the OLR's framework designed to standardise approaches taken to sentencing high-risk serious violent and sexual offenders.

Essentially, the legislation operates on the premise that in cases where the section 210E risk criteria are met an OLR is necessary, though the application is limited to some degree by the offence categories. This approach leaves open the possibility that an offender might meet the criteria that requires the making of a RAO, and subsequently the criteria that mandates the imposition of an OLR, but in circumstances where the OLR is not competent. *Henderson* may be such a case, but no consideration was given to whether the offence was properly considered to fall under section 210B(1), or whether the risk criteria are met because the case was decided on the basis that the OLR exceeded the statutory penalty and had to be quashed. It would be absurd if a court were compelled to make an order which is a procedural step towards a final disposal which itself could not be imposed. This means that either statutory sentencing limits have to be read into the section 210B as an exception, or that the provision requires amendment.

[46] It seems that Lord Uist, who made the RAO in respect of Henderson, considered that the offence, when combined with his history of violent offending, indicated that he had a propensity to commit a serious violent offence in the future. The question of whether this really was a relevant offence was raised by the appellant but never explored in the judgment, the appeal having been decided on the basis that the OLR was incompetent and required to be quashed. One of the arguments advanced by the appellant was that the criteria for making a RAO were not met, and therefore it had not been open to the judge to make a RAO in the first place – see para. 6 of the judgement.
[47] The ICO is discussed in the next section of the chapter, however, it should be noted that the making of an ICO with assessment of risk requires that the criteria for a RAO are also met.
[48] s. 210B(2).
[49] s. 210F(1).

Section 53, for example, under which the ICO is imposed, uses the formulation 'convicted…of an offence punishable by imprisonment (other than an offence the sentence for which is fixed by law)'[50] to delineate its scope. If that sort of approach were to be taken, it would additionally offer Parliament the opportunity to consider whether its intention really is, as determined in *McCluskey v HM Advocate*,[51] that the OLR extend to cases where a maximum sentence over which power is devolved is set by statute.

5.2.2 Appeals and the Risk Assessment Order

As has been said, section 210B(6) expressly prohibits appeal against the making of, or refusal to make, a RAO. McSherry and Keyzer have said that this raises 'issues of fairness' to the offender subject to the order,[52] but elaborate no further. Lord Carloway, in his judgment in *Ferguson v HM Advocate*,[53] does discuss the reasons that the RAO cannot be appealed and appears to consider the provision relatively unproblematic.[54]

> The rationale behind [section 210B(6)] is straightforward. The RAO may, or may not, result in an OLR. It is simply a necessary procedural step on the way towards determining whether the risk criteria are met. It involves the court obtaining certain statutorily prescribed information but, that apart, the process is little different from any adjournment in order to achieve clarity on a particular matter affecting sentence. Even if the statute had not expressly excluded an appeal, it is highly doubtful whether a party could competently have challenged the making (or refusal) of a RAO.

His Lordship subsequently raised the – rather remote – possibility of challenge by way of bill of advocation, though noting that this would require 'exceptional circumstances' to arise.[55] It is also perhaps worth considering the lack of discretion built into the OLR's sentencing framework. One of its key purposes was, it will be recalled, to address the discretionary nature of life sentencing in non-murder cases.[56] The provisions were structured so that if a judge considered the risk criteria may be met he had no option but to make the RAO; conversely, if he did not consider the risk criteria met he could not make a RAO. The inclusion of sub-section 6 might have been intended to ensure that a judge's decision to trigger the risk assessment process could not be undermined.

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[50] s. 53(1)(a).
[51] 2013 J.C. 107.
[52] McSherry and Keyzer (2009), 101.
[53] 2014 S.L.T. 431.
[54] *Ibid*, at 85 .
[55] *Ibid*.
[56] See the discussion in chapter 4 at 4.5.4.

The situation in cases which begin in the sheriff court is similar,[57] although a RAO cannot be made in the sheriff court. The CJ(S)A 2003 amended section 195(1) to require the sheriff to remit any case where he considers the risk criteria may be met to the High Court of Justiciary.[58] Like a judge considering making a RAO, the sheriff has no discretion in whether to remit the case if he considers the risk criteria may be met. There is no appeal against the decision of the sheriff to remit the case, or not[59] although the Crown may appeal if it considers the sentence imposed unduly lenient.[60] In *HM Advocate v McCuaig*[61] the sheriff, having considered a criminal justice social work report (CJSWR) and the reports of two forensic psychologists, passed an extended sentence on an offender convicted of 20 offences, including the taking, distribution, or showing of indecent images of children, and possession of extreme pornographic images.[62] The Crown subsequently appealed, arguing that the extended sentence was unduly lenient because the sheriff ought to have taken the view that the risk criteria may have been met and remitted the case so that a RAO could be considered. The advocate depute acknowledged that his submission was 'most unusual'.[63] The court was, however, satisfied that the sheriff had carefully considered the reports before her and that the extended sentence was a disposal that she could reasonably have considered appropriate.[64] Of significance was that the sheriff had relied upon reports of highly experienced psychologists and neither had explicitly said that the OLR was necessary, or that the respondent posed a 'very high' risk, and that the prosecutor at first instance had not at any stage intimated that he considered that the risk criteria may be met. Also deemed to be of relevance was that the RAO is not appealable and therefore, even if the sheriff had the power to make one herself, her decision not to do so could not have been appealed.[65] This last point is of some interest.

The advocate depute's argument was that the extended sentence was unduly lenient because the sheriff should have concluded that the risk criteria were met; if this were so, a RAO ought to have been made and this, in turn, would have required her to remit the case to the High Court for sentencing. Despite the court's observation that the refusal to make a RAO is not appealable

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[57] There is no data available on the number of cases remitted to the High Court for sentencing specifically on the grounds the sheriff considers the risk criteria are met, but it does happen. See, for example, *Johnstone v HM Advocate* 2012 J.C. 79; *M v HM Advocate* 2012 S.L.T. 147; *O'Leary v HM Advocate* 2014 S.C.C.R. 422; *McKinlay v HM Advocate* [2019] H.C.J.A.C. 15.
[58] s. 195(1) as amended by the CJ(S)A 2003, sch. 1, para. 2(5)(a).
[59] *McGhee v HM Advocate* 2006 S.C.C.R. 712, at 6.
[60] s. 108(1)(a).
[61] [2018] H.C.J.A.C. 55.
[62] *Ibid*, at 3.
[63] *Ibid*, at 28.
[64] Which could not, therefore, be considered unduly lenient: *HM Advocate v Bell* 1995 S.C.C.R. 244, 250 D.
[65] *McCuaig*, at 36.

– and the principle that the decision as to whether to remit a case for sentencing is not one with which the High Court should interfere[66] – their Lordships engaged in in-depth enquiry into the basis of the sheriff's decision not to remit the case for sentence. They consulted the sheriff's report, the CJSWR, and the psychologist's report. They drew out the sheriff's reasons for having arrived at the decision that the extended sentence was the appropriate disposal. They noted that she had relied upon the psychologists' reports more heavily than the CJSWR and concluded that she was 'plainly correct to do so'.[67]

McCuaig stands out because the argument is explicitly that a RAO should have been made. But any prosecution appeal against the making of an extended sentence (as opposed to the length of that sentence) is an argument that an OLR was the appropriate disposal: this is so regardless of whether an 'unusual' argument of the sort advanced in this case is made. If an OLR is to be made, then a RAO must first be made. It is true that, however phrased, this is an appeal against the sentence imposed rather than an appeal against the refusal to remit the case for sentencing, but the court has demonstrated great reluctance to revisit the question of the appropriateness of a RAO when raised on behalf of the offender. For example, *Henderson*, discussed above, where the court ignored the appellant's submissions that the criteria for making the RAO were not met, addressing the OLR instead, and *O'Leary v HM Advocate*,[68] considered in section 5.4.3 below. In that case a compatibility issue was raised, arguing that section 210B violated the offender's article 6 rights. The court was clear that the procedure could not be used to quash a RAO.[69] Simply put, where appellant counsel has sought to explore avenues of challenging the decision to make a RAO, the courts have rather robustly closed them down; but the availability of a Crown appeal against an extended sentence would seem to entail something that is tantamount to an appeal against the refusal to make a RAO. *HM Advocate v McCuaig* would seem to be an example of it, albeit an unsuccessful one.

If this interpretation is correct, it would seem that offenders in respect of whom a RAO is made are disadvantaged by the lack of provision for appeal against the RAO. Notwithstanding the point made in *Ferguson* about procedural steps not generally being subject to appeal, ICOs may be appealed in the same way as a sentence.[70] The RAO and ICO are of roughly the same

[66] *McGhee*, at 6.
[67] *McCuaig*, at 39.
[68] 2014 S.C.C.R. 421.
[69] *Ibid*, at 25.
[70] s. 60.

duration – 90 days and 12 weeks respectively – so it cannot be a matter of lack of time.[71] Given that the function of the RAO is to enable a depth of enquiry into an offender and his circumstances that is not possible without it, and that the product of that enquiry – the RAR – may have consequences for the offender in terms of risk management and progression regardless of whether an OLR is imposed,[72] it is not clear at all that the RAO is akin to any other adjournment. At the very least, there is no obvious reason as to why there should not be an appeal against its making, especially given that a decision that a RAO is not appropriate appears to be open to challenge, albeit somewhat tangentially.

5.3 The Interim Compulsion Order with Assessment of Risk

The alternative to the RAO is the ICO with assessment of risk. It should be noted that although the relevant section heading in the 1995 Act is 'Interim hospital order and assessment of risk', the order that is made is in fact an ICO.[73] The IHO is the order that was available prior to the introduction of the Mental Health (Care and Treatment) (Scotland) Act 2003 and the creation of the ICO.[74] The making of an order under section 210D triggers the formal risk assessment process and, like the RAO, requires that an RMA-accredited risk assessor prepare a report,[75] but the ICO itself is made under section 53 of the 1995 Act. Not all assessors accredited for RAO assessments will be accredited for the purposes of section 210D. Those who wish section 210D accreditation must have at least three years' experience working in a forensic mental health setting.[76] An ICO with risk assessment is appropriate in cases where the court is considering a sentence of imprisonment – which might be an OLR – and is also contemplating the possibility of a hospital disposal, such as a compulsion order with restriction order (CORO),

[71] Though as discussed later, the ICO may, subject to renewal, last as long as one year.
[72] See 5.4 for detailed discussion of the RAR.
[73] s. 210D(1).
[74] See the discussion at 4.5.2.D in chapter four. The Criminal Justice (Scotland) Act 2003 was the 7th Act passed by the Scottish Parliament that year; the MHA 2003 was the 13th. Rather than the MHA 2003 amending the 1995 Act directly, it amended the CJ(S)A 2003, which in turn amended s. 210D when the MHA 2003 came into force. Whatever the reason for approaching it in this manner, the substance of the provision was changed whilst its title was not.
[75] s. 210D(2).
[76] Risk Management Authority, *Accreditation of Risk Assessors: Information for Applicants* (Paisley, undated), 3.

or a hospital direction (HD). Both the CORO and the HD are discussed briefly as alternatives to the OLR in chapter six.

It is worth noting at this point that there are two separate provisions under which an ICO can be made. Section 53 ICOs are made in respect of convicted persons, but an ICO can be made under section 57(2)(bb) where someone is acquitted by reason of the special defence set out section 51A of the 1995 Act,[77] or following an examination of facts where he has been found unfit for trial.[78] Only those made under section 53 are of interest since we are concerned with disposals upon conviction, and the section 210D order can only be made alongside a section 53 ICO since it is part of a sentencing process. The ICO can be made in the sheriff court or the High Court,[79] but the section 210D order, like the RAO, can only be made in the High Court;[80] all ICOs which might result in an OLR will therefore be made in the High Court.

An ICO is available where the offender has been convicted of an offence punishable by imprisonment, other than an offence the sentence for which is fixed by law.[81] The judge must be satisfied on the written or oral evidence of two medical practitioners that: (1) the offender has a mental disorder;[82] (2) there are reasonable grounds for believing that it is likely medical treatment is available that will prevent the mental disorder worsening,[83] or alleviate any of the symptoms or effects of the disorder;[84] (3) it is likely that if such treatment were not provided that there would be a significant risk to the health, safety or welfare of the offender,[85] or to the safety of any other person;[86] and (4) that the making of the order is necessary.[87] 'Necessary' is not defined by the legislation; however it may not be necessary to make an ICO where the offender has already been subject to a period of assessment or treatment before trial, for example, on an assessment order[88]or treatment order.[89] This is because the purpose of the ICO

[77] When successfully pled, this defence results in acquittal on the basis that the individual was not criminally responsible for their conduct by reason of mental disorder.
[78] The "acquittal ICO" should not be confused with the temporary compulsion order which is available under section 54(1)(c) following a finding of unfitness for trial and *pending* an examination of facts. A temporary compulsion order may be followed by an ICO when the examination of facts is concluded, provided other relevant criteria are met.
[79] s. 53(1)(a).
[80] s. 210D(1).
[81] s. 53(1), although this criterion is clearly satisfied in any case in which an OLR would be a competent disposal.
[82] s. 53(2)(a)(i).
[83] s. 53(5)(a)(i).
[84] s. 53(5)(a)(ii).
[85] s. 53(5)(b)(i).
[86] s. 53(5)(b)(ii).
[87] s. 53(5)(c).
[88] Made under s. 52D on the application of the prosecutor.
[89] Made under s. 52M on the application of the prosecutor.

is to enable prolonged assessment of the offender's mental health and care needs, including clarification of his diagnosis, the nature of the relationship (if any) between his offence and the mental disorder, the risk the offender may pose and whether this may be mitigated by treatment for the mental disorder.[90]

Offenders subject to an ICO are detained in hospital for 12 weeks initially,[91] but the order can be renewed provided the total of the initial period and the extensions does not exceed 12 months.[92] The ICO engages part 16 of the Mental Health (Care and Treatment) (Scotland) Act 2003, meaning that it authorises the giving of compulsory medical treatment to the patient. In contrast to the civil compulsion provisions of the 2003 Act, no account is taken of the offender's ability or capacity to consent to or refuse treatment.[93] People subject to an ICO have restricted patient status, meaning that the consent of the Scottish Ministers must be obtained before any temporary suspension of the order's conditions is granted.[94]

The OLR, it will be recalled, has its origins in judicial decisions about the preventive detention of high-risk offenders detained in hospital who could not be treated.[95] Although section 210D quite obviously cannot prevent error in diagnosis and in the consequent determination that someone ought to be subject to detention in hospital, rather than imprisonment, it does permit the sentencing judge to assess the suitability of both a compulsion order and an OLR at the same time. One of the options in such circumstances is a hybrid disposal: that is, where – following the making of orders under sections 53 and 210D – an offender is found to satisfy the criteria for both the OLR and the compulsion order, the court may make a hospital direction in addition to the OLR.[96] The criteria for making a hospital direction (HD) are outlined later,[97] but the HD's effect is that an offender subject to it begins his sentence in hospital and remains there until his mental health improves sufficiently that his continued detention in hospital is unnecessary, or it is established that – as in *Reid* and *Ruddle*[98] – he does not, in fact, suffer

[90] *MHA 2003 Code, vol. 3*, 102, para. 3.
[91] s. 53(8A)(b).
[92] s. 53B(5).
[93] Persons may only be detained and/or treated under the 2003 Act's non-criminal justice provisions if their ability to take decisions about treatment for their mental disorder is significantly impaired by that mental disorder. See s. 36(4)(a), s. 44(4)(b), and s. 57(3)(d) of the MHA 2003. There is no analogue of this test in any of the criminal justice mental health orders.
[94] s. 224 of the MHA 2003.
[95] See sections 4.3 and 4.4 of chapter four.
[96] s. 210F(1) and s. 59A(2).
[97] See section 6.4.1.D.
[98] *Reid v The Secretary of State for Scotland* 1999 S.C. (H.L.) 17; *Ruddle v The Secretary of State for Scotland* 1999 G.W.D. 29 – 1395 (Sh. Ct.); see section 4.3 of the thesis.

from a mental disorder which is amenable to treatment. In either case the offender is transferred back to prison to serve his sentence in the normal way.[99] If the judge only made an ICO, then no risk assessment report would be submitted under section 210C of the 1995 Act and an OLR would not be a competent disposal; if only a RAO was made, the appropriateness of a hospital order associated with restrictions would not be adequately explored.[100] Unlike the RAO, the imposition of the ICO under section 53 may be appealed;[101] this matters because the ICO permits compulsory treatment.[102] The Mental Welfare Commission for Scotland (MWC) – the body which has oversight of the operation of the MHA 2003 and the mental health provisions of the 1995 Act – reports that 15 ICOs were made in 2018–2019.[103] There is no indication of how many of these were associated with a section 210D order in either the MWC statistical reports or the RMA's annual reports.[104] This is regrettable since such data would be useful for charting the pathways that high-risk offenders follow from conviction to sentence.

5.4 The Risk Assessment Report

Strictly speaking, a RAR is a report prepared and submitted under section 210C in respect of an offender subject to a RAO. In section 210D(2) the report is simply described as 'a report as to the risk the convicted person's being at liberty presents to the safety of the public at large'.[105] This is the same as the definition given of 'risk assessment report' in section 210B(3), and both reports require to be prepared by accredited risk assessors in accordance with the RMA's *Standards and Guidelines for Risk Assessment Report Writing* (hereafter 'the RAR

[99] The normal operation of the OLR is discussed at section 6.4 of the thesis.
[100] Though a CO/CORO could be competent following an RAO alone where the court is satisfied it would not have been appropriate to make an ICO in the circumstances: see s. 59(2A). The making of a CO/CORO without first having made an ICO is considered extremely bad practice, however. See the *MHA 2003 Code vol. 3*, 103, para. 7. It should, however, be emphasised that if at the point the court reaches the determination that the risk criteria might be met, it is also aware that it may make an ICO it *must* make an ICO with assessment of risk under ss. 53 and 210D.
[101] s. 60. It should be noted that the 1995 Act contains duplicates of sections 59A, 60, 60A and 60B. Those which contain the relevant provisions are found under the 'Hospital Directions' heading.
[102] s. 53(8)(c).
[103] Mental Welfare Commission for Scotland, *Mental Health Act Monitoring Report 2018–19* (Edinburgh, 2019), 47, table 6.3.1.
[104] Any attempt to extrapolate from the data that is available would be ineffective. Though there are far fewer COROs made than OLRs each year (in 2018–19 there were 7), some ICOs may lead to a compulsion order without restrictions; others may lead to a hospital direction, and still others might result in a prison sentence. Additionally, some RAOs carry over from one year to another meaning that it is not possible simply to subtract the number of risk assessment reports from the number of RAOs.
[105] See also s. 210D(3): '…shall apply in respect of any such report as it does in respect of a risk assessment report.'

Standards').[106] In its documentation, the RMA refers to both reports as RARs[107] and the literature makes no distinction between them.[108] For reasons of convenience this convention is adopted here. There are, however, some differences in the provisions relating to the section 210C RAR and the section 210D report. These will be highlighted as they arise.

It is important to note two things at this point. First, that the RAR Standards must be read in the context of the *Framework for Risk Assessment, Management and Evaluation* (FRAME),[109] and the *Standards and Guidelines for Risk Management*, rather than taken in insolation,[110] as the objective is to promote an integrated approach to risk assessment and risk management of which the RAR is one part. Second, assessors – and others that have functions in relation to the assessment of risk, including those engaged to undertake defence reports in OLR cases[111] – have a statutory obligation to 'have regard to' the guidance;[112] but this does not amount to a requirement to follow the procedures therein to the letter in all cases. Instead assessors must show that they have given the guidelines 'explicit and express consideration',[113] the expectation being that the guidance is adhered to unless there are compelling reasons why it cannot be or should not be. In such a case, assessors must offer a 'reasoned explanation' as to why they have deviated from the guidance – this is what the RMA terms the requirement to 'comply or explain'.[114]

5.4.1 STRUCTURED PROFESSIONAL JUDGEMENT

The RAR serves two main functions. It assists the sentencing judge in his determination as to whether the risk criteria are met,[115] and it helps to inform risk management planning whether or not the offender is ultimately made subject to an OLR.[116] Compiling an RAR is an intensive process and can take up to 120 hours.[117]Assessors undertaking RARs are required to employ a

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[106] CJ(S)A 2003, s. 5(2); 1995 Act, s. 210B(3)(a) and s. 210D(2); *RAR Standards*, 4, para. 2.
[107] *Ibid*; RMA Risk Assessment Report Template 'Declaration of Competence' (Document available by download at https://www.rma.scot/standards-guidelines/risk-assessment/ Accessed 25th March 2020).
[108] See, for example, Darjee and Russell (2011) 220 – 226; Fyfe and Gailey (2011), 206 and 214; and McSherry and Keyzer (2009), 65.
[109] Risk Management Authority *Framework for Risk Assessment, Management, and Evaluation: FRAME* (Paisley, 2011). FRAME is an ongoing inter-agency collaborative project which builds upon Scotland's Multi-Agency Public Protection Arrangements (MAPPA).
[110] *RAR Standards*, 9, para. 28.
[111] *Ibid*, 5, para. 7. Defence reports are discussed later.
[112] CJ(S)A 2003, s. 5(2).
[113] *RAR Standards*, 5, para. 8.
[114] *Ibid*.
[115] s. 210F(1)(a) and (b).
[116] *RAR Standards*, 31, para. 53.
[117] Darjee and Russell (2011), 221.

structured professional judgement approach,[118] which must be supported by a wide variety of evidence obtained from a range of different sources. This is what FRAME calls a 'scrutiny of risk'[119] approach, which is appropriate in the most 'complex and concerning' cases.[120] Such an approach entails a 'detailed and individualised understanding of the onset, maintenance and occurrence of sexual and/or violent offending over time, and the likelihood of further such behaviour in the future. This then informs the production of a detailed and individualised risk management plan.'[121] Sources of information may include CJSWRs, psychological reports, Parole Board reports, medical records, educational and employment records, and previously completed risk assessment reports.[122] The Crown Office and Procurator Fiscal Service (COPFS) will provide a report on the prosecution evidence and any relevant statements that they have.[123] It is also expected that assessors will conduct interviews with the offender, and relevant others[124] such as the offender's family and friends, victims, and professionals that have had contact with the offender.[125]

As is characteristic of SPJ, the process involves the use of one or more risk assessment instruments. In the earlier years of the OLR's operation, the guidance was more prescriptive than it is currently. The *Standards and Guidelines for Risk Assessment* published in 2006 and revised in 2013 mandated the application of tools approved by the RMA for use i.e. those included in RATED.[126] Actuarial risk assessment instruments (ARAIs) could be used, but only where a SPJ tool was also used; it was permissible to use only one instrument, but that had to be a SPJ instrument.[127] Assessors considered this to be overly-constraining, however,[128] and the current RAR Standards simply require that assessors select 'empirically supported' tools appropriate to the individual case.[129] The choice of instrument of course depends on the offender's characteristics and the nature of the risk to be assessed as well as the assessor's familiarity and experience with the instruments.[130] The RMA's *Risk Assessment Tools*

[118] See 3.4.2 of chapter 3.
[119] *FRAME*, 55.
[120] *RAR Standards*, 9, para. 28.
[121] *Ibid*. This is in contrast to lower 'tier' approaches in less complex/demanding cases. See *FRAME*, 51–55.
[122] *RAR Standards*, 16, para. 33.
[123] *Ibid*, 15, para. 31.
[124] *Ibid*, para. 34.
[125] *Ibid*, para. 33.
[126] Risk Management Authority, *Standards and Guidelines for Risk Assessment* (Paisley, 2013), 16.
[127] *Ibid*.
[128] Darjee and Russell (2011), 221.
[129] *RAR Standards*, 17, para. 38.
[130] *Ibid*.

Evaluation Directory (RATED)[131] groups risk tools according to applicability, sets out the evidence supporting their use, gives information on the strengths and limitations of each instrument, and specifies the training and experience that an assessor must have in order to use the tool properly.[132] The Directory includes both actuarial and SPJ tools that have been validated for use on different populations and the RMA encourages an approach to assessment that involves both, but emphasises professional judgement. [133] If the nature of the offending at issue is such that no tool is of relevance, the assessor should consult the scientific and clinical literature in order to develop a 'defensible' approach to the assessment.[134]

The reason for this emphasis is that the RAR is not simply the product of a predictive exercise, though that is a part of it. The RMA's model is one in which risk assessment is viewed as part of risk management, and therefore one of the key purposes of the RAR is to inform risk management planning whether or not the offender is ultimately made subject to an OLR.[135] This requires far more insight into the offender and his offences than could be garnered from statistically derived probabilities, though these may contribute to it.[136] SPJ tools address specific categories of offending,[137] e.g. violent offending, sexual offending, intimate partner violence/stalking, and they are more appropriate to the development of a 'narrative risk formulation'.[138]

Formulation in this context is both a way of conceptualising risk and of communicating it.[139] Such an approach aims to contextualise the information that has been gathered during the risk

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[131] *RATED* (http://www.rma.scot/research/rated/). One of the strengths of the Directory is that it is a fully online unprotected resource and so available to anyone who wishes to access it, but it consists of a large number of PDFs under sub-headings rather than a single document. Most of these files do not have page numbers, which is why they are omitted from some references.
[132] *RATED*; and *RAR Standards*, 17, para. 39.
[133] *RATED: Introduction* (https://www.rma.scot/wp-content/uploads/2019/09/RATED_Introduction_1_Background-to-RATED_September-2019.pdf)
[134] Darjee and Russell (2011), 223.
[135] *RAR Standards*, 31, para. 53.
[136] For example, the Level of Service Case Management Inventory (LS/CMI). It is one of the validated tools included under RATED's 'General Risk' heading and is designed to help services providers identify and plan interventions that are appropriate to the needs of the offender. It includes 43 items under eight headings and produces a score which places the offender on a five-point risk scale which runs from 'very low' to 'very high' risk. The score can be adjusted based on the assessor's judgement. The LS/CMI is discussed again later in the context of offender characteristics, but for a more detailed discussion of the role of clinical judgement in the tool's application see J.P. Guay and G. Parent, 'Broken Legs, Clinical Overrides, and Recidivism Risk: An Analysis of Decisions to Adjust Risk Levels with the LS/CMI' (2017) 45:1 *Criminal Justice and Behaviour* 82.
[137] *RATED: Introduction*. Though there are some ARAIs of this type too e.g. the Static-2002R which is a tool for assessing risk of sexual offending. See: https://www.rma.scot/wp-content/uploads/2019/09/RATED_Static-2002R_August-2019_Hyperlink-Version.pdf
[138] *RAR Standards*, 20, para. 41.
[139] S. Hart *et al.,* 'Forensic case formulation', (2011) 10:2 *International Journal of Mental Health* 118, 119.

assessment process and the conclusions that the assessor has drawn from it. The narrative risk formulation presents an analysis of the nature, frequency, and severity of offending before and including the index offence.[140] The objective to is explain why offending occurs, and what the early warning signs of repeat offending might be, so that opportunities to intervene may be identified. The RAR also addresses the individual's engagement and compliance with risk management measures previously, and their motivation to engage at the time of the assessment.[141] This has significance for the risk classification, as well as the determination about whether measures short of an OLR may be sufficient.

A key part of the formulation is the development of future risk scenarios to assist the court in determining whether the risk criteria are met, and to assist in risk management planning. Future risk scenarios are hypothetical situations in which the interaction of the characteristics of the offender and the circumstances in which he finds himself are likely, in the examiner's judgement, to produce offending behaviour of a particular nature.[142] Assessors are expected to be explicit about the limitations of such an exercise in terms of the difficulties of projecting the likelihood of particular conduct over the long-term,[143] and the need to revise the scenarios over time as circumstances change and new information becomes available.[144]

The RMA encourages assessors to consider 'victim-related issues and impact' in compiling the RAR.[145] This includes directly involving victims, where possible, in order to obtain information from them on the way the offending behaviour has affected them. The risk formulation should include suggestions as to how victims might be kept safe. The *Standards and Guidelines* direct assessors to a range of resources to ensure any engagement with victims, and use of the information they provide, is lawful and reflects best practices.[146] Where direct victim engagement is not appropriate, it may be possible for assessors to gain some insight into their experiences via other agencies who may have dealt with them, for example, domestic abuse advocacy or support services.[147]

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[140] *RAR Standards*, 20, para. 41.
[141] *Ibid*.
[142] *Ibid*, 21, para. 43.
[143] *Ibid*, 25, para. 49.
[144] *Ibid*, 21, para. 43.
[145] *Ibid*, 8, para. 26.
[146] These include the *Victims' Code for Scotland*, and the *Standards of Service for Victims and Witnesses* See 9, para. 28.
[147] *Ibid*, 9, para. 27.

5.4.2 Offender Engagement

One of the most valuable sources of information on which to base the assessment is the offender, and the *RAR Standards* place a great deal of importance on offender engagement. The 2013 guidance specified that the assessor should meet the offender in person at least three times across several weeks, and that total contact time should be at least 6 hours.[148] As with choice of risk tools, however, the present guidelines accord the assessor more discretion: '[the] assessor should ensure an appropriate number of interviews with the individual and these should be spread over several occasions, spanning several weeks'.[149] In addition to the face-to-face contact time during which the assessment takes place, there must be a 'feedback session'.[150] The feedback session occurs after the assessment has been completed, but before the RAR has been submitted. It provides an opportunity for the assessor to go through the report with the offender, and for the offender to comment on it and may result in amendments being made before the RAR is finalised.[151]

Assessors are expected to make every reasonable attempt to encourage the offender to engage,[152] but where the offender refuses the assessor should document this and set out the effect of this on the evaluation of risk.[153] Darjee and Russell – both RMA accredited risk assessors[154] – acknowledge the ethical difficulty in proceeding without the offender's consent, but point out that the criminal justice system could not function if assessments could not be carried out in the absence of consent.[155] They suggest that the most ethical course of action where co-operation is refused is (1) to make multiple attempts to see the offender; (2) to ensure the offender understands the purpose of the assessment and how it will be used, and that it will go ahead with or without his participation; (3) to obtain as much information from other sources as is possible; (4) to establish whether any reliable conclusions can be drawn in the absence of the offender's co-operation; and (5) to ensure that limitations that arise as a result are clearly set out in the RAR.[156]

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[148] *RAR Standards* 19.
[149] *Ibid,* 16, para. 34.
[150] *Ibid*, 35, para. 61.
[151] *Ibid*.
[152] *Ibid*, 33, para. 53.
[153] *Ibid*, 34, para. 54.
[154] At the time the cited work was published; both have since left the register of accredited assessors. The register is available on the RMA's website: https://www.rma.scot/order-for-lifelong-restriction/accreditation/assessors-register/
[155] Darjee and Russell (2011), 224.
[156] *Ibid*.

In *McKinlay v HM Advocate*,[157] the appellant, whilst in prison for a series of aggravated assaults, was convicted of a further assault to severe injury upon a fellow prisoner by throwing boiling water into his face and eyes, having gone to the victim's cell specifically for that purpose. The assessor had interviewed the offender on only one occasion because the offender had thereafter refused to meet with him; four attempts had been made by the assessor. He had also refused to co-operate with two assessors who had been engaged to produce defence reports. The appellant's history included rape and multiple serious assaults, some committed while in prison; he had been segregated on several occasions for the protection of the other prisoners. The RAR classified him as high-risk, the assessor having reached the conclusion that he met the criteria for psychopathy despite only having been able to carry out a partial assessment on the PCL-R.[158] An OLR was imposed with a punishment part of 2 years and 3 months. An appeal against sentence was lodged on the grounds *inter alia* that the RAR was 'almost entirely based on a paper exercise' since the assessor had only met with the appellant for one-and-a-half hours.[159] The court held that the assessor had relied upon sufficient information drawn from other sources and had been able to use a variety of risk tools to enable him to give an informed opinion.[160] The appeal was refused.

Where there are concerns about the initial RAR, an appeal court can order another – in one case this approach was taken in an appeal that was lodged when an offender was five years into an OLR with a punishment part of six years.[161] It is still, however, unclear as to what would happen in cases where the non-participation of the offender severely undermines the report. Reliance upon multiple sources of information, as is required, will reduce the likelihood of the RAR being undermined in such a way, but there are instances where alternative sources might be limited. For example, OLRs can be imposed, and have been imposed, on offenders with no previous convictions of any kind.[162] This complicates the assessment because it is harder to

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[157] [2019] H.C.J.A.C. 15.
[158] The Psychopathy Checklist – Revised. It is an assessment tool used for detecting traits of psychopathy and has both clinical and research applications. See https://www.rma.scot/wp-content/uploads/2019/09/RATED_PCL-R_August-2019_Hyperlink-Version.pdf Accessed 3/12/2020.
[159] *Ibid*, para. 38.
[160] See also *Kinloch v HM Advocate* 2016 J.C. 78 where the offender's refusal to continue meeting with the assessor and refusal to allow him to interview his family members meant that there were some gaps in the information upon which the RAR was based. The court declined to consider whether a RAR was defective for failure to follow RMA guidelines, because the appeal was allowed on other grounds. This does suggest that courts may enter into such enquiry where it is material to the case even where offender non-engagement is a factor.
[161] *Byrne v HM Advocate* 2016 S.C.L. 998. The risk classification, however, remained the same.
[162] See, for example, *Johnstone v HM Advocate* 2012 J.C. 79; *M v HM Advocate* 2012 S.L.T. 147; and *Laird v HM Advocate* 2016 S.C.L. 62. Gailey *et al*. (2011) found that around 14% of those subject to OLRs were first-

assess the likelihood the offender will engage with rehabilitation, and the probability of its success in reducing the risk he poses.[163]

It is possible, therefore, that at the point of sentencing the RAO/ICO process may be the only opportunity the offender has had to demonstrate the extent of his willingness to co-operate. Further, according to Darjee and Russell, refusals of co-operation generally arise from 'personality pathology' rather than any external source of influence such as a solicitor discouraging participation.[164] It is not clear from the context of the statement whether they mean simply that the presence of certain personality traits or disorders can explain non-participation, or whether they are suggesting that it is legitimate to infer the presence of such traits from the refusal to co-operate. However, given that the offender's willingness to engage in rehabilitation/treatment, and the likelihood of its success are key considerations for the assessor and the court,[165] the potential for serious detriment to the offender from refusing to engage is clear. Whilst the point that Darjee and Russell make about the necessary reliance of the criminal justice system upon involuntary processes is well made, it is difficult to escape the conclusion that, at the point the risk assessment is undertaken, it may be all but impossible for the offender to protect his own interests. If he engages with the assessment, he may supply information which indicates a higher risk classification is appropriate; if he does not engage, his non-engagement may be taken to indicate that a higher risk classification is appropriate.

5.4.3 Reliance Upon Allegation Information

Reliance upon many different types of information drawn from a range of sources is intended to ensure that the assessment is as complete as it can be. The MacLean Committee recommended that assessors be able to consider unproven allegations as part of the risk assessment,[166] and the Scottish Executive agreed on the basis that it would 'maximise the accuracy' of the RAR.[167] Assessors are thus empowered by section 210C(1) to take into

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time offenders and about 1 in 3 had never been imprisoned, but no more recent data on this is available. See 125.

[163] *Laird v HM Advocate* 2016 S.C.L. 62, para. 12.

[164] Darjee and Russell (2011), 223.

[165] *RAR Standards*, 21, para. 4; *Liddell v HM Advocate* 2013 S.C.L. 846, paras. 53; *Ferguson v HM Advocate* 2014 S.L.T. 431, para. 34, 35, 53, and 54. It can be especially difficult to assess this where the offender has no previous convictions, so it might be that engagement with the assessor is the best indicator available. See *Laird v HM Advocate* 2016 S.C.L. 62, paras. 8 and 12.

[166] MacLean Report, rec. 15.

[167] *SVSO White Paper*, 25, para. 21.

account allegations of criminality. This includes conduct that was never prosecuted as well as conduct that resulted in charges of which the individual was acquitted.[168]

Some of this information might be included in a CJSWR. For example, according to the national guidance,[169] information relating to children's hearings that the offender was the subject of at some stage,[170] sexual offences prevention orders (SOPOs)[171] and information about how the offender had conducted himself during previous sentences[172] should, where applicable, be included. It is also permissible for the social worker to make reference to outstanding/pending charges and warrants.[173] The scope of section 210C(1) is, however, much broader and is one of the most controversial elements of the OLR's framework.[174]

Being able to take allegation information into account is helpful in establishing whether the offence of which the individual has been convicted is an isolated incident or whether it is part of a pattern of behaviour;[175] it is also helpful in planning risk management interventions.[176] Fyfe and Gailey offer the following hypothetical scenario to demonstrate the utility of reliance upon allegation information.[177]

> An individual is before the court for a breach of the peace and assault during a drunken fight with his wife that was broken up by the police. His wife suffered only minor injuries and he pleads guilty and expresses remorse. On this evidence alone, he might not be considered a candidate for the order for lifelong restriction…However, imagine that this man has several convictions and allegations of violence and sexual violence against partners, some of which have put previous partners in the hospital. Further, there are two convictions for stabbing men against whom he has a vendetta. Previous court orders have ranged from an early probation order to a prison career of several lengthy sentences with extended periods of post-release supervision. When his behaviour in prison and on supervision in the community is considered, there is evidence of discipline problems in prison, not engaging with professionals, not participating in

[168] Darjee and Russell (2011), 223.
[169] Scottish Government, *National Outcomes and Standards for Social Work Services in the Criminal Justice System: Criminal Justice Social Work Reports and Court-Based Services Practical Guidance* (Edinburgh, 2010) Available at: https://www2.gov.scot/resource/doc/925/0110144.pdf (Retrieved 12 March 2020).
[170] *Ibid*, 24, para. 6.12.
[171] *Ibid*, 48, para. 6.26.
[172] *Ibid*, 38, para. 6.22.
[173] *Ibid*, 24, para. 6.12.
[174] *SVSO White* Paper, 25, para. 22; Gailey *et al.* (2017), 135; McSherry and Keyzer (2009), 100; Lord Carloway, *The Lifelong Restriction of Serious Offenders and the Role of Risk Assessment in Scotland*, 28. Paper presented at the 27th conference of the International Society for the Reform of Criminal Law on 26 June 2014 and available at http://www.scotland-judiciary.org.uk/26/1305/Lord-Justice-Clerk's-address-to-the-International-Society-for-Reform-of-Criminal-Law (Accessed 23 Mar 2020).
[175] Gailey *et al*. (2017), 135.
[176] Fyfe and Gailey (2011), 206.
[177] *Ibid*.

> programmes, and further offences resulting in recall to prison. These additional factors may be given weight by the sentencing judge.

It is worth noting at this stage that there are at least two cases in which an OLR has been imposed following conviction for breach of the peace.[178] It should also be pointed out that an offender must be considered to be a 'candidate' for the OLR at the point that the RAO/ICO is made; this means that there must be reason for the court to consider that the risk criteria might be met before it has access to information not ordinarily included in the CJSWR and any other reports it has before it at that stage.[179]

Not all RARs will include allegation information, but it is likely that most do. Fyfe and Gailey examined 60 RARs – that being the total number of RARs completed at the time of the study[180] – and found that 40 of those reports made reference to allegation information.[181] Where a RAR does include allegation information, assessors are required to take certain measures to ensure the status of the information, and the manner in which it is being relied upon, is clear. The assessor must list each allegation individually;[182] detail any evidence that supports the allegation;[183] and explain the impact of the allegation on the assessor's opinion as to the risk the offender presents.[184] In most of the RARs examined by Fyfe and Gailey the allegation information had been used solely to aid in risk management; fewer than 15 relied upon the allegations alongside convictions to make out a pattern of behaviour.[185]

McSherry and Keyzer have, however, argued that reliance on allegation information should be impermissible for two reasons. First, they consider that reliance on allegation information undermines the presumption of innocence.[186] They argue that taking allegations into account entails an assumption that the civil standard of proof is met; this is problematic because no enquiry of this kind is undertaken when someone is acquitted in criminal proceedings. Consideration of allegation information is therefore not appropriate where it might result in a more onerous sentence being imposed. As is discussed later, however, the test for the

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[178] *Johnstone v HM Advocate* 2012 J.C. 79; and *M v HM Advocate* 2012 S.L.T. 147. The appellant in *Johnstone* was a first-time offender.
[179] Although there may not be a CJSWR because there is no statutory requirement for the court to obtain a CJSWR prior to making a RAO because a RAR is far more detailed and substantial: *Ferguson v HM Advocate* 2014 S.L.T. 431, at 90.
[180] *Ibid*, at 202.
[181] *Ibid*, at 207.
[182] s. 210C(2)(a).
[183] s. 210C(2)(b).
[184] s. 210C(2)(c) and s. 210C(3).
[185] Fyfe and Gailey (2011), 207.
[186] McSherry and Keyzer (2009), 100.

imposition of an OLR is that, on the balance of probabilities, the risk criteria are met.[187] This involves consideration of a number of sources of which the RAR is one, albeit one of the most significant. The question of whether the risk criteria are met is one for the judge, not the assessor,[188] and the judge may choose to disregard allegations referred to in the report if he does not find them to be credible, and can proceed on the basis of the remainder of the report and other evidence available to him.[189]

The steps that can be taken by an offender to challenge a RAR with which he does not agree are discussed below, but it is worth noting at this stage that an offender subject to a RAO has the right to obtain his own RAR,[190] and that, where the conclusions or other contents of the report are contested, an evidential hearing may be held before the sentencing diet.[191] The second objection that McSherry and Keyzer raise is that if allegations contained in a RAR are to be challenged, alleged victims, who may be vulnerable, may be called to give evidence.[192] This is a concern that was apparently shared by the police and COPFS, at least in the earlier years of the OLR's operation, and which resulted in those agencies being reluctant to provide assessors with allegation information in some cases.[193] To date, it does not appear that any such case has arisen, but it has been anticipated and certain safeguards are provided for.[194] These are discussed further in part E below. The Scottish Executive considered that the availability of a defence RAR and the provision for an evidential hearing amounted to adequate procedural protections and was keen to emphasise that allegation information was only being used to aid risk assessment after the point the conviction was obtained.[195]

The extent to which courts may rely upon allegation information in the decision as to whether the risk criteria have been met has not, as yet, been established. In *O'Leary v HM Advocate*,[196] the minuter sought to have a RAO quashed on the basis that section 210C was incompatible with article 6 of the ECHR. The circumstances of the case are somewhat unusual. Thomas O'Leary was convicted on indictment in the sheriff court of 8 offences including assaulting two previous partners to their severe injury and the danger of their lives. He had previously

[187] s. 210F(1).
[188] *O'Leary v HM Advocate* 2014 S.C.C.R. 421, at 22.
[189] Ibid, at 24; Darjee and Russell (2011), 223.
[190] s. 210C(5).
[191] s. 210C(7).
[192] McSherry and Keyzer (2009), 100.
[193] Darjee and Russell (2011), 223.
[194] s. 210EA.
[195] *SVSO White Paper*, 25, para. 24.
[196] 2014 S.C.C.R. 421.

been convicted of assaults upon women and men, and had received custodial sentences, including an extended sentence with a custodial element of just under 5 years.[197] The sheriff, having obtained a CJSWR and psychiatric reports, considered that the risk criteria may be met and remitted the case to the High Court for sentencing. At some point after the RAO was made, the mother of one of the complainers in the case sent the judge a letter and a newspaper cutting which concerned the suicide of one of the offenders' former girlfriends when he was in prison.[198] The judge forwarded the letter to the assessor, and the incident was noted in the RAR alongside other allegation information including police intelligence. The assessor's reliance upon the allegations was addressed in the report's 'Limitations' section.[199]

> [I]n the report it has not been necessary for the assessor to draw on these allegations in making his conclusions.
>
> If all the allegations are not taken into account, one would still have to conclude that there is a high likelihood of the offender committing further serious violent offences…if all the allegations are taken into account, then the main effect is to provide some potential additional information about [the offender's] general pattern of behaviour.
>
> Therefore, allegation evidence has little significance in the assessor's determination, the police intelligence in particular is therefore omitted from the assessor's consideration of risk level and the likelihood of harm to others in [the offender's] case.

The letter itself was considered only in the context of the impact of the offender's conduct on the victim.[200] The defence subsequently lodged a minute intimating intention to raise a compatibility issue, and the judge declined jurisdiction because his decision to forward the letter to the assessor was the reason for the minute. When the case called again before another judge, that judge referred the case for determination by a bench of three judges.[201] On behalf of the minuter, it was argued that consideration of unproven allegations by the assessor and the court violated the right to a fair trial. Further, if the court makes decisions on the basis of the assessor's opinion, where the opinion assumes that the individual concerned is guilty of criminal behaviour he has not been convicted of, the individual's right to be presumed innocent

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[197] *Ibid*, para. 5.

[198] The Daily Record article in question published in June 2013 is available at: https://www.dailyrecord.co.uk/news/scottish-news/violent-bullys-reign-terror-intimidation-1928487 (Retrieved 22 Mar 2020).

[199] *O'Leary*, at 10.

[200] *Ibid*, at 12.

[201] See s. 288ZB.

will be violated. Thus, it was argued, the process initiated by the making of the RAO was incompatible with the minuter's article 6(1) and (2) rights.[202]

There were three difficulties for the minuter. First, if the assessor's consideration of allegation information was to violate his article 6 rights, it would have to be established that the assessor was a public authority as defined by section 6(3) of the Human Rights Act 1998.[203] This meant it would have to be shown that the assessor's functions were 'functions of a public nature'. The court found that the assessor was not a public authority. [204]

> A risk assessor is not an employee of the court nor is he necessarily employed by any central or local government department or agency. He is a private individual who, once duly accredited, engages in this type of work, for profit. His is not under any duty to accept the court's appointment in a particular case. Whether he does so or not will, no doubt, depend upon his other commitments. The important point is that the assessor is engaged by way of public law contract between the risk assessor and the court (or, more accurately, the Scottish Court Service)…The mere fact that the court, or any other public authority solicits an opinion from a person of skill does not convert that person into a public authority.

Second, it was necessary to prove that the minuter was, or would be, a victim of the assessor's inclusion of the allegation information in the report.[205] This would have required the minuter to demonstrate that the assessor's opinion had been based on unfounded allegations, and that those allegations would have been taken into consideration by the court. The assessor had been clear in the RAR that he had not relied upon the allegation information. Even if the assessor had relied upon it, section 210C sets out a procedure to enable the offender to challenge the RAR;[206] that process had not been followed, the decision having been taken to raise the compatibility issue instead. The minuter was not, therefore, a victim.[207]

Finally, where a compatibility issue is raised, it must be connected to a 'practical remedy'.[208] Initially, the minuter sought only a declarator of incompatibility, but later counsel stipulated that he wished the RAO to be quashed.[209] The RAR had, however, been completed at the time the proceedings were initiated and the sentencing judge was bound by section 210F(1)(a) to have regard to its terms: there was no way of preventing the allegations being taken into

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[202] *O'Leary*, at 14.
[203] *Ibid*, at 20.
[204] *Ibid*, at 21.
[205] *Ibid*, at 23. See also s. 7(4) and (7) of the HRA 1998; and art. 34 ECHR.
[206] See part E of this section of the chapter.
[207] *O'Leary*, at 23.
[208] *Ibid*, at 24.
[209] *Ibid*, at 7.

account by the assessor, because he had already done so. Thus, the declarator could not have the required practical effect. In addition, the court held that section 210B(6)'s prohibition on appealing the making of, or refusal to make, a RAO meant that the RAO could not be quashed.[210]

This latter point is of some significance since their Lordships appear to have regarded the minuter's recourse to compatibility procedure as an attempt to get around section 210B(6) and effectively appeal the RAO. They pointed to alternative avenues that could or should have been taken. Had the minuter wanted the aspects of the RAR concerning allegation information to be disregarded by the sentencing judge, the correct course of action would have been for the offender to avail himself of the statutory mechanisms for challenging a RAR;[211] if an OLR was nevertheless imposed, he could have appealed against the sentence.[212] If his contention was that an unfair trial had resulted from the consideration of the allegation information, then a plea in bar of sentence would have been the appropriate procedural step.[213] Having failed to obtain the declarator sought, the minuter was subsequently made subject to an OLR with a punishment part of 5 years.[214] One of the other consequences of the approach that was taken, in terms of attempting to address the use of allegation information from the standpoint of compatibility, and of directing the complaint solely towards the conduct of the assessor, was that their Lordships did not have to consider the extent to which the court may take account of allegation information and expressly reserved its judgment on the matter. This was not, the court said, the issue in the reference.[215]

The extent to which allegation information may properly be taken into account is, of course, entirely the issue so far as concerns about the use of allegation information go. Therefore, it is a matter of some regret and some frustration that what – at the time of writing – remains the leading case on reliance upon allegations in OLR sentencing does not address the degree to which they may be relied upon. Two things are, however, clear from *O'Leary*. The first is the extent to which the framework depends on section 210C(5) and (7) to ensure procedural fairness; these are the right of the offender to obtain his own RAR, and the right to an evidential

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[210] *Ibid*, at 25.
[211] *Ibid*, at 23.
[212] *Ibid*, at 24.
[213] *Ibid*.
[214] See BBC News article 'Thomas O'Leary given lifelong restriction order for abusing women'. Available at https://www.bbc.co.uk/news/uk-scotland-glasgow-west-28855171 Accessed 4/4/2020.
[215] *O'Leary*, at 23.

hearing on matters relating to the RAR.[216] As is discussed below, the right to obtain a defence RAR is only extended to those subject to a RAO – there is no such entitlement for those subject to an ICO. The second is that there is force in counsel for the minuter's argument that judges making a RAO 'set in train a sequence of events that [cannot] be stopped'.[217] The making of the RAO cannot be appealed. The completion of the RAR cannot be prevented, nor can the sentencing judge's taking account of it. If the court, having taken account of it, considers that the risk criteria are met, the OLR must be imposed. The only option at that point is an appeal against sentence. It is therefore essential that the criteria for making such an order in the first place are robust. This is returned to later.[218]

5.4.4 Opinion on Risk

The RAR must include an 'opinion on risk'.[219] An important part of this is assigning the offender a risk classification of 'high', 'medium', or 'low'.[220] There are standardised descriptors for each of these labels and the report must demonstrate, with reference to the narrative risk formulation, how the elements of these descriptors are satisfied.[221] Table 5.1 sets out the risk definitions in full. These definitions have changed over time. In the last set of standards and guidelines, the meaning of 'high risk' was: [222]

> [An] offender [who] presents an ongoing risk of committing an offence causing serious harm. The identified scenarios involve pervasive risk and there are few if any protective factors to mitigate that risk. The offender requires long-term risk management, including supervision, and where the offender has the capacity to respond, ongoing treatment.'

A 'medium risk' classification signified that the offender was 'capable of causing serious harm' but that there were enough protective factors to mitigate that risk, including a willingness to engage in risk management interventions.[223] Low risk offenders were (and are) unlikely to cause serious harm in the future, even if they had done so in the past.[224] When compared with current definitions, it is immediately apparent that they far more closely reflect the language of section 210E. The inclusion of the terminology of 'enduring propensity' in the criteria for high risk and

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[216] See 5.4.5 for a discussion of challenging the RAR.
[217] *O'Leary*, at 14.
[218] But see the discussion of RAO competence at 5.2.1.
[219] *RAR Standards*, 24, para. 44.
[220] s. 210C(3).
[221] *RAR Standards*, 24, paras. 47 and 48.
[222] *Standards and Guidelines for Risk Assessment* (2013), 49.
[223] *Ibid*.
[224] *Ibid*; *RAR Standards*, 27.

'propensity' in medium-risk classification is significant, especially as regards to the latter where it replaces the expression 'capable of causing serious harm'. This is a much more stringent test,[225] and one that reflects conceptualisations of dangerousness as a property of an individual.[226]

	Risk Definitions
High	The nature, seriousness and pattern of this individual's behaviour indicate an enduring propensity to seriously endanger the lives, physical or psychological well-being of the public at large. The individual has problematic, persistent, and pervasive characteristics that are relevant to risk and which are not likely to be amenable to change, or the potential for change with time and/or intervention is significantly limited. Without changes in these characteristics the individual will continue to pose a risk of serious harm: • There are few protective factors to counterbalance these characteristics • Concerted long-term measures are indicated to manage the risk, including restriction, monitoring, supervision, and where the individual has the capacity to respond, intervention • The nature of the difficulties with which the individual presents are such that intervention is unlikely to mitigate the need for long-term monitoring and supervision. In the absence of identified measures, the individual is likely to continue to seriously endanger the lives, or physical or psychological well-being of the public at large.
Medium	The nature, seriousness and pattern of this individual's behaviour indicate a propensity to seriously endanger the lives, physical or psychological well-being of the public at large. The individual may have characteristics that are problematic, persistent and/or pervasive but: • There is reason to believe that they may be amenable to change or are manageable with appropriate measures • There is some evidence of protective factors • The individual has the capacity and willingness to engage in appropriate intervention • They may be sufficiently amenable to supervision, or • There are other characteristics that indicate that measures short of lifelong restriction maybe sufficient to minimise the risk of serious harm to others

[225] See *Ferguson*, at 57.
[226] See the discussion at section 3.3.2.D of chapter 3.

Low	The nature, seriousness and pattern of this individual's behaviour suggests a capacity to seriously endanger the lives, physical or psychological well-being of the public at large, but there is no apparent long-term or persistent motivation or propensity to do so. The individual may have caused serious harm to others in the past, but: • It is unlikely that they will cause further serious harm • There is clear evidence of protective factors which will mitigate such risk • They are likely to respond to intervention • They are amenable to supervision • They do not require long-term restrictions in order to minimise the risk of serious harm to others While the individual may have, or had, characteristics that are problematic and/or persistent and/or pervasive, they can be adequately addressed by existing or available services or measures.

Table 5.1[227]

There is overlap between the medium and high-risk categories. The most important determinant of which rating someone is given is the extent to which the risk of serious harm can be managed in that particular case.[228] Assessors therefore require familiarity with the range of interventions that are available in prisons or, if applicable, mental health facilities,[229] so that they can provide an informed opinion on the likely impact on risk. The OLR sits at the top of the hierarchy of the prison sentences, and it should only be used when no other sentence is adequate to manage the risk the offender presents – the assessor has a role to play in restricting its use by indicating where he considers risk can be managed by less restrictive means.[230]

It is important to note that, while the assessor will have the risk criteria in mind, section 210E sets out the test that the judge must apply; the decision as to whether or not the criteria are met and, consequently, whether an OLR is to be imposed, is for the judge alone: the assessor does not decide the 'ultimate legal issue'.[231] The classification given is, however, closely bound up in that determination. It is also important to stress that, notwithstanding 'if at liberty' in the risk criteria, no offender who is the subject of a RAO will receive a non-custodial sentence. Neither the assessor nor the judge will have in mind the risk presented if the offender were to

[227] *RAR Standards*, 26 and 27. Reproduced with permission.
[228] Darjee and Russell (2011), 223.
[229] *Ibid*.
[230] Darjee and Russell (2011), 223.
[231] *Ibid;* see also *Ferguson* at 104; Liddell, at 75; *O'Leary*, at 22.

be released at the end of the RAO straight into the community;[232] rather it is the impact of interventions at the end of an alternative sentence that is under consideration.

5.4.5 Challenging a Risk Assessment Report

As noted previously, offenders who object to the contents of the RAR are entitled to challenge it. Section 210C(5) provides that an offender subject to a RAO may instruct the preparation of a RAR on his own behalf. The *Standards and Guidelines for Risk Assessment Report Writing* also apply to the preparation of these defence reports.[233] This right does not extend to people subject to an ICO with assessment of risk.[234] There is no obvious reason why this should be. It is not mentioned in the White Paper, and nothing contained in the MacLean Report could be construed as providing an explanation for it. It is possible that it was a legislative oversight, but it is not simply a matter of one provision in section 210B not being transposed into section 210D. The provision relates to the RAR itself in section 210C and section 210D is clear that all section 210C provisions apply to those on an ICO with assessment of risk with the exception of those that relate to the defence report.[235] A second potential explanation is that it may have been considered unnecessary because the ICO can be appealed, whereas the RAO cannot. This is slightly more plausible, but the difficulty with it is that section 53 may be appealed, but the RAR is authorised by section 210D. In short, a successful appeal against the ICO does not prevent the construction of RAR.

On the face of it, it appears that mentally ill offenders are being placed in a potentially less favourable position as regards challenging the RAR, though this might be mitigated by the requirement that defence reports are also prepared by accredited assessors in the manner prescribed by the RMA. The consistency of approach may reduce likelihood of significant divergences of opinion which may not be particularly helpful for an offender where he wishes to challenge the recommendations of a report pointing towards the need for intensive risk management over the long-term.[236] Courts must also consider other reports laid before them,[237] such as forensic psychiatric and psychological reports that do not conform to the standards of

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[232] *Ferguson v HM Advocate*, para. 94.
[233] CJ(S)A 2003, s. 5(2); *RAR Standards*, 7, para. 22.
[234] s. 210D(3).
[235] It might also be considered unlikely on the basis that practitioners would notice and challenge the disparity, but this could be done anyway, and it does not appear as though any such objection has been raised to date.
[236] It should also be noted that the defence report must be sent to the Principal Clerk of Justiciary upon its completion, like the RAR. There is no discretion in whether or not to do this: s. 210C(5).
[237] s. 210F(1).

the RAR and which were never intended to. There is nothing to prevent a judge from preferring the opinions in those other reports over the RAR: the RAR is just one of the sources of information that he has to consider, albeit an important one.[238] In *Laird v HM Advocate*,[239] the sentencing judge had accepted the opinion of a psychiatrist instructed to prepare a report on behalf of the appellant, that the RAR had underestimated the risk he posed. The appeal court held that the judge was entitled to do so: it was sufficient that he had considered the RAR as part of the evidence presented to him.[240] It may be, therefore, that there is little practical disadvantage.

Nevertheless, the legislation has been drafted to give the RAR centrality. The RAO and RAR were brought into being because the options for assessing risk otherwise available were considered to be inadequate. The RAR is far more comprehensive than, for example, a CJSWR,[241] and the need to ensure that the process was robust was great enough to warrant the creation of a body to research, and to accredit persons and methods for the purposes of undertaking, that assessment. Simply put, the whole point of the RAR is that it can fulfil a function that none of the alternative assessments can or, at the very least, that it can fulfil it better. The RAR is therefore – rightly – accorded a somewhat special status in the process, and particular attention must be paid to it by sentencing judges.[242] In the absence of any apparent justification for the discrepancy, it would seem appropriate to extend the right to obtain a defence report to those subject to section 210D.

Section 210C(7) provides that an evidential hearing may be held where an offender objects to the content or findings of the RAR.[243] This applies both to offenders subject to a RAO, and those subject to a ICO. In cases where there is a defence report, the assessors may meet to try to find agreement on areas of minor divergence of opinion; this may, in some instances, be sufficient to avert the need for a hearing.[244] Where the offender wishes a hearing to be held, a note of objection to the RAR is lodged,[245] setting out the objections and the grounds for them.[246] Both the offender and the prosecutor will be entitled to produce and examine witnesses in

[238] *Ferguson*, at 92.
[239] 2016 S.C.L. 62.
[240] *Ibid*, at 10.
[241] *Ferguson*, at 90.
[242] *Ibid,* at 101 and 103.
[243] s. 210C(7)(a).
[244] *RAR Standards*, 7, para. 22.
[245] s. 210C(7)(a).
[246] s. 210C(7)(b).

relation to the content or findings of the RAR to which the offender objects,[247] and the content and findings of the defence report, if there is one.[248] As was touched upon earlier, it is possible for complainers and victims of alleged criminal conduct to be called to give evidence at the hearing, though it does not appear that this has happened as of yet. If it does happen, section 210EA[249] provides that witnesses who used special measures in order to give evidence at trial in the original proceedings may also utilise those measures for the giving of evidence during the section 210C(7) hearing.[250] At the conclusion of the evidential hearing, the case proceeds to sentence.

5.5 Conclusion to Chapter Five

This chapter has critically discussed the process that must be followed where an OLR is under consideration as a final disposal. Where an offender is convicted of a sexual, violent, or life-endangering offence other than murder, or an offence the nature or circumstances of which are such that it appears to the court that the offender has a propensity to commit any such offence, and where the court considers on the motion of the prosecutor, or at its own instance, that the risk criteria set out in section 210E may be met, the judge must make a RAO. The only exceptions to this are where the offender is already subject to an OLR, and where he also meets the criteria for the making of an ICO. In the latter case the court must make an ICO with assessment of risk instead of the RAO. The making of a RAO or ICO results in a comprehensive risk assessment being undertaken, the product of which is a report as to the risk an offender would present if at liberty. This assessment is carried out by an assessor accredited for these purposes by the RMA, a body which performs certain critical functions in relation to the OLR and to risk assessment and management of offenders, including setting the standards and guidelines according to which the RAR must be constructed. The risk framework in which the OLR is embedded clearly demonstrates its status as a preventive sentence that is geared towards mitigating the risk of serious harm to the public. The next chapter considers the OLR itself, including the criteria for its imposition, and its operation. Some discussion of alternative disposals where the criteria for making an OLR are not met is undertaken. The OLR and its

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[247] s. 210C(7)(i).
[248] s. 210C(7)(ii).
[249] Inserted by the Management of Offenders (Scotland) Act 2005, s. 19.
[250] s. 210EA(4).

supporting framework are then subjected to detailed analysis and potential areas for reform are identified.

6. THE ORDER FOR LIFELONG RESTRICTION

6.1 INTRODUCTION TO CHAPTER 6

So far, this thesis has considered the ethical implications of preventive detention and the appropriate scope of such sentences. The legal and policy background to the creation of the OLR has been discussed, and the procedural framework governing the steps which must be taken before it can be imposed has been set out in detail. This chapter carries forward that discussion from the point of sentencing. The OLR, it will be recalled, is an indeterminate sentence made under section 210F(1) of the 1995 Act, and is available where three conditions are met: (1) the offender is to be sentenced in the High Court of Justiciary;[1] (2) the offender has been convicted of a sexual offence,[2] a violent offence,[3] an offence which endangers life,[4] or of an offence which suggests to the court that the offender has a propensity to commit an offence falling within those other categories;[5] and (3) the risk criteria set out in section 210E of the 1995 Act are found by the court to be satisfied on the balance of probabilities.[6] Where conditions (1) and (2) are met, and the court considers that (3) *may* be met, it must make one of the interim orders discussed in the last chapter, but usually it will be a RAO.[7] When the court finds that the risk criteria *are* met, an OLR *must* be made:[8] there is, on the face of it, no discretion.[9]

The purpose of this chapter is to subject the OLR to detailed descriptive and analytical treatment. In particular, the statutory risk criteria have yet to be subject to in-depth academic critique; a key objective of this chapter is to address that gap. The chapter proceeds as follows. Section 6.2 considers the human rights implications as they apply specifically to the OLR, with the emphasis on article 5 of the European Convention, article 6 having been addressed in chapter five in the context of the RAO.[10] Some attention is also given to the Council of

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[1] s. 210B(1).
[2] s. 210B(1)(a)(i).
[3] s. 210B(1)(a)(ii).
[4] s. 210B(1)(a)(iii).
[5] s. 210B(b).
[6] s. 210F(d).
[7] s. 210B(2).
[8] Unless a CORO is made or the offender is already subject to an OLR. This is discussed later.
[9] Though the process by which judges choose between available sentences is somewhat more complex than the legislation would suggest. See 6.3.3.
[10] See section 5.4.3

Europe's Recommendation to Member States on Dangerous Offenders. The statutory risk criteria which are central to the OLR's operation are considered in detail at section 6.3. Section 6.4 goes on to consider the structure of the OLR, and its status as an indeterminate sentence is discussed. Alternative disposals to the OLR and their relationship to it are explored in section 6.5. Before the chapter concludes, section 6.6 returns to the principles derived from the more theoretical discussions that took place in chapters two and three, and the OLR is evaluated against this framework.

6.2 HUMAN RIGHTS AND THE OLR

The core characteristic of indeterminate sentences for dangerousness is that they permit detention or imprisonment for longer than would be justified on the basis of the index offence alone. The exercise of such a power by the state plainly raises human rights considerations. There is a fairly substantial body of literature which addresses the human rights implications of preventive detention across a number of different jurisdictions.[11] As might be expected, little of this material is concerned directly with the OLR, but it has been addressed to some extent by Gailey *et al.*[12] and by Lord Carloway in his address to the International Society for the

[11] See, for example, G. Merkel, 'Incompatible Contrasts? – Preventive Detention in Germany and the European Convention on Human Rights', (2010) 11:9 *German Law Journal* 1046; E.S. Janus, 'Preventive detention of sex offenders: The American experience versus international human rights norms', (2013) 31:3 *Behavioural Sciences and the Law* 328; G. Michaelsen, 'From Strasburg with Love' – Preventive Detention before the Federal Constitutional Court and the European Court of Human Rights', (2012) 12:1 *Human Rights Law Review* 148; B. McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (New York, 2014), Part III; P. Keyzer, 'The "Preventive Detention" of Serious Sex Offenders: Further Considerations of the International Human Rights Dimensions', (2009) 16:2 *Psychiatry, Psychology and Law* 262; S. Alexander et al. '*M v Germany*: The European Court of Human Rights Takes a Critical Look at Preventive Detention', (2012) 29 *Journal of International and Competition Law* 605; P. Keyzer, 'The United Nations Human Rights Committee's views about the legitimate parameters of the preventive detention of serious sex offenders', (2010) 34:5 *Criminal Law Journal* 238; V. Stern, 'Preventive Detention', in P. Keyzer (ed.) *Preventive Detention: Asking the Fundamental Questions* (Cambridge, 2013); C. Slobogin, 'Preventive Detention in Europe, the United States, and Australia', in P. Keyzer (ed.) *Preventive Detention* (Cambridge, 2013); K. Gledhill, 'Preventive Detention in England and Wales: a Review under the Human Rights Framework', in P. Keyzer (ed.) *Preventive Detention* (Cambridge, 2013); B. Gogarty *et al.* 'The Rehabilitation of Preventive Detention', in P. Keyzer (ed.) Preventive Detention (Cambridge, 2013); K. Drenkhahn et al. 'What's in a name? Preventive Detention in Germany in the shadow of European human rights law', (2012) *Criminal Law Review* 167; B. McSherry and P. Keyzer, *Sex Offenders and Preventive Detention: Politics, Policy and Practice* (Sydney, 2009); and I. Fyfe and Y. Gailey, 'The Scottish Approach to High-Risk Offenders: Early Answers or Further Questions' in B. McSherry and P. Keyzer (eds.) *Dangerous People: Policy, Prediction, and Practice* (New York, 2011).

[12] Y. Gailey *et al*. 'An Exceptional Sentence': Exploring the Implementation of the Order for Lifelong Restriction', in K. McCartan and H. Kemshall (eds.) *Contemporary Sex Offender Risk Management*, Volume I (London, 2017).

Reform of Criminal Law.[13] These are returned to later. There has been some fairly substantial treatment of articles 5 and 6 in OLR case law.

6.2.1 ARTICLE 5 OF THE ECHR

Article 5 of the ECHR sets out an exhaustive list of circumstances in which deprivation of liberty may be justified in terms of the Convention. For the purposes of the OLR, sub-paragraph (a) is of most relevance, though (e) is also set out below as it is touched upon later. Article 5(1) provides that:

> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court...
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants...

The leading case on article 5 and its application to the order for lifelong restriction is *Johnstone v HM Advocate.*[14] The appellant was a first-time offender. He was being treated by a clinical psychologist – Dr AB – with whom he became obsessed. He covertly took a photograph of her with his phone during one of their appointments. Subsequently, a package containing two brooches and a note was hand-delivered through the letterbox of AB's home. The appellant was suspected and, having discussed the matter with a senior colleague, it was decided that AB would end contact with Mr Johnstone. In an attempt to avoid raising suspicion the appellant was told that, because of the package, she was ending contact with all of her patients.

Some days later, the windscreen wipers and wing mirrors were removed from the complainer's vehicle, which was parked at her place of work. When the police interviewed the appellant, he denied having been on the hospital grounds. There was insufficient evidence to charge him at that stage, and he was warned to stay away from AB. Subsequently, mental health nurses

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[13] Lord Carloway, 'The Lifelong Restriction of Serious Offenders and the Role of Risk Assessment in Scotland', Paper presented to the 27th International Conference of the International Society for the Reform of Criminal Law, 26th June 2014 in Vancouver, Canada. Available at http://webcache.googleusercontent.com/search?q=cache:a5oGYBwk9q8J:www.scotland-judiciary.org.uk/Upload/Documents/Lord_Carloway_Lifelong_restriction_of_serious_offenders_and_the_role_of_risk_management_in_Scotland_Vancouver_260614_1.doc+&cd=3&hl=en&ct=clnk&gl=uk Accessed 11/08/2020.

[14] 2012 J.C. 79.

visiting the appellant at home discovered that he had a photograph of the complainer as his computer background. Later that same day, the wipers and mirrors were again removed from AB's car. All this left the complainer extremely distressed. The police attended the appellant's home where they discovered six wiper blades and four wing mirrors in his open hall cupboard. At this point Johnstone was detained and, when searched, was found to be in possession of a key to AB's home. He also had several cannisters of pepper spray 'adapted for its discharge' in his residence.[15] His computer held 1,112 images of AB, her home, and her car. The appellant had written comments of a sexual nature on some of the images.

Johnstone pled to guilty to an offence under the Firearms Act 1968 in respect of the cannisters of pepper spray, and to one charge of breach of the peace in respect of his conduct regarding AB. Although the appellant had no previous convictions, the sheriff considered that the risk criteria may be met, and the case was remitted to the High Court for sentencing. The RAR classified the appellant as high risk. The defence report originally ascribed medium risk to the appellant, but this was revised upward to high risk when the report's author received information that indecent images of children had also been found on the appellant's computer. A psychologist's report also concluded he presented a high risk, there being particular concern that he would stalk and harass female professional caregivers.[16] An OLR with a punishment part of 18 months was made.

An appeal against sentence was lodged in which it was argued, *inter alia*, that OLRs violated ECHR article 5(1) because they are 'tantamount to a form of preventive detention'.[17] It was further argued that, even if the sentence itself was permissible in terms of article 5 generally, the appellant's article 5 rights had been violated by the Lord Advocate's 'resistance' to the appeal against sentence.[18] The reason for this, it was contended, was that the law governing the operation of the OLR was not 'sufficiently accessible, precise, and foreseeable in its application:'[19] simply put, the appellant could not have known that his offence could result in an indeterminate sentence. Refusing the appeal, the Court set out the four established requirements that the OLR must satisfy in order to comply with article 5(1)(a):

A. The imposition of detention must be causally connected to a conviction;

[15] *Ibid*, at para. 4.
[16] *Ibid*, at para. 6.
[17] *Johnstone*, at 11.
[18] *Ibid*, at para. 20.
[19] *M v Germany*, at 90; *Johnstone*, at 20.

B. The detention must be authorised by national law;
C. Continued detention is only lawful for as long the conditions that necessitated its intervention obtain; and
D. Opportunities for rehabilitation, education, and training must be offered to assist the individual subject to the detention to reduce his risk.

These are now considered in turn.

A. Detention must be Causally Connected to a Conviction for an Offence

First, in order for the detention to be compatible with article 5(1), there must be 'a sufficient connection between the conviction for a specific criminal offence and the order for detention'.[20] In the European Court of Human rights (EC*t*HR) case of *M v Germany*,[21] the applicant had been made subject to an indeterminate period of preventive detention following on from a prison sentence in Germany which, at that time, operated a 'dual track' system. Offenders considered to be dangerous could be imprisoned for a specified period (the punishment track) before being moved onto preventive detention (the preventive/corrective track) in a different part of the prison in which the conditions of detention were more favourable.[22] At the time he was sentenced, the applicant was found to suffer from a severe mental disorder. The maximum period of preventive detention he could be subject to was capped at 10 years by German law since this was the first time he had been subject to such an order. However, by the time his application came before the EC*t*HR, he had been in detention for 19 years. The case history is complex but, following re-conviction for offences carried out while in prison, a further order was made that his confinement be continued for an indeterminate period. This followed the enactment of a purportedly retrospective provision that permitted indeterminate detention of those subject to it for the first time. The questions for the court concerned the compatibility of that detention with articles 5(1) and 7(1). For the purposes of the present discussion only article

[20] J*ohnstone*, at 21*; M v Germany* (2010) 51 E.H.R.R. 41, at 87 – 88. See also *Van Droogenbroeck v Belgium* (1982) 4 E.H.R.R. 443, at 39.
[21] (2010) 51 E.H.R.R. 41. For more detailed consideration of *M* see K. Drenkhahn *et al.* 'What's in a name? Preventive Detention in Germany in the shadow of European human rights law', (2012) *Criminal Law Review* 167.
[22] *Ibid,* at 41.

5 is of interest since the OLR is a single prison sentence and questions concerning the retrospective imposition of preventive detention do not arise.[23]

In determining whether *M*'s detention was permissible in terms of article 5(1)(a), the Court emphasised that the word 'after' in that provision does not mean 'subsequent to'; it requires that the detention arise from the conviction: [24]

> In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue. However, with the passage of time, the link between the initial conviction and a further deprivation of liberty gradually becomes less strong. The causal link required by subpara. (a) might eventually be broken if a position were reached in which a decision not to release or to re-detain was based on grounds that were inconsistent with the objectives of the initial decision (by a sentencing court) or on an assessment that was unreasonable in terms of those objectives. In those circumstances, a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary and, hence, incompatible with art. 5.

M's initial placement in preventive detention had been justified in terms of subparagraph (a), but the link had been broken at the point of its extension and it was no longer permissible under that provision. The court also found that M's continued detention could not be justified under subparagraph (e) since, at the time the extension order was made, he was no longer considered to be suffering from a mental disorder. 'Unsound mind' was not, however, advanced as a justification for the detention and so it received little treatment save for the court to note that detention of some offenders might be permissible on that basis.[25]

The court in *Johnstone* accepted that the OLR was a form of preventive detention,[26] it was clear that the OLR, as a sentence imposed upon conviction, was causally connected to that conviction. The OLR itself was therefore found to be capable of complying with article 5 provided all other conditions were met. Additionally, several experts had agreed that the appellant presented a high risk of perpetrating similar offences in the future. Thus, the imposition of the OLR was causally connected to conviction in that particular case. The criteria for making an OLR, and its structure as a single prison sentence imposed upon conviction, mean that subparagraph (e) will not serve as a basis for its imposition. It might, however, be of relevance in cases where the OLR is combined with another order, such as a hospital direction

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[23] McSherry and Keyzer (2009), 66.
[24] *Ibid,* at 88.
[25] *Ibid,* at 103.
[26] *Johnstone,* at 20.

to the extent of the detention in hospital where transfer to prison is under consideration. This is discussed briefly below in the context of alternative disposals and ancillary orders.[27]

B. Detention must be Lawful

The second condition is that it is necessary, but not sufficient, that the detention conform to the substantive and procedural rules of national law.[28] This, as was explained in *M*, does not simply mean that there must be rules which (purport to) authorise detention, but also sets a standard for the 'quality of law': [29]

> 'Quality of law' in this sense implies that where a national law authorises the deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness. The standard of 'lawfulness' set by the Convention thus requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

Surprisingly given the facts, little is said of this requirement in *Johnstone*. The reason for this seems to be that the court considered it adequately dealt with in the context of another ground of appeal, which was that an amendment to the 1995 Act meant that section 210F failed for lack of clarity.[30] It had been argued by the appellant that the wording of the amending legislation meant that 'shall' in the section providing that – where the criteria are met – the judge 'shall' make an OLR had been deleted rendering the provision nonsensical. The court held that this was clearly not the intention, that 'shall' had not been deleted,[31] and the appellant's argument in respect of clarity therefore failed.

The difficulty with this is that, of the four criteria for ECHR compatibility laid out in *Johnstone*, this second requirement would seem to be the most problematic. The appellant was a first-time offender. It was not, to be clear, that he lacked a history of violent or sexual offending; he had no previous convictions of any kind. As was discussed in the last chapter, a very wide range of conduct is capable of coming within the auspices of section 210B, and therefore triggering the risk assessment process. Typically, however, there will have been a very serious index offence,

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[27] Section 6.5.2.B; see also the discussion at 4.4 on the background to the OLR's development.
[28] *M*, at 90.
[29] *Ibid*.
[30] The amendment by s. 14 of the Management of Offenders etc. (Scotland) Act 2005 was intended to amend s. 210F to enable the Court to choose between an OLR and a compulsion order and an OLR where an offender met the criteria for both.
[31] See *Johnstone*, at 13 – 17.

or a pattern of offending behaviour of which the index offence is a part. This is returned to in the next section of the chapter when risk criteria are considered in detail. Although not the only reported case in which an OLR was imposed on a first-time offender, *Johnstone* is something of an outlier in that there was no physical contact or attempt to make physical contact with the victim.

In *M v HM Advocate*,[32] which bears the greatest resemblance in terms of the lack of physical contact, the appellant[33] – a medical doctor – stopped his vehicle next to two children aged 10 and 11, asked if he could touch their legs, and attempted to entice them into his vehicle. The girls refused. The appellant returned to the place where he had met the children several more times in the days after, prompting someone who lived nearby to contact the police. The appellant admitted that his intention had been to groom the girls for the purposes of sexually abusing them and volunteered that he had previously engaged in the online grooming of children. He described himself to the criminal justice social worker as a 'recovering paedophile'.[34] A RAO was made and an OLR imposed, although the punishment part was reduced on appeal.

The appeal court in *Johnstone* acknowledged that – in terms of offences that might attract an OLR – the conduct 'was not at the highest level'.[35] This does not in any way diminish the impact upon the victim, but the case does appear to differ from others. The OLR is a 'sentence of last resort',[36] that was intended for 'exceptional offenders';[37] other sentences remain available in respect of offenders who do not require such intensive risk management for an indefinite period.[38] It does not seem reasonable to conclude that the appellant ought to have foreseen the possibility that an OLR might be imposed. Nevertheless, the court in *Johnstone* did not consider the 'lawfulness' requirement worthy of substantial treatment.

[32] 2012 S.L.T. 147.
[33] C.f. *Laird v HM Advocate* 2016 S.C.L. 62 in which there was no prior offending history, but the OLR was imposed in virtue of repeated rapes and sexual assaults of multiple victims all charged on the same indictment.
[34] *Ibid,* at 2.
[35] *Johnstone*, at 23.
[36] *McFadyen v HM Advocate* 2011 S.C.C.R 759, at 13.
[37] MacLean Report, 34, para. 5.1. See also the discussion at section 4.5.4 of this thesis.
[38] Although the relationship between consideration of the adequacy of these sentences and the risk criteria is not entirely settled. This is discussed later.

C. Continued Detention is only Permissible as Long as the Reasons for its Imposition Remain

The third condition is that, as well as a causal connection between conviction and detention, there must be a causal relationship between the purpose of detention and the detention itself.[39] The court approached this requirement by analogy with imprisonment for public protection (IPP), which shared many of the OLR's characteristics but differed in certain crucial respects.[40] In the case of sentences such as the OLR and IPP, the purpose is the protection of the public.[41] An individual's preventive detention may be compatible with article 5(1)(a) at the outset, but the requisite link could be severed if subsequent decisions regarding release or return to custody were to be taken based upon considerations other than those on which the initial decision to impose the detention was made.[42] Simply put, since the purpose of the OLR (or, as the case may be, IPP) is public protection, the detention remains permissible only as long as it is necessary to achieve that objective.[43] The court held that this requirement was satisfied in relation to the OLR by the right of periodic review by the Parole Board after punishment part expiry[44] as it is in relation to IPP after the tariff expiry.[45]

D. Access to Training and Rehabilitation Opportunities

The final condition is that, if detention is to remain compatible with article 5, the state must ensure access to courses and rehabilitation designed to help to the offender mitigate his risk to the extent he is able.[46] This requirement implicitly recognises that, in at least some cases, risk mitigation to the extent that release is feasible is not always attainable. Nevertheless, it places a positive obligation upon the relevant authorities to provide courses and treatment appropriate in the individual case. One of the objectives of this is to permit the offender to demonstrate his suitability for parole.[47] This can be problematic from a resourcing perspective and was one of

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[39] *Johnstone*, at 22.
[40] For a thorough account of IPP in England and Wales and its impact upon those subject to it, see J. Jacobson and M. Hough, *Unjust Deserts: Imprisonment for Public Protection* (London, 2010). IPP is touched upon again later.
[41] *Johnstone*, at 22; *R (James) v United Kingdom* [2010] 1 A.C. 553, at 12
[42] *R (James),* at 12. It was this requirement in relation to the hospital order with restriction order that led to the creation of the OLR though, as will be discussed later, the OLR has not solved the problem. See sections 4.2 and 4.3 of this thesis.
[43] *R (James),* at 12; *Johnstone*, at 22.
[44] *Johnstone*, at 22.
[45] *R (James)*, at 12.
[46] *Johnstone*, at 23; *R (James)*, at 26 and 112.
[47] *Johnstone*, *ibid*.

the significant difficulties that led to IPP's demise.[48] Such a difficulty does not *yet* appear to have arisen in respect of OLR prisoners,[49] but it is clearly something that requires to be kept under consideration by the Scottish Ministers. Regardless, no suggestion was made in *Johnstone* that this was an issue for the appellant.

Having set out the four conditions, the court went on to conclude that the OLR was capable of article 5(1) compatibility provided these criteria were satisfied which, it said, they were in the appellant's case.[50] Of interest, however, are the court's remarks regarding the risk as it falls to be assessed by the Parole Board and the seriousness of the index offence.[51]

> We observe in a case of this nature, where the events giving rise to the sentence are not at the most serious level, it is particularly important that the prison authorities and the Parole Board should carefully monitor the level of risk that the appellant actually poses...While the offence giving rise to the sentence was not at the highest level, it was nevertheless plainly serious, especially in its effect on the victim. This was made clear by the trial judge, who observed in his report that he was more than satisfied that the crime had a very serious impact on the complainer and that it would be wrong to minimise the seriousness. Moreover, a number of experts all ultimately concurred in the view that the appellant was at high risk of committing similar offences in the future.

The OLR is a risk-focused sentence imposed, not on the basis of the index offence alone, but on the characteristics of the offender and other indicators of risk such as prior offences. Careful assessment of risk level by the Parole Board – and other appropriate persons throughout the sentence[52] – is therefore important in every case, regardless of offence severity. Further, the implication seems to be that the sentencing judge, with the appeal court's approval, considered that disposing of the case otherwise than by an OLR would amount to a trivialisation of the impact of the offence upon the victim. That would seem to mischaracterise the sentence. Certainly, risk assessors do consider victim impact, but it does not necessarily affect the risk classification.[53] Where it is of particular relevance is in the assessment of the gravity of the offence and, therefore, the severity of the punishment it ought to attract. The latter is, of course, a part of the OLR, reflected in its punishment part. The case report does not give any detail on

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[48] Lord Carloway (2014).

[49] But see *Daly v Scottish Ministers* 2016 Rep. L. R. 38; *Beattie v Scottish Ministers* [2016] C.S.O.H 57; *G v Scottish Ministers* [2017] S.C.O.H. 10; and *Haggerty v Scottish Ministers* [2017] C.S.O.H. 61 where it was argued that a failure to assess for, and to provide courses of rehabilitation in respect of OLR prisoners had occurred. The petitions failed, but the cases are touched upon later.

[50] J*ohnstone*, at 23.

[51] *Ibid*, at 23 – 24.

[52] See sections 6.5.1.A and 6.5.1.B below.

[53] See, for example, *O'Leary* which is discussed in detail at section 5.4.3.

how the impact of the offence upon the complainer was used by the risk assessor, but it would be quite wrong to suggest a decision about whether to make an OLR could be appropriately based on victim impact divorced from the context of risk classification and formulation. In any case the legislative framework is clear that an OLR may be imposed only where the risk criteria are met and indeed *must* be imposed where they are met. The next section of the chapter considers the risk criteria in detail; however, it is worth saying something of the Council of Europe's Recommendation on dangerous offenders before proceeding as it provides an additional means of assessing the operation of the OLR from a human rights perspective.

6.2.2 The Recommendation on Dangerous Offenders

The Recommendation on Dangerous Offenders was adopted by the Council of Europe's Committee of Ministers on 19th February 2014.[54] Like other instruments of its type, the Recommendation is not binding upon member states; instead it provides a policy framework that states can implement over and above that which is necessary to comply with the ECHR.[55] It is therefore, as Gailey *et al*. have said, a useful tool for the evaluation of the OLR in human rights terms.[56] For the purposes of the instrument, a dangerous offender is someone aged 18 years or older[57] 'who has been convicted of a very serious sexual or very serious violent crime against persons and who presents a high likelihood of re-offending with further very serious sexual or very serious crimes against persons'.[58] Violent offending means the actual or threatened use of 'intentional physical force' and may entail physical, sexual, or psychological harm, or the deprivation of liberty.[59] Sexual offending is not defined. The Recommendations apply both to detention and monitoring in the community.[60] Gailey *et al*. are critical of the instrument's use of the terminology of dangerousness but, as they point out, its definition sets a very high threshold.[61]

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[54] Recommendation CM/Rec(2014)3 of the Committee of Ministers to Member States Concerning Dangerous Offenders. Full text available at: https://pjp-eu.coe.int/documents/41781569/42171329/CMRec+%282014%29+3+concerning+dangerous+offenders.pdf/cec8c7c4-9d72-41a7-acf2-ee64d0c960cb

[55] Rec/CM(2014)3 preamble.

[56] Gailey *et al*. (2017), 117.

[57] Rec/CM(2014)3, para. 2.a; Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures, para. 21.1. Adopted 5th November 2008 Full text available at: https://www.unicef.org/tdad/councilofeuropejjrec08(1).pdf

[58] *Ibid*, para. 1.a.

[59] *Ibid*, para. 1.b.

[60] *Ibid*, para. 1.g and h.

[61] Gailey *et al*. (2017), 117.

The issue of terminology was addressed at section 3.3.1, where reasons were given for adopting the language of dangerousness as a shorthand for the group of offenders with whom this thesis is concerned. Whatever one's views on the word, there are difficulties in ascribing a risk-based categorisation that applies to all of those who are, or who might be, made subject to an OLR. As will be discussed, the OLR is not restricted to offenders assessed as being at high risk of offending as defined by the RMA;[62] nor do they require to have been convicted of a serious violent or serious sexual offence at any time.[63] On that basis, suggested alternatives along the lines of 'high-risk serious violent or sexual offender' are problematic. Of course, one is at liberty to argue that only those who *can* fairly be labelled as such should be made subject to an OLR, but it would remain the case that – as the law currently stands – it is descriptively false. In any case, risk is defined in the instrument as 'the high likelihood of a further very serious sexual or very serious violent offence against persons',[64] and it is incorporated into the definition of the dangerous offender. Offenders are, on this account, properly subject to preventive detention only if they have already perpetrated a very serious violent or sexual offence, and they are assessed as being at high risk of perpetrating another. Whether one accepts this or not, it is apparent that the OLR's scope is much broader.

Gailey *et al*. also observe that the OLR's net is wider in terms of offender age. Youth sentencing is a highly specialised area of academic enquiry and is therefore outwith the ambit of this thesis. It is, however, worth noting that no age restrictions apply to the OLR. This is consistent with the recommendations of the MacLean Committee.[65] The Scottish Executive in the SVSO White Paper made clear its expectation that it would be 'extremely unlikely' that anyone younger than 21 would be considered for an OLR owing to the kind of offending required for its imposition.[66] Nevertheless, it considered that the 'interests of public safety' required that the OLR be available for an offender of any age that met the criteria.[67] As of 12th October 2020, 22 people under the age of 21 years had had RAOs made in respect of them, and 15 of those were then sentenced to an OLR.[68] These have included offenders as young as 15.[69]

[62] See the discussion at 5.4.4 and Table 5.1 for detailed consideration of risk classifications.
[63] In fact, they do not require a conviction for violent or sexual offending of any degree. See the discussion of RAOs at section 5.2.
[64] CM/Rec(2014)3, para. 1.c.
[65] MacLean Report, 34, para. 5.1.
[66] SVSO White Paper, 22, para. 7.
[67] *Ibid*.
[68] Only 12 of those were still under the age of 21 at the date of sentence. Source: RMA unpublished data.
[69] Fyfe and Gailey (2011), 211. It is not clear whether that case resulted in the imposition of an OLR.

Aside from general scope, however, the framework supplied by the Recommendation and that associated with the OLR are very similar indeed. In terms of risk assessment, the Recommendation emphasises the need for an 'evidence-based, structured [approach], incorporating validated tools and professional decision-making' by persons who have in-depth knowledge of risk assessment methodologies, and are explicit about their limitations when reporting.[70] Risk assessments should be conducted with the dual aims of ensuring that the measures taken for risk management are the least restrictive – i.e. that they are proportionate to the risk – and of informing an individualised sentence, tailored to the management of risk presented by that particular offender. [71] The risk assessment should not, the instrument says, be used to determine what sentence should be imposed, although it 'may be used constructively to indicate the need for interventions'.[72]

This is entirely compatible with the RMA's structured professional approach to risk assessment and risk reporting. As regards determination of sentence, there is no delegation of the sentencing function to the risk assessor.[73] The judge alone is responsible for passing sentence, and an OLR may be made in cases where the offender is found to be either high or medium risk.[74] Its imposition is therefore not determined by the risk classification selected by the assessor. However, if the judge accepts a classification of low risk, an OLR should not be made.[75] On that basis it might be that the RAR may effectively determine when an OLR is *not* made – in which case there are a number of options available[76] – but that would seem to be entirely consistent with the Recommendation's principle of risk-proportionality.

The remainder of the Recommendation deals with ongoing risk management and the treatment and conditions that dangerous offenders are detained in. It recognises that deprivation of liberty, whether justified on the ground of prevention or not, is punishment in itself,[77] and emphasises proportionality between level of risk and the measures taken to mitigate it.[78] Treatment should be construed as including psychological and social care,[79] and should be

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[70] CM/Rec(2014)3, para. 28.
[71] *Ibid*, para. 29
[72] *Ibid*.
[73] *O'Leary* 2014 S.C.C.R. 422, at. 22; *Ferguson*, at 104; *Liddell*, at 75.
[74] *M v HM Advocate*, at 12; *Ferguson*, at 107.
[75] *Ferguson*, at 108. Though the RMA has amended the risk criteria since the opinion was delivered, the low-risk descriptor still requires that the offender be assessed as manageable 'without long-term restrictions'. See table 5.1 in chapter 5.
[76] This is discussed at 6.4.2.
[77] CM/Rec(2014)3, para. 40
[78] *Ibid*, para. 41.
[79] *Ibid*, para. 43.

available to any offender who needs it.[80] Such treatment should not be viewed as purely a risk management intervention: [81]

> The purpose of the treatment of dangerous offenders should be such as to sustain their health and self-respect and, so far as the length of the sentence permits, to develop their sense of responsibility and encourage those attitudes and skills that will help them to lead law-abiding and self-supporting lives.

Finally, the instrument recommends specialist training and supervision, emphasises the need for resourcing, and multi-agency co-operation.[82] It also includes a recommendation that states make provision for specialist research on tools for assessing risks and needs of dangerous offenders.[83] As Gailey *et al.* say, there is a 'striking consistency' between the Recommendation and the Scottish framework. They do, however, harbour concerns about the OLR's scope.[84] This is largely determined by the criteria set out in section 210B of the 1995 Act, and the risk criteria set out in section 210E.

6.3 The Risk Criteria

The risk criteria set out in section 210E are central to the OLR's operation. An OLR may only be imposed – and must be imposed – in cases where the court finds those criteria are, on the balance of probabilities, met.[85] Section 210E provides that:

> For the purposes of sections 195(1), 210B(2), 210D(1) and 210F(1) and (3) of this Act, the risk criteria are that the nature of, or the circumstances of the commission of, the offence of which the convicted persons has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical, or psychological well-being, of members of the public at large.

The cross-references refer to the sheriff's duty to remit a case to the High Court for sentencing where he considers the risk criteria may be met, for the RAO, the ICO with assessment of risk, and the OLR, respectively. In determining whether the risk criteria are met, the court must have regard to: the RAR, and defence report if there is one;[86] a report in respect of a person

[80] *Ibid*, para. 44.
[81] *Ibid*, para. 45.
[82] *Ibid*, paras. 49 – 50.
[83] *Ibid*, para. 51.
[84] This is returned to in section 6.5.1.
[85] s. 210F(1).
[86] s. 210F(1)(a).

subject to an ICO with assessment of risk;[87] any evidence led in the section 210C(7) hearing, if there was one;[88] and any other information the court has before it.[89] If the judge concludes that, on the balance of probabilities, the risk criteria are met he has no option but to make an OLR. The only exception is where the court has the option of making a compulsion order. In that case the judge may make either an OLR or a compulsion order.[90] Where the risk criteria are not found to be met, it will not be competent for the court to impose a life sentence.[91] The Crown has a right of appeal against the court's refusal to make an OLR in cases where the prosecutor contends that the risk criteria are, on the balance of probabilities, met.[92] The key terms in section 210E are not further defined in the legislation, but the requirements for satisfying the risk criteria have received judicial consideration. The following sections consider the constituent elements of the risk criteria in turn, with reference to case law, in order to construct a detailed account of the substance of the risk criteria and their application.

6.3.1 The Conviction-Risk Relationship

The primary aim of the OLR is the protection of the public,[93] though as a sentence of life imprisonment it would be absurd to suggest that it is not a punishment.[94] The risk criteria have been drafted in such a way as to permit them to be satisfied either by a serious index offence, or by a less serious offence which is part of a pattern of behaviour.[95] *Kinloch v HM Advocate*[96] concerned two prisoners in HMP Edinburgh who had been seeking transfer to another prison. Apparently frustrated at their lack of success, they held a fellow prisoner at knifepoint: [97]

> [The appellants] entered the complainer's cell, pretending they had something to tell him. They closed the cell door. Mr Quinn put a bladed weapon to the complainer's neck while Mr Kinloch stood nearby…They held the complainer hostage with the use of two homemade weapons. Demands were made for Kentucky Fried Chicken, Chinese food, a pouch

[87] s. 210F(1)(b). That report being, for all practical purposes, the same as a RAR.
[88] s. 210F(1)(c).
[89] s. 210F(1)(d).
[90] s. 210F(1). It is interesting that the provision does not specify a compulsion order with a restriction order, but it seems extremely unlikely that anyone who met the criteria for an OLR would ever be made subject to the compulsion order alone. This is returned to later.
[91] s. 210G(2).
[92] s. 210F(3).
[93] *Henderson*, at 10; *RAR Standards*, 7, para. 26.
[94] *McCluskey v HM Advocate* 2013 J.C. 107, at 18.
[95] *Kinloch v HM Advocate* 2016 J.C. 78, at 24.
[96] *Ibid*.
[97] *Ibid*, at 4.

> of tobacco and a bus to HMP Barlinnie…The incident lasted six hours, after which it was resolved peacefully.

The first appellant, Kinloch, had numerous previous convictions, including offences of dishonesty, assault, robbery, and culpable and reckless fire-raising. He had breached community service orders and failed to comply with conditions of probation and bail. The RAR risk formulation described him as having ‘a propensity to utilise threats and coercion alongside physical violence to achieve his aims. His actions are underpinned by violent ideation and intent, use of aggression in order to maintain his self-esteem and feelings of control and assessed Personality Disorder traits that affect his attitudes, perceptions and behaviours’.[98] He was classified as high-risk. The second appellant, Quinn, had a long history of public order offences, possession of weapons, and assault, including an assault to severe injury and permanent disfigurement in which he stabbed his victim. The assessor concluded that he was high-risk having ‘a personality disorder characterised by pervasive self-centredness, lack of concern for others, impulsivity, aggressive and antisocial attitudes, poor anger control, lack of trust and stubbornness’.[99] Both offenders received OLRs and appealed on the grounds that the judge erred in finding that the risk criteria had been met.

The court held that the risk criteria had not been met. The reason for this is the need for a causal connection between the index offence and the need for detention.[100]

> The language of the legislation is clear in requiring not only that there be a serious risk posed by the offender but also a link between the offence and that risk. If there is no such link, the risk criteria cannot be satisfied, irrespective of the general level of risk posed by the offender in terms of the risk assessment report.

The court considered that, ‘while serious in terms of prison discipline’ it was significant no injury or attempt to cause injury to the complainer occurred.[101] The incident was not in itself regarded as capable of giving rise to the inference that there was a likelihood the offenders would, if at liberty, seriously endanger the lives of the public.[102] Despite the appellants’ previous convictions, the court also held that the offence could not be construed as part of a pattern of behaviour that demonstrated such a likelihood: the offence having taken place during the offenders’ imprisonment as a means to obtain transfer meant that it was too highly

[98] *Ibid*, para. 8.
[99] *Ibid*, para. 11.
[100] *Ibid*, para. 27; see also *Johnstone*, at 21; *M v Germany* (2010) 51 E.H.R.R. 41, at 88; *van Droogenbroeck v Belgium* (1982) 4 E.H.H.R. 443, at 39. This was discussed at part 6.2.1.
[101] *Ibid*.
[102] *Ibid*.

contextualised to suggest a risk was presented to the public at large.[103] The OLRs were quashed and extended sentences substituted.

Three things are worthy of note. The first is that fact of an offence having taken place in a prison does not, in itself, rule out the possibility of the risk criteria being met. In the case *McKinlay v HM Advocate*,[104] which was discussed earlier,[105] the appeal against the making of an OLR was refused in circumstances where a very serious assault upon another prisoner was deemed to be part of a pattern of behaviour. Second, although the risk criteria are drafted to require a serious offence against the person *or* to require a pattern of behaviour be demonstrated, in practice, cases in which there is no pattern are likely to be disposed of otherwise than by OLR; usually, this will mean an extended sentence.[106] Finally, even if one accepts that – notwithstanding the histories of instrumental violence, and use of bladed weapons – the index offence in *Kinloch* was not part of a pattern of behaviour, it seems appropriate to make the observation that it was a horrifying attack upon an individual who was held in a cell for six hours at knifepoint. The victim's prisoner status in no way diminishes that. It is therefore somewhat discomfiting to see it described in the judgment only as 'serious in terms of prison discipline'. The offence was serious, even if the court could not envisage the offenders carrying out a similar offence against a non-prisoner victim.

It is also worth noting that an offence can be deemed to be part of a pattern of behaviour that satisfies the risk criteria in the absence of any violence whatsoever. In *McFadyen v HM Advocate*,[107] the complainer became aware that the appellant had entered her bedroom in the early hours of the morning, the front door apparently having been left unlocked by one of her daughters. When asked who he was and what he was doing in her bedroom, the appellant, Jason McFadyen, replied 'I'm Kev' before running from the house with the complainer's laundry basket.[108] Subsequently, the woman's daughters were found to have various items of clothing missing including underwear. The appellant also removed a handbag and makeup box. This offence is clearly alarming and capable of causing significant fear and distress, but it is difficult to see how it could satisfy the risk criteria in isolation. The incident does,

[103] *Ibid*, para. 28.
[104] [2019] H.C.J.A.C. 15.
[105] See section 5.4.2 of the thesis.
[106] Fyfe and Gailey (2011), 209.
[107] 2011 S.C.C.R. 759.
[108] *Ibid*, at 2.

however, take on a somewhat different character when considered in light of the appellant's history.

Prior to the index offence, the appellant had acquired several convictions which included two charges of theft by housebreaking, and one assault to severe injury and permanent disfigurement.[109] These offences spanned several years. The assault to severe injury occurred when he entered the home of a woman who, upon hearing someone in her house, had emerged from the bedroom to look. McFadyen struck her on the face, forced her to the floor, sat on top of her and attempted to strangle her. He then removed a knife from his pocket and began stabbing her. The complainer managed to get hold of the knife and snap the blade, but he continued to stab her with the broken blade. He then stood up and began kicking and punching her on the face and body before ordering her back into the room. McFadyen then ran into another bedroom, stole a handbag, and ran from the house. He was sentenced to a hospital order with restriction order which was automatically converted to a CORO when the MHA 2003 came into force.[110] The offence which led to the OLR occurred during a period of conditional discharge to supervised residence in his own tenancy.

The RAR concluded that the appellant presented a high risk, with women, intimate partners and hospital staff the most likely targets for violence. Of particular significance were the repeated pattern of entering houses and stealing women's clothing – the RAR noted that he had previously worn stolen clothing while carrying out violent offending[111] – and that the violence he employed went far beyond that which was required to accomplish the thefts. This led the assessor to conclude that the purpose of the violence was gratification.[112] The court concluded that the sentencing judge had been correct to impose the OLR. Attempts made to manage the risk presented by means of a CORO had failed, as had previous prison sentences. The RAR, and psychiatric reports the court had before it, had also concluded that the appellant did not have a mental disorder of the type that could be responsive to medical treatment in hospital.[113]

In contrast to *Kinloch*, therefore, it did not matter that no physical harm had been done to the complainer, or that no attempt to inflict such harm had been made. It was sufficient that the

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[109] *Ibid*, at 3.
[110] See 6.5.2.B.
[111] *Ibid*, at 8
[112] *Ibid*.
[113] *Ibid*, at 10.

offence had similar characteristics to previous offending where serious harm had been done. *McFadyen* is also significant in that it addresses the relationship between the OLR and other disposals that might be considered, and it will be returned to in this context later. At this stage, the point to be emphasised is that the purpose of the OLR is to prevent serious offences; it does not have to be imposed *for* such an offence, nor does the offence have to be one of violent or sexual offending. What matters is the complete picture, as it were.

6.3.2. 'LIKELIHOOD'

There must be a likelihood that the offender, if at liberty, will seriously endanger the public. 'Likelihood' was defined straightforwardly in *Liddell v HM Advocate*[114] as 'something that is likely; a probability',[115] the court having decided that the dictionary definition should be applied. This is consistent with the approach taken by the courts in other contexts.[116] In *Ferguson v HM Advocate*,[117] counsel for one of the appellants submitted that the court had erred in adopting the dictionary definition: 'likelihood' should be construed as requiring a 'real and substantial risk', that was more than a bare possibility, but not necessarily more probable than not.[118] Lord Carloway, in delivering his opinion, noted that *Liddell* was binding upon the court, and along with it the definition. However, he went on to expand somewhat upon it: [119]

> [G]iven that the statutory context is liberty of the person, the meaning of likelihood must be that of probability; the court requiring to be satisfied, before making an OLR, not just that there is a substantial or real chance of serious endangerment but that such endangerment is more likely than not to happen or, put another way, *that it will occur*.

This is something of a departure from *Liddell*, and from section 210E. A 'substantial or real chance' would seem to set a lower threshold than 'more likely than not;' but the level of certainty implied in 'that it will occur' requires something more than being satisfied the occurrence is more likely than not. Lord Drummond Young in his judgment in *Ferguson* agrees that 'likelihood' means probable, in the sense of more likely than not; that it is a stringent

[114] 2013 S.C.L. 846.
[115] *Ibid*, para. 52.
[116] See, for example, *Fotheringam v Dunfermline District Council* 1991 S.L.T. 610, at 611 ('more likely than not'); and *North Uist Fisheries Ltd. v Secretary of State for Scotland* 1992 S.C. 33, at 39 ('what is probable').
[117] 2014 S.L.T. 431.
[118] *Ibid*, para. 76.
[119] *Ibid*, para. 98. Emphasis added.

construction, which is clearly justified by the fact that the liberty of the individual is involved'[120] but does not go so far as Lord Carloway's 'that it will occur'. Clearly, if the sentencing judge was satisfied such endangerment *would* occur, the risk criteria would be met, but the language of section 210E does not set that high a standard. RARs address likelihood in probabilistic terms, and assessors are required to emphasise limitations of long-term projections:[121] simply put, an assertion of that degree of certainty would not be compatible with defensible risk practice. Since the RAR has been given 'a very particular significance'[122] as regards the application of section 210E, it seems odd that it should be read into the risk criteria.

6.3.3 'If at Liberty'

The risk that an individual poses can only ever be assessed at the point of sentence, but the risk criteria direct the judge to look forward to the point at which the offender will be at liberty.[123] This is not a question of what the risk of serious endangerment would be if he were *immediately* liberated; what is to be contemplated is the point at which the offender would be at liberty if he were not sentenced to an OLR.[124] It is difficult to envisage any circumstance in which a person subject to a RAO/ICO with assessment of risk ultimately receives a non-custodial disposal and, since it is not competent for a court to impose a life sentence where an OLR is not made,[125] this means that what must be considered is the risk the offender will pose at the conclusion of a determinate and most likely extended sentence.[126] Lord Carloway in *Ferguson* put it in the following terms:[127]

> [T]he judge contemplating making an OLR is looking at the likelihood of serious endangerment when the offender is at liberty, but taking into account what he/she might be anticipated to have achieved by way of rehabilitation whilst in custody and the predicted effects of post release supervision. However, the judge has to bear in mind that, under standard (not OLR) sentencing regimes: first, rehabilitation programmes, including courses, cannot be forced upon the offender; and, secondly, any period of post release supervision will inevitably expire. If serious endangerment is regarded as likely at any point in what, but for the imposition of an OLR, would have been the offender's post release future, an OLR *must* be made.

[120] *Ibid*, para. 128.
[121] RAR Standards, 25, para. 49.
[122] *Ferguson*, *per* Lord Clarke at 139.
[123] *Ibid,* at 99.
[124] *Ibid*, at 100.
[125] s. 210G(2).
[126] *Ferguson*, at 100.
[127] *Ibid*, at 102. Emphasis in original.

Thus, 'at liberty' refers, not only to the point at which the offender is no longer in custody, but to the time at which he is no longer subject to the conditions of a licence. This does not require a 'precise calculation' of the date that such measures would cease, or certainty as to the offender's condition at that time.[128] All it means is that the judge will consider, having regard to the RAR and other sources of information before him, whether measures short of an OLR will result in any 'material reduction' of the risk of serious endangerment.[129] If he considers that they will not, he will be entitled to conclude that the risk criteria are met. The significance of this is that, were 'at liberty' to be construed as immediate release, far more people would meet the risk criteria because the potential for risk mitigation by measures short of an OLR would not be part of the deliberation. It also means that – while there is no requirement for judges to move up a 'ladder of escalating punishments' before imposing an OLR[130] – the risk criteria, properly applied, preclude the making of an OLR in circumstances where the offender's risk could be adequately addressed by an extended sentence.

6.3.4 Serious Endangerment

The risk to which section 210E refers is that the offender 'will seriously endanger the lives, or physical or psychological well-being of members of the public at large'. Clearly any offence which threatens life entails serious endangerment, but what may constitute serious endangerment in the context of non-life-threatening physical injury, and especially psychological harm sufficient for the purposes of section 210E, is less certain. Like other elements of the criteria, the concept of serious endangerment is not further defined in the legislation, nor has it received substantial judicial consideration. That may simply be because the cases which have arisen are those in which the nature of the risk presented is regarded as self-evidently serious enough. Alternatively, it might be that risk level serving as a proxy for dangerousness means that the same difficulties arise in determining what is sufficiently serious as they do in defining dangerousness. In any case, it is necessary to look beyond section 210E to the case law, pre-legislative materials, and other aspects of the framework to develop an understanding of what serious endangerment actually encompasses for the purposes of the OLR.

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[128] *Ibid*, at 101.
[129] *Ibid*.
[130] *Ibid*, at 104.

It will be recalled that the first constraint on the use of the OLR is section 210B(1), which prescribes the offences in respect of which a RAO or section 210D order can be made:

> (a) ...
>
> (i) a sexual offence (as defined in section 210A of [the 1995] Act);
>
> (ii) a violent offence (as so defined);
>
> (iii) an offence which endangers life; or
>
> (b) is an offence the nature of which, or circumstances of the commission of which, are such that it appears to the court that the person has a propensity to commit any such offence as is mentioned in sub-paragraphs (i) to (iii) of paragraph (a) above.
>
> (2) Where subsection (1) above applies, the court, at its own instance or (provided that the prosecutor has given the person notice of his intention in that regard) on the motion of the prosecutor, if it considers that the risk criteria may be met, shall make [a RAO]...

From this it is apparent that – notwithstanding the conceivability that some sorts of property offences may result in serious psychological harm – the OLR framework is concerned with offences against the person. Subsection 210B(1)(b) is different from the others in that it contains both a backward-looking and forward-looking element requiring the court to consider possible future offending scenarios. This might appear to replicate the exercise in section 210B(2), but it should be emphasised that (b) is about the offence of which the individual has already been convicted; the forward-looking element serves only to broaden the scope of the OLR so that conviction for a sexual, violent or life-endangering offence is not necessary for its application. This is one of the aspects of the legislation that have led some commentators to raise concerns about the potential for 'net-widening' over time.[131] Nevertheless, it is generally consistent with the scope and recommendations of the MacLean Report which was discussed in detail earlier in the thesis.[132] It is, however, worth noting that the number of OLRs made each year has been relatively stable.

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[131] McSherry and Keyzer (2009), 102; Fyfe and Gailey (2011), 205; and Gailey *et al*. (2017), 119. This is returned to later.

[132] See part 4.5.

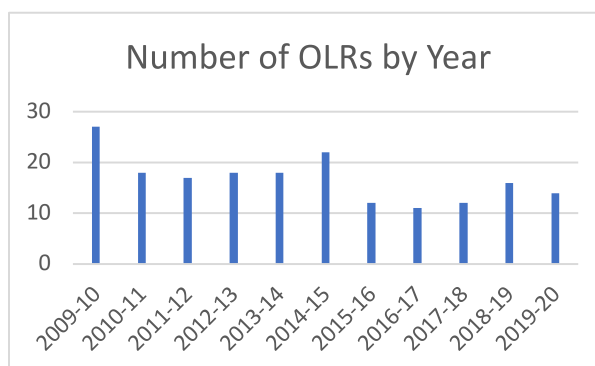

Fig. 6.1[133]

The spikes visible in Figure 6.1 above are likely the result of RAOs awaiting disposal.[134] The MacLean Committee tasked, it will be recalled, with making proposals for the management of 'serious sexual and violent offenders who may present a continuing danger to the public',[135] interpreted 'continuing danger' as referring to a high risk of serious violent or sexual offending in the future.[136] It did, however, also consider that, whilst the emphasis was on serious sexual and violent offending, the OLR should be available in cases where index offence was neither sexual nor violent:[137]

> The option of imposing an OLR should be available only in the High Court. The court should have the power to impose an OLR where the offender has been convicted on indictment of (a) an offence of violence, (b) a sexual offence, or (c) any other offence which is closely related to, or reflects a propensity for violent, sexual, or life-endangering offending.

The Committee was also clear that the residual category should only serve as grounds for an OLR where the offender had a history of violent or sexual offending and the "other" offence was related to or otherwise reflective of that history.[138] No such qualification appears in the legislation though, as was discussed earlier, a pattern of behaviour is normally required when the offence is not a serious violent or sexual offence. There is thus some divergence between the Committee's recommendations and the wording of section 210B. Nevertheless, it is clear that it is the infliction of physical harm upon others with which 210B is concerned and section 210E must be read in this context.

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[133] Source: RMA Annual Reports 2013-14 to 2019-20. Available at: https://www.rma.scot/resources/annual-reports/ Accessed 18/11/2020.
[134] See Fig. 6.2 below.
[135] MacLean Report, 1.
[136] *Ibid*, 8, para. 2.6.
[137] MacLean Report, 40, rec. 16.
[138] *Ibid*, para. 6.2.

The constraining effect of section 210B on the risk criteria is important. The MacLean Committee's formulation of the statutory criteria for making an OLR differ quite considerably from section 210E:[139]

> The High Court [must be] satisfied that there are reasonable grounds for believing that the offender presents a substantial and continuing risk to the safety of the public such as requires his lifelong restriction. If the Court is so satisfied, it must make the Order.

Two aspects of this recommendation are key. First is the requirement for a 'substantial and continuing risk to the safety of the public', and second is the necessity of 'lifelong restriction'. Section 210E instead describes the risk as being one that the offender 'if at liberty, will seriously endanger the lives, or physical, or psychological well-being, of members of the public'. This risk is a long-term risk since, as was discussed above, it is one presented at the conclusion of determinate – and likely extended – sentence, but it need not be thought to be a *lifelong* risk. The statutory risk criteria had not been drafted at the time the White Paper was published, but they are more closely reflective of the 'substantial and continuing risk to public safety' to which the white paper refers.[140] Section 210E does not, however, use the word 'safety', instead employing the terminology of danger to life or to 'physical or psychological well-being'.

The line between safety and well-being is undoubtedly blurred; but they are not synonymous. For example, in public health well-being is a subjective measure associated with the concept of quality of life; it is considered to be of value precisely because it encompasses something more than freedom from disease or injury.[141] The 1995 Act makes a distinction between safety and welfare in the context of mental health disposals, the latter being deemed insufficient to authorise detention in the interests of a third party.[142] Notwithstanding that the contexts here are different – although the compulsion order is a competent disposal in some cases where the section 210E criteria are met[143] – the risk criteria as enacted do appear set a lower threshold in terms of both duration and intensity of risk: whilst one's wellbeing is undoubtedly

[139] *Ibid*, 41, rec. 17.
[140] *SVSO* White Paper, 23, para. 2.8.
[141] See, for example, S.M. Skevington and J.R. Böhnke, 'How is subjective well-being related to quality of life? Do we need two concepts and both measures?' (2018) 206 *Social Science & Medicine* 22; M. Fisher, 'A Theory of Public Wellbeing' (2019) 19 *BMC Public Health* 1283; and P. Walker, 'Wellbeing: Meaning, Definition, Measurement and Application', in P. Walker and M. John (eds.) *From Public Health to Wellbeing* (London, 2012), esp. 26-27.
[142] s. 57A(3)(c) and s. 59A(3)(c). This replicates the so-called civil commitment provisions of the Mental Health (Care and Treatment) (Scotland) Act 2003.
[143] This is touched upon later.

endangered by conduct which makes one unsafe, it does not follow that all threats to wellbeing threaten one's safety.

The overall picture though is one that centres on violent and sexual crimes: the MacLean Committee's terms of reference, its recommendations, the publication of the white paper titled *Serious Violent and Sexual Offenders*, and the criteria for making a risk assessment order have the same general focus, even if their wording differs somewhat. This is reflected in the reported cases which, at the time of writing, have addressed OLRs made in respect of rape,[144] sexual offences (other than rape),[145] breach of a sexual offences prevention order (SOPO),[146] attempted murder,[147] (non-sexual) assault,[148] possession of indecent images of children,[149] and breach of the peace.[150] Some cases involved more than one category of offending, and some involve multiple appellants.[151] In cases in which there was no physical contact with any person,[152] there was found to be a risk of some form of contact offending with, it seems, the exception of *Johnstone*.[153] It therefore seems likely that, while psychological suffering is – rightly – recognised as being worthy of prevention, it is the psychological impact of offending of a sexual or violent nature that is in contemplation.

6.3.5 'The Public at Large'

The construction of 'public at large' has received little judicial treatment, but its placement in the risk criteria does not amount to a requirement that the offender is likely to seriously endanger any member of the general public. In *M v HM Advocate*[154] it was argued that, since

[144] *Petch and Foye v HM Advocate* 2011 J.C. 210 (second appellant); *GWS v HM Advocate* [2011] H.C.J.A.C. 45; *MacLennan v HM Advocate* 2012 S.C.C.R. 625; *Munro v HM Advocate* 2015 J.C. 1; *Laird*; *McIntosh v HM Advocate* 2016 S.C.L. 923; *Daly v Scottish Ministers* 2016 Rep. L.R. 38; *R(J) v HM Advocate* 2017 S.C.L. 814; *Beattie*; and *Moynihan v HM Advocate* 2017 J.C. 71.

[145] *Liddell*; *McCluskey*; *Byrne v HM Advocate* 2016 S.C.L. 998; *G v Scottish Ministers* [2017] C.S.O.H. 10

[146] *McMillan v HM Advocate* 2012 S.C.L. 547.

[147] *Ross v HM Advocate* 2013 S.C.L. 1054; *Ferguson*; *Connors v HM Advocate* [2018] H.C.J.A.C. 5

[148] *Ferguson*; *O'Leary v HM Advocate* 2014 S.C.C.R. 422; *Simpson v HM Advocate* 2015 S.C.L. 510; and *McKinlay v HM Advocate* [2019] H.C.J.A.C. 15.

[149] *HM Advocate v McCuaig* [2018] H.C.J.A.C. 55.

[150] *M*; *Johnstone;* and *McFadyen*. These cases involved offending of sexual nature, stalking behaviour, and the entry to a woman's home in the early hours of the morning and taking of underwear, respectively.

[151] For example, *Petch and Foye;* and *Ferguson.*

[152] *M v HM Advocate*; *McFadyen; Johnstone;* and *McMillan.*

[153] Though it should be emphasised that this understanding is derived from the case report; it is possible that the RAR and/or RMP contemplate future offending scenarios in which a violent or sexual offence occurs and that this was not mentioned in the judgment. Given what has been said above about the case, however, that would seem a strange omission.

[154] 2012 S.L.T. 147.

the appellant's risk was specifically one of sexual offending against young girls, the risk criteria had not been satisfied. This was given short shrift.[155]

> The court is also unable to agree that a risk to a section of the public "at large", such as young girls, does not constitute a risk to the public "at large" as set out in the section. The use of the term "at large" is primarily intended to exclude those offenders who pose a risk to an individual or individuals as distinct from posing a general danger to persons, such as young girls, whoever they may be.

A distinction must therefore be made between risks to specific, identifiable individuals, and risks to classes of persons. This means, for example, that an offender who attempted to murder his wife because she had an affair with his best friend may not meet the risk criteria; but one who seriously assaulted his husband because he victimised intimate partners might. Evidence of a pattern of behaviour will be useful in distinguishing between cases where it really is an individual that is at risk, and those when an individual is at risk because of a role they happen to fulfil at the time.[156] The rationale behind such making such a distinction is likely that if the risk is in fact to a specific individual, it may be mitigated by measures short of an OLR. Whether one accepts this as legitimate or not, a finding that the risk criteria are not met does not amount to a finding that an offender is worthy of less punishment; it is a judgment on the manageability of risk only. Classes of person, risk to which has resulted in an OLR, include intimate partners,[157] females,[158] professional caregivers,[159] and children.[160] Despite the judgement in *Kinloch* discussed above, an OLR was made in the case of *McKinlay*[161] where the victim was the offender's fellow prisoner. In *Kinloch*, however, the motivation for the offence – the desire to obtain a prison transfer – was regarded as specific enough to warrant its consideration as an isolated incident despite a history of serious violent offending involving similar weapons. In *McKinlay*, the appellant had a history of serious violent offending against fellow prisoners across multiple custodial sentences as well as a history of attacks on members of the public. Notwithstanding the criticisms made of *Kinloch* earlier in the chapter, it seems that the distinction between these two cases turned, not so much on the class of persons to which the victims belonged, as to the instrumental nature of the offending in *Kinloch*. A risk to prisoners may therefore satisfy the risk criteria, though if the risk were *only* to other prisoners

[155] *Ibid*, at 12.
[156] See the discussion at 6.3.1 above.
[157] For example, *McFadyen*; *Ferguson; McKinlay; Laird; O'Leary.*
[158] For example, *Johnstone, McFadyen, Ross, Ferguson, Laird, R(J); McIntosh.*
[159] For example, *McFadyen; Johnstone.*
[160] For example, *M; McMillan; Ferguson; Byrne; McIntosh; R(J).*
[161] [2019] H.C.J.A.C. 15; see also 6.3.1.

one might wonder what special protection an OLR would confer, since the major distinction between it and any other custodial sentence to which an offender might be subject is that it permits detention in prison indefinitely. Regardless, as was said earlier, risks of serious harm to prisoners ought to be treated as seriously as those to any other section of the community.

6.3.6 Conclusion to Section 6.3

Despite occupying a central role in the OLR sentencing framework, the risk criteria set out in section 210E have received little academic attention. This section of the chapter has sought to go some way to addressing that gap in the literature. The criteria were broken down into their constituent parts and addressed in detail with reference to case law, other parts of the statute, and other sources such as pre-legislative material. The risk criteria are satisfied where, on the basis of the RAR and any other information before the court, the sentencing judge considers that the offender is more likely than not to perpetrate a serious offence of a violent or sexual nature. That offence may be directed at any section of the community. The offence for which the offender falls to be sentenced will reflect the risk that he poses, and that risk will not be substantially reduced in the course of a determinate sentence. Where the judge finds that the risk criteria are, on the balance of probabilities, met he has no option but to make an OLR unless a compulsion order is made. The next section of the chapter considers the variety of sentencing scenarios that follow from consideration of whether the risk criteria are met.

6.4 Final Disposal

It was said earlier that where the court finds that on the balance of probabilities the risk criteria are met, the judge has no option but to impose an OLR. The only exception to this is where the offender also meets the criteria for a compulsion order. In that case, the court may make either a compulsion order or an OLR.[162] The interaction between the OLR and the other sentences that could be made is complex, and for reasons of space it cannot be fully explored; the focus of this section will therefore be on the making of the OLR, but some consideration of the decision process at the point of sentence is warranted. In most cases, the judge will have made a RAO. Where he has considered that the risk criteria may be met *and* that a compulsion order

[162] s. 210F(1).

or hospital direction may be appropriate, he ought to have made an ICO with assessment of risk under sections 53 and 210D of the 1995 Act.[163]

There are thus six possible sentencing scenarios:[164] (1) a RAO was made and the court is satisfied that, on the balance of probabilities, the risk criteria in section 210E are met; (2) a RAO was made and the court is not satisfied that the risk criteria are met; (3) an ICO with assessment of risk was made, and the court is satisfied that the risk criteria are met, and is satisfied that the criteria for making a compulsion order are met; (4) an ICO with assessment of risk was made, and the court is satisfied that the risk criteria are met, and is not satisfied that the criteria for making a compulsion order are met; (5) an ICO with assessment of risk was made, and the court is not satisfied that the risk criteria are met, and is satisfied that the criteria for making a compulsion order are met; and (6) an ICO with assessment of risk was made, and the court is not satisfied that the risk criteria are met, and is not satisfied that the criteria for making a compulsion order are met. However here, for simplicity – and to keep the emphasis on the OLR – these outcomes will be considered in terms of those where an OLR is made, and those where it is not.

6.4.1 Where an OLR is Imposed

An OLR is imposed where the risk criteria are met. The offender may have been subject to a RAO or an ICO with assessment of risk.[165] Despite its categorisation in section 210F(2) as a 'sentence of imprisonment...for an indeterminate period', the OLR operates as a life sentence on much the same basis as the MLS for murder. The sentencing judge must fix a punishment part which is the minimum period of time that the offender will spend in custody before being eligible for release.[166] The Parole Board for Scotland sitting as a Tribunal will decide whether to direct his release,[167] and will do so only where satisfied that his continued detention is not necessary for the protection of the public.[168] If he is released, he will be subject to a licence – and recall for any breach of its conditions – for life.[169] He will also be subject to a risk management plan (RMP) for the duration of the sentence, i.e. for the rest of his life.[170] If the

[163] See section 5.3 of the last chapter.
[164] Assuming best practices have been followed and an ICO has been made where it ought to have been.
[165] Scenarios 1, 3, and 4.
[166] Prisoners and Criminal Proceedings (Scotland) Act 1993, s. 2(3). Hereafter 'the 1993 Act'.
[167] s. 2(4).
[168] s. 2(5)(b).
[169] s. 2(4).
[170] CJ(S)A 2003, s. 6(1).

OLR is made following on from an ICO with assessment of risk, and the criteria for making a compulsion order were also found to be met, there are two options: the OLR could be made on its own, or it could be combined with a hospital direction (HD). This section of the chapter first sets out the key aspects of the OLR, before discussing the HD briefly.

A. The Punishment Part

For the purposes of parole and licensing, the OLR operates as a life sentence. The 1993 Act requires that the judge, when imposing an OLR, sets a punishment part.[171] The punishment part is the period of imprisonment the judge considers 'necessary to satisfy the requirements of retribution and deterrence',’[172] and is the minimum term that the offender will spend in custody. Although the punishment part is a feature of the MLS the calculation is quite different – and is considerably more complex – in the case of the OLR. In section 6.5.1.A of the chapter, references are to the 1993 Act unless otherwise specified.

In setting the punishment part, the judge must take into account the seriousness of the offence in respect of which the OLR is being imposed, and the seriousness of any other offences of which the offender was convicted on the same indictment;[173] any previous convictions;[174] and the sentence that the judge would have passed, had he not imposed the OLR.[175] This 'notional determinate sentence' is the starting point, and is what makes the OLR's punishment part calculation more complicated than that of a MLS. Once the starting point has been selected, the judge must identify the part of that period which is appropriate for the purposes of retribution and deterrence.[176] In identifying this part, the judge must ignore any element of the notional determinate sentence that would have been attributable to public protection;[177] there is no need to reflect the need to protect the public in the punishment part, because this is addressed by the imposition of the indeterminate sentence.[178] Once the public protective

[171] s. 2(1)(ab) inserted by CJ(S)A 2003, Sch. 1, para. 1(2)(a).
[172] s. 2(2).
[173] s. 2(2)(a).
[174] s. 2(2)(b).
[175] s. 2(2)(d) and s. 2A(1)(a).
[176] s. 2A(1)(b).
[177] s. 2A(2)(a).
[178] *O'Neill v HM Advocate* 1999 S.C.C.R. 300, at 307E. It is the whole of the element for public protection that is stripped out, not simply that reflecting the particular requirements that led to the making of the indeterminate sentence: *Petch and Foye*, at 44.

element has been stripped out, a downward adjustment is made: this will usually mean halving the figure that has been arrived at,[179] but may be a lesser reduction.[180]

The purpose of this adjustment is to reflect, at least broadly, the early release provisions as they operate in relation to determinate sentence prisoners.[181] Determinate sentence prisoners subject to a sentence of 4 years or more are entitled to have their case referred to the Parole Board for Scotland (PBS) when they have served one half of their sentence,[182] though they will not necessarily be granted parole at that point. Since the OLR prisoner will be eligible to apply for parole once the punishment part has elapsed, setting that period at one half of that calculated on the basis of the notional determinate sentence is intended to go some way to achieving comparative justice.[183] That makes sense: it is risk that has necessitated the imposition of the OLR; not desert, and therefore the OLR prisoner should afforded the opportunity to demonstrate his suitability for release at the same stage he would have if he were subject to a determinate sentence. However, the period that is (usually) halved is not the duration of the notional determinate sentence – it is the duration of the notional determinate sentence with the public protective element stripped out.

The result is that the punishment part is less than half the duration of the determinate sentence, and therefore the prisoner is eligible to be considered for parole *earlier* than he would have been had he been given a determinate sentence instead. This anomaly was raised in argument by the advocate depute in *O'Neill v HM Advocate*[184] though, as the court pointed out, the reality is that very few life prisoners are released at the conclusion of their punishment part and so it considered the problem 'may be more apparent than real'.[185] Still, the anomaly's 'unsatisfactory' existence was again addressed in *Petch and Foye v HM Advocate*,[186] where the court considered that – because it arose from section 2 of the 1993 Act – if it were to be

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[179] s. 2B(1)(a).
[180] s. 2B(1)(b).
[181] *O'Neill*, at 962; *Ansari v HM Advocate* 2003 J.C. 105, at 111F; *Petch and Foye*, at 29; s. 2(2)(aa)(iii) as in force until 23/09/2012.
[182] s. 1(3)(a). Those on short sentences (i.e. of less than 4 years) are eligible for automatic release at the halfway point: s. 1(1).
[183] *O'Neill*, at 962; *Petch and Foye*, at 29; see also J. Chalmers, 'Punishment parts and discretionary life sentences', (2003) 24 *Scots Law Times* 199; and D. Thomson, 'The Scottish Ministers try to resolve the issue of punishment parts in discretionary life sentence cases – but do they succeed?' (2012) 5 S.L.T. 23, 26.
[184] 1999 S.L.T. 958, at 962.
[185] *O'Neill*, at 963. According to Thomson, only around 1 in 4 Life Prisoner Tribunals result in a direction to release the prisoner on licence. This is not limited to cases which are being heard by the Parole Board for the first time. See. Thomson (2012), 26. The odds of being granted parole for OLR prisoners are even less favourable. This is discussed below.
[186] 2011 J.C. 210, at 53.

remedied, then Parliament would have legislate. This Parliament did in the form of the Criminal Cases (Punishment and Review) (Scotland) Act 2012, which amended (and rather significantly complicated) the procedure for setting the punishment part of an OLR to provide *inter alia* that the punishment part should normally be set at half of the stripped down notional determinate sentence,[187] but that it could be longer if the court considers it appropriate.[188] In determining whether it is appropriate to specify a longer period, the court must consider the seriousness of the offence on its own or alongside other offences of which the offender was convicted on the same indictment;[189] where applicable, the fact of the offence having been committed during imprisonment for an earlier offence;[190] and any previous convictions.[191] Once this exercise has been completed, any discount to be applied for a guilty plea will be applied.[192]

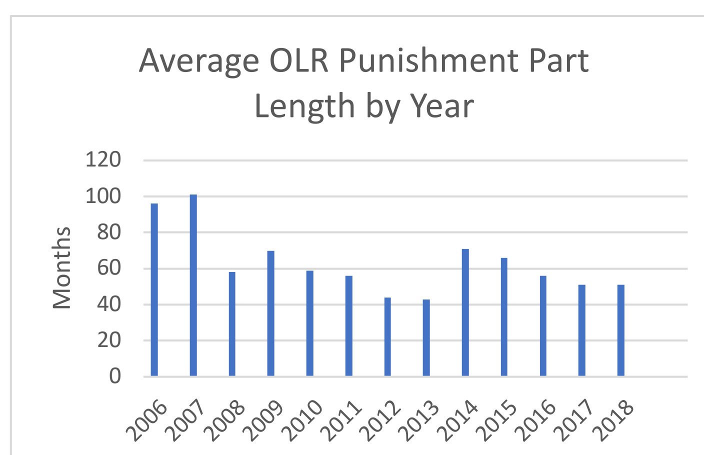

Fig. 6.2[193]

These amendments to the 1993 Act were intended to rectify the anomaly identified in *O'Neill*[194] but they are convoluted and repetitious. For example, in identifying the period that is appropriate to satisfy the requirements of retribution and deterrence, the judge is required by section 2(2) to consider the seriousness of the offence,[195] and any previous convictions;[196] this

[187] s. 2B(1)(a).
[188] s. 2B(2).
[189] s. 2B(5)(a).
[190] s. 2B(5)(b).
[191] s. 2B(5)(c).
[192] s. 2A(1)(c). Section 196 of the 1995 Act requires the court to have regard to certain matters when a guilty plea is tendered, to state the extent to which the sentence that would otherwise have been passed has been reduced in virtue of the plea, or – if no discount is to be granted – to explain why it is unwarranted.
[193] Source: RMA FOI(S)A 2004 response dated 24/10/2019.
[194] Scottish Government, *Criminal Cases (Punishment and Review) (Scotland) Act 2012 Policy Memorandum*, para. 34. Available at: https://www.parliament.scot/S4_Bills/Criminal%20Cases%20(Punishment%20and%20Review)%20(Scotland)%20Bill/Policy_Memo.pdf
[195] s. 2(2)(a).
[196] s. 2(2)(b).

period – the requirement for public protection having been stripped out – is then required by section 2B(1)(a) to be halved unless, that is, the judge in virtue of section 2B(1)(b) considers that a lesser reduction is appropriate having considered the seriousness of the offence and any previous convictions. This seems an extremely complicated way of saying that the punishment part should be set at one half the stripped down determinate sentence unless the judge considers it appropriate to specify a longer period. Regardless of the complexity, it is the manner in which the length of the punishment part is calculated – specifically the reduction to reflect the point at which a determinate sentence prisoner would be eligible for consideration for release – that means the punishment parts in OLRs are significantly shorter than those in MLSs in which no such reduction takes place.[197] The mean OLR punishment part length across the years that the order has been available is shown in figure 6.2. It should, however, be noted that there is nothing to prevent a punishment part being set which exceeds the life expectancy of the offender,[198] and whether or not the offender is paroled, he will remain subject to the sentence and therefore risk management measures for the rest of his life. Central to this is the risk management plan which was discussed briefly in the last chapter, and is considered in more detail below.

B. Risk Management and the Risk Management Plan

The key legislative provisions are set out in the CJ(S)A 2003, and references to legislation in this section are to that Act unless otherwise specified. The RMP is the responsibility of the Lead Authority which, it will be recalled, is determined by where the offender resides. At the point the OLR is imposed the Lead Authority will – in most cases – be the Scottish Ministers, though in practice this function is discharged by the Scottish Prison Service on their behalf.[199] If a hospital direction was made with the OLR, the offender will go to hospital and the Lead Authority in that case will be the hospital managers.[200] The Lead Authority must inform the RMA immediately that it assumes responsibility for an OLR offender; this is so the RMA can

[197] This is returned to below.
[198] s. 2(3A)(b). This is why populist whole life sentence policies to ensure 'life means life' – like that most recently touted by Scottish Conservative MSP Liam Kerr, and in the process of being revived by its now leader Douglas Ross – are, aside from being morally repugnant, redundant.
[199] s. 7(1); *Standards and Guidelines for Risk Management* (2016), 45.
[200] s. 7(2); *RAR Standards* (2016), 45. Who constitutes hospital management depends on the hospital in which the individual in a patient, such as the Special Health Board responsible for the State Hospital: see s. 329 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

assist the Lead Authority in meeting the requirements of the Standards and Guidelines and in discharging statutory functions. [201]

The Lead Authority must convene a 'multi-agency, multi-disciplinary group' which will be responsible for the ongoing assessment and management of the risk the offender poses; this is called a Risk Management Team (RMT).[202] This is often accomplished via established structures such as MAPPA, or Restricted Patient Multi-disciplinary Teams but, if appropriate, the Lead Authority may establish a group specifically for the management of the individual.[203] The precise make-up of the group is dependent upon the offender's circumstances, needs, and risks and thus can – and should – change over time; a range of professionals, such as psychologists, addiction workers, prison staff, police, and prisoner or hospital management may be part of it.[204] Criminal justice social workers may be part of the RMT's composition but even if not, RMA guidelines are that they should always have the option to attend.[205] The author of the RAR may be invited to attend the first meeting.[206] There will be a Case Manager (CM) appointed by the Lead Authority. The CM is supported by, and accountable to, the RMT and co-ordinates the completion and delivery of the RMP.[207]

Section 6(3) of the CJ(S)A 2003 provides that the RMP must set out an assessment of risk;[208] set out the measures to be taken for the minimisation of risk, and how such measures are to be co-ordinated;[209] and be in such form as is specified by the RMA.[210] The *Standards and Guidelines for Risk Management* contain the relevant guidelines, and also a template for the RMP.[211] The template requires analysis of previous offending behaviour, including the index offence, and a risk formulation. This includes a description of the 'cycle of events, thoughts, feelings, and behaviours that precede and follow an episode of seriously harmful offending'.[212] The wording is of interest since it presupposes a history of seriously harmful offending, but as has been discussed no such history is required for the imposition of an OLR. The risks that the plan has been created to manage are then set out. The author of the plan must identify

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201 *RAR Standards* (2016), 52
202 *Ibid*, 46.
203 *Ibid*.
204 *Ibid*, 47.
205 *Ibid*.
206 *Ibid*, 48.
207 *Ibid*, 49.
208 s. 6(3)(a).
209 s. 6(3)(b).
210 s. 6(3)(c) and s. 6(5).
211 An editable Word template is available at https://www.rma.scot/standards-guidelines/risk-management/
212 See the 'Analysis of Offending and Risk Formulation' section of the template.

predisposing, precipitating, perpetuating, and protective factors along with early warning signs. Indicators of positive change are also included, and this is important. The OLR was – as has been discussed – designed to be a means of risk *management* where community reintegration, where possible, is the goal. This optimism is, however, less visible when OLR prisoner progression is considered. This is returned to later. The RMP is structured around four risk management strategies: supervision; monitoring; treatment or other intervention; and victim safety planning. These measures should be proportionate to the risks they aim to address and should be tailored to the individual offender's needs.[213] The RMP may make provision for any person who 'may reasonably be expected to assist in the minimisation of risk to have functions in relation to the implementation of the plan',[214] but such a role should be collaboratively agreed rather than imposed.[215] The template requires that requires that collaborative RMP development has occurred. Once prepared, the RMP will be submitted to the RMA for approval.[216]

The OLR offender will be subject to the RMP for life, but the plan should evolve over time as his needs and risk change. The RMT is required to keep the plan under review and identify circumstances in which it may no longer be appropriate.[217] Where there has been, or is likely to be, a significant change in circumstances, the Lead Authority must conduct a formal review of the plan.[218] If the Lead Authority concludes that the plan has become, or is likely become, unsuitable, it must prepare a new RMP.[219] In circumstances where it is concluded that a new Lead Authority requires to be designated, then that agency will prepare the new RMP.[220] 'Significant change' is not further defined in the legislation, and it is for the Lead Authority to determine whether one is or is not likely to occur, however, the RMA gives the following examples: transfer to conditions of lower security; change of place of detention, such as transfer to another prison or movement between hospital and prison; where the offender is in the community, a change of address; changes in physical or mental health. [221] Transfer to a new Lead Authority is itself a significant change.[222]

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[213] *Standards and Guidelines for Risk Management*, 27 – 30.
[214] s. 6(4).
[215] *Standards and Guidelines for Risk Management*, 36.
[216] This process was discussed at section 5.2.3 of the thesis.
[217] *Ibid*, 46.
[218] s. 9(5).
[219] s. 9(6)(a).
[220] s. 9(6)(b).
[221] *Standards and Guidelines for Risk Management*, 59.
[222] *Ibid*.

There is no statutory requirement for a formal annual review of the RMP, but the RMA requires that an annual implementation report (AIR) be submitted within 12 months of the RMP's approval and thereafter.[223] It consists of a copy of the current RMP and a progress record,[224] and serves as evidence that the RMP is being implemented and kept under review by the Lead Authority.[225] The AIR can accommodate minor changes, i.e. those which are not significant enough to render the RMP unsuitable.[226] The AIR is also the responsibility of the RMT and, while it is expected the RMT will meet regularly – with the frequency of meetings determined by the individual case[227] – the requirement to agree and prepare the AIR means that the RMT must convene at least once a year.[228]

C. Parole and Management in the Community

Perhaps the most significant change in an OLR offender's circumstances is his transition from custody to the community. Although the offender is entitled to be considered for release on licence at the expiry of the punishment part, OLR offenders will normally require to have progressed from closed conditions before being tested in conditions of lower security in the National Top End,[229] and then open estate before parole can be considered.[230] He will also have had periods of temporary release; this is to help prepare the offender for release, and to test him to ensure that he may be adequately managed in the community.[231] Progression is not linear, and the individual may be returned to conditions of increased security if this is necessary.

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[223] *Ibid*, 58.
[224] *Ibid*, 92.
[225] *Ibid*.
[226] *Ibid*.
[227] *Ibid*, 37.
[228] *Ibid*, 48.
[229] NTE facilities are part of the closed prison estate to which offenders may be transferred before release or transfer to open conditions. They allow offenders to be tested in conditions of lesser security while accessing greater privileges. NTE facilities are located at HMP Shotts, Peterhead, Perth, Edinburgh, and Cornton Vale.
[230] See, for example, *Beattie*, at 4; and Gailey *et al.* (2017), 137. But the Parole Board has directed the release of an offender who had not been tested in open conditions before his release. See *O'Leary v Scottish Ministers* [2020] C.S.O.H. 81. This is returned to shortly.
[231] Scottish Prison Service, *Risk Management and Progression* (Edinburgh, 2011) chapter 5, para. 5.5. Available at: https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjM0qfihfPsAhUYiFwKHXA3DPEQFjABegQIARAC&url=http%3A%2F%2Fwww.sps.gov.uk%2Fnmsruntime%2Fsaveasdialog.aspx%3FfileName%3DFOI%2BHQ%2B17236%2BAttachment%2B15545_2589.pdf&usg=AOvVaw1uv1qBXm445Lmq_fvn0ko9 Accessed 28th Oct 2020. For the purposes of the first grant of temporary release (FGTR) the OLR is treated as if it were a life sentence, and the Scottish Ministers – in practice the Minister for Community Safety – must approve it. See G. Nicholson, *Ministerial Decision Making in Criminal Justice Cases* (Edinburgh, 2008), ch. 3, paras. 3.9 to 3.11.

When the case comes before the PBS, the tribunal will direct the prisoner's release on life licence only if it considers that it is no longer necessary for the protection of the public that he remain confined.[232] In assessing whether this test is met, the tribunal has a statutory obligation to 'have regard' to the plan;[233] this does not mean that it is bound to 'slavishly obey', but it must demonstrate that the RMP has been carefully considered.[234] In *O'Leary v Scottish Ministers*,[235] the petitioner had been granted parole despite an RMP which assessed his risk as unmanageable in the community and with which community based social work agreed. All the risk management measures identified in the RMP were custodial. In short, Mr O'Leary was released in circumstances where the relevant agencies simply did not know what to do to protect others from him. On the day of his release, the Lead Authority – now Glasgow City Council – submitted a breach report. It did not allege, or provide evidence of, any breach of licence conditions. Instead it said that the petitioner had been 'released without a forward facing community risk management plan being in place to adequately meet critical elements of Supervision, Monitoring, Intervention and Victim Safety Planning…' and that 'his risk in the community is assessed as unmanageable'.[236] The petitioner was recalled to custody three days after his release.[237] The procedural history from this point is complex. However, in response to a query from the petitioner's solicitor, the Parole Board intimated that, in a case such as this, it would expect to have sight of a 'community facing' RMP; that is, a RMP which sets out measures that will be taken to ensure adequate risk management in the community.[238] Standing the Scottish Prison Service's position that he was not yet manageable in the community, no such plan was forthcoming. The petitioner's solicitor sought to have the Parole Board compel the production of such a plan and, having been unsuccessful on more than one occasion, lodged a petition for judicial review in which it was argued *inter alia* that the Scottish Ministers had acted unlawfully in refusing to prepare such a plan, and that their failure amounted to a breach of article 5. The court held that the only obligation on the Scottish Ministers was to produce an RMP, and that they had done this. An RMP, as a creature of statute, was a plan prepared according to the requirements of the CJ(S)A 2003, the relevant standards and guidelines, and approved by the RMA. It would be 'absurd' if the law were construed as compelling production

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[232] s. 2(5)(b).
[233] 1993 Act, s. 26B.
[234] *O'Leary* [2020] at 55.
[235] [2020] C.S.O.H. 81.
[236] *Ibid*, at 53.
[237] Though the Parole Board maintained that the recall was incidental to the breach report, it having considered 'intelligence' under r. 6 of the Parole Board (Scotland) Rules 2001 at the same time that had a bearing on risk. See para. 23.
[238] *O'Leary* [2020], at 53.

of a plan stating that a prisoner was ready for release when, in the opinion of the Lead Authority he was not.[239] Counsel for the RMA, intervening in the proceedings, had gone further than this, pointing out that there 'was no basis to suggest that a risk management plan required (or even was permitted) to be produced which misrepresented as manageable in the community risk which had been assessed to be unmanageable there'.[240] Additionally, the court held that 'satellite reports' i.e. those supplementary to the RMP, for example a contingency plan for unexpected release, ought to be discouraged. Satellite reports, the court said, could undermine the RMP to which the statutory framework has given centrality.[241] At the same time the court relied on the Parole Board's powers to obtain information on risk from other sources to reject the contention the petitioner was disadvantaged by reliance on the RMP.[242]

This case is interesting for a variety of reasons but, for the present purposes, it is of significance because of what it tells us about the role of the RMP in parole decision-making. First, given the duty to have regard to the RMP but not to 'slavishly follow' it, it appears that the role of the RMP in parole decision-making is analogous to that of the RAR in sentencing. However, at sentencing the practice of consideration of sources other than the RAR is routine.[243] Second, the nature of the duty to have regard – especially if, following this decision, the Parole Board declines to obtain other risk reports – is such that it will be very difficult for the Board to justify departure from it, especially in cases where the RMP's author considers the offender is not ready for release. One other point is worthy of consideration. The court decided that the Parole Board (Scotland) Rules 2001 could not reasonably be interpretated as empowering the Board to compel a Lead Authority to produce a report that it considered appropriate. That would be, as the court held, 'absurd'. It is, however, submitted that the court – and perhaps even the RMA – has understated the position somewhat. No plan that set out measures that, evaluated against the risk assessment, were inadequate to manage the risks identified would be capable of conforming to the standards and guidelines, or of being approved by the RMA. Since a RMP is a plan conforming to these requirements, it could not, in fact, *be* a RMP. Any Lead Authority who prepared such a plan would therefore be failing in its statutory obligations.

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[239] *Ibid*, at 61.
[240] *Ibid*, at 52.
[241] *Ibid*, at 81.
[242] *Ibid,* at 55.
[243] As noted earlier, it is competent to impose an OLR on the basis of reports which conflict with the RAR. For example, *Laird*.

Finally, it is worthy of note that parole is exceedingly rare in the OLR population. Of the 206 OLRs that have been made[244] – 193 of which are 'active'[245]– 11 offenders have been released on licence, four of whom were recalled to custody.[246] As of 31st March 2020, 66% of offenders' punishment parts had expired.[247] This will be returned to later, but it should be remembered that the OLR is a risk-focused sentence, and the decision as to whether to release is based on the manageability of that risk. OLR punishment parts are also relatively short owing to the manner in which they are calculated. Simply put, the punishment part should not be regarded as a measure of the appropriateness (or otherwise) of an offender's continued detention.

D. HOSPITAL DIRECTION

The HD is a mental health order that can be made in either the sheriff court, or the High Court of Justiciary in respect of offenders convicted on indictment.[248] The criteria for making the order are virtually identical to those for making a CO, which are outlined in section 6.5.2.B below. The HD cannot be made without a sentence of imprisonment, thus its duration is determined by the length of the custodial sentence it is made alongside.[249] Consequently, where an HD is attached to an OLR, the OLR renders the period of detention in hospital indeterminate.[250] Patients subject to a HD are restricted patients and therefore decisions about discharge rest with the Scottish Ministers;[251] there is, however, a right of appeal which can be exercised in the same way as an appeal against sentence.[252]

The HD is, in effect, a prison sentence served in hospital, and if the patient's mental health improves to the extent that it is no longer appropriate for him to remain in hospital, he will serve the remainder of his sentence in prison[253] and the hospital direction will cease to have effect.[254] That is the key difference, in practical terms, between the CORO, and an HD: whereas the HD is ancillary to the custodial sentence, the compulsion order *is* the sentence. This is why the MacLean Committee recommended that in cases where the criteria for both an OLR and

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[244] RMA, *Annual Report and Accounts 2019-20*, 39.
[245] *Ibid*, 36.
[246] Source: RMA unpublished data received 12/10/2020.
[247] *Annual Report 2019-20*, 36.
[248] 1995 Act, s. 59A(1), although those made alongside an OLR will only be made in the High Court.
[249] MHA 2003, s. 217(2).
[250]In the case of a compulsion order with restriction order, it is the restriction order that renders the period of detention indeterminate.
[251] 2003 Act, s. 216(2).
[252] s. 60.
[253] 2003 Act, s. 216(2).
[254] 2003 Act, s. 216(3).

CO are met, the only competent disposal should be an OLR combined with a HD.[255] It would have reduced the risk of high risk offenders being detained indefinitely on COROs because their mental disorder was subsequently found not to be treatable. This is returned to in section 6.6. Finally, before moving on, it should be emphasised that the HD is a disposal upon conviction: it cannot be made on acquittal, as a CO or CORO can. In 2018/19, two HDs were made.[256]

6.4.2 Where an OLR is not Imposed

The focus of this chapter – and, indeed, the thesis – is the OLR, but it is worth saying something of the disposals which may be made where the OLR is not made because the OLR does not exist in isolation: it is part of a framework of risk-based disposals and it is important to consider it in that context. Section 210G(2) provides that, where an OLR is not imposed because the court is not satisfied that the risk criteria are met, the judge may dispose of the case as he sees fit, but must not impose a life sentence. In any case where an offender has been considered for an OLR, any alternative disposal will be a custodial sentence and – as has already been said – most likely a section 210A extended sentence. Where the offender has been found to meet the criteria for imposing a compulsion order, but has not met the risk criteria, he may be made subject to a CO, possibly alongside a restriction order (RO). This part of the chapter considers both the extended sentence and the CO, before the chapter moves to an evaluation of the OLR.

A. The Extended Sentence

The extended sentence (ES) is a form of determinate sentence that is available in respect of certain violent or sexual offenders, and terrorist offenders under section 210A of the 1995 Act.[257] It represents a middle-way between an ordinary determinate sentence and the OLR.[258] Its purpose was described in the leading case of *S(D) v HM Advocate*[259] as 'to allow the court

[255] MacLean Report, 49, rec. 27.
[256] Mental Welfare Commission, *Mental Health Act Monitoring Report 2018-19* (Edinburgh, 2019), 48. The report does not say whether either were associated with an OLR.
[257] Section 210AA, inserted by section 20 of the Criminal Justice (Scotland) Act 2003, also allows for an extended sentence be passed in respect of persons convicted on indictment of abduction without the requirement for that conduct to fall within the categories of sexual offence specified in s.210A(10). Nothing further will be said of it here.
[258] See, for example, *Petch and Foye*, at 43; also, *Liddell*, at 45; *Ferguson*; *R(J)*, at 3, in which appeals against the making of OLRs were based on the extended sentence being the appropriate sentence in cases where ordinary determinate sentences were inadequate to manage the appellants' risk. Appeals of this nature succeeded in respect of one of the accused in *Ferguson* (Cameron, at 117); and in *Kinloch*. See also Fyfe and Gailey (2011), 209.
[259] 2017 S.C.C.R. 129.

to make provision for public protection…while not imposing a custodial sentence, which from other perspectives, might be disproportionate'.[260] The ES for violent and sexual offenders was introduced by section 86 of the Crime and Disorder Act 1998, and more recently expanded to include terrorism.[261] The present discussion is concerned with violent and sexual offences only. Offences which count as violent or sexual offences for the purposes of an extended sentence are set out in section 210A(10) which, it will be recalled, is also the provision to which section 210B cross-refers. Section 210A provides that where an offender is convicted on indictment of an offence in section 210A(10) and the court intends to pass a determinate sentence of imprisonment,[262] it may instead make an extended sentence if it considers that any period of time during which the offender would be subject to a licence would not be adequate for the purposes of protecting the public from serious harm.[263]

'Serious harm' is not further defined in the legislation, however it requires more than a finding that it is in the 'public interest' that the offender spend a prolonged period on licence.[264] It is also not sufficient that the offender requires to attend courses that cannot be completed in the absence of the long licence period,[265] nor is the requirement for a lengthy period of supervision and community rehabilitation at the conclusion of a custodial sentence in itself sufficient.[266] In *S(D) v HM Advocate*,[267] the court emphasised that, whilst pre-sentence risk assessment is important to establish whether an extended sentence is necessary, the judge must consider the likely impact an ordinary determinate sentence is likely to have on that risk.[268] It is only if the court considers that the offender would still present a risk of serious harm to the public at the conclusion of ordinary determinate sentence that the test for imposing an extended sentence would be met.[269]

The sentence itself is comprised of two parts: the 'custodial term' which is the period of imprisonment the offender would have been sentenced to had the court decided not to impose an extended sentence;[270] and the 'extension period' during which the offender will be subject

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[260] *Ibid*, at 21.
[261] Counter-Terrorism and Border Security Act 1999, s. 10.
[262] s. 210A(1)(a).
[263] s. 210A(1)(b).
[264] *Kelly (Sean) v HM Advocate* 2018 S.C.C.R. 104, at 9.
[265] *Wood v HM Advocate* 2017 J.C. 185, at 27.
[266] *S(D) v HM Advocate* 2017 S.C.C.R. 129, at 22.
[267] *Ibid*.
[268] *Ibid*, at 21.
[269] *Wood*, para. 27; *S(D)*, at 21; *Kelly (Sean)*, at 27.
[270] s. 210A(2)(a).

to a licence in the community.[271] Both are parts of a single sentence; the extended sentence is not an extra period of licence attached to an ordinary determinate sentence.[272] The judge must specify the duration of the whole sentence, and how that is apportioned between the custodial term and extension period when passing sentence.[273] The custodial term is determined primarily by the requirements for retribution and deterrence,[274] and is served in much the same way as any long determinate sentence[275] with the offender becoming eligible to apply for parole when half of the custodial term has been served.[276] Offenders subject to an extended sentence imposed on or after 1st February 2016 are not, however, eligible for automatic early release.[277]

If released on parole, offenders will be subject to a licence for the balance of the custodial term plus the duration of the extension period.[278] Those not paroled will be released at the expiry of the custodial term and will remain on licence throughout the extension period.[279] If he fails to comply with the conditions of his licence it may be revoked and he may be recalled to prison.[280] The maximum extension period is ten years for all offence categories,[281] but the sentencing judge can select a shorter period if he considers it sufficient for the protection of the public from serious harm. As the ES is a determinate sentence the licence will, eventually, expire. For this reason the ES will not be appropriate for the minority of offenders who require the 'concerted lifelong efforts' to manage their risk that the MacLean Committee identified.

B. The Compulsion Order

The CO without restrictions is broadly similar to the civil compulsory treatment order (CTO) to which an individual requiring compulsory treatment for mental disorder would ordinarily be made subject.[282] It may be made under section 57A of the 1995 Act where an offender is

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[271] s. 210A(2)(b).
[272] *S(D) v HM Advocate* 2017 S.C.C.R. 129, at 23.
[273] *O'Hare v HM Advocate* 2001 G.W.D. 29-1160, at 5.
[274] *Jordan v HM Advocate* 2008 J.C. 354, at 19.
[275] That is, a sentence of four years or more: Prisoners and Criminal Proceedings (Scotland) Act 1993, s. 27(1); *Robertson v HM Advocate* 2004 J.C. 155, at 30. It is no longer served in *exactly* the same way as is said in *Robertson* because of changes to the automatic early release provisions in the 1993 Act that have taken place since the case was decided.
[276] 1993 Act, s. 1(3)(a).
[277] s. 1(1A)(b)(ii) as inserted by the Prisoners (Control of Release) (Scotland) Act 2015, s. 1(2)(a).
[278] *Robertson,* para. 30.
[279] 1993 Act, s. 11(1).
[280] *Ibid*, s. 17(1). Though he may subsequently be released once again on the recommendation of the Parole Board for Scotland: s.3A(4) of the 1993 Act. Licences and their conditions are discussed later in section 5.4.3 of this chapter.
[281] s. 210A(3).
[282] The Scottish Executive, *Mental Health (Care and Treatment) (Scotland) Act 2003 Code of Practice,* Vol. 3. (Edinburgh, 2005), page 126 at para. 14.

convicted in the sheriff court or High Court for an offence, other than murder, that is punishable by imprisonment;[283] or where the person has been remitted by the sheriff to the High Court for sentencing for such an offence.[284] The court must be satisfied, on the basis of oral or written evidence by two medical practitioners, that the person concerned has a mental disorder;[285] that medical treatment is available for the person that would be likely to prevent the mental disorder worsening, or that would alleviate the symptoms or effects of the disorder;[286] and that if such treatment were not provided, there would be a significant risk to the health, safety or welfare of the person or to the safety of any other person.[287] The CO authorises the offender's detention in hospital[288] – which may be the State Hospital the person requires to be detained in conditions of special security[289] – and the giving of medical treatment in accordance with part 16 of the MHA 2003.[290] Like other criminal justice mental health orders including the HD, and contrary to the civil provisions of the MHA 2003,[291] the CO authorises medical treatment even if the patient refuses it and is fully capable of doing so. The ordinary duration is six months,[292] but it is renewable.[293] In some cases, the court will also make a restriction order (RO) under section 59 of the 1995 Act.

The RO may be made where it appears to the court that, having regard *inter alia* to the nature of the offence,[294] that it is necessary for the protection of the public that the offender be subject to special restrictions because of the risk of further offences resulting from his mental disorder.[295] Like the HD, the RO is an ancillary order attached, in this case, to a CO. It can only be made with a CO and, when it is, the disposal is called a CORO. The effect of the RO is that the CO applies without limit of time[296] (though it is still subject to review),[297] and therefore the CORO is an indeterminate sentence. It will be recalled that a CO is an alternative disposal

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[283] s. 57A(1)(a).
[284] s. 57A(1)(b). It should not be confused with the CO made under s. 57 of the Act which is a disposal on acquittal.
[285] s. 57A(2)(a).
[286] s. 57A(2)(a).
[287] s. 57A(2)(a).
[288] s. 57A(8)(a). It can also authorise treatment in the community and will unless the court is satisfied on the evidence of two doctors that hospitalisation is necessary, but only hospital-based COs are considered here since it is inconceivable that anyone who was under consideration for an OLR would be given a non-custodial disposal.
[289] s. 57A(6)(a).
[290] s. 57A(8)(b).
[291] MHA 2003 ss. 36(4)(b), 44(4)(b), and 57(3)(d).
[292] s. 57A(2A)(b).
[293] MHA 2003, s. 148.
[294] s. 59(1)(a).
[295] s. 59(1)(c).
[296] s. 57A(7)(b).
[297] MHA 2003, s. 148.

to the OLR where the risk criteria and the criteria for making a CO are met. Though section 210F does not specify that it must be a CORO, given its requirements, it seems inconceivable that anyone who also satisfies the section 210E risk criteria would not be made subject to restrictions. In 2018/19, seven COROs were made.[298]

Finally, it should be remembered that the CORO, contrary to the MacLean Committee's recommendations, is a competent disposal where the OLR's risk criteria are also met. The provision allowing for indefinite detention of those considered untreatable, but presenting a significant risk to others, was transported to the current legislation;[299] however no particular record is kept of those patients who fall into this category. This is because the public safety test is at the top of the 'hierarchy' of tests to be applied when release is considered: simply put neither the Scottish Government nor the Mental Welfare Commission knows how many people are detained indefinitely in our hospitals with no prospect of treatment.[300] That is, to put it mildly, concerning. It also remains the case that those no longer considered to have a mental disorder must be discharged even if it emerges the risk the present was not causally connected to it.[301] Thus, the issue that ultimately led to the OLR's creation has not been resolved.

6.5 Assessing the OLR Framework

Chapters two and three presented a theoretical framework for the evaluation of OLR's operation. It was said that an ethically defensible model must include the following elements:

A. It must only be a disposal upon conviction for an offence;
B. It must only be employed to protect the public from violations of the sort expected to result in serious physical or psychological harm;
C. The subject must have been convicted of an offence of the type the PD is to be imposed to prevent, though this need not be the index offence;
D. There must be an individualised risk assessment based on best practices as recognised by a responsible body of experts and which is capable of informing risk management; and

[298] Mental Welfare Commission, *Mental Health Act Monitoring Report 2018-19* (Edinburgh, 2019), 48.
[299] MHA 2003, s. 193(2)(b).
[300] Source: FOI(S)A 2002 Response from the Scottish Government's Restricted Patient Team. Received 19/07/2019.
[301] MHA 2003, s. 193(3).

E. It must incorporate opportunities for risk reduction geared towards progression to release and management in the community.

Each of these points has been elucidated in the preceding chapters, and the OLR has been subject to critical analysis throughout. This section therefore draws the preceding discussion together in a succinct application of the characteristics of the OLR that have been identified to the elements of the defensible PD model outlined above. Some further observations are made on some of the issues that have been raised in the evaluative literature as it currently stands.

6.5.1 The OLR and Ethical Defensibility

A. A Disposal Upon Conviction

The requirement for a conviction serves three purposes: (a) it ensures the PD is imposed in virtue of voluntary criminal conduct i.e. that there is a culpability constraint; (b) it requires that those imposing PD recognise its inherent punitiveness; and (c) means that its imposition is subject to the ordinary safeguards of the criminal justice system. The OLR, though imposed on risk grounds, may only be imposed where an offender falls to be sentenced for an offence. Those who face the prospect of an OLR have made a choice to engage in offending behaviour; one is not made subject to it on the grounds of risk alone, or of possession of traits alone. The OLR satisfies, *prima facie*, the conviction requirement, though this is subject to certain qualifications and is returned to below.

B. The Serious Violation Constraint

The OLR must only be used where the threat presented is serious enough to warrant an indeterminate sentence: i.e., it must be proportionate to the threat. There are two elements to this: (a) the conduct must amount to a violation of other persons such as is likely to result in long-term physical and/or psychological harm; and (b) the OLR must be necessary to prevent that conduct. The risk criteria in section 210E are broadly drafted, requiring that the OLR be made in cases where the court is satisfied, on the balance of probabilities, that it is more likely than not that the offender – if not subject to an OLR – would seriously endanger the lives, physical or psychological wellbeing of the public. As regards (a), it is apparent that the focus of the OLR, from the point at which its introduction was recommended by the MacLean Committee, has been on preventing serious violent and sexual offending. As discussed in

chapter three, however, it is appropriate to extend the protection of PD to non-violent and sexual offences that place someone at risk of long-term harm. The caveat is that where we are concerned with prevention of psychological harm alone, it must be associated with a threat of violent or sexual offending. This is intended to prevent net-widening, and to restrict the use of PD to the most uncontroversially serious cases.

The risk criteria do not contain such a qualification in relation to psychological 'wellbeing', as it is termed there; nor do they require a threat of long-term harm. Leaving to one side, for the moment, whether wellbeing really is the same as harm – as discussed above,[302] it is probably not – it seems that in practice OLRs are used to prevent violent and sexual offences. Among the reported cases, there seems only to be one in which there was no particular apparent concern of progression to such offending.[303] As discussed, the court considers risk at the point of sentence but takes account of any risk mitigation that may result from imposition of a lesser custodial sentence, such as the extended sentence. In addition, the RMA's risk definitions distinguish between high, medium, and low-risk offenders.[304] High risk offenders are those with an 'enduring propensity' to seriously endanger the public, limited capacity for change, and who require 'concerted long-term measures' to manage their risk. Medium risk means that there is a propensity to endanger the public, but that there are factors that indicate measures short of lifelong restriction will be sufficient to manage that risk. An OLR may, as has been said, still be made where the risk classification is one of medium.

The constraints on interpretation of the risk criteria are therefore substantially applied by the courts and the RMA. Whilst it is apparent that there is no deluge of OLRs being made, it is submitted that the legislation should have more constraining force than it does. Section 210E ought to be amended to better reflect the language of the MacLean Committee's 17th recommendation, for example:[305]

> [T]he risk criteria are that the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that the offender presents a substantial and continuing risk to the safety of the public such as requires his lifelong restriction.

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[302] At 6.3.4.
[303] *Johnstone*, discussed in detail above: see 6.2.1.
[304] See 5.4.4. As discussed there, low risk offenders will not be given an OLR.
[305] See s. 210E as in force, and the MacLean Report, 41, rec. 17.

Such a formulation would have effect of making it clear that the risk presented must be serious enough, and difficult enough to manage, that measures short of an OLR would be inadequate. Where the risk classification is accepted by the court, it would effectively restrict the OLR to high-risk offenders. On that basis it is sufficient that the court considers that the criteria are met on the balance of probabilities, as that amounts to a finding that the offender is more likely than not to seriously endanger the public if not subject to an OLR.

C. Past Offending

Past offending includes the index offence, any other offences on the indictment of which the individual was convicted, and any offences of which he has been convicted previously. The index offence triggers the application of the risk framework where the court considers the risk criteria may be met and, along with any other offences on the indictment, is the basis for the calculation of the punishment part. Prior offences inform the risk assessment, and the assessor's opinion on risk and assist the judge to determine whether the risk criteria are met. Section 210B requires that the index offence be a sexual offence, a violent offence, an offence which endangers life, or an offence which suggests to the court the offender has a propensity to perpetrate one of the three preceding types. Murder is, of course, excluded. As was discussed earlier, it is generally the case that where the OLR is imposed on the basis of one offence it is a particularly serious offence, and OLRs have been imposed on first-time offenders. In most cases, however, the OLR will be imposed on the basis that there is a pattern of behaviour evident. In addition, the risk assessor is empowered to consider allegation information and include it in the RAR, though most of the time it does not impact the risk classification assigned.

It is submitted that, so far as index offence goes, the OLR complies with the model proposed. Section 210B is clearly focused on crimes against the person, and this is reflected in RMA statistics. As of 2015-16, when such a breakdown was last published, 34.4% of OLRs were imposed in respect of violent offences; 49.7% sexual offences; 13.9% in respect of both a violent and sexual offence (charged separately); and 2% fell into the residual category of 'other' offences.[306] Nevertheless, if PD is to be morally permissible, then the offender's forfeiture of the right to be presumed harmless must be unequivocal. On that basis, where the index offence is an 'other' offence, there ought to be a requirement (a) that the offender has, at some point, been convicted of a violent, sexual or life endangering offence; and (b) that it, alongside the

[306] RMA, *Annual Report and Accounts 2015-16* (Paisley, 2016), 22.

index offence, is part of a pattern of behaviour which meets the amended risk criteria, as proposed. It might be objected that this sacrifices some protective efficacy, and it might. But it is simply not reasonable to consider the application of the OLR to have been foreseeable and avoidable in a case where the offender has no history of violent or sexual offending to any degree. Section 210B(1)(b) ought to be amended to require such a history.

In the case of the first-time offender, it is accepted that there may be incidences where a first conviction is for an offence so serious that it properly gives rise to concern that the risk criteria may be met; for this reason there should be no explicit prohibition on making the OLR in such circumstances. This brings us, once again, to the issue of seriousness. As was discussed in chapter three, the difficulties of articulating a standard of seriousness capable of being applied in every case are substantial. It was, however, said that the CJS routinely distinguishes between offences and harm of differing severity, and that we generally accept this, though we may of course disagree on individual cases. On that basis, admittedly somewhat unsatisfactorily and arbitrarily, the present requirement for conviction on indictment and sentence in the High Court means that the framework as it stands is considered to comply with the seriousness requirement. Concerns about culpability-constraint, foreseeability, and the opportunity to avoid should be somewhat mitigated by requiring a violent, sexual, or life-endangering offence where the index offence falls into the residual category.

Finally, whilst it is accepted that, in risk management terms, there is a sound basis for inclusion of allegation information in the RAR, it is important that the presumption of harmlessness is rebutted by conduct of which the offender has been convicted beyond reasonable doubt. Allegation information should not be used to inform risk classification, given the centrality of its role in determining whether the risk criteria are met, and should be confined to assisting risk management planning, though it is appreciated that it may be difficult in some cases to separate these. This is broadly consistent with current practices, but section 210C(2) should nevertheless, it is submitted, be amended to clarify the limits of the use of allegation information and section 210C(2)(c), which permits allegation information to be used to assign risk classification, should be repealed.

D. Risk Assessment

Risk assessments must be individualised and grounded in methods and practices regarded as robust and defensible by the those with expertise in their development and application. Rather

than aiming at binary predictions of recidivism, risk assessment should be capable of accounting for the individual circumstances of the offender, and of informing risk management interventions. In particular, it should provide guidance as to the necessity of PD, indicating cases where measures short of an OLR may be sufficient. In cases where an OLR is imposed, the risk assessment must support risk management planning that permits, where possible, progression to conditions of lesser security. The standard-setting function in relation to the OLR is fulfilled by the RMA which has special expertise in risk assessment and management: this was the reason for its creation. The RMA, it will be recalled, accredits risk assessors, tools, and publishes the *Risk Assessment Tools Evaluation Directory* which provides impartial advice to professionals on the strengths, weaknesses, and appropriate application of various instruments. It will also be recalled that SPJ is the standard prescribed for RAR production. Subject to the caveats raised above in relation to use of allegation information, it is submitted that the legislative framework therefore conforms to the requirements outlined for the role of risk assessment in relation to the OLR.

E. Opportunities for Reintegration

Autonomy is the thread that runs through the thesis' theoretical framework. It is the basis on which a conviction is required, that the presumption of harmlessness is rebutted, and the redistribution of the burden of uncertainty is grounded. Since the offender must, in effect, choose to run the risk of an indeterminate sentence, it follows that he should have the opportunity to choose to address the risk of reoffending that he poses. This means that the state is under an obligation to keep risk status and risk management under review, and to provide access to appropriate courses and treatment. The MacLean Committee envisaged that time spent supervised in the community would be a core part of the sentence.[307] But, as discussed earlier, though most of the OLR population is beyond punishment part expiry, roughly 6% of OLR offenders have been paroled, and, of these, just under half were subsequently recalled. Because of this there is little information on OLR offender progression available. Though this thesis is concerned with the moral permissibility of *imposing* sentence, respect for autonomy – and for human rights[308]– means that we must be satisfied that the sentence provides opportunities for re-integration. Although the judicial reviews that have been brought so far averring that the Scottish Ministers are failing in their obligations to facilitate the progression of OLR prisoners

[307] MacLean Report, 2.
[308] See 6.2.1.D.

have been unsuccessful, there is not currently enough information available to determine whether or not the OLR meets the requirement under consideration here. More research is required on OLR offender movement through the prison estate, the courses and therapies provided to them, and the way that they experience their sentences.

Finally, though space precludes examination of related disposals such the HD and the CORO, it must be observed that the failure to include capacity or decision-making criteria such as that in the MHA 2003's civil provisions does not respect autonomy. Persons ought to have the chance to choose to address their risk, but equally, they ought to have the opportunity to choose not to. Offenders subject to the OLR and the HD, and who have the ability to take treatment decisions, should have the freedom to refuse it if they wish; the consequence of a refusal would then be transfer back to prison where progression may be delayed if treatment refusal means risk is not addressed. For this reason, it is tentatively suggested that the MacLean Committee's recommendation that an OLR plus HD should be the only competent disposal where the risk criteria and the criteria for making a CO are met, is the correct one. This aside, it would prevent people being kept on COROs indefinitely with no therapeutic intention because detention was necessary to protect the public: in other words, it would address the issue that led to the OLR's creation in the first place.

6.5.2 The Nature of the OLR

The practical implication of the suggestions made above is that there are people currently subject to OLRs at present who would not – and, it is contended, ought not – be subject to the revised framework. The case of *Johnstone* in particular is called to mind. The OLR, though identified in section 210F as an indeterminate sentence, is, in fact, a life sentence, and in terms of the 1993 Act's application is indistinguishable from the MLS. An OLR remains in effect until the person subject to it dies. Former chief executive of the RMA, Yvonne Gailey, and her colleagues, have argued that a formal review mechanism should be introduced that could see the OLR itself revoked where no longer required for public protection.[309] This would mean, in effect, that the 'entry' and 'exit' criteria of the OLR as it currently stands were the same, and people who no longer required lifelong restriction were no longer subject to the order and, on the face of it, that would reflect respect for offender autonomy. As above, far more information about offender progression and release would be needed to assess the potential impact of such

[309] Gailey *et al*. (2017), 138.

a reform, and it could not be done within the scope of a work such as this. Nevertheless, if it is and remains the intention of the Scottish Parliament that the sentence is one of *lifelong* restriction, the legislation should identify it as such; not as an indeterminate sentence, but as a life sentence imposed on risk and which can never, for all an offender's best efforts, and despite any level of risk reduction, be lifted.

6.6 Conclusion to Chapter Six

This chapter has given a detailed and analytical account of the OLR from the point at which the risk criteria are applied. The requirements that must be met for article 5 compliance were considered, and then the risk criteria in section 210E were subject to detailed treatment. The OLR is, it was argued, despite the wording of sections 210B and 210E, a sentence for the prevention of serious violent and sexual offences. Notwithstanding its classification as an indeterminate sentence, it was argued that the OLR is really a life sentence – only the period of imprisonment is indeterminate; the duration of the sentence itself lasts for the whole of an offender's life and leaves him liable to continuous or repeated detention during that time. Finally, the statutory framework was evaluated against the theoretical framework set out in chapters two and three. It was concluded that, whilst the OLR is consistent with most of its requirements, there are areas in which it could be improved to accord proper respect to autonomy. Three proposals for reform were then made: (1) that the risk criteria be amended to require a 'substantial and continuing risk' that requires lifelong restriction, though not necessarily lifelong imprisonment, as recommended by the MacLean Committee; (2) that section 210B be amended to require that where the index offence falls into the residual category, the offender has been previously convicted of at least one violent, sexual, or life-endangering offence; and (3) that section 210C be amended to preclude the use of allegation information for risk classification.

The thesis now concludes in chapter seven.

7. CONCLUSIONS

7.1 INTRODUCTION TO CHAPTER SEVEN

This thesis presented a critical analysis of the order for lifelong restriction and the legal framework that supports its operation. Chapter one set out four specific objectives. First, to identify and develop a theoretical framework of preventive detention capable of supporting a principled, workable model of preventive detention; second, to provide a detailed, critical account of the procedural framework that supports the OLR's operation; third, to assess the extent to which the current statutory framework conforms to the requirements set out in the analytical model identified in the first aim; and finally, on the basis of conclusions relating to aims one to three, to identify areas where consideration should be given to amending the relevant legislative provisions. These conclusions are summarised below, along with areas identified for potential reform and for further research.

7.2 THE THEORETICAL FRAMEWORK

Chapters two and three considered the theoretical basis for the imposition of sentences of preventive detention. Chapter two concerned the more philosophical literature and addressed the objection that preventive sentences are impermissible as a matter of principle. It was argued that preventive detention is best conceptualised as a form of societal self-defence grounded in the communication of a credible threat of serious harm to others; this threat must be sufficient to rebut the presumption that the offender is harmless. Measures of this nature are, it was said, properly considered punitive, but they represent a derogation from the principle that punishment must be proportionate to wrongdoing. Nevertheless, a culpability constraint is required in the form of a requirement for a conviction, since we must be sure that the offender has chosen to open himself to the risk he will be preventively detained. The offender's exercise of free-will in order to offend permits us to redistribute the burden of uncertainty as to what he may or may not do in the future. The right of members of the public not to be made victims is thus preferred to the right of an offender to create victims. The imposition of a sentence on the basis of what it is thought an offender will do does not amount to a claim about his capacity to choose to conform his conduct to law and does not, therefore, treat him as though he lacks autonomy: on the contrary, it recognises and responds to his exercise of autonomy. It was emphasised that

preventive detention does not create the burden of uncertainty as to the offender's future conduct; it merely redistributes it. It was said that we ought nevertheless to recognise the peculiar burdens associated with indeterminate detention, and the difficulties that arise in terms of our ability to determine future conduct. The suggestion was made that we should consider the criteria for use of preventive detention in terms of defensibility rather than justification.

Chapter three continued the discussion with in-depth consideration of the concepts of dangerousness and risk and how these had evolved over time. It was said that dangerousness, despite being regarded by some as meaningless and pejorative, does have some substance. This substance relates to the threat of repeated rights violations that carry the potential for physical and psychological harm. In particular, the dangerousness is associated with a present threat of violent and sexual offending. It was argued that the terminology of dangerousness is not inappropriate in the context of OLRs first, because it does describe a type of offending; and second because the OLR requires neither a finding of high-risk nor a conviction for a sexual or violent offence. It was submitted that preventive sentencing is defensible in a context where (a) an offender has a history of violating the rights of others in such a way that long-term physical and/or psychological offending would be expected; (b) in cases where psychological harm alone is anticipated, the conduct entails a threat of physical harm; and (c) where a robust, individualised risk assessment capable of informing risk management indicates that measures short of indeterminate sentencing are likely to be inadequate to manage risk. The effect of (b) is to remove from scope any offence that could not properly be described as an offence against the person and that does not in itself present a physical threat to another person. This sacrifices some preventive efficacy but maintains some degree of proportionality between the threat presented, and the harms of an indeterminate sentence.

From this, five requirements were identified:

1. It must only be a disposal upon conviction for an offence;
2. It must only be employed to protect the public from violations of the sort expected to result in serious physical or psychological harm;
3. The subject must have been convicted of an offence of the type the PD is to be imposed to prevent, though this need not be the index offence;
4. There must be an individualised risk assessment based on best practices as recognised by a responsible body of experts and which is capable of informing risk management; and

5. It must incorporate opportunities for risk reduction geared towards progression to release and management in the community.

These are returned to in section 7.4 below.

7.3 The Procedural Framework

Chapters four, five, and six set out a critical account of the OLR and the framework that supports its operation. Chapter four considered the OLR's legal background and policy development. It was demonstrated that the OLR arose from a perceived loophole in mental health legislation that pertained to people who were detained in hospital by the criminal justice system. Particular attention was paid to the work of the MacLean Committee that recommended the OLR's introduction, having concluded that sentencing options for a minority of offenders were insufficient at that time. Though there are some disparities, the OLR as implemented closely reflects the recommendations in the Report.

Chapter five discussed in detail the procedures to be followed before the OLR can be imposed. The interim orders that may be made, and the criteria for making them were considered and the centrality of formalised risk assessment to the sentencing framework was emphasised. As well as addressing the key legislative provisions, attention was paid to the RMA's standards and guidelines for risk assessment, and the process by which the RAR is produced received substantial treatment. This included consideration of the use allegation information in these reports which is expressly permitted by the legislation. It was noted that, whilst most often allegation information does not impact the risk classification, it may do so and may therefore lead to the imposition of an OLR where it is given sufficient weight. The lack of clear authority on the weight that it can be given was identified as problematic. It was subsequently concluded that, while it may have value in terms of establishing behaviour patterns and in risk management planning, risk classification ought not to be based on allegation information.

Chapter six progressed the discussion from the pre-OLR procedure to the point at which the RAR is before the judge for consideration. This is the point at which the statutory risk criteria fall to be applied. The requirements for ECHR article 5 compliance in relation to the OLR were discussed, before the risk criteria were broken down into their constituent elements and subject to detailed analysis. Two main arguments were advanced in relation to them: first that they were concerned primarily – and consistently with the MacLean Committee's terms of reference

– with offences against the person. Second, that despite the absence of any statutory requirement to consider alternative sentences, taken alongside the RMA's risk classifications, it should be considered that the risk criteria cannot be met where a lesser sentence – specifically the extended sentence – is found to be adequate for the purposes of risk management. The chapter then progressed to evaluate the OLR against the analytical framework proposed in chapters two and three.

7.4 Evaluation and Proposals for Amendment

When this project began some years ago, the researcher's starting view was that indeterminate sentences are unjust, morally repugnant, and should form no part of any jurisdiction's framework. Whilst certain aspects of this viewpoint are valid – these are terrible sentences, and that must never be lost sight of – it proved, perhaps predictably, to be somewhat naïve. The absolutist position against is easy to maintain when considerations are confined to the offender and the restrictions of a prison sentence, whether the offender is in prison or supervised in the community. The difficulty arises when one is forced to ask the question: 'what happens at the end of the sentence?' The precise point at which this realisation occurred cannot be recalled but, in any case, some months into the work it became apparent that there is a need for the lifelong management of a small group of offenders, and the Reports of the MacLean and Floud Committees were instrumental in this realisation being reached. Though the author of this thesis has, in some respect, come full circle, the necessity for a sentence like the OLR has not been accepted uncritically. Indeed, with the realisation that such sentences are necessary evils comes the need for more scrutiny; not less. Though it was ultimately considered that the OLR strikes an appropriate balance overall between the rights of potential victims to be protected, and the offender's right to liberty, this was arrived at by way of critical evaluation. The conclusions reached are summarised below.

In relation to the first requirement identified, the OLR satisfies the requirement that the preventive detention in respect of voluntary conduct be imposed as a sentence upon conviction. It is quite obviously a punishment and could not reasonably construed as anything other than a punishment.

In relation to the second, the OLR was found to conform broadly to the requirement that preventive sentences be used to protect the public from serious offences of the kind that are likely to present a threat of long-term psychological or physical harm. These offences ought to

have the character of personal violations, i.e., offences against the person, though it may be legitimate to detain to prevent offences of other kinds that threaten serious physical harm. This constraint is to remove from the OLR's scope property offences that do not in themselves, or in the manner of their commission, place persons at risk. This, it was accepted, limits preventive efficacy somewhat but it was argued that it was justified in order to retain some proportionality between the threatened conduct and the likely impact of the sentence on an offender. It is also broadly reflective of the way the OLR operates in practice. It was recommended that consideration be given to amending the risk criteria in section 210E to better reflect the formulation of the risk criteria proposed by the MacLean Committee. This would require that the offender present a 'substantial and continuing risk' to public safety such that lifelong restriction was required, rather than the likelihood of serious endangerment at the end of a determinate sentence, as the criteria currently stand.

In relation to the third, it was found that the OLR as it stands partially complies with the requirement for a conviction of an offence of the type we are concerned to prevent. Although most OLRs are imposed in respect of violent or sexual offences, or life-endangering offences, the legislation includes a residual category. The residual category allows the OLR to be imposed where the index offence is not violent, sexual, or life-endangering where it suggests to the court that the offender has a propensity to perpetrate one of those offence types in future. This, it was argued, is insufficient to ground a determination that an offender has autonomously forfeited his right to be presumed harmlessness.

It was recommended, therefore, that consideration be given to amending section 210B to require that, where the index offence is of 'other' type, the offender must have been convicted of a violent, sexual, or life endangering offence at some point. It was further suggested that the use of allegation information should be confined to establishing patterns of behaviour and informing risk management. Section 210C should be amended to this effect, and, if this is done, section 210C(2)(c), which permits allegation information to be used to assign risk classification, would require to be repealed.

In relation to the fourth, it was concluded that the RMA's standard setting and accreditation role means that the OLR conforms to the requirement for robust, individualised risk assessment capable of informing risk management practices, and of identifying cases where measures short of indeterminate detention may be sufficient.

In relation to the fifth, it was concluded that the OLR at least partially conforms to the principle that offenders ought to be afforded opportunities to choose to address their risk so that they may progress through the prison estate. It was noted that there is insufficient information to ascertain whether, in practice, such adequate opportunities are presented. It was further observed that few offenders have been paroled, and a number of them have been recalled to custody at some point. The need for a presumption of progression to the community, where possible, was emphasised: this is consistent with way in which the OLR was envisaged by the MacLean Committee. No recommendations were made in respect of this, rather the need for further research on the pathways offenders follow through the OLR was identified.

Finally, it was noted that the OLR, while described as an indeterminate sentence by section 210F is, to all intents and purposes, a life sentence. It was tentatively suggested that there may be a case for review of the sentence itself, rather than merely the RMP or conditions of licence. Like the matter of progression generally, the ability to take a view on the matter is significantly hampered by the lack of available information. Further research is therefore required.

7.5 Conclusion to Chapter Seven and to the Thesis

The primary purpose of this thesis was two-fold: (a) to set out what are extremely complex provisions in a coherent and – so far as possible – accessible manner and (b) to subject the OLR to extensive critical analysis. In relation to (a), there is, as was noted at the outset, only a very small existing literature base, the core of which is really three book chapters which address aspects of the framework.[1] Thus even the descriptive elements of the thesis make an original contribution.

In relation to (b), the implications of this sentence for those subject to it are dire, and there is a need to ensure that it is subject to a level of scrutiny that is commensurate with that impact. Here too, the thesis makes an original contribution, by undertaking that detailed and comprehensive scrutiny and identifying areas for potential improvement. The hope is that this might help to encourage further (especially legal) academic discussion about the nature of the OLR and the constraints there should be on its use. Although it was argued that there is a need

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[1] Gailey *et al*. (2017); Darjee and Russell (2011); and Fyfe and Gailey (2011). These works have been referenced throughout.

for the OLR, or a disposal like it, it should never be the case that we are comfortable with its use. The deprivation of liberty it entails should never be lost sight of, and this is so even though the number of people subject to it is relatively small. The requirements set out earlier for an ethically defensible model of indeterminate sentencing can be reduced to one: the obligation to do all that we can to ensure that no one is made subject to it unless it is absolutely necessary; in other words, to ensure that the OLR really is a sentence of last resort.

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