Labouring in the Shadows: Hope, Fear and Bureaucratic Harms in navigating risk with "dangerous people"

An examination of Scotland's Order for Lifelong Restriction

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

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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.

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Contents

Abstract

This thesis offers a qualitative account of the Order for Lifelong Restriction (OLR) a risk-based sentence for public protection which became available to the Scottish Courts in 2006. The legislative base for the order sets a new governance framework and the introduction of the Risk Management Authority, which deploys a raft of heavily audited, bureaucratic procedures, and processes designed to gain control over a subgroup of serious violent and sexual offenders. As its distinctive nomenclature suggests, the sentence allows for the *lifelong restriction*, in the form of confinement or, where release is granted, community supervision and control of those thought to pose an ongoing risk to public safety. This highly administrative form of justice denotes a shift from deserts-based criminal punishment, and is *tout court,* a form of life sentence through incapacitation and lifelong control measures. The sentence is established and operates through adherence to risk-based imperatives. The majority of those subject to the OLR are currently held in prisons beyond the punishment part of their sentences on the basis that they remain dangerous. This thesis brings to the fore, a number of important human consequences regarding preventive punishment for penal agents and those subject to the order. For penal actors toiling under the rubric of risk and the precautionary principle, this work imposes a series of emotional and bureaucratic burdens as they are exposed and bear witness to the harms of risk-based work and its internal logics. Through operating the sentencing and management process, penal agents are tasked with balancing public protection with care and control. They are assigned with the intractable problem of neutralising the risk of an imprecise and contradictory 'motley crew' deemed unmanageable by any other means. In performing risk labour, penal agents are vicariously exposed to the harms for which the OLR has been imposed which engenders *dread risks* (Slovic, 1987) and associated fears and anxieties. This heavy burden is amplified by a fear of future harm, wrong decision-making and reputational annihilation. The 'exceptional' sentence imposes a new identity on the penal subject, tainting them with the permanent mark of dangerousness. Themes of hopelessness and despair, bleed from the condemned subjects, vicariously contaminating criminal justice agents in a way that hinders their work, conflicts with human, professional and criminal justice values having

implications for a 'hope standard' in punishment (Brownlee, 2021:589). At its most poignant, the mark of the Order signifies a banishing of the risky individual, who through the criminal justice process, is colonised and stripped of agency and reduced to an object of bureaucratic control. The machinery of risk operates a labyrinthine system of processes, characterised by opaque objectives and practices which entrenches OLR subjects, and those who work with them, in endless loops of paperwork and process. Moreover, while introduced as a purveyor of risk, this highly restrictive form of sentencing and management, generates its own risk(s) and its own forms of complexity, harm and institutional violence, through the risk-based imperatives of its own making. This qualitative study was conducted by exploring the perspectives of criminal justice practitioners directly involved in the sentencing, management, and care of individuals subject to the OLR.

Key words: Scotland, Risk, Order for Lifelong Restriction, indeterminate sentencing, preventive detention, fear, emotional harms, hope, bureaucracy, institutional absurdities

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List of Abbreviations

AIR	Annual Implementation Report
CORO	Compulsion Order with Restriction Order
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
HORO	Hospital Order with Restriction Order
ICM	Integrated Case Management
ICO	Interim Compulsion Order
IPP	Indeterminate for Public Protection
IPV	Intimate Partner Violence
MAPPA	Multi-agency Public Protection Arrangements
MOSA	Management of Offenders (Scotland) Act 2005
NTE	National Top End
OE	Open Estate
OLR	Order for Lifelong Restriction
PPED	Punishment part end date
RAO	Risk Assessment Order
RAR	Risk Assessment Report
RMA	Risk Management Authority

RMP	Risk Management Plan
RMT	Risk Management Team
SEL	Special Escorted Leave
SOPO	Sexual Offences Prevention Order
SPS	Scottish Prison Service
SVP	Sexually Violent Predator Statues

Chapter 1 Introduction

This thesis presents an arguably much-needed exploration of the Order for Lifelong Restriction (OLR) a sentence of imprisonment available to the Scottish courts. The OLR is a risk-based disposal available for persons who are deemed "dangerous" and who are thought to be unmanageable by any other means. The indeterminate nature of this sentence for public protection means that at the point of sentencing, the offender will not know with any degree of certainty if, or when, they will be released. In 2024, 74 percent of persons subject to an OLR were beyond the designated punishment part of their sentences (RMA, 2024), a far higher percentage than those over tariff who are subject to the mandatory life sentence for murder (Ceesay, 2022). For the small number of those who have been released, they are subject to measures of lifelong control and supervision. Thus far, this sentence seems to have escaped the criticisms afforded to similar preventive sanctions imposed in other jurisdictions such as the now abolished, Indeterminate for Public Protection sentence (IPP) which had been used in England and Wales (see chapter two of this thesis). Very little is known about how the OLR works in practice, the processes involved, and how it is experienced by those who are subject to it, or by the wide range of professionals involved. This thesis seeks to uncover some of these 'silences' (Foucault, 1968) focusing on the lived experience of those charged with deciding and administering the order, a seemingly marginalised perspective within the wider scholarship on managerialist forms of justice. It is on this basis that this thesis provides an original contribution to the theoretical debates, knowledge and perspectives of preventative punishment from inside the system as it operates in Scotland. It is hoped that this work will provide valuable insights into the premise of the OLR, its particularities as well as the peculiarities of this disposal and in so doing, inspire further academic exploration and debate.

An 'exceptional' sentence for an exceptional offender

Scotland is a small constituent nation of the United Kingdom which has one of the highest levels of life sentenced prisoners in Western Europe (Scottish Government, 2024). The vast majority of those imprisoned under these provisions are men serving a mandatory life sentence following a conviction for murder (van Zyl Smit and Morrison, 2020). Life sentences in Scotland take three forms: automatic life sentences for those convicted of murder, discretionary life sentences and the OLR. The latter set out to largely replace the discretionary life sentence

provisions, however it may still be used by the Scottish courts. While in law, the Order for Lifelong Restriction (OLR) is defined as an indeterminate sentence, it can be understood as a form of preventive detention for those assessed, on the balance of probabilities, as posing a risk of serious harm in the future. The main distinction between the OLR and the discretionary life sentence is the introduction of the statutory risk assessment and management framework overseen by the Risk Management Authority. The OLR has been written about in the context of international regimes of preventive detention (see, McSherry and Keyzer, 2009, 2011; McSherry, 2014) and described elsewhere as a 'sentence of last resort' (Ferguson, 2021:1). Some attention to other forms of preventive detention is provided in chapter two of this thesis.

The Order for Lifelong Restriction was introduced against a backdrop of concerns about the competence of previous sentencing regimes and weaknesses in mental health legislation (Crichton et, al. 2001; McKenna, 1999) for dealing with dangerous offenders, some of whom would have a diagnosis of a personality disorder (Scottish Government, 2000). In history the control of people designated as dangerous, is situated at the intersection of law and medicine (Prins, 2010) and despite scientific uncertainty about what to do with this group, new regimes such as the OLR continue to emerge. Underpinned by the MacLean Committee's review of sentencing for 'serious violent and sexual offenders' the OLR 'an exceptional sentence' (Maclean, 2000: 34), was introduced via amendments to the *Criminal Procedure (Scotland) Act 1995* and the *Criminal Justice (Scotland) Act 2003*. The legislative framework provides for a lifelong sentence that comprises a punishment part or *tariff,* expressed in years and months, by following a specific format for sentence calculation based on the offence, while the lifelong element is imposed on the basis of future risk. This includes the potential for release on life licence. Release will be granted by the Parole Board for Scotland if a test is met[1], that on the balance of probability, the offender can prove that they no longer present a risk to the public. As well as drawing in an assemblage of pre-existing institutions, the OLR has seen the genesis of new bodies such as the RMA introduced in 2005 to set the standards and guidelines for risk, accredit risk assessors and directly manage the complex web of documentation and procedures for the new sentence.

[1] There are specific tests set out in legislation for the release of indeterminately sentenced prisoners i.e. those subject to mandatory life, the Order for Lifelong Restriction and for the extension period of an extended sentence. Where there is no defined statutory test, the Board must be satisfied that any risk that a person poses can be managed safely in the community. https://scottishparoleboard.scot/wp-content/uploads/2024/01/MembersGuidanceManual.pdf

The emergence of risk-based justice

During the latter part of the 20th century, an emerging body of work within social theory concerned itself with the rise of risk in late modernity (Beck, 1992a, 1992b, 1999; Giddens, 1990, 1991, 1998a, 1999). Risk has become the object of thorough inquiry (O'Malley, 2004) and is now considered an organising principle of modernity (Giddens, 1990). The latter has suggested that it presents as something of a double-edged sword for governments, through demands for both the regulation of risk and for greater accountability. Since the late 1980s risk-based regulatory practice has risen to a prominence that has seen it become embedded in forms of bureaucratic governance across the public sphere (Power, 2004). Risk has become an 'artefact' of the modern body politic concerned with the pursuit of objective, scientific knowledge, where social phenomena such as criminality, can be measured, calculated, and predicted (Lupton, 1999:6). In the arena of crime control risk has become a central concern of penal culture and the preoccupation with risk and prevention, has led some scholars to suggest that we have seen a temporal shift from a 'post crime to a pre-crime society' (Zedner, 2007:262). This has also been conceptualised as causing a paradigm shift in the punishment of offenders as outlined in the 'new penology'. In this view, crime control is now principally concerned with identifying, classifying, managing, monitoring, and controlling aggregate groups of dangerous people (Feeley and Simon, 1992). The encroachment of managerialism into the terrain of criminal justice, has led to the prioritisation of risk governance over substantive and transformative goals for individuals. An alternatively important theoretical contribution has its origins in the work of Emile Durkheim (1984) which offers insight into the way in which social life is organised. In this perspective, punishment is not merely about technical practices but is underpinned by moral and emotional sensibilities (Garland, 1990). The introduction of preventive measures is a response to collective fears and anxieties regarding certain crimes (Tulloch and Lupton; 2003; Hough and Roberts, 1999) and the regulation of specific groups deemed to pose a threat to the social and moral order. Therefore, preventative punishment can be viewed through 'cultural' theory underpinned by the work of Mary Douglas (1966, cited in Lupton, 1992; McSherry, 2014) because certain crimes ignite the retributivist passions of the public's new punitiveness (Pratt et al, 2005) representing a transgression of a shared moral order, a violation of the sacred, of kith and kin. In addition, the risk paradigm, through risk assessment and risk modelling and the integration of psychological sciences, attempts to define and capture people who cause us fear. The dream of risk assessment

is that they can sort and isolate dangerous people, offering the means by which, the nation state can exact measures of expulsion and control, thereby safeguarding the public and its own reputation and legitimacy. And yet in practice it seems that these beliefs/assumptions may not be as certain as one might think, as we shall see in the analysis of the OLR.

The importance of examining the OLR

In the years following the introduction of the OLR, a small body of early scholarship emerged in the domain of Scottish forensic psychiatry (Darjee and Crichton, 2002; Crichton et. al, 2001; Darjee and Russell, 2011), in policy studies, (Gailey et. al, 2017: Fyfe and Gailey, 2011) and in law (Ferguson, 2021). Academics in the international sphere have also taken an interest in the Scottish model in comparative studies (see McSherry, 2014, McSherry and Keyzer, 2009; 2011). Yet the Order for Lifelong Restriction has received little attention by criminologists.

As preventative detention becomes an increasingly normative element of modern justice systems and the numbers of those detained under the general category of life sentences increases, the importance of interrogating these practices takes on an urgency. What is more, the implications for preventive punishment in contemporary societies requires that extraordinary measures be justified, with strong safeguards and due process protections against excessive punishment (Ashworth and Zedner, 2014). Extending Ashworth and Zedner's enquiry, as a bare minimum a sentence such as the OLR should be subject to deserved scrutiny while posing the following questions: What is the nature, extent and scope of such exceptional measures, who are they for, and on what basis, and with what implications? (Ashworth and Zedner, 2014) Although there are many forms of preventive detention, an apt description has been provided by Slobogin (2011) as follows:

> A deprivation of liberty, instigated by the government through incarceration or other means which is based on the assessment that the person deprived of liberty represents a risk to society (Slobogin, 2011:37).

Preventive detention (Maclean, 2000; Ashworth and Zedner, 2014) is also known as preventative or protective sentencing (Henham, 2001; 2003). While these terms, can be applied to a wider set of carceral practices which will be more fully described in chapter two, they are used in this thesis to mean regimes of punishment which constitute an indeterminate criminal sentence. A sentence with a preventive element means that beyond any punishment part which

meet the requirements of deterrence and retribution, individuals are held preventatively for crimes that they have not yet committed. Commentators have argued that these post-conviction forms of preventative detention stand in violation of the normative principles of criminal law and are therefore tantamount to double jeopardy (McAlinden, 2001). It is also observed that a main point of contention with preventive detention measures is that traditional justice values based on principles of proportionality and rehabilitation are usurped by incapacitation (McSherry et al. 2009; 2011; McSherry, 2014). Henham (2003:59) has noted that 'preventive confinement of persistent violent and sexual offenders is inconsistent with principles of fairness' (also see Von Hirsch and Ashworth, 1996). Clearly, detaining an individual based on crime that has not yet occurred is an extreme position for any government to take. This makes preventive justice an important area of research for scholars of criminology with an interest in both the sociological and ethical foundations of modern punishment. Therefore, present and future empirical examination of Scottish dangerous offender legislation is of great consequence, not least because as Walker suggests, 'the horns of the dilemma are sharpest when the harm feared is of the kind which destroys life or the quality of life' (Walker, 1996:1).

Thesis structure

To achieve its aims of understanding the lived experience of practitioners this thesis has two main objectives. Firstly, it provides an overview and examination of the background of the OLR, which emerged principally from the recommendations set out in the Maclean Committee's Review of the Provisions for Serious Violent and Sexual Offenders (2000). This includes a critical appraisal of the legal and policy frameworks in which the sentence is embedded, covering a wide range of policy and practice documentation from the Risk Management Authority (hereafter RMA) and the Scottish Prison Service (SPS). Here I also provide some descriptive statistics regarding its use and application. Secondly and more substantially, this thesis qualitatively explores the experiences of criminal justice agents who operate this system of punishment and who make key decisions about those subject to the Order. Twenty-two semi-structured interviews were undertaken with key informants working in the criminal justice system. This includes interviews with members of the judiciary and practitioners of criminal law, consultant forensic psychiatrists, prison-based psychologists, prison personnel, community justice social workers, and current and former members of independent institutions such as the Parole Board for Scotland and the Risk Management

Authority. The findings from these interviews are laid out across four chapters of this thesis and summarised in the conclusion.

Chapter two addresses the legal background and impetus for the introduction of the Order into Scottish criminal justice legislation explaining why this form of punishment emerged in Scotland at the time that it did. It contextualises the order within international forms of preventive punishment as practiced in other jurisdictions. This helps to situate the OLR within these alternative models, particularly as it has been heralded a model of good practice (McSherry and Keyzer, 2009; 2011; Darjee and Russell, 2011; Fyfe and Gailey, 2011). In the 1990s there were concerns about the 'treatability loophole' in mental health in regard to high-risk patients and the changes that resulted from legal challenge to detention without limit of time at the State Hospital (Crichton et al, 2001:652). Specific consideration is given to the MacLean Committee's Review (2000) and how this informed the development of the exceptional sentence, who it would be for, what form it would take, and the requirements of its operation. It will explore the development of arrangements surrounding use of the OLR, as developed by the Risk Management Authority who determine the standards and guidelines for risk assessment and management, and how this has shaped and continues to shape current practice. Despite a handful of persons subject to an OLR being cared for at the State Hospital at Carstairs (RMA, 2024) the majority of people subject to OLRs have been sentenced to terms of imprisonment.[2], and therefore this chapter undertakes an examination of prison-based progression managed by the Scottish Prison Service. This chapter also includes descriptive statistics regarding the use and application of the OLR sentence, a review of research already undertaken and, where relevant, draws upon case law. This chapter ends by considering the implications of the OLR in terms of human rights legislation and judgments concerning indeterminate imprisonment at the European Court of Human Rights (ECtHR).

Chapter three provides key separate but supporting conceptual frameworks which can be used to make sense of the proliferation of preventive forms of punishment. It gives attention to the

[2]A judge will consider the seriousness of offence(s) and the length of sentence that would have been imposed in a determinate prison sentence. The proportion of that sentence which would have been for public protection is stripped out as this is accounted for by imposing the Order for Lifelong Restriction. https://www.rma.scot/what-is-a-punishment-part/

interplay between social, moral and concerns that have historically and contemporaneously given rise to societal fears about dangerousness, and the measures which follow. Following McSherry (2014) and Lupton (1999) I draw on a number of theoretical perspectives on risk, including 'cultural/symbolic', 'risk society' and 'governmentality' approaches. Within this I also provide an account of the emergence of forms of governance which have emerged against a backdrop of economic and political shifts, the fall of the Keynesian welfare state and the advent of neoliberalism. The latter has contributed to the whole scale retraction and revision of welfare states (Wacquant (2011) and a general decline of the rehabilitative ideal (Allen, 1981). It follows the introduction of the 'new regulatory state' (Braithwaite, 2000) and 'audit culture' (Power, 1997) as market-oriented principles and which have culminated in the managerialisation of the public sphere pervading state institutions including criminal justice. The emergence of a managerialist model denotes a shift from rehabilitation as a guiding feature of justice toward a strong commitment on monitoring, control, surveillance and compliance. The final section of this chapter gives attention to the technologies of the *precautionary principle* which allow for a formulation and assessment of future risk. In doing this, it raises a number of epistemological and ontological questions about how we know what we know about risk.

Chapter four details the methodology and methods used in this study which set out to qualitatively explore how criminal justice practitioners experience working within the framework of the Order for Lifelong Restriction. In doing this, I explore the processes of risk management through human experience. Thus, it is underpinned by an interpretivist phenomenological method which seeks to explore how individuals both experience and make sense of their world. This facilitates an understanding of how penal agents interpret their work, providing insight into interpretation, values, emotions and sense making. In this context, practitioner accounts are treated as situated, interpretive forms of knowledge, offering insight into how the OLR is enacted in practice, rather than as direct representations of prisoner experience, reflecting the study's broader reflexive epistemological stance. It necessitates particular attention to a reflexive approach in research on activities that are sensitive (Cowles, 1998) and emotionally demanding (Burrell, et, al. 2023), as well as the ostensibly laborious and separate ethics processes that were required. It also details the more technical steps that were taken regarding, participant recruitment, sampling, a range of ethical considerations, and data analysis.

Chapter five is the first findings chapter which sets up those that follow. It places the person sentenced to an OLR as a *knowledge subject* (Foucault, 1977), critically examining his[3] construction through the descriptions and narratives provided by penal agents who encounter him through the criminal justice process. In many ways the subject is, to borrow from Pat Carlen (2008) a criminal 'imaginary' reminiscent of Proteus from Greek mythology, an enigmatic protagonist, who takes on various identities as shown in this thesis. This chapter takes the reader through the complexities of a system which attempts to identify and understand the penal subject in need of the total control allowed by the OLR. It describes his initial construction in the MacLean Review and his reimagining in the perspectives of those I interviewed. The reflections across the range of professionals reveal a shifting, fragmented and contradictory picture. He is characterised on the one hand as someone who is unmanageable and who is to be feared, as a model prisoner but who may pose a threat if at liberty, and on the other as someone who is deeply traumatised and vulnerable, potentially amenable to change but potentially not. These fragmentations and contradictions are at the core of this chapter, and they illuminate the complexities of the OLR. Members of this group seem to fall between the nets of legal and medical systems and pose problems and paradoxes for institutions, those charged with their care and confinement and importantly, themselves. Because of this, the management and control of this group creates a confusion and ambiguity about who the intended subject of the OLR is. This places limits on what can be done with such persons which leads into themes explored in subsequent chapters.

Chapter six considers the way in which emotions of fear and anxiety are occupational runoffs of risk labour which engender a number of harms for penal actors. Interview subjects describe profound anxieties, which relate to the nature, essence and potential adverse consequences of managing 'dread risks' (Slovic, 1987:3). The chapter draws upon a framework developed by organisational theorist Michael Power (2004) which posits that organisations are required to manage both primary and secondary risks. I adapt this model, to show how labouring under risk and public protection requires the management of primary risks (the danger presented by the person under an OLR), for which practitioners are professionally trained, but also personal reputational risks, as opposed to reputational risks at the level of organisations. Throughout the course of this research, interviewees explained that as well as bearing the heavy burden of

[3] I refer to "him" as the majority of OLRs have been imposed on men, and the focus of interviewees in this thesis is exclusively with men subject to the order

responsibility for the protection of the public, visceral fears and anxieties accompany this work. For some, these concerned catastrophic thinking about reoffending, a preoccupation with risk showing that the "*what ifs?*" of offender management extends beyond the boundaries of the professional, seeping into everyday life. Others explain how they manage their existential fears and anxieties and their 'tainted' (Garrihy, 2021:982) view of the world by positively reframing risk-based exposure. In addition to this, there were concerns that the system would fail to adequately protect professionals if the wrong decisions are made, leading to feelings of insecurity and vulnerability. Fear of reputational annihilation compounds these anxieties as they operate in an environment in which errors in decision-making can be levied against those who make them. This chapter illuminates how the risk system, despite its tightly audited procedures and organisational defences (Menzies-Lyth, 1988), is considered unable to adequately protect penal agents from reputational harms if things go wrong.

Chapter seven evaluates the human impacts of the OLR against a standard of hope (Brownlee, 2021). It explores how hopelessness affects both penal actors and their views of the way in which the Order impacts those subject to it. One of the key features of the OLR is its permanence. In prison, the burden is placed on prisoners to prove that they are no longer a risk to the public. In custody as well as in the community there is a requirement for prisoners to demonstrate that they can manage their own risk. They are also required to manage the indeterminacy of the sentence and to manage the strictures of the risk-based system. For those in custody, this is no easy feat, evident in the numbers of people being held many years and months after the expiration of the punishment parts of their sentences (see chapter two). Interviewees showed great awareness of, and elaborated on how those on OLRs experience a deep and enduring sense of hopelessness. Part of this is related to the symbolic weight of the order and the offences they have committed which impose a lifelong mark of stigma (Goffman, 1968) upon the subject. In this chapter I show how penal agents shoulder the emotional burden of managing the loss of hope that is experienced by OLR subjects as well as their own diminishing hope and lack of faith in this unique form of punishment and control.

Chapter eight explores what it means to perform risk-based justice and concerns the way in which the OLR apparatus deploys a series of scientific modes of assessment and risk prediction, and planning methods designed to identify and mitigate risk. At the heart of this chapter are the experiences of penal actors who are grappling with the obtuse aims of the system as the task of offender management becomes more 'managerialist' and less 'transformative' (Feeley

and Simon, 1992: 452) displacing the primacy and subjectivity of the offender under a bureaucratic load. This results in both administrative and epistemological burdens for those working with OLRs in prisons and in the community. These experiences are characterised by confusion and a sense of futility as they bear witness to the 'absurdities' of the internal logics of the system (Graeber, 2015). The OLR is experienced by its administrators as a Kafkaesque system of processes which rather than provide clarity and reduce complexity, is characterised by opaque objectives, which trap individuals – both those working the machine and those being worked by it, in endless loops of bureaucracy. This leads to a fundamental questioning of the aims of the Order and the processes upon which it rests. Further, this system operates through keeping checks and balances on the system *and* those labouring within it compounding the other burdens of risk work that have been described in this thesis. As well as nuanced expressions of an arbitrary and inequitable system of carceral practices, the system is beset by progression setbacks and delays, ironically perpetuating the risk it aims to reduce through exacerbating existing resource difficulties which beset an already overburdened system (HMIPS, 2024). Overall, this chapter shows that the strictures of risk logic appear to prioritise the requirements of the auditable system (Power, 1997) rather than the needs of those subject to it. The 'imaginary' of rehabilitation (Carlen, 2008) appears to ebb away and yet, governing subjects are required to act as if the system can deliver it, leading to a sense of absurdity as they grapple with the obtuse aims of the system.

Chapter nine concludes this thesis by embarking on an evaluation of the OLR that synthesises the findings of this thesis. In doing this, it lays the foundations for a detailed understanding of the burdens and peculiarities of managing indeterminately sentenced prisoners under this framework. Tensions are raised to the fore by penal actors exemplifying the seemingly intractable problem of what can be done with the OLR subject when he is caught in the machinery of risk. It concludes that, the risk management system culminates in a number of significant harms for both penal actors and subjects. While the OLR meets the ends of public protection if this is narrowly defined as removal from society, yet there is scope for a deeper consideration of the human consequences of this sentence. The official story is that the OLR sentence prima facie is a rational and efficient way of processing a difficult group of persons using heavily bureaucratic processes and procedures. This has resulted in an intensification of the managerial and bureaucratic goals of the system in ways that are deemed more expansive than those in place hitherto. Further, this form of preventative detention appears to culminate in work-based pressures, emotional and psychological burdens and bureaucratic harms which

should be a matter of concern to criminal justice systems both here and elsewhere. Of crucial importance, is the way in which the supposed rationality of the system has given rise to a series of new risks or irrationalities for those working within it - which have until now been unseen and perhaps unanticipated. The thesis thus demonstrates the importance of attending to the work of risk management, and the entwined affective fates of people subject to and tasked with totalising sentences. Given the relatively low numbers of those released on the order, the future of this sentence and the focus of this thesis on the experiences of penal agents, the full sense of these implications is yet to be fully understood - this is perhaps an idea for a new project.

Chapter 2 Background, influences and specificities of the OLR

Introduction

The aim of this chapter is to give a full and detailed account of the Order for Lifelong Restriction. Inevitably this chapter is to a large extent descriptive, drawing on legislation, a range of policy documentation as well as building upon a small body of scholarship that has been undertaken. Some attention will be given to appeal case law which has influenced the direction of the OLR over time (Gailey et al, 2017; Ferguson, 2021). The OLR, like other preventive regimes is imposed where there are concerns about the risk of serious harm posed by persons who are *known* to criminal justice systems. Such concerns have beset other jurisdictions and have led to shifts toward preventive confinement and control of those convicted of serious violent and sexual offences (McSherry and Keyzer, 2009, 2011; McSherry, 2014; Hebenton and Seddon, 2009; La Fond, 2008; Petrilla, 2011; Keyzer, 2009; Keyzer and Blay, 2006).

This chapter begins with a brief situating of the OLR within an international context of preventive regimes that have been introduced in other jurisdictions. This sets the foundations for the rest of the chapter and for the explanatory frameworks regarding risk and prevention explored in the chapter which follows. Although I do not offer a fully comparative analysis of preventive detention, some descriptive and comparative reference to other regimes is prudent. My argument for this is most strong in the light of claims by McSherry and Keyzer, (2009; 2011) that the Scottish model has significant strengths and some limitations (Gailey et al. 2017; Ferguson, 2021). These will be evaluated at the end of this chapter. The broad frameworks in the United States, Australia, and England and Wales will be discussed to allow me to contextually locate the Scottish model within preventive typologies. These models include ‘pre-crime’ as outlined by Zedner (2007) and ‘post crime’ and ‘post sentence’ forms (as outlined by McSherry 2014). This chapter then considers in some detail the legal developments in Scotland that were the antecedents to the OLR.

An appeal case brought before the House of Lords in the 1990s against civil detention without limit of time under mental health provisions, resulted in the exposure of what became known as the ‘treatability loophole’ in Scottish law (Crichton et al, 2001:652). The subsequent release of a high-profile patient with a primary diagnosis of psychopathic disorder resulted in public and political concerns and the introduction of emergency legislation in 1999 to close the loophole. Later, this resulted in the establishing of the MacLean Committee to review

provisions for the sentencing and management of serious violent and sexual offenders, and the Millan Committee to review the *Mental Health Act 1984*.

In what is the largest section of this chapter, I lay out the legislative, policy and practice framework for the Order for Lifelong Restriction. As I do this, I walk the readers of this thesis through the OLR framework outlining the role and statutory obligations of the Risk Management Authority who set the standards, guidelines and framework for the assessment, evaluation and management of risk, and the process for prison progression and release. This will also provide a discussion of multi-agency public protection arrangements (MAPPA) regarding supervision in the community. This aims to explain the risk management process, the raft of accompanying documentation, procedures and obligations of those responsible for managing persons subject to an Order for Lifelong Restriction thus setting the foundations for the rest of this thesis. I will then present some descriptive statistics drawing on a range of policy documentation and the small body of existing academic literature concerning the use and application of the Order. Consideration will be given to general characteristics of the group the age range of OLRs and other features of the group as drawn from previous studies (Gailey, et al, 2017: RMA, 2023).

The final section of this chapter offers an account of the human rights challenges and potential shortcomings (also see Gailey, et al, 2017; Ferguson, 2021) of such regimes in Scotland and elsewhere, drawing on appeal case law. I will then specifically focus on the 'right to rehabilitation' and to 'hope' as discussed in European jurisprudence. I argue for a measuring up of the OLR against what Brownlee (2021:586) has termed a 'hope standard' and consider where this may invite avenues of challenge specifically where inefficiencies and inadequate resourcing of the sentence which may invoke rights under Articles 5 and 3 of the European Convention of Human Rights.

Preventive detention

The Order for Lifelong Restriction (OLR) is a risk-based sentence of last resort, which has been introduced to protect the public from serious harm. Occurring at a time where other jurisdictions were implementing dangerous offender legislation it is said to have several advantages over regimes in other jurisdictions (Malsch and Duker, 2016; McSherry, 2009; 2011; Darjee and Russell, 2011). The harm caused by a minority, of *known* offenders, and fear that they may reoffend again has proved the catalyst for controversial legislation underpinned by what has been termed 'precautionary logic' (Hebenton and Seddon, 2009:343). There are

many forms of preventive detention and a new and developing body of literature on its practices of forms such as "*forvaring*"[4], in Nordic countries (see Lappi-Seppala, 2023), Germany (Drekhahn, et. al, 2012) and in Poland (Szwed, 2021). These models of criminal law are not based on the common law system of judicial precedent and case law, but rather legal systems with codified statutes and therefore, would require more untangling than time or space would permit. Other forms of preventative confinement involve the civil commitment of mentally ill and disordered persons under mental health provisions (Darjee and Crichton, 2003), the detention of those seeking asylum or awaiting deportation (Bosworth and Guild, 2008; Zedner, 2007b) and the detention of those suspected of terrorism offences (Ashworth and Zedner, 2014; McSherry and Keyzer, 2011; Elliot, 2006).

I focus on anglophone countries who have shared cultural and linguistic histories and have seen the adoption of neo-liberal forms of governance in response to insecurities (Ericson, 2005) and have similar adversarial legal systems, institutions and policy priorities. Forms of preventative detention may operate under civil or criminal provisions and legislative frameworks. Zedner (2007) observes that practices of preventive detention have emerged in three forms in 'pre-crime', 'post-crime', and 'post-sentence' forms. Pre crime detention takes the form of remand for those awaiting trial or sentencing, or for those thought to pose a risk of terrorism related offences and where a period of detention is used to gather intelligence. However, it may be argued in a broad sense, the notion of 'pre-crime' sanctions apply to all preventative regimes in that they are based upon a presumption of risk or dangerousness, usually in light of previous offences committed by individuals *known* to criminal justice systems. A general application of the term 'pre-crime' applies even more so when detention is justified on the grounds of assessed dangerousness. Under some regimes, pre-crime detention has been used for people with mental disorders or accused of sex offences through civil commitment in circumstances where no crime has taken place.

'Post-crime' regimes deal with crime that has already been committed and a sentence imposed. In such cases the individual will be aware of the preventive aspect of their sentence usually through its indeterminate nature. In its 'post-sentence' application, this can include indefinite measures imposed following the expiry of a sentence of imprisonment (McSherry, 2014:6). These measures permit the transfer for treatment to extra-judicial facilities, civil commitment

[4] For example in Norway 'Forvaring' is a form of preventive detention reserved for repeat offenders for whom a determinate prison sentence is not deemed to adequately contain the risk posed - See Tapio Lappi-Seppälä (2023) Preventive detention in Finland and the other Nordic countries, *Peking University Law Journal*, 11:1, 59-72,

measures and the measures of supervision and control that may not have been outlined at the point of sentencing. Despite differences in these typologies, they serve the common goal of regulating subgroups of people that are deemed to pose an ongoing threat to public safety. For the purposes of this chapter, I am principally concerned with preventative detention as operated by criminal justice systems but will also include where relevant, mechanisms for civil commitment for mentally disordered offenders and the transfer of prisoners under civil provisions following the expiration of a prison sentence.

The development of preventive legislation

The preventative detention of dangerous offenders is not new; many jurisdictions have introduced dangerous offender legislation following highly publicised cases. The Sexual Psychopath Laws of the early 1930s (Lave, 2009; Di Furia and Mees 1963; Roche, 1966; Horwitz, 1995) introduced in US states, were a precursor to the current wave of public protection laws often referred to as sexually violent predator statutes. This allows for the civil commitment of known sex offenders deemed to pose a risk to the public. In the 1930s these laws were occasioned by a spate of high-profile sexually motivated homicides (Lave, 2009).

These laws, although not implemented in a uniformed way across states, may be considered both ‘pre-crime’ and ‘post-crime’ forms of detention as they also permitted civil commitment where a crime had not occurred. In the latter these measures may have been imposed without trial or hearing, but where a person had been deemed a sexual psychopath by one or more psychiatrists (Lave, 2009).

In the 1980s, the catalyst for the new wave of sex offender laws was said to be a sexual assault and attempted murder of a minor by a person who had two previous child sex offences. Earl Shriner, was assessed as a ‘defective delinquent’ with a ‘severe intellectual impairment’ (Bochnewich, 1992:280). The first sexually violent predator statutes (SVPs) were implemented in Washington State in 1990 following the effect of the *Community Protection Act* (McSherry and Keyzer, 2009) and remain in statute today. The SVPs operate a ‘post-sentence’ civil commitment regime which allows for the indefinite containment of those convicted of sex offences having the dual purpose of detention for public protection and treatment of mental disorders within treatment facilities (Mercado and Ogloff, 2007). However, little is known about this form of incapacitation within treatment facilities referred to by critics as *shadow prisons* (Rozek, 2022; Hoppe et al, 2020; Ruth, 2023). The SVP laws specifically target those who are deemed to have a ‘mental abnormality’ (Janus, 2004:50) or ‘personality disorder’

(Ruth, 2023; Hoppe, et al. 2020:2) considered to predispose an individual to sexual offending. Detention in such a facility commences with the expiration of a prison sentence and is therefore a post-sentence regime which allows for civil commitment for an indeterminate period (Petrilla, cited in McSherry and Keyzer, 2011; Fitch and Hammen, 2003). It is argued that the SVPs meet the dual purpose of public protection and treatment of high-risk people. One of the main disadvantages of this regime as noted by McSherry (2014) is that the person may not be aware at the time of sentencing that they may become subject to post-sentence detention. Currently, there are over 6300 individuals civilly committed in 20 state and federal civil commitment programs (Hoppe, et al., 2020). There have also been a number of concerns regarding, post sentence detention as a double punishment (Keyzer and Blay, 2006) a breach of due process of law (Slobogin, 2011), the high standard of proof for release, and some findings and statistical information which indicate bias in their application (Hoppe, et al. 2020). La Fond, (2011) has argued that this form of managing sex offenders is a costly failure (cited in McSherry and Keyzer, 2011: 9).

In Australia, the catalyst for the current preventive detention regimes was the child abduction and subsequent sexual assaults committed by Dennis Raymond Ferguson (McSherry and Keyzer, 2009:2011). This 'post-sentence' detention takes the form of civil commitment or detention by civil order at the end of a term of imprisonment. Compared with the USA, the Australian literature is moderate although notwithstanding the efforts of a small team of scholars who have written extensively in this area namely, Bernadette McSherry and Patrick Keyzer (McSherry and Keyzer, 2009; McSherry and Keyzer, 2011; McSherry and Keyzer, 2013; McSherry, 2014; Keyzer, (2009a); (Keyzer and Blay, 2006); and comparative work by Mercado and Ogloff (2007). The Australian model is distinct from the US based system, firstly, as it is imposed under criminal law (Mercado and Ogloff, 2007). Unlike the provisions in the US, Australian "post-sentence" detention schemes are not dependent upon any diagnostic criteria although they too are focused on sexual offences. Since the early 2000s four of the six Australian states, have introduced preventative regimes for sex offenders enabling continued detention for an indefinite period at the end of a prison sentence (McSherry, 2014). The *Queensland Dangerous Prisoners (Sexual Offenders) Act* was the first, introduced in 2003 for the continuation of a period of detention or supervision of a subgroup of sex offenders who were serving prison sentences (Mercado and Ogloff, 2007). The schemes in other Australian jurisdictions are public protection focused but they vary in the extent to which they are aimed toward rehabilitation, treatment, and/or confinement (McSherry and Keyzer, 2009). In the

example of Queensland State, the law permits for an application for a continuing detention order to be made by the Attorney General during the final six months of a prison sentence. This requires that the Supreme Court is satisfied that the individual will pose a risk of committing a further serious sexual offence if at liberty (Mercado and Ogloff, 2007).

The Dangerous and Severe Personality Disorder Programme: England and Wales

Around the same time that Australia was making proposals for its dangerous offender legislation two parallel developments occurred in England and Wales; the implementation of the Dangerous and Severe Personality Disorder Bill and the introduction of a new criminal sentence: Imprisonment for Public Protection (Tyrer, 2010; Duggan, 2011; Minoudis and Kane 2017). These will be considered in turn.

In 1999, the UK Home Office and Department of Health outlined a proposal for detaining and treating male offenders with severe personality disorders. O'Loughlin (2016) explains that these proposals were in part inspired by systems in other jurisdictions. The revisions in 2007 to the *Mental Health Act 1983* culminated in the co-option of psychiatry (also see Rose, 1998) in the management of a group of dangerous and severe[ly] personality disordered people thought to pose a serious risk of harm to themselves or others. It was the high-profile case of Michael Stone which precipitated the introduction of DSPD units (Minoudis and Kane, 2017; Feeny, 2003). That said, O'Loughlin (2016) explains that the initiative was a response to the enduring and longstanding problems posed by this group.

The DSPD programme applied to sexual and violent offenders, many of whom were admitted following civil detention under the *Mental Health Act 1983*. Others were subject to life sentences and some serving determinate sentences (Burns et al, 2011). Admission to the DSPD programme required the individual to be categorised as having a dangerous and severe personality disorder. This meant that patients living in the community with a diagnosed personality disorder and a significant record of serious sexual or violent crime could be placed within DSPD units indefinitely if they were believed to pose a risk (Cheswick, 2001; Mullen, 1999). In this sense, these measures appear to form a hybrid between a 'pre-crime' form of disposal where dangerousness was presumed in some cases, and a 'post-crime' disposal where a person had committed an offence. The criteria for dangerousness were as follows; 'more likely than not to commit an offence that might be expected to lead to serious physical or psychological harm from which the victim would find it difficult or impossible to recover' (Bennett, 2003:22). For detention under the DSPDs two further criteria required to be satisfied:

The offender would have a diagnosed personality disorder and thirdly, this required evidence of a causal connection between risk of harm and the severe personality disorder (DSPD Programme, 2008:14-15). The new framework led to the introduction of four DSPD units in High Secure Psychiatric Hospitals at Broadmoor and Rampton and within (Category A) prisons at HM Prison Frankland and HM Prison Whitemoor (Home Office, 2005). A number of DSPD services were later established in medium secure hospitals offering community-based services (Kettle, 2008).

The DSPD programme was short-lived, drawing opposition from a range of professional areas (Duggan, 2011; Eastman, 1999a; Haddock et al. 2001; Tyrer, et al. 2010; Corbet, 2005). In 2012 following an investment of over £500 million, the DSPD programme was dismantled. There were several reasons for this. From the outset, the programme was deemed to be controversial, as it was extensively reliant on an unscientific political construct - *dangerous and severe personality disorder* (Pickersgill, 2013). There was a lack of evidence regarding the efficacy of and access to appropriate treatment, leading to long periods of detention infringing the right of the individuals to receive adequate healthcare and rehabilitation (Bennett, 2003). Furthermore, the possibility of detaining a person beyond the expiry of the punishment part of their sentence undermined basic human rights (Perkins, 2015). For example, Eastman (1999a) has argued that the proposals acted as a mechanism by which the UK could circumvent the ECHR (also see Corbett and Westwood, 2005). There were also concerns about the safe management of those in the DSPD group and the negative impact of this on professionals (Perkins, 2015; Bennett, 2003). Following the dismantling of the DSPD units, the Communities Pathway Service and Personality Disorder Pathways for prison were introduced in 2013 (Minoudis and Kane, 2017). The current Offender Personality Disorder Pathway (OPD) operates in English prisons for those who are deemed high' or 'very high' risk, many of whom were 'screened in' under an Imprisonment for Public Protection order (King and Crisp, 2021), discussed next.

Sentence of imprisonment for public protection (IPP)

In England and Wales, the introduction of the IPP was influenced by the Michael Stone case (Duggan, 2011) as well as the sexual homicide of a child by a person with a history of sexual convictions (Anniston, 2014). This raised popular concern over subsequent crimes committed by those known to the criminal justice system. The Imprisonment for Public Protection Sentence (IPP) was implemented to deal with those convicted of a serious violent or serious

sexual offence. Coming into effect in 2005, the legislation aimed to protect the public from dangerous offenders who were considered to pose a significant risk of harm (Jacobsen and Hough, 2010). The IPP, like its life sentence counterpart, was comprised of two parts; a fixed punishment part followed by release on licence for an indeterminate period as directed by the Parole Board for England and Wales. The IPP would be imposed where an individual had been convicted of a 'specified' offence and where the test of dangerousness was met (s 225 CJ Act 2003). This may be viewed as a 'post crime' form of preventive detention as in theory, it would have been clear at the outset, that the sentence is indeterminate. The court would consider the 'nature' and 'circumstances' of the offence(s) as well as information about 'any pattern of behaviour of which any offences form part' (section 229 subparagraph 3 (a) and subparagraph 3 (b). Rose (2012) explains that the 'prescriptiveness' of the provisions meant that the court was required to assume the test of dangerousness was met where an individual had previously been convicted of an offence listed – this included minor offences (2012:303). As with other life regimes, the onus is on the person in custody to participate in opportunities to aid rehabilitation prior to applying for a parole hearing (Bettinson, 2013). The indeterminate nature of the IPP meant that if an individual was not able to demonstrate suitability for release, they would remain in custody. Upon release, those subject to an IPP were subject to ten years on licence and therefore eligible to be returned to custody at any point where their licence was breached (Zanna, 2023; Grimshaw, 2024).

By its peak in 2012, over six thousand people had received the IPP sentence, with tariff parts ranging from two years to the maximum ten (House of Commons, 2019). At the same time, as few as 94 offenders had been released on licence (Prison Reform Trust, 2010). The legitimacy of the IPP began to decline due to the sheer numbers of those entering the prison system with an IPP, attributed to the strict application of the sentence and the wording of the legislation which meant that a far wider group of people were caught in its net than was originally anticipated (Rose, 2012). Although, many IPP prisoners had served their minimum tariffs, the low rate of release was found to be the result of systemic failures (Grimshaw, 2024; Beard, 2024). The high burden of proof placed on prisoners to show they were no longer a risk to the public further culminated in prolonged imprisonment. Additionally, it has been argued that the indeterminate nature of the sentence led to mental health deterioration, making progression toward release even more difficult (Zanna, 2023). These combined factors resulted in thousands of IPP prisoners remaining in prison long after their tariff periods had expired, reinforcing widespread criticism of the sentence as excessively punitive and unjust. In the leading case *R*

v Secretary of State for Justice (2008) the sentence was deemed a 'systemic failure'. In May 2012 the sentence was abolished by the *Legal Aid, Sentencing and Punishment of Offenders Act (2012*) with the UK government stating it was not 'defensible' (Beard, 2024:4). Despite its repeal, many remain stuck in prison sentenced under IPP rules (Bettinson and Dingwall, 2013). The introduction of the *Victims and Prisoners Act 2024 (s 66 (3)(d)* introduced significant reforms[5] regarding the termination of IPP licences (Ministry of Justice, 2024). In March 2024, including recalls to custody, there were a total number of 2,796 IPP prisoners in custody in England and Wales (Beard, 2024: 16).

The case of Scotland

In Scotland, it has been argued that the precursor to the Order for Lifelong Restriction was at least partly informed by the offences committed by John Cronin and who had a diagnosed personality disorder (BBC, 2000; McSherry and Keyzer, 2009). However, it is perhaps more strongly influenced by the cases of Alexander Reid and Noel Ruddle discussed below. Given that legislative measures in other jurisdictions have been implemented following highly publicised events and concerns about the risk of harm posed by known offenders, in this respect Scotland is no anomaly. Yet the Scottish background intersects with a history of psychiatric provisions for the care of a group who have become known as 'mentally disordered' and, on occasion, the confinement of those with a diagnosis of psychopathic disorder within the State Hospital under conditions of high security. For a more thorough account of this history, particularly the provisions for the care of those with psychopathic disorder (otherwise termed severe personality disorder) - see Nuttall (2013), Crichton et al. (2001), Darjee and Crichton (2003), and Barnes (2018).

During the 1990s, Scotland, followed similar responses in other jurisdictions following high-profile crimes which gave rise to heightened anxieties. Crichton et al. (2001) explain, that 'sensitivity to popular anxieties in this area has led to a flurry of political and legislative activity, all taking place against a background of human rights concerns' (Crighton et al. 2021: 648). The origins and background can be located in two Scottish appeal cases: *Reid v Secretary of State for Scotland* (1999) and subsequently *Ruddle v Secretary of State* (1999). This was a debate which centred around questions of appropriate (and humane) disposals for high-risk

[5] See section 66 of the *Victims and Prisoners Act 2024 which* amends the s 31a and 32 of the *Crime and Sentences Act 1997. This* allows the automatic termination of IPP licence where the following conditions are met: a person has been released on licence and has not breached licence in a continuous two-year period having been released. the qualifying period has expired.

individuals with histories of violence who also had a diagnosis of psychopathic disorder. The two individuals in these cases were subject to a Hospital Order with Restriction Order following convictions for culpable homicide, which entailed detention without limit of time at the State Hospital in Carstairs. The landmark judgements in *Reid* and later *Ruddell* called into question the adequacy of provisions for the continuing detention of these persons who had been, until that point, within the remit of the mental health system. It is necessary to provide further context here. In 1967, Alexander Reid was a teenager who was convicted of culpable homicide for the murder of a woman in her home. At his trial, expert evidence was submitted to the fact that he was suffering from a 'mental handicap' which at the time satisfied the criteria for detention under the *Mental Health (Scotland) Act 1984* ([1999] 1 All ER 481). A recommendation was made for his admission to hospital on the basis that hospital care may 'alleviate' or 'prevent a deterioration of his condition' as was defined in s 17(1)(a)(i) of the Act (*Reid v Secretary of State*). The criteria for detention were as follows: Where the individual was found to be 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; 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 (s 17 (1) 1984 Act).

Provisions of the 1984 Act included a Hospital Order and in exceptional cases this could be bolstered by the imposition of an additional measure, a Restriction Order. When imposed together, the hospital order with restriction order (HORO) allowed for detention at the State Hospital *without limit of time*. Following Reid's conviction and imposition of the HORO, he was detained at the State Hospital for a period of almost three decades following which he applied to be discharged. There was the possibility for a review of a hospital order which was introduced following the appeal case *X v UK* (1981) which held that there was a requirement to review the continued detention of long-term hospital patients. This served the function of amending the *Mental Health (Scotland) Act 1960* and was later consolidated in the 1984 Act (McKenna, 1999).

In 1994 at a Tribunal Hearing, Reid was refused release on the grounds of his persistent and permanent mental disorder which in his original trial, had been described by the sentencing judge as 'abnormally aggressive' and 'seriously irresponsible behaviour' (Reid v Secretary of State [1999] 1 ALL ER 481). The Sheriff sitting at the mental health tribunal, was satisfied

that Reid would pose a very high risk of violence if an order for discharge was granted and thereby refused to discharge him 'regardless of treatment or treatability' (ibid). A petition for judicial review was submitted where consideration was given to the diagnosis of psychopathic disorder, and the grounds for admission to the State Hospital such as treatability. The reviewing committee argued that the discharge criteria did not explicitly mention 'treatability' and the appeal was rejected. Having unsuccessfully reviewed the Tribunals decision, the Secretary of State appealed to the House of Lords.

Alexander Reid was diagnosed with psychopathic disorder which was (and continues to be) the subject of long debate and consternation in the field of psychiatry, regarding the extent to which the condition is treatable (see Nuttal, 2013). The Law Lords viewed 'treatment' within a broad definition of the term, and as such, held that Reid was treatable to the extent that the therapeutic environment of the hospital made him less dangerous. This meant that his continued detention under the Act was consistent with the requirement of treatability (Crichton et, al. 2001). However, the effect of the judgement in Reid raised anxieties about treatability and the (un)lawfulness of detaining those under the provisions of the 1984 Act in cases where there was *no* prospect of treatment. One of the key reasons for these anxieties concerns the grounds for discharge from the HORO provisions. Should a person be deemed untreatable, the Sheriff would be compelled to grant absolute discharge and there would be no grounds for recall to hospital should the patient become dangerous.

The judgement in *Reid* allowing for prolonged detention on grounds of 'treatability' was successfully employed in 1999 in the case of *Ruddell V Secretary of State for Scotland* (1999 GWD 29-1395). Ruddle had been detained under the HORO provisions again following conviction for culpable homicide. At the time he was diagnosed with schizophrenia, induced by his use of drugs and alcohol, and an anti-social personality disorder (Mckenna, 1999). Using what had become known as the 'treatability loophole' in Scots Law, Ruddle submitted an application for absolute discharge and was successful on the grounds that a therapeutic environment was of no benefit because he was untreatable. The prospect of the release of such patients was unattractive to the public and government with news coverage from the BBC reporting various headlines; "*Dewar 'powerless' to stop release*", "*Released Killer says: I'm not cured*" and "*Legal loophole murderer freed*" (BBC, 1999). This served to heighten moral panics and political anxieties, widespread criticism of the Scottish Executive and calls for the

recall of parliament for the drafting of emergency legislation (McKenna cited in Crichton et, al. 2001).

The Mental Health (Public Safety and Appeals) (Scotland) Act 1999

The furore concerning the release of dangerous patients led to the swift implementation of emergency legislation, an inquiry by the Mental Health Commission into the care of Noel Ruddell in the State Hospital (Crichton et al. 2001) and the establishing of two working groups to consider the provisions for the sentencing and management of serious violent and sexual offenders: the MacLean and Millan Committees discussed below.

These developments coincided with the reconvening of the Scottish Parliament in 1999 for the first time since 1707, following the historic devolution via the *Scotland Act 1998*, and therefore, marked an important historical juncture for Scotland. Under First Minister Donald Dewar, the emergency *Mental Health (Public Safety and Appeals) (Scotland) Act 1999* was one of the first pieces of law implemented by the Scottish legislature. Section 1 introduced various amendments to the *Mental Health (Scotland) Act 1984*, including a requirement for a Sheriff to consider matters of public safety regarding appeals made by patients subject to a Restriction Order (s 64 of the amended Act). The function of this was to prevent the release of those patients who posed a risk to public safety, closing the 'loophole' placing an obligation on the courts to consider this prior to discharging high risk patients (Crichton, et. al, 2001). The legislation did not escape criticism from both mental health professionals and those in the legal profession. Such criticisms were lodged on the grounds that it was viewed as a contravention of legal principles through the potential for retrospective application of the law, and that it shifted the basis of detention for treatment away from therapeutic need towards public protection (McKenna, 1999). The Act was the first Scottish Act to be subject to challenge in *Anderson v Scottish Ministers* (Ferguson, 2021:106).

Two independent reviews were commissioned by the devolved Scottish Government in response to these developments and criticisms. The Millan and MacLean Committees were to develop a framework for the sentencing and management of serious violent sex offenders including those with a diagnosis of personality disorder (Darjee and Crichton, 2002). The Millan Committee would carry out a review of Mental Health law for the first time in four decades (Crichton et al, 2001; Nuttal, 2013). It was tasked with proposing a definition of mental

disorder as well as establishing the criteria for detention and discharge for mentally disordered offenders requiring a hospital direction, known today as a Compulsion Order with Restriction Order (CORO) (Scottish Government, 2000). The MacLean Committee would review the mechanisms for the sentencing and managing serious violent and sexual offenders who did not have a treatable mental illness, but whose risk was such that it warranted exceptional measures. These reviews laid the foundations for Scotland's dangerous offender legislation (Ferguson, 2021).

The report of the MacLean Committee

The *Report of the Committee on Serious Violent and Sexual Offenders (2000)* chaired by Lord MacLean reported to the Scottish Government its proposals for the sentencing, management, and treatment of serious violent and sexual offenders (Scottish Government 2000:1). Fourteen members with diverse expertise and experience in criminal justice, legal, medical and psychological backgrounds were involved. Although its focus was for all high-risk offenders it dedicated a third of its report to those who had a personality disorder and who because of this posed a risk of serious harm. The committee considered cross-jurisdictional laws and practices, some of which have been covered in this chapter, to evaluate provisions to inform its recommendations. Its remit also encompassed the identification of specialist interventions for this group, the assessment of risk, mechanisms for review and assessment of progress, and the development of procedures for release and supervision in the community (ibid, 2001:21).

Ferguson (2021:109) draws parallels between the approach of the MacLean Committee and the Floud Committee (1981), the latter which was established to review the HORO provisions. This supported the drawing in of public resources to mitigate serious risk of harm highlighting the 'moral defensibility' of such an approach (ibid:09). Prior to the MacLean Review, the Scottish Courts had a number of sentencing options for serious violent and sexual offenders. These included the use of long-term and short-term determinate sentences, an extended sentence comprising two parts: a custodial term and an additional extension licence period. The maximum term on licence was ten years for sexual offences and five years for violent offences, during which the parole board could recall a person to custody (Scottish Government, 2000). Additionally, the High Court in Scotland had the option of imposing a discretionary life sentence for common law and some statutory offences. As continues to be the case with the mandatory life provisions, there was no automatic release when the punishment part of a

discretionary life sentence expired; again this decision would fall to the Parole Board for Scotland. A parolee is required to adhere to the conditions of licence, and breach of that licence may result in recall to prison.

However, regarding the discretionary life sentence licence, the MacLean Committee noted that the grounds for recall were 'narrower than [the] mandatory life sentence' Scottish Government, (2000:160), suggesting that the former were subject to closer scrutiny. The MacLean Committee also identified several weaknesses in existing provisions including that the discretionary life sentence was found to be applied in an unstructured and unsystematic way, with variations in tariff parts and licences (2000: 27-28). It also explained that the judiciary lacked sufficient information and means by which to assess the level of risk that an offender posed (Scottish Government, 2000). Regarding assessments of risk, it noted that clinical judgement had poor predictive value and recommended the use of more structured risk assessment instruments (Scottish Government, 2000: 7-9). It was observed that current offender management systems were poorly coordinated and variable and that there was a 'reluctance' (2000:14) amongst some agencies to share information about offenders (Scottish Government, 2000: 127). A further related criticism was that the procuring of social enquiry reports which would help inform sentencing including the evaluation of information relevant to risk was problematic (2000:35). Regarding persons with a diagnosed personality disorder, the committee's terms of reference required it to assess the evidence for a medical protocol for this group, positioning this as a 'potentially important component' in those who commit serious violent or sexual offences (2000: 63). However, the Committee edged around this point cautiously stating that they did not 'think this implication should be over-stated' and that their approach was one which 'was governed by the identification and management of the risk they present to society rather than by the presence or absence of any particular psychological or medical condition' (p, 63).

The Committee in its report issued 52 recommendations that were partially implemented by the Scottish Government. Another few broad points are worth making about the MacLean Committee's view on the approach that Scotland should take going forward. It was noted that there was a need to keep a distance between some of the practices and terminology used in other jurisdictions such as 'dangerousness' and instead Scotland would focus on the 'risk' posed (Scottish Government, 2000:7). This is perhaps indicative of the political climate at a

time where Scotland was focused upon polity building and in keeping with the view that Scotland had a distinctive, and arguably less punitive, penal climate (McAra, 2008). For the Committee, this would be an opportune moment for the newly convened Scottish Parliament to position itself as operating a unique model of serious offender management. As well as bolstering the legitimacy of the Scottish Parliament the new framework for dealing with high-risk offenders would aim to quell public and political anxieties. The penal climate in which the MacLean committee carried out its work was one in which high-risk offender management can be considered increasingly managerialist in nature, with some commentors suggesting that it is punitive in its effects (Eski, et al. 2011). As with other jurisdictions, Scotland has seen the expansion of the criminal justice apparatus (Rodger, 2008) with several notable developments pertinent to the OLR. These have included the introduction of the new legislation as proposed by MacLean and a raft of associated frameworks such as Multi Agency Public Planning Arrangements (MAPPA), the Violent and Sex Offender Register (ViSOR) and the creation of the Risk Management Authority.

The legislative framework of the OLR

The OLR is an indeterminate sentence which comprises two elements, a punishment part to "satisfy the requirements of retribution and deterrence" (Ferguson, 2021:194) and a preventative element to protect the public. In Scotland, the High Court may instruct a Risk Assessment Order (RAO). This initiates the process that can lead to an Order for Lifelong Restriction being imposed. The decision to instruct the RAO is discretionary but is usually considered in cases where the sentencing judge is concerned that the threshold for high risk may be met. There are no exclusions in terms of offences that may be considered as will become clear later in this chapter (Fyfe and Gailey, 2011). The OLR should be used where less restrictive measures such as a determinate and extended sentences may not be sufficient in managing the long term and enduring risk posed (Darjee and Russell, 2011). In regimes of preventive detention, as discussed above, the burden of proof lies with the prisoner to demonstrate their suitability for release. According to the legislation, the following elements need to be considered: the index offence for which an individual has been brought before the courts; any previous offences which may indicate a pattern of offending; and the characteristics of the offender (Darjee and Crichton, 2002).

The Order for Lifelong Restriction, was legislated for by the Criminal Justice (Scotland) Act 2003 which introduced provisions for the sentencing of dangerous offenders from whom the public require protection. The Act inserted sections 210B – 210H into the *Criminal Procedure (Scotland) Act 1995.* The risk criteria as inserted into 210E of the 1995 Act is as follows:

> 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 wording of Section 210E is important for it sets out two key elements. The legislation sets out the justification for the OLR on the basis of '[a single] offence *or* an offence which is embedded within a context of a broader 'pattern of behaviour' (Section 210(e)). Therefore, the OLR may be imposed on the basis of a single offence *or* as a pattern of behaviour which demonstrates a 'likelihood' of serious harm (also see cases *Liddel v HM Advocate; Ferguson v HM Advocate*). Lord Carloway's opinion in *Ferguson V HM Advocate*, held that 'likelihood' should stand to mean that 'serious endangerment is more likely than not to occur' (Ferguson, 2021:184-185), a civil law standard of proof roughly equating to a greater than 50-50 chance, in contrast to the much heavier burden of criminal law (beyond a reasonable doubt). It is also worth emphasising that an OLR may be imposed where no sexual or violent offence has occurred, where 'an offence which by its nature or circumstance indicates in the opinion of the Court a propensity to commit any of the preceding offences' (s210E of the 1995 Act). This is significant in that a person might receive an OLR sentence on a lower standard than for others who receive life sentences.

Release under an OLR is not an automatic right and is decided by the Parole Board for Scotland if they are satisfied that any risk is manageable in the community. In prison there is a requirement to cooperate with rehabilitation and treatment to meet the requirements of parole. Where release is granted, the person will be subject to a lifelong licence and an indefinite supervision requirement through a risk management plan (RMA, 2023). Unlike other life sentences in Scotland, there is no possibility for terminating the supervision element of the licence and a risk management plan will be in place until the offender dies. The purpose of the OLR was to replace the discretionary life sentence and fill a gap in the *Criminal Procedure*

(Scotland) Act's (1995) mental health provisions. The OLR is a risk-based sentence and may be conceived of as a form of 'post-crime' preventative detention using the typology offered by Zedner (2009), as like the IPP, it is imposed following conviction for an offence. *The Criminal Procedure (Scotland) Act 1995* defined the new OLR sentence as one which is indeterminate, however it is *de facto* a life sentence (below, I discuss how the OLR has been used, including statistics on release). The OLR comprises a punishment part or 'tariff' which is the minimum custodial period that an individual must serve. The punishment part is imposed to reflect the seriousness of the index offence whilst, as with all sentences of imprisonment, meet the aims of deterrence and retribution. Where a person subject to an OLR is released on licence, and the conditions are breached they may be recalled to custody.

The calculation for the punishment part of the sentence has been subject to some controversy and confusion. The first OLR was imposed on Colin Ross in 2006 (McSherry and Keyzer, 2009). Following an attempted murder, he was initially given 25 years discounted to 20 to reflect his plea of guilty (*Colin Ross v HM Advocate [2013] HCJAC 111*). A subsequent appeal known as the *Petch and Foye* ruling was employed in the appeal against sentence length by Colin Ross. *Petch and Foye*[6] established the mechanism for determining the punishment parts of OLRs which led to the introduction of further legislation in 2012, the *Criminal Cases (Punishment and Review) (Scotland) Act 2012*. The result of the *Ross (2013)* ruling meant greater clarity on the way in which the punishment part of the sentence would be calculated, by showing how the public protection element is removed from calculating the punishment part due to the fact of imposing the lifelong order (Ferguson, 2021).

The OLR may be imposed alongside an Interim Compulsion Order where a person requires medical treatment for a mental disorder. This allows for transfer to prison from the State Hospital at such times as it is deemed necessary. Once imposed OLR prisoners become the responsibility of the 'lead authority' as defined in section 8(2) of the *Criminal Justice (Scotland) Act 2003*. This is either the Scottish Prison Service, or in the case of those subject to an ICO alongside the OLR, the lead authority will be the State Hospital (for a detailed discussion see Ferguson (2021:142-145).

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

If a person subject to an OLR is released to the community, the 'lead authority' will be the Local Authority colloquially known as 'local council' responsible for their management and supervision. When the OLR is imposed, the lead authority has a duty to inform the Risk Management Authority (see below) who will provide guidance on compliance with the statutory obligations and the standards and guidelines for risk management. At the end of the punishment part the Parole Board for Scotland will decide whether or not to direct the release of an OLR prisoner based on a determination of risk. If the board is satisfied that any risk is manageable in the community, they may direct release. A person subject to an OLR will be subject to a life licence and conditions set by the board by which they have to abide to remain in the community. OLR prisoners will be subject to an individual specific Risk Management Plan involving monitoring and supervision for life (Scottish Government, 2000). There is no means of applying to revoke the reporting/supervision requirements of the life licence under the OLR. This marks the OLR as unique from the mandatory and discretionary life sentences as well as the former IPP provisions implemented south of the border where the reporting/supervision elements may be terminated.

Risk Management Authority

Following consultation with the Scottish Ministers, it was agreed that a non-departmental public body would fulfill the recommendations of Lord MacLean and his committee. Section 3 of the Criminal Justice (Scotland) Act 2003 allowed for the establishing of the Risk Management Authority (RMA) following recommendation five of the report. The RMA's remit would be to protect the public from serious violent and sexual offenders by developing risk management procedures, methods, and technologies. Drawing on research, policy and practice in the international sphere, the RMA would commission Scottish research, developing standards and guidelines for managing risk of serious harm and disseminate best practice (Scottish Government, 2000). This was laid out in recommendation seven (Scottish Government, 2000:20). Currently, the RMA sets the standards and guidelines for risk assessment and accredits specialist risk assessors. They also centrally oversee the risk management plans (RMA, 2018). The RMA also continues to undertake a range of duties promoting effective risk assessment and management practice with the aim of reducing the risk of serious harm posed by violent and sexual offenders (Risk Management Authority, 2022). Thus the RMA has a far wider remit than administering OLRs, and it also has specific statutory obligations in relation to the OLR, including the auditing of Risk Management Plans. This work is meant to ensure that a range of agencies including statutory, voluntary, and private

sector organisations work together in a systematic and coordinated way to address risk posed by this group.

Accreditation of risk assessors is covered under Sections 210B and 210D of *the Criminal Procedure (Scotland) Act 1995*. The risk assessors are specialists in psychiatry and psychology and are commissioned to undertake the Risk Assessment Order (RAO) (see below). Accredited assessors are independent to the RMA. They are remunerated by the Crown, and they are required to comply with a code of conduct (Darjee and Russell, 2011). Only those individuals accredited by the RMA can undertake the specialist risk assessment. The RMA hold a public register of accredited risk assessors and places a requirement to undertake Continuing Professional Development (RMA, 2018:05). Assessors may be called as an expert witness and/or challenged in court by those who review the assessments. Darjee and Russell (2011) have explained that the RMA, with its stipulated processes and guidelines, and accreditation process, and the lifelong nature of the Risk Management Plans, positions Scotland's approach to preventative detention through the OLR as unique and distinct from other jurisdictions.

Risk Assessment Order and process

A point of distinction is the OLR's statutory pre-sentencing framework. Where a person has been convicted of or is thought to have a propensity to commit a serious sexual or violent offence and, therefore, that the risk criteria may be met, the judge must make a Risk Assessment Order. Cases that result in the imposition of an OLR will usually be heard at solemn level at the High Court, but it is possible for a sheriff sitting at summary level to remit a case to the High Court for sentencing where it is thought the risk criteria may be met. An OLR cannot be imposed at summary level, unlike the IPP which could be imposed at the lower tier Magistrates Court.

The RAO is essentially a request for a Risk Assessment Report (RAR) and marks the beginning of the process where the assessor will gather the relevant information, undertake risk assessments, and set out recommendations based on the assessed risk. To pull together a comprehensive assessment this may also include interviewing victims and other relevant people. The evidence gathered will be submitted as part of the RAR with the author designating a level of risk of reoffending as low, medium or high risk. The defence may commission an independent risk assessment report on behalf of a client. If there is consideration of a mentally disordered offender under the ICO, then the timescale for the report is set at 12 weeks, with an

extension of 28 days as determined in the *Mental Health Care and Treatment (Scotland) Act 2003* as inserted into the *Criminal Procedure (Scotland) Act 1995*. As such this provides for an alternative to the RAO where the Court can make an ICO and commission the assessor to compile the RAR. The RMA states that while the Standards and Guidelines refer specifically to RAOs, this should be understood as including risk assessments for the purposes of the ICO (RMA, 2018). The purpose of the RAR is to inform the decision of the sentencing judge and where the judge considers the risk criteria met. However, this does not remove judicial discretion and the RAR is merely a tool with which to assist the court in terms of the risk posed. Therefore, it may well be the case - even following a designation of 'medium' or 'high risk' - that the judge does not make an Order for Lifelong Restriction.

Low, medium and high risk

The RMA revised its standards and guidelines for risk assessment in 2013. The rationale for this was outlined in *Ferguson v HM Advocate* (paras 24 and 103). This clarified the definition of different levels of risk, refining the classifications as they were thought to be too wide and at times ambiguous (RMA, 2013). In assigning a designation of 'low', 'medium', or 'high' risk, several factors will be considered; a high risk classification should involve problematic, persistent and pervasive personality characteristics that function as drivers to harmful behavior. Such a person will have a lack of protective factors and risk is presumed not likely to be amenable to change and any intervention thought to have a limited impact of offending (RMA, 2018:26-27). The logic is that such a person will pose an ongoing risk of serious harm and endangerment, which necessitates long-term restriction, monitoring, and supervision. In a sense this means that a lack of treatability or responsivity becomes the basis of control although this time in the context of the criminal justice system rather than mental health.

Those assigned a medium level of risk may have similar characteristics to those in the high category. However, here a judgment is made that those characteristics may be amenable to change or manageable with appropriate measures of supervision and intervention. There will be evidence of some protective factors and a willingness to engage in relevant interventions and supervision. Such a person may have characteristics which indicate that measures short of lifelong restriction may suffice (RMA, 2018: 2023). Where a risk assessor designates a level of low risk, there is no apparent evidence to suggest that the person has a long term or persistent propensity to "seriously endanger the lives, or physical or psychological well-being of members of the public at large" *(S210E Criminal Procedure (Scotland) Act 1995*). Another

point worth noting is that the wording of the legislation, particularly in relation to wellbeing, has the capacity to create a broad jurisdiction.

This individual may have committed acts of serious harm, yet it is considered unlikely that they will cause this in the future. In addition to this, they will be likely to respond to supervision and intervention and there will be clear evidence of protective factors. Those in the low-risk group do not require the level of restrictions that are identified in the other categories and as such any personality characteristics that act as a driver to offending are in theory thought to be adequately addressed by alternative measures (RMA, 2018:2023).

Risk Management Plans and Annual Implementation Reports

Where the OLR sentence is imposed, the risk assessment report (RAR) is used as a template by the lead authority to develop the initial risk management plan (RMP) in accordance with the format specified by the RMA. Section 6(3) of the *Criminal Justice (Scotland) Act 2003* provides that a statutory Risk Management Plan sets out an assessment, proportionate to the individuals risk and needs setting out the ways in which this will be achieved. The RMA specify the guidelines and template for the RMP. This will have four key areas of risk management: monitoring, supervision, treatment or an intervention such as specific programme requirements, and victim safety planning (RMA, undated; Ferguson, 2021:199). Fyfe and Gailey (2011:202) explain that the RMPs "ensure that proportionate relevant and evidence-based risk management strategies are put in place". The RMP is required to outline all aspects of risk management as to demonstrate defensible and robust risk practice. The risk management plan is an extensive and active document used in the first instance to manage risk in custody. The RMP template includes an examination and analysis of historical or unchangeable characteristics or 'static factors' such as age of first offence, criminal history and pattern of offending, adverse childhood experiences, abuse or care experience. As well as factors amenable to change or intervention 'dynamic factors' such as employment, substance use, peer groups, attitudes and beliefs and mental health needs (Andrews and Bonta, 2006).

The RMP will also use a variety of risk assessment instruments to estimate an overall formulation of risk. Commonly used items can be found in the Risk Assessment Tools Evaluation Directory (RMA, 2022). The RMP will also give an account of health and mental illness, mental disorder including intellectual disability and personality disorders, and the persons social and psychological adjustment. It seeks to identify, the precipitating, predisposing and perpetuating factors in episodes of offending. As well as formal risk assessments the RMP

will likely contain submissions from multiple agencies and collaboration will include statutory agencies such as social work, psychologists or other case managers responsible for OLRs in prisons, intelligence analysts, residential staff, and personal officers. Collaborations in the community will include those involved in MAPPA (discussed in a moment).

The RMP is meant to guide and monitor an individual's progress in custody, how well they comply with the prison regime, if they are working towards progression, and or have been subject to downgrading. The RMP will monitor early warning signs and take steps to mitigate any further escalation of risk (RMA, 2022). If substance misuse or negative peer association are a risk factor, then data gathering from supervision and monitoring will be carried out to formulate or amend the plan. Acts of aggression or threats of violence or sexual misconduct may result in a revision of the RMP and victim safety measures enhanced as deemed necessary.

At key points in the custodial sentence, this may require a re-administration of risk assessment tools and any interventions, treatments or referrals necessary will be made to the healthcare team. The RMP will also contain an analysis of documents such as minutes of the annual integrated case management (ICM) meeting all long-term prisoners undergo, reports from offending behaviour programmes, submissions from the parole board, updates on daily behavioural monitoring forms which are specific to OLRs. The plan will be subject to a formal review by the lead authority and amended each time there is a significant change in a person's risk level or circumstances, such as transfer to another prison, hospital, release to the community or to reflect a change of address in the community or any other significant factor that may impact on risk. While there is no statutory duty for an annual review of the RMP there is a requirement to submit an annual implementation report (AIR). This is to be submitted to the RMA within 12 months of the approval of the initial risk management plan and on a rolling 12 monthly basis. The purpose of the AIR is to demonstrate that the RMP is being implemented and kept under review (Ferguson, 2021).

The role of the Scottish Prison Service: Progression pathway, risk management and temporary release

The Scottish Prison Service operates a standard process or 'All-purpose progression pathway' which is a means by which long term (and some short term) prisoners progress through the prison estate. The pathway outlines the criteria for progression depending on sentence types and identifies three relevant areas for progression. These are, the length of time served in

relation to the sentence, behaviour in prison and individual specific risk factors (Scottish Prison Service, 2018).

The Integrated Case Management (ICM) process assists the planning and monitoring of an individual's progress through their sentence. The Risk Management Team (RMT) is a multidisciplinary group led by the Deputy Governor that will make key decisions on prisoner progression based on ICM reviews. For people on OLRs, the RMT are responsible for preparing and agreeing the RMP and the AIR documentation and will meet at irregular intervals determined on a case-by-case basis. There is a requirement to submit the AIR to the RMA at least once per calendar year (RMA, 2024). There is no absolute requirement for an OLR prisoner to follow the all-purpose progression pathway and in theory they may be released from conditions of high security (termed 'closed conditions' or the 'closed estate'). Consideration of risk will remain central to any decision regarding prisoner progression, with proposals agreed by the RMT and any amended Risk Management Plans subject to approval by the RMA. The timescales for consideration for OLR progression are dependent on the length of tariff and risk to the public (SPS, 2018).

Given the nature of the risk the OLR group are deemed to pose, evident through the imposition of the Order, it seems likely that most of these individuals will progress through the 'pathway' in order to satisfy the test of release rather than be released from the closed estate. The standard progression route for a life sentenced prisoner would mean waiting on the national waiting list for an allocated place and subsequent transfer to a National Top End facility (NTE), a transitional form of housing located within standard prisons where prisoners are granted some access to the community, where they would stay for a period of around two years (SPS, 2018). At NTEs, prisoners are allowed Supervised Escorted Leaves (SELs) following successful application for a First Grant of Temporary Release (for Life Sentenced Prisoners) as well as approval by the Cabinet Secretary for Justice. In the case of an OLR, approval for progression is required from the Risk Management Authority. During the first year, again following a RMT review, a person in custody may be granted unescorted leave from the prison, and if no issues arise, and they are compliant with their RMP, they would move on to an external work placement or learning opportunity in the community. This period of testing in the community is meant to last for two years, supposedly building evidence with which the Parole Board can make evidence-based decisions about release.

Following a period at the national top-end and approval by the RMT, a person in custody may then be transferred to the Open Estate where they would continue work placement and further unescorted leave, thus completing the progression pathway. One of the obvious areas of potential difficulty with the timescales of the standard progression route and progression for OLR prisoners is that tariff lengths are relatively short, averaging 5.5 years compared with Life sentences which average 21.1 years (Ceesay, 2022). The SPS guidance states that the SPS 'seeks to provide an OLR sentenced offender with a reasonable opportunity, by the time of their PPED (punishment part end date), to demonstrate that they are suitable for release…'[and that] 'the actual time spent in less secure conditions will be a matter of the RMT based on the risks presented…the testing phases of the management of OLR sentence offenders should therefore commence no earlier than two years prior to the expiry of their punishment part' (SPS, 2018:53). The all-purpose progression pathway has a default time frame of four years. Taking the 5.5-year tariff as an example, the person subject to an OLR would need to be considered for progression in the first year of the sentence which raises a number of immediate impracticalities and logical contradictions. Not least because a person deemed to be *too dangerous to be at liberty*, would unlikely be ready to progress at the earliest opportunity.

Furthermore, a bottleneck already exists due to waiting lists for the NTE (HMIPS, 2024), creating competition for spaces with other groups of prisoners who also require progression, including the sizable proportion of life sentenced prisoners who are beyond their punishment parts. These factors, as well as obstacles to progression such as downgrading, could result in an OLR being beyond their punishment part before being eligible for progression. The journey of a life sentenced or OLR prisoner navigating the progression pathway is nonlinear. Many of those who have made steps in progression have been subsequently downgraded back to closed conditions for an expansive variety of reasons. Regarding persons subject to an OLR the Maclean Committee proposed that support for OLRs in the community would be more intensive than that which is available to other persons released on licence (Scottish Government, 2000).

Downgrading will usually follow an Adverse Circumstance Report and is the decision of the RMT following assessment. It may be the case that following downgrade, a prisoner is recommended to undertake further programmes or interventions pertinent to risk (Ceesay, 2022). In sum, even on paper, the system of moving through a sentence towards community access is long and dependent on many layers of risk assessment. Being downgraded and assigned to take courses and undertake interventions multiplies the obstacles that those in

custody are required to navigate if they are to be released. In addition, programmes were identified by HMIPS (2024:39), as being 'under resourced, with need far outstripping availability'. These collective features of progression are important as they offer context to the findings of this thesis.

Release, control and monitoring in the community

The Parole Board for Scotland

A community-facing risk management plan should be submitted to the Parole Board for Scotland as part of the parole dossier. Where the criterion for release is satisfied, community supervision will replace the custodial sentence and the person subject to the OLR is required to adhere to the conditions of his licence as determined by the Parole Board. Where parole is denied, there is no appeal against the decision of the Board.

The role of Criminal Justice Social Work

In the community the local authority or council in discharging its statutory functions becomes 'lead authority' for an OLR as defined in the *1995 Act*. This is undertaken by Justice Social Work (JSW) and an allocated social worker is responsible for case management, monitoring, and assessment of the individual, including reviewing, developing and where relevant amending the RMP and the AIR. As well as contributing to the day-to-day management of the individual, social work will also contribute to Multi-Agency Public Protection Arrangement forums (MAPPA), sending reports to the RMA. CJSW as lead authority will also bear the responsibility for action in case of a breach of an OLR in the community.

Multi-Agency Public Protection Arrangements

In Scotland, the Cosgrove report on Sex Offending, the Irving report on Reducing Risk and the work of the Information Steering Group culminated in the proposals for new multiagency public planning arrangements or MAPPA (Eski, 2011). Section 10 of the *Management of Offenders (Scotland) Act 2005* (MOSA) provides the statutory basis for MAPPA. MAPPA is governed by the following principles: to identify those who have been convicted and who may pose a continuing risk of harm, to assess the nature and extent of risk, carrying out victim safety planning and to share information pertaining to risk (Scottish Government, 2014). This framework, includes police, local authorities, Scottish Prison Service and the health board for restricted patients as 'responsible authorities' who assess and manage the risk posed by known offenders. Other agencies who have a duty to co-operate in MAPPA include Jobcentre Plus,

registered social landlords, electronic monitoring providers, the Children's Reporter and other agencies that support the management, risk and needs of this group (Scottish Government, 2014; Thompson, 2011). Since 2007, MAPPA includes all registered sex offenders subject to notification requirements under the *Sexual Offences (Scotland) Act 2003*, mentally disordered offenders who are restricted patients, and others who by reason of their conviction may pose a risk of serious harm. Those under MAPPA are also subject to the Violent and Sex Offender Register (ViSOR) which allows authorities to store and share information, the immediate transfer of information relevant to risk should an individual move between Local Authority areas (Scottish Government, 2014).

Those subject to MAPPA will be allocated a risk management level separate from their designated level of risk as established in the initial RAR: The majority of offenders who fall under MAPPA arrangements are managed through Level 1 Routine Risk Management where there is no high risk of serious harm, and the risk may be managed by one agency. Those posing a significant risk of serious harm will be assigned MAPPA levels 2 and 3 and will require multi-agency management. This will be reflected in the RMP and will be kept under review. The MAPPA reviews have differing timelines depending on seriousness of the risk; for example, level 2 cases are where there may be significant risk of harm, and these may be reviewed no less than once every 12 weeks. The highest risk level is Level 3 where there are complex risks and needs synonymous with imminent risk of serious harm. The risk is of such a nature that it can only be managed by a resource intensive plan overseen at a senior level with active multi-agency involvement. Level 3 MAPPA may be used in cases where there is not a high or very high risk of serious harm, but where the circumstances are exceptional in nature. An example of this would be media scrutiny in the case of Robert Green as reported by (Edinburgh Live, 2022) where public interest in an individual's management post custody is high, and MAPPA therefore serves the aim of public reassurance (Scottish Government, 2016). In addition to the ascribing of risk levels from 1- 3, MAPPA candidates will also be graded on the 'imminence and likelihood of risk of serious harm' which is classified as either low, medium, high, or very high risk of harm (Scottish Government, 2014). All OLRs will be managed through MAPPA if released on licence and the RMP will stipulate an individual's MAPPA level before they are eligible for release. Darjee and Russell (2011) argued that that the introduction of MAPPA has been beneficial to the process of sharing information regarding those subject to an OLR, which was historically more challenging.

OLR data and statistics

According to the most recent statistics, at the time of writing, there have been a total of 279 individuals made subject to an OLR in Scotland (RMA statistics, 2024). Of this number, 388 individuals were subject to a RAO which results in the development of the risk assessment report (RAR) and a designation of high, medium or low risk. In total, 106 were considered medium-risk, and a further 276 high-risk of reoffending (RMA statistics, 2024). The RAO and subsequent RAR may not result in the imposition of an OLR, as it is a tool to aid sentencers. According to the Annual Report of the RMA (2023-24) on the 31st March 2024 there were 249 active OLR cases with 198 individuals beyond the tariff part of their sentences (ibid, 2024:24). So far, as of March 2024, 5 people subject to the OLR had died and one further individual was deported (RMA, 2024: 20). This number conflicts with the total number of deaths provided in an FOI dated that same year which explains that a total of 24 people have died on an OLR: 18 within prison or secure care and six in the community[7]. According to the 2023-24 Annual Report, there are 152 individuals in the closed prison estate, with 15 at National Top End (NTE) (see discussion later in this chapter), 10 are in the Open Estate (OE), and a further 10 in the community and 5 in NHS care (Annual Report, 2023-24: 24). Again, these numbers do not align with the total number of persons subject to an OLR[8].

The number of OLRs given in any year has remained stable with 16 orders issued on average each year, with some low numbers after the first two years of its use 2006-2008 which saw as few as five OLRs imposed. Other years that saw low numbers were 2015-16 (n=13), 2016-17 (n=11) 2017-18 (n=12). Higher numbers can be identified in 2009-10 (n=26), 2014-15 (n=22) and 2022-23 (n=24): the latter increase is perhaps due to the post-covid backlog (RMA Statistics, 2024). The current average of 16 per year seems to be in line with the "small numbers" (Scottish Government, 2000: 17) anticipated by the Maclean Committee who considered the number of *relevant* discretionary life sentence cases per year from 1994-1998 in their review (Scottish Government, 2000: 27). Gailey et al, (2017) consider this number to have been around 14 cases per year for the discretionary life sentence and therefore given the wider criteria they consider that the OLR would be imposed at around 15-20 cases per year

[7] FOI 15TH Aug 2024 requested and provided to OLR Campaign Group NOLR by the RMA
[8] As you will see these figures provided by the RMA seem inconsistent

(Gailey, et al. 2017:120). There have been a number of successful appeals against the OLR sentence[9][10] although exact numbers are difficult to ascertain.

Ages of those receiving and subject to OLRs

In the report by the Maclean Committee, it was noted that the OLR sentence would be rarely imposed on persons under the age of 21 due to the requirement for evidence of a 'pattern' of behaviour (Scottish Government, 2000). This is in keeping with a long history in the UK and Scotland of a presumption against committing young persons under the age of 21, particularly by medical routes (see Nuttal, 2013). However, it is worth noting that there have been a number of young people upon whom the OLR has been imposed who were under the age of 21 with the highest numbers occurring in 2008-9 (n=4). In the early years of the Order there were two OLRs imposed on persons under the age of 18 (RMA statistics, 2024). In recent years, the definitions of young persons for the purposes of sentencing have been changed to meaning those under 25 following Scotland's new sentencing guidelines effective from 2022 (Scottish Sentencing Council, 2022). These guidelines align with international standards, particularly the United Nations Convention on the Rights of the Child, which acknowledges that young people 'will generally have a lower level of maturity, and a greater capacity for change and rehabilitation' (Scottish Sentencing Council, 2022:3). The guidelines advocate the use of detention only as a last resort. Overall, the number of those under the age of 21 imprisoned in Scotland has fallen by around 8% since 2010 (Catalano and Samuel, 2023). There is no recent data on the impact of these guidelines and therefore as to whether they have culminated in any substantial changes. The RMA has noted that 27 young persons were under the age of 25 at the point of being given an OLR (RMA statistics, 2024). Gailey, et al. (2017:131-133) have suggested that judicial reviews in this area may have had an influencing factor, particularly *Ferguson v HM Advocate.*

The High Court of Justiciary sitting as the Appeal Court in *Ferguson v HM Advocate* considered areas of potential ambiguity regarding the risk criteria. This was in part clarified by the notion

[9] In *Andrew Kinloch and James Quinn v. Her Majesty's Advocate* [2015] HCJAC 102 the OLR was quashed as the court found that the risk criteria were not satisfied and the statutory test for the imposition of an OLR were not met in either case. The court substituted the OLR with extended sentences for both appellants.

[10] In *Stephen Henderson v HMA 2011 JC 96* the appellant was convicted of a firearms offence, and the court imposed an OLR. At appeal the court held that the OLR was not a competent disposal as the instruction of the RAO and OLR were out with the legislative competence of the Scottish Parliament as firearms are reserved. The OLR was quashed and a determinate sentence given.

that ‘serious endangerment should be more likely than not to occur’ if a person was in the community. The judgment detailed how the ‘potential for change’ ought to be considered when considering if the risk criteria be met. The court advised:

> Where the offender is a young man or one whose actions on the particular occasion did not appear to be prompted by his underlying personality traits but by the ingestion of drink or drugs, the prospect of change over time as a result of maturity or rehabilitation measures would render it unlikely that a judge could reasonably consider that the statutory criteria were met (cited in Gailey, 2017:133).

Gailey et al. (2017) advise on a presumption against the consideration of a RAR for young people below the age of 21.

This proposition may be further bolstered in light of the sentencing guidelines aforementioned. Consistent with the views of the MacLean Committee that the order would most likely be made against men, at the time of writing no women have been made subject to an OLR although there were two women who ‘transitioned subsequent to sentencing, so were recorded as male at the time’ (RMA, 2023:17). The MacLean Committee explained that ‘principles behind our recommendations apply irrespective of the age or gender of the offender’ (Scottish Government, 2000:34) and therefore the language of the legislation is gender neutral. Both women have since died in custody at HMP Perth and HMP Grampian in 2019 and 2024 respectively (SPS, 2025; Deaths in custody Data).

Age range of OLRs

The RMA published research on the offending profile of those given OLRs using data from 2006-2021 (RMA, 2023). Here it can be seen that the age range of persons receiving an OLR is between 16-68 years (RMA, 2023: 24): of this, a total of twelve individuals received an OLR aged under 21 with two of those being under the age of 18 (RMA, 2023:103). The average age in 2023 of a person subject to an OLR was around 37.4 years old. The highest proportion of all OLRs are within the 31-40 age range. There were at this time, four persons with an OLR who are over the age of 60 (RMA, 2023:24). This age distribution is broadly reflective of the average age of people in prison in Scotland which was reported to be 36.9 years in 2021-22 (Public Health Scotland, 2022). According to this data set, there are around 34% of those subject who are in the 40-60+ age range (RMA, 2023:24).

Given the low release rate of OLRs, more recent RMA statistics reflect that around 77.5% of individuals are beyond their designated punishment parts (Annual Report, 2023-24:24). It is therefore foreseeable that a number of OLR prisoners will move into the older prisoner group. The elderly prison population is increasing, and this group have distinctive needs and specialist care requirements (HMIPS, 2020). Longer sentences and convictions for historic sex offences are one of the key drivers of the increase in the elderly prison population (ibid, 2020). Recently the Governor of HMP Glenochil expressed concerns about the increasing need for personalised care plans and the ability of prisons to cope with these changing needs (BBC, 2024).

Characteristics of OLRs from available studies

The RMAs study, *The Offending Behaviour of Those Subject to an OLR* (2023) explored the offending profiles of a cohort of 202 individuals subject to the order. I will provide a short summary of relevant points here. The majority of this cohort, (92.6%) were assessed as being 'high risk' following the risk assessment report, and a smaller group (7.4%) were given a risk score of 'medium risk'. No OLRs were imposed on an individual who was found to be low risk (RMA, 2023:24). The team found clear evidence of persistent life-course offending, with behaviour continuing across many years, multiple index and previous offences. Rather than following the typical pattern of desistance in adolescence or early adulthood, offending persisted throughout the life course (RMA, 2023:77).

Across the group, 89.6%, or (n=181) individuals had convictions for violent crimes. Violence was either part of a previous conviction(s), or as a result of the index offence which saw the imposition of the OLR, or a combination of both factors (RMA, 2023:26). The RMA acknowledged that the violent category that was adopted for coding was broad and included offences such as 'breach of the peace' (RMA, 2023:74) and 'threatening and abusive behaviour' (RMA, 2023:76). Of the cases with multiple prior offences, 60.4% (n=122) involved sexual offending, 89.6% (n=181) involved violence, 45% (n=91) involved intimate partner violence (IPV), and 87.6% (n=177) involved other forms of offending (RMA, 2023:26). Regarding the offence of 'breach of the peace' as was noted above, that there are no exclusions to the offences that can be considered for instructing the risk assessment order. In approximately half of the cases, individuals had sexual offending within their offending histories. This included both single and multiple index offences, occurring either historically or over extended periods of time.

Of all those included in the research, 95% (n=177) had previous convictions. Most individuals with 'no previous convictions' had a sexual offence as the index offence at the point they received an OLR (2023:173). In those with a history of previous convictions, similar patterns were observed across all offence types, and the majority of individuals had convictions which spanned five years or more. Some individuals had convictions for sexual and violent offences that spanned a 25-year period or longer and the longest duration of IPV offending was over 20 years. The team note that this is unsurprising given the criteria for long standing and enduring risk (RMA, 2023: 76).

This research on offending behaviour characteristics did not provide insight into the interpersonal characteristics and traits that drive the offending in this group. It also assumes that the drivers to offending are internal when they may be environmental or relational. This is perhaps due to the approach advocated by MacLean (2000) which diverged from the developments in England and Wales which sought to 'conflate personality disorder, risk and dangerousness' (Nuttal, 2011:140). My reading of annual reports from 2007-2023 also found that this does not appear to be an area of specific focus or interest for the RMA. That said, Gailey, et. al, (2017) cite unpublished data on OLRs which indicates a number of findings. In the study, the risk profiles of the OLR group were compared with those who were given an extended sentence, finding that the former had elevated overall risk scores as well as, 'psychopathy and the absence of protective factors that may mitigate risk' (RMA, 2016 cited ibid, 2017:125).

Additionally, Gailey et al (2017) cite a small research project undertaken by Ahmet (2016) cited in Gailey et al, 2017) which compared a dataset consisting of those sentenced under the OLR (n=30) and those not subject to the order (n=30), and subject to an extended sentence. The groups were compared across outcomes of several risk assessment instruments heir (PCL-R) or Hare Psychopathy Checklist-Revised scores. This research indicated that 'scores which explore anti-social personality was a mark of distinction between those subject to an OLR and those who were not' (Ahmet, 2016 cited in Gailey, 2017:125-126).

In addition, the authors explain that the RMA (2016) examined a cohort of long-term prisoners (from a dataset supplied by the Scottish Prison Service) using the level of service case management inventory (LSCMI) (Gailey, 2017: 126). This data set contained information on prisoners subject to an OLR (n=85) and those serving an extended sentence (n=766). Whilst acknowledging various limitations of the study, and the fact that the numbers only partly

reflected the OLR cohort, some observations were made regarding small distinctions between those serving an OLR, and those subject to an extended sentence. By comparison, the OLR group had a higher LSCMI score at either 'high' or 'very high' compared with 15% of those on extended sentences rated as 'very high' risk/need. The OLR group were more likely to have a history of both sexual *and* violent offending. Further differences between those subject to an OLR and those subject to an extended sentence were found, for example, the former were more likely to be 'identified as requiring a specialist assessment for antisocial personality, display 'early and diverse anti-social behaviour', have experience 'severe adjustment problems in childhood, being arrested under the age of sixteen, breaching a prior community licence or order and to have a generalised pattern of trouble in a variety of areas of life' (ibid, 129:page). The findings also suggested that specific factors related to 'responsivity' and 'diagnosis of psychopathy, personality disorder impulsivity, anger, interpersonal skills and intimidating and controlling behaviour, are more prevalent in the OLR group' (Gailey, et al. 2017:129).

In a case analysis offered by Darjee and Russell (2011), it was found that personality disorder or dysfunction, paraphilias and sexual pathology are common characteristics of this group. Some also had learning disabilities and mental illness all of which contribute to the complexity of those put forward for RAOs and OLRs. Importantly, the authors cautioned that the provisions and specialist interventions in both prisons, secure hospitals and in the community may not meet the criminogenic and responsivity needs of these cases. It was also acknowledged that rates of mental ill health, self-harm and suicide are more frequently found in the OLR group (ibid, 29); a finding consistent with research conducted on the IPP (Harris et al. 2020). To date, the existing body of research on this subject has been conducted predominantly by the Risk Management Authority.

OLR case law and current human rights considerations

Although a thorough account of human rights legislation and its compatibility with the OLR reaches far beyond the scope of this thesis, some attention to this, drawing on existing literature and human rights case law, is prudent. As Gailey et al, (2017) explain that case law alters the judicial landscape. This requires judges to evaluate and whether the risk criteria is met for the OLR (Gailey, et al, 2017). In terms of the European Convention of Human Rights, the most relevant articles for challenges to life imprisonment are Articles 3 ECHR (prohibition of torture and inhumane or degrading treatment) and Article 5 of the ECHR (prohibition against arbitrary detention) which have been seen as applicable in cases involving preventative detention or

indeterminate sentencing. Collectively, these prohibitions affirm the rights of the individual and emphasise the importance of protecting their physical and psychological integrity and dignity, prohibiting acts or conditions which inflict severe suffering or humiliation (see below).

Furthermore, in 2014, the Council of Europe's Committee of Ministers adopted recommendation CM/ rec (2014) 3 which regards the detention and supervision of dangerous offenders. This offers guiding principles for legislation, policy and practice for sentencing and managing this group (Gailey, et al, 2017). The authors explain that the framework for the OLR is "broadly consistent" with the principles of proportionality, through cautious application of the sentence through the pre-sentencing framework, and opportunities for review (Gailey et al, 2017:309). They do, however, acknowledge a number of potential areas of conflict with human rights law. These are as follows: the imposition of the order on young people; the meaning of a 'pattern of behaviour' (ibid, 134); the potential scope for net-widening due to the definition of the wording of the risk criteria in terms of 'likelihood' and 'at liberty' (ibid, 132); the use of allegation information by the risk assessor (ibid, 138); and review of the lifelong aspect of the sentence when there is no longer a requirement for public protection. Again, many of these points have been addressed in detail by Ferguson (2021; see below).

Appeal case law and legal challenge

The relatively short lifetime of the OLR has been influenced by appeal case law and in particular the wording of the legislation in section 210E of the *Criminal Procedure Scotland Act 1995*. Appeals have considered the ambiguity in terms of the risk criteria in relation to what constitutes a "pattern" of behaviour, in the successful appeals on sentence by *Kinloch and Quinn v HM Advocate* (Gailey et al, 2017: 134-35; Ferguson, 2021:180-81). The courts have clarified the meaning of definitional terms in the legislation, including 'likelihood' *in Liddell v HM Advocate* and "at liberty' and 'serious endangerment' in *Ferguson v HM Advocate* (2014), (Ferguson, 2021:185–86). Consideration has also been given to the definition of risk to the 'public at large', as clarified in *M v HM Advocate (2012)* (Ferguson, 2021:179), and regarding the raised imposition of the order on first-time offenders in *Johnstone v HM Advocate (2012)* (Ferguson, 2021:165–70).

This case established four key requirements for an OLR to be considered compatible with the European Convention on Human Rights: the order must be connected to a conviction, it must be authorised by law, necessary for as long as the individual remains dangerous, and opportunities for rehabilitation to reduce risk must be provided (Ferguson, 2021:165–70). In

this instance, the OLR was found to be compatible with Article 5, with the court concluding that all four conditions were fully satisfied. For a detailed analysis of each requirement, see Ferguson (2021:168–176).

The right to rehabilitation

Even though the number of OLRs issued each year has remained fairly stable, the total number of people on OLRs is still increasing, and there are concerns about how few have left prison. Perhaps one of the most notable points to be made is that the majority of those upon whom the OLR sentence has been imposed are beyond their tariff parts. Given that the OLR is an exceptional sentence, which includes the possibility of indefinite imprisonment, that is, until an offender dies, this is perhaps unsurprising. However, the issue of rehabilitation has been raised more recently in *BS for Judicial Review [2024] CSOH 47*. The case is discussed further below, but the effect of the judgment was that to be competent within the framework of the Convention, opportunities for rehabilitation must be offered. These opportunities are particularly important in the case of preventive punishment, where the burden of proof is placed upon the prisoner to demonstrate, on the balance of probabilities, that he is no longer a risk to the public (ibid). While states have a duty to protect the public from harm, there is a duty for prisoners to engage with rehabilitation to demonstrate that they can be brought within the 'circuits of civility' and inclusion (Rose, 1999). This issue is long standing and has been acknowledged in Article 5 case *Anderson v HM Advocate* (1999) regarding a patient who was held under the HORO provisions in mental health. Here the court opined:

> Even where the test for original detention did not violate Article 5, a different test was applied for discharge, thus giving rise to an objectionable 'lobster-pot' effect, in that it was harder for a patient to obtain his discharge than it was for him to avoid being admitted in the first place.

In England, *James, Wells and Lee v. the United Kingdom* involved an appeal under Article 5.1 on the grounds of the failure of the Secretary of State to provide rehabilitative courses thereby hindering their release while serving the IPP (O'Loughlin, 2016). The court found that failure to provide rehabilitative courses constituted arbitrary detention violating Article 5(1) of the ECHR. The 'downfall' of the IPP was not due to the risk of disproportionate punishment presented by short tariffs but due to the government's failure to provide rehabilitative interventions (*James, Wells and Lee v. UK* [2012] ECHR 1706).

This is relevant in the light of a recent challenge to an Order for Lifelong Restriction where the court held that Article 5 had been breached. Coming back to the case of *BS for Judicial Review* [2024] CSOH 47, to access the prospect of parole, the petitioner was required to undertake the Self Change Programme (SCP) a rehabilitative programme required to address his offending behaviour and reduce risk. It was held that BS was not provided with access to this programme and therefore his rights had been violated under Article 5(1) of the ECHR which, as stipulated earlier in this chapter, safeguards his right to liberty. Insufficient access to this programme would therefore hinder his prospect of release. Under the rehabilitative aims of punishment, interventions and treatments are in place to allow prisoners to address offending behaviour and demonstrate if possible that the risk they had posed at the time of sentencing has been reduced. In their recent review of prisons, HMIPS acknowledges that the current situation for prisoners within an overcrowded and under-resourced prison service is lengthy delays on the national prison waiting list for offending behaviour programmes (HMIPS, 2024). Van Zyl Smit et al. (2014) have argued that those serving life or indeterminate sentences have a right of access to rehabilitation under the ECHR (Van Zyl Smit et al. 2014). In the case of harm-doers who are *known* to justice systems the safety and security of the public is harnessed by the state to justify extreme measures when their reputations and legitimacy are themselves at risk if harm occurs. It can be argued that the right to rehabilitation may be overshadowed by the right of the public's to security. Regarding citizenship, O'Loughlin (2016:172) explains that the 'duty to engage in rehabilitation may also be characterised as a condition of citizenship' and are only afforded citizenship rights when they comply with and conform to specified norms and risk-based criteria. However, this scholarly debate has not considered, as in *BS for Judicial Review*, what happens if the person wants to engage in rehabilitation but the opportunities for this don't exist.

Article 3 and the right to hope

In recent years, the topic of 'hope' in the context of life sentences has attracted academic commentary (Brownlee, 2021; Vannier, 2016; Seeds, 2022; Trotter, 2022). This comes following cases heard at the ECtHR with notable cases being *Vinter and Others v. the United Kingdom (2013)*, *Kafkaris v. Cyprus (2008),* and *Murray v. the Netherlands (2016*) and *Matiosiatis and Others v. Lithuania (2017),* all of which held that there ought to be a process of reviewing very long sentences.

In the case *Murray v. Netherlands (2016)* the court held that the defendant, who had an intellectual disability, was not provided with specialised treatment for a mental health

condition. This was the first time that the ECtHR had considered the reducibility of life sentences for prisoners with mental disabilities or mental health conditions (International Justice Resource Centre, 2016). In *Vinter and Others v the United Kingdom (2013)*, the issue of whole life orders was considered. The judgment held that such were 'incompatible with human dignity and therefore contrary to Article 3' (cited in *Matiosiatis and Others v Lithuania*, 2017).

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has also taken a keen interest in the issue of whole life sentences concluding that 'no category of prisoners should be stamped as likely to spend their natural life in prison; no denial of release should ever be final; and not even recalled prisoners should be deprived of hope of release' (Matiošaitis and Others v. Lithuania (2017) Sections 111-113). This has opened the way to interpreting Article 3 as guaranteeing a right to 'hope'; as the same wrote:

> Even those who commit the most abhorrent and egregious acts nevertheless retained their essential humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope, to deny them the experience of hope would be to deny a fundamental aspect of their humanity and to do that would be degrading.

Clearly there is no prohibition on life or indeterminate sentences that include the possibility of lifelong incapacitation on the grounds of public protection, and thus the main conclusion to be drawn from the determinations of the Strasbourg Court is that certain conditions should be met to comply with Article 3 with regard to review and opportunities for release. Several consequences can be drawn from the case law which specifies that member states of the Council of Europe must establish processes for review but also that imprisonment must allow life-sentenced individuals to access opportunities through which they can work toward rehabilitation (ibid, 2017). Within that there is recognition of the importance of hope.

In Scotland, Gailey et al. (2017:137) have been the first to raise concerns regarding implications for hope in relation to the OLR explaining that 'the motivation to achieve and advance…may be hampered by a sense of hopelessness if the outcome for the individual or the agencies involved remains lifelong risk management'. Several publications have examined the

implications of hope in relation to long-term, or life imprisonment (Vannier, 2016; Seeds, 2022) and indeterminate sentencing regimes such as the IPP (Independent Advisory Panel on Deaths in Custody, 2021; Prison Reform Trust, 2020). Hope has been discussed where it culminates in a deprivation of a right to 'hope' (Trotter, 2022) and the legitimacy and morality of such measures evaluated against a 'standard of hope' for prisoners (Brownlee, 2021).

As the numbers of OLRs continue to increase, so too does the pressure on the prison estate and undoubtably OLR prisoners. Gailey and colleagues (2017:137) have cautioned, the 'accumulating resource demand and administration of risk management plans over coming years and decades merits some consideration'. If upward trends continue, and the numbers who are released remain minimal, it may well be that the OLR will begin to attract similar criticisms to those lodged against the IPP in England and Wales. Furthermore, without consideration of the impact of the sentence on OLR prisoners and human rights safeguards, such persons may experience a significant loss of hope and wellbeing, which in turn, may constitute a serious violation of their humanity.

Concluding thoughts

In this chapter, I have provided a comprehensive account of the Order for Lifelong Restriction (OLR), situating it within the broader landscape of preventive justice. In doing this, I have made comparative reference to international preventive and indeterminate sentencing regimes, highlighting some of the challenges which have emerged in these contexts. In general, these regimes propose to strike a balance between the right of the public to be protected from dangerous people with the right of prisoners against disproportionate punishment and arbitrary detention.

In examining these various penological forms, I show that there are similarities and differences in the way that these are practiced over time and across jurisdictions. Such practices have risen and fallen in popularity and oscillate between frameworks of medicine and law. By drawing on legislation, policy documentation, and existing scholarship, I have traced the evolution of the OLR and its current role in managing the risk posed by serious violent and sexual offenders. I have walked the reader through the bureaucratic archipelago of risk practices which govern the OLR process, from the initial risk assessment order, risk management planning, prison progression, release, and community supervision. This gives the reader a good sense of how the order works but also how it imposes a duty upon persons to demonstrate suitability for parole and release. A discussion of statistical data further contextualises the application of the

OLR, offering insights into who it is imposed upon, age ranges, gender. I have included where possible relevant case law which has seen changes made to the risk management process, but which has also shaped the direction of the Order over time. I have made reference to a small body of existing research which provides some insight into the offending characteristics of the OLR group.

Finally, the chapter has considered some human rights implications of the OLR, particularly in relation to rehabilitation, in an overcrowded and poorly resourced prison estate. I have also considered a 'standard of hope' as developed by Brownlee (2021) who argues that a framework of punishment ought to give credence to this 'standard' for it to be legitimate and morally justifiable. At present, the majority of OLRs remain in prison well beyond their designated tariff parts, and small numbers have been released on licence, some of these have been recalled to custody. In such a system, a designated 'dangerous person', must face the certain fact that release is conditional if it occurs at all. This has significant implications for the right to hope, particularly where the possibility of release is uncertain. The European Court of Human Rights has emphasised that all prisoners must have a realistic prospect of release and rehabilitation. A denial of these prospects may culminate in a lack of hope, which can violate human dignity and constitute inhumane or degrading treatment under Article 3 of the ECHR. In systems where parole opportunities are limited or where individuals face systemic barriers to rehabilitation, it may erode their willingness to change. A lack of hope has profound deleterious psychological effects, contributing to despair, mental health deterioration, and even increased risk of self-harm. Upholding the right to rehabilitation and hope shows the true colours of a justice system that values the possibility of redemption.

In summary, this chapter has provided a foundation for the following discussion on various theories of risk and forms of preventive detention. These perspectives offer insight into why and how preventive confinement reflects some of the broader anxieties about uncertainty and risk as well as the social, institutional and cultural forces that demand state intervention to minimise harm.

Chapter 3 Risk and the preventative state

Various theoretical explanations have been offered to explain why governments around the world have shifted towards coercive measures manifest in longer sentencing, and lifelong and indeterminate incapacitation (Foucault, 1977 Garland; 2001; Feely and Simon, 1992; Wacquant, 2009: 2011). Preoccupations with risk and security are not new; they have always been a central and longstanding concern of the nation state (Pratt, 1997; Rigakos and Hadden, 2001). The state plays a key role in maintaining social, political and economic stability, protecting the citizenry from external threats and maintaining law and order within its boundaries. Failure to mitigate harms invites challenge to state authority, eroding legitimacy and public trust in experts (Freudenberg, 1988) and the organisations charged with its regulatory functions.

In criminal justice, the state increasingly has adopted *precautionary* laws, policies, and institutions to manage risk posed by certain groups perceived as a threat to the social and moral order. This has led to the development of defensive strategies, laws and the establishing of branches of government and institutions designed to respond to hazards and threats (Power, 2004). Governments select and prioritise risks based on the intersection of various factors including, public opinion, social relevance and available resources. Some have argued that the increase in risk governance within criminal justice reflects a heightened risk consciousness, brought to the public's attention by high-profile events (Lupton, 1999). This has led to the proliferation of new criminal justice risk architectures, which are also influenced by cultural, temporal and jurisdictional dynamics. These developments have also seen the emergence of theories in sociology, criminology, anthropology and other disciplines, such as organisational theory, which seek to explain risk landscapes.

In this chapter, I will build upon the 'grand theories' of risk outlined by McSherry (2014) and Lupton (1999) which broadly encompass the 'cultural/symbolic', 'risk society' and 'governmentality' perspectives (also see McSherry, 2014). I will also borrow from the field of organisational studies and include a background outlining the influence of political economy in the rise of modern forms of regulatory and risk management practices. Finally, I will explore the specific technologies of risk and precaution. Drawing upon these theoretical works will

assist in explaining the emergence of risk and precaution as central tenets of the state and how these principles have shaped risk, and the fear of certain criminal types, and encouraged preventive detention as a mode of governance and control. It also exposes some gaps in our knowledge of risk-based modes/ideologies of state control. The chapter is set out in four broad conceptual sections, yet these perspectives are interconnected and overlap. These are the cultural and socio-political construction of fear and the 'dangerous' individual. The risk society perspective emphasising uncertainty and preventative governance, a governmentality lens examining how power and neoliberal governance shape penal practices, and the 'new penology' perspective which considers risk management techniques as technologies of control.

The first section of this chapter considers how precautionary measures have long been grounded in fear, with anxieties about particular groups driving expansive legislation to maintain social, moral, and political order. In the 19th century, eugenic based concerns about the "dangerous classes", moral deviance (Nuttall, 2013) and poverty emerged due to political forces which displaced populations and to the economic forces of industrialisation (Rigakos & Hadden, 2001). I show that the modern criminal justice system and its techniques of risk management are rooted in historical, socio-political, and moral imperatives. While contemporary tools are more structured and data-driven, they still reflect past assumptions.

Scholars have explored the relationship between risk perception and culture, highlighting how precautionary practices driven by fear can lead to an exaggerated sense of risk (Sunstein, 2005; Furedi, 1997; Gigerenzer, 2002: 2004). Fear, especially in the form of dread risks (Slovic, 1987), shapes public concerns and demands state intervention. Heuristic processes distort perceptions of risk, often overshadowing actual probabilities. In a criminal justice context, these distorted perceptions contribute to the creation of the 'dangerous criminal' as an archetype, who is singled out for legislative control and punitive law and policy. A cultural symbolic view (Douglas, 1966) draws on the work of Durkheim, positing that crime is socially and morally constructed, shaped by collective emotional responses to threats against societal moral bonds (Garland, 1990). As social trust declines, fear and anxiety rise, influencing both political decisions and public discourse, which in turn can overshadow common sense and result in ineffective policies (Garland, 2001; Wacquant, 2009). Fear of crime is harnessed by capitalist processes, the media and popular culture, distorting perceptions and reinforcing bias, amplifying societal fears and anxieties. This, alongside 'populist punitiveness' (Bottoms,

1995:40) drives fear and revulsion, influencing political decisions, harsher punishments, regardless of their effectiveness in reducing crime.

The risk society perspective, developed by Anthony Giddens and Ulrich Beck. Beck (1992) argues that contemporary societies face heightened uncertainty and manufactured risks due to processes of industrialisation, globalisation, and technological advances. Giddens (1990) describes the 'ontological insecurity' which characterised the post-Fordist era, arising from global changes, leading to a wide range of new uncertainties. In criminal justice, this shift has led to a preventative approach across the span of public policy. In criminal justice law, and policy this has taken the form of increased surveillance, regulation and the use of pre-emptive measures.

A governmentality lens helps us understand how power is exercised to govern social problems (O'Malley, 2004). Foucault's concept of governmentality refers to the control of populations through techniques of knowledge production (Foucault, 1991). It is by examining these techniques of classification, measurement, assessment, and surveillance that we understand how power is exercised and populations are known and governed. But of course, the domain of punishment is also shaped by the political economy which gives rise to governance in particular forms. The advent of neoliberal governance has seen the shift from centralised state power and systems of welfare protection, to market-deregulation impacting all public arenas. According to Wacquant (2009) the decentralisation of power and the retraction of welfare has resulted in the increase in regulatory functions and penal coercion (Wacquant, 2009).

In criminal law, this development has been termed the *punitive turn* and has seen the expansion of surveillance and control (Lyon, 1994; 2007), police powers (Hall et al, 1978), longer sentences and the burgeoning of prison populations (Wacquant, 2009:2011). Traditional rehabilitative values have, to some extent, been eroded (Ericson, 2007), paving the way for a hybrid model of governance that combines welfare-oriented and punitive approaches (O'Malley, 1999). Within this framework, neoliberal responses to insecurity emphasise pre-emptive measures, shifting the focus away from rehabilitation toward the management of future risk.

Although neoliberal policies have reduced state intervention into the market, the state has expanded its regulatory and supervisory functions in other domains. This has been done through the establishment of quangos, inspection bodies, and performance-monitoring systems which aim to manage risk, enforce compliance, and ensure accountability. Braithwaite (2000)

calls this the ‘new regulatory state’ where governance is networked and collaborative, involving both public and private sectors. In Scotland, this has led to the creation of specialist risk management bodies like the RMA, which reflect neoliberal and regulatory imperatives in criminal justice. The rise of the ‘new regulatory state’ incorporates risk management as a central feature of criminal justice.

Risk culture emphasises the market principles of transparency, accountability, and efficiency, with organisations adopting stringent rules and procedures to manage both primary and secondary risks (Power, 2004). This defensive approach is set against a decline in the trust in experts (Weed, 1995 cited in Wacquant, 2009; Freudenberg, 1988) and has resulted in bureaucratic procedures that erode professional autonomy and hinder decision-making processes. Critics have argued that a pervasive risk management culture stifles resilience and flexibility, urging for a more adaptable approach to uncertainty (Power 2004; Furedi, 1997; Taleb, 2007:2012). These scholars broadly argue against the ‘the myth of calculability’ and a recognition that not all risk can be controlled (Reddy, 1996:237).

Risk management in criminal justice operates through a system of categorising and managing dangerous individuals, focusing on risk assessment techniques. The “new penology” examines how actuarial justice, using large data sets, influences the management of populations based on statistical models rather than clinical knowledge (Feeley & Simon, 1992). These methods form a ‘regime of truth’, raising fundamental epistemological and ontological questions about how we know, what we can know about risk. The final section of this chapter delves into what Foucault (1972) considers ‘the internal workings of the apparatus…the actual technologies of penal power and their mode of operation’ (Garland, 1990:131). It examines the genesis of the three main techniques of risk - clinical, actuarial, and structured professional judgment (Hannah-Moffat, 2005). In so doing, it explains that risk tools, as cultural artifacts, reflect historical, economic, and social contexts (Hannah-Moffat, 2013) as well as institutional priorities defining the limits of knowledge.

Laying out these theoretical perspectives in this chapter is fundamental to strengthening the foundations upon which an empirical analysis of the practices of contemporary punishment-as-risk-management are built. Individually and collectively, they highlight the ways that societal perceptions of risk, uncertainty and insecurity shape regulatory practices and criminal justice policies. In this vein, the administrative rational and managerialist forms of penality are not separate to moral, cultural and economic explanations of risk, these are inextricably linked.

As Kemshall, (2003) explains, 'the emotive punishments of expressive penalty exist side by side with the cold calculations of actuarial justice' (Kemshall, 2003:22).

Fear, governance and the moral order

In medieval times, practices of anticipating and responding to threats were firmly based in religion and cultures characterised by superstition, folklore, and rituals (Lupton, 1999). When disaster such as famine, disease or tragedy occurred, blame would be attributed to the supernatural, witches would be hunted, oracles consulted, and rituals performed (Lupton, 1999). In Europe during the 17th and 18th, centuries the Enlightenment had some bearing on the rejection of superstition, religious dogma and traditional authority (Robertson, 2015). Its key impacts were the commitment to rational scientific inquiry, through reason, and secularism as a means to understand society and the natural world through the gathering of empirical evidence (ibid).

Techniques that the state employs to inform its precautionary measures are ground in fear (Ericson, 2007). Over time fears about social others has driven an expansive array of legislation targeted towards particular groups who were seen to pose a threat to the social, moral and political order. In the 19th century, such fears were grounded in notions of collective threat posed by the 'dangerous classes'. As the economic base of anglophone societies shifted from agriculture to industry, the constituent parts of the United Kingdom were impacted by political factors such as the Highland Clearances in Scotland (Prebble, 1963) and the Irish Famine (Kinealy, 1994), leading to the large-scale displacement of persons from villages into urban areas in search of labour. The proliferation of populations seen as morally unsavoury such as 'vagrants, vagabonds, rogues, [and] hawkers and landless men' (ibid, 1983), among them, 'thieves, bullies, beggars, touts and tarts' (Chesney, 1970:33). The dangerous classes were written about in the context of the *lumpenproletariat* described as 'a passively rotting mass' (Marx and Engels, 1981).

The convergence and development of these new groups became the locus of fear and anxieties amongst the governing classes now faced with a new set of risks to be managed on a scale which far surpassed anything they had known. The development of 'semi-barbarous tribes' who comprised of 'unprincipled, ruffianly, degraded elements, ready to …break down the established order' challenged the 'tissue of laws moralities and taboos' holding ordered society together (Chesney, 1970:32-33). Concerns about vagrancy also extended into the domain of health, attributed to the spread of diseases such as smallpox and syphilis (Mayall, 1995). A

wave of ‘risks’ in industrialising cities was borne from a hodgepodge of the poor, the ill, the displaced, the politically dissident, and a burgeoning and dangerous criminal underclass. By the 19th century risk had firmly moved away from being an ethereal phenomenon, to one which was firmly ground in human beings and their conduct (Lupton, 1999). Lupton (1999) explained that risks and threats were re-conceptualised as calculable and facilitating the development of the surveilling and disciplinary apparatus, to better understand and respond to hazards.

State responses, as seen in many liberal democracies, expand laws, regulations and institutions to criminalise and discipline classes of persons through framing social problems like poverty, violence and illegitimacy as moral failures. In the UK laws and policies targeting these behaviours saw the expansion of laws and state powers through the *Habitual Criminals Act (1869)*, The *Vagrancy Act (1824)* and the *Vagrancy (Scotland) Act 1846* punished and criminalised poverty. Fears of degenerate women and their children posed as threat to the social and moral order was reflected in the *New Poor Law of 1834* and the *Poor Law (Scotland) Act 1845* (Blaikie, 2005). By the late 19th and early 20th centuries, the focus had shifted to individuals such as the mentally ill or ‘degenerate’ as well as repeat offenders thus denoting a shift from notions of collective to individual threat. It is as much today as it was in history that preventative regimes are justified through the construction, examination and classification of the ‘individual’ and the behaviours they exhibit.

The interplay between moral principles and criminal justice

A cultural symbolic view explains how constructions of risk are embedded within communities and are historically and culturally contingent (McSherry, 2014). This view holds that what a community selects as embodying ‘risk’ is that which is seen to threaten shared moral principles which in turn helps maintain the social order. This perspective provides a useful explanatory framework for setting out an understanding of how practices of punishment, the rationalities of governance and the technologies of risk, are rendered legitimate and receive popular support (O’Malley, 2010).

In the context of law and policy in the United Kingdom, historical debates regarding the regulation of classes of persons ‘dangerous to society’ or ‘mad and dangerous’ (Prins, 2010:53) can be traced back to the 18th century. Arguably much earlier, their inclusion with mental health legislation can be found in the deliberations of the Royal Commission on the Care and Control of the Feebleminded (1908), chaired by Lord Radnor (Nuttall, 2013:59). This emerged within a context of eugenic based anxieties regarding ‘defective’ segments of society and the link to

dangerousness later deemed to be 'morally insane' (Prins, 2010:158). At the time the term provoked controversy due to the contested and uncertain nature of the concept which 'provided the basis for the development of the diagnostic category of psychopathic and other personality disorders' (Nuttall, 2013:50). This prompted over a century of debate over terminology (Prins, 2010; 2015) and the limits of the preventative state in confining dangerous people by mental health or criminal legal routes.

These debates within the United Kingdom, considered disposals for dangerous persons who engaged in repeated offending. Section 1 of *The Mental Deficiency and Lunacy (Scotland) Act 1913 described*, those with 'strong vicious criminal propensities', 'defective' or 'moral imbeciles' (Section 1d). These categories were extended in the *Mental Deficiency Act 1927*, and the *Mental Health Act 1960* and the 'mentally disordered' criminal who posed challenges to care and confinement through their behaviour. As Prins (2010:52) explains, the provisions of 'care and control appear to show a cyclical pattern, - a kind of 'flavour of the month' quality, often demonstrated by more passionate and often irrational conviction rather than by objective appraisal of need'.

Debates about definitions, treatability or control (Butler Committee, 1975: the Reed Report, 1979), the use of compulsion and its limits, the attribution of stigma and exclusion from services, the inclusion or exclusion of terminology (Scottish Standing Committee, 1960), all centred around notions of dangerousness and public and political concern over safety and the limits of state power (Cited in Nuttall, 2013). Dangerous persons have and continue to be subject to the regulatory control of the state. Prins (2010:2015) observes that the mechanisms, both historical and current, for constructing, classifying and dealing with dangerous subjects have not been clear cut and it has not been simply a case of 'prison or hospital' (Prins, 2010:51). Despite the use of imprecise labels to classify individuals whose behaviour falls outside prevailing social norms, it can be argued that such figures remain as elusive today as they were in the past. Today our clinical and diagnostic understanding of this particularly tricky phenomenon, can be traced back in time to the nineteenth century where clinicians attempted to make sense of dangerous persons and the offences they committed. From this period onwards, much research has been done into the *dangerous* person and yet it remains steeped in contestation and debate (Prins, 2010).

The construction, classification and interpretation of dangerousness

The modern criminal justice system, and its technologies and techniques, are built upon an old regime of risk management - as I will show. In this sense, risk management is not new, it is based on the evolution of ideas shaped by historical, socio-political contexts, judgments and moral imperatives designed to identify and control deviance. Understanding these roots highlights how contemporary tools, though now more data-driven, still embody past assumptions. A historical perspective thus does not merely assist in tracing the origins of these assumptions but allows for a critical evaluation against the benchmarks of fairness, effectiveness, and ethical risk governance in modern times.

The foundations of modern classificatory systems regarding criminal behaviour stem from various traditions within psychiatry. Theologically based explanations, regarding degrees of a lack of 'moral conscience' or 'sense of god', were offered by Benjamin Rush (1745–1813) in the United States (Kiehl and Hoffman, 2011; Ellard, 1989). Working in England, James Pritchard (1835) developed the theory of 'moral insanity', emphasising moral and emotional disruption in persons who were not suffering from delusions or intellectual impairment, thus exhibiting risky, dangerous and difficult to understand behaviours (Horley, 2014). The biologically deterministic work of German psychiatrist Koch in the late 19th century examined 'psychopathic inferiority'; a term coined to describe those with supposedly innate, hereditary defects of personality, which predisposed them to chronic moral, social and emotional dysfunction causing criminal behaviour (Eghigian, 2015). The now controversial term 'psychopathy' itself is derived from the word "psychopsticie", which means 'suffering soul' (Kiehl and Hoffman, 2011:5).

Koch's work was built upon by psychiatrist Emil Kraepelin, who is considered the first pioneer in psychiatric classification, who developed the concept of 'psychopathic personalities' based on observable patterns of behaviour, and personality traits, as well as how these were influenced by internal biological factors and external environmental factors. In the 20th century, Hervey Cleckley an American psychiatrist widely known for his influential paper, *The Mask of Sanity* (1941) identified psychopathy by reference to a list of interpersonal and behavioural traits which demarcate this person from others. Cleckley posited that such persons often outwardly appear normal as they can 'mask' emotional and moral deficits. These theories and frameworks are important as they have evolved giving us the definitions and classifications for anti-social personality traits and behaviours as we understand them today (Nuttall, 2013).

Kraepelin's classification system, for example, laid the foundation for disorders of the personality, found today in diagnostic manuals like the DSM-5 and ICD 10 and Cleckley's work influenced the development of the diagnostic criteria in the Hare Psychopathy Checklist-Revised (PCL-R) (Nuttall, 2013). The Revised PCL-R has been integrated into a range of other standardised actuarial risk assessments and is widely considered a reliable tool in the prediction of recidivism (ibid, 2013).

It was medical discourse that defined the ways in which forms of madness and criminality were constructed, offering a lens through which such individuals should be understood (Foucault, 1965). Today, various terms, none of them particularly succinct or endearing, have been used to describe those who, while not suffering from an alienation of reason, consistently infringe society's norms and rules, harm others (and often themselves) and engage in exploitative behaviours driven by their personality traits (Prins, 2010;2015; Craissati, 2021). Terms such as psychopathy and sociopathy are deemed unfavourable, and often used in common parlance as 'lay synonyms for the incorrigible' (Kiehl and Hoffman, 2011:1) and sit alongside newer clinical terminology such as dissocial personality disorder (ICD-10), and anti-social personality disorder (DSM-II [APA, 1968]) onwards. It is precisely due to the lack of definitional clarity and the stigmatising nature of these terms, that commentators have concluded that the terms are better suited to popular culture rather than in clinical practice (Prins, 2010). However, while these terms are unpopular, they have not disappeared altogether and are still used in the field of medicine, psychology and law. In a UK setting, they have more or less been subsumed within a broader legal definition of 'mental disorder' and ways of identifying and measuring people by risk has largely shifted from clinical judgement to structured professional judgement which incorporates the application of a broad range of risk management tools and actuarial risk assessments. These will be considered later in this chapter.

The role of culture, emotions and fear of the Other

A number of scholars have written in relation to risk perception and culture (Douglas (1966) Douglas and Wildavsky (1982), and fear of risk (Sunstein, 2005; Furedi, 1997; Slovic, 1987; Gigerenzer, 2004; Taleb, 2007). Fear leads to distorted perceptions of risk, which are amplified through familiar channels rather than reflecting an actual increase in risk (Gigerenzer, 2004). When the nation state perceives a threat or hazard, it is fear that drives the development of precautionary measures aimed at mitigating or preventing harm. Fear shapes public concerns, perceptions, and attitudes, and demands are placed upon the state to act. The *precautionary*

principle has a vast literature base (Freestone and Hey, 1996; Sunstein, 2005). It is a philosophical concept embodying a particular approach to decision making embracing the motto 'better safe than sorry' (Sunstein, 2005:13). The precautionary principle can be considered as a legal, regulatory and policy response to the fear of events that have not yet occurred. As I outlined in the previous chapter, the challenge for the preventative state (Ashworth and Zedner, 2014; Janus, 2006) is to reinforce governmental authority by identifying and managing potential risks and by taking proactive measures before they occur. Practices of prevention are not restricted to the criminal justice arena, and they include the enactment of techniques of surveillance (Lyon, 1994; 2007) private security (Shearing and Stenning, 1981; 1983; Zedner, 2006) and the increasing use of big data analytics to monitor populations (Gigerenzer, 2022), in commerce and industry and across the span of public policy and crime prevention (Hannah-Moffat, 2018). In criminal justice, the concept of risk and 'radical prevention' (Janus, 2006) has emerged as a pivotal determinant shaping laws, policies, and interventions.

Slovic (1987:3) coined the term 'dread risks' to illustrate the potential for high profile catastrophic events to cause widespread fear and panic. In his work, he argues that dread risks have two dimensions, firstly, that the event has been uncontrollable, and therefore unanticipated by the authorities, experts and the public. Secondly, that it has the potential to culminate in widespread devastation thus bearing a *dread factor* and a catastrophic or fatal outcome. Accordingly, societal responses to a risk or hazard are influenced by scientific assessment, knowledge and opinion but also by subjective experiences of risk, which can either increase or decrease the level of concern (Slovic et al., 1979; Slovic et al., 1985). Gerd Gigerenzer (2004) posits that dread risks cause overreactive responses and the implementation of knee-jerk decisions based on fear and also ignorance, which in turn can lead to the emergence of new risks and hazards. Dread risks, he argues, involve heuristic processes which influence decision-making and how individuals respond to 'low probability, high consequence events' (ibid, 2004:1). Cass Sunstein (2005) considers risk perceptions and decision-making and their implications for regulatory law and policy. The main thrust of this argument is laid out in his book *Laws of Fear* where he outlines the ways in which perceptions of risks and hazards are distorted by cognitive processes of heuristics, biases, and emotions which lead to irrational fears and behaviours. Heuristic processes simplify decision-making by drawing on available examples of risks that are both familiar, salient and recent (ibid, 2005). An important aspect of his work demonstrates how the 'availability heuristic illuminates the operation of the

precautionary principle, by showing why some hazards will be on-screen and why others will be neglected' (ibid, 2005:36).

Heuristics are shaped through external phenomena such as exposure to 'vivid illustrations' (Sunstein, 2005:40) and amplification by the media (Hall, et al, 1972) and also by governments, and institutions (Foucault, 1965) which, through public discourse, influence and shape societal fears. One of the unintended consequences of risk regulation is that moral panics and public concern may outweigh the probability of similar events occurring and regulatory changes may be excessive to the reality of actual risk (Gigerenzer, 2002). Sunstein (2005) contends that individuals unconsciously select risks and measures to avoid them through drawing on processes of cognitive imagery. This can work in the opposite way, by exclusively focusing on positive outcomes, crowding out risk and thus neglecting probability. In both scenarios, cognitive biases can lead to probability errors in decision-making and the management of uncertainty becomes 'loss aversion' (2005: 43) rather than on objective probabilities. At the level of governance this can lead to both adversely shaping risk perception and knee-jerk policy responses based in notions of fear and uncertainty, or 'system neglect' (Sunstein, 2005:45-46). Such a view neglects underlying factors or broader trends and patterns which may show a more nuanced picture. The misunderstanding of risk leads to excessive responses (Gigerenzer, 2002). Both risk and organisational theorists have warned that excessive anxiety about risks and hazards can have a detrimental effect on organisations and the work they undertake (Power, 2004; Graeber, 2015).

In the aftermath of a crisis, the amplification of existential threats and populist politics influence a politicised approach to crime (Garland, 2001) producing an increase in regulatory policy which has real implications. This is particularly acute where blame is attributed to a particular group of people (Kemshall, 2009). Garland and Sparks (2000) explain that the rise of insecurities is linked to citizens being increasingly crime conscious and attuned to the problem of crime. The public imagination beholds the dangerous criminal archetype as an imaginary; he becomes the dreaded 'worst case scenario' existing beyond the realm of the *ordinary* criminal: obstinate and indifferent when caught or challenged, ungovernable, depraved and perverted, seemingly incapable of behaving with decency and propriety. Over history, this group have been disposed of in death camps (Eghigian, 2015) or oscillated between criminal justice systems and state asylums and hospitals (Prins, 2010; 2015). These 'castaway categories' are subject to the moral condemnation of various publics and politicians (Wacquant, 2009:4).

A cultural symbolic view

What constitutes a crime is socially and morally constructed and culturally contingent (Becker, 1963; Cohen, 1972; Hall et al, 1978; Young, 1999). A cultural symbolic view originates in the work of Emile Durkheim and holds that crime represents an offence to the *conscience collective* - the common moral bonds which bind societies members together. Garland (1990) explains that, for Durkheim, 'punishment is driven, in the first instance, by collective moral outrage rather than strategic planning' (p, 61). The selection and attribution of risks is also emphasised by anthropologist Mary Douglas (Douglas, 1966) whose theory on 'purity and danger' can be used as a prism with which to view crime. A cultural symbolic view explains how constructions of risk are embedded within communities and are historically and culturally contingent (McSherry, 2014). In a cultural symbolic view, collective emotional responses reinforce the moral order in response to external stimuli. The process of risk identification and selection occurs when a community's moral principles are threatened. This is particularly true when cases of child abuse, rape, or murder are confirmed, as they constitute a fundamental rupture in the social order. In these cases, powerful raw emotions ignite the flames of retribution in the social field (Freiberg, 2001) and the ensuant outrage, revulsion, and condemnation incinerate the humanity of the perpetrators of harm (Wacquant, 2009) placing them 'beyond the limits of civility' (Rose, 2000:334). Herbert Mead in his account of the symbolic nature of criminal procedure explains that the purpose of justice 'to evoke in its audience, the twin emotions of respect for the law and hatred for the criminal aggressor' (Garland, 1990:69).

Those whose behaviours appear to be deliberate, calculating, and incorrigible, are polarised as, at best, abnormal, at worst, as possessing characteristics of subhuman quality, beastly paragons of evil, devoid of moral discernment. Unanswered questions of motive and reason, leave behind a dangerous chasm of incomprehensibility poised to be filled with fear, speculation and lay hypotheses. Powerful emotions like anger and indignation fuel demands for retaliation and a desire for revenge. For Berezin (2002) emotions play a vital role in how individuals and communities perceive and respond to threats to their security. Social trust is a key feature of Berezin's work creating a sense of safety and stability as well as predictability. When trust is diminished, "something is in flux" (p 47) and emotions such as fear, anxiety, and suspicion arise in response to instability. When a catastrophe occurs, shared experiences create 'communities of feeling' which are collective emotional responses which can influence decision-making both practical and political.

Popular culture both taps into and reflects broader cultural emotions and anxieties regarding harm and dangerous persons, by focusing on extreme cases. This contributes to moral panics (Cohen, 1972), a decline in public trust, and a trust in experts (Freudenberg, 1988, 1993), as well as the opening of new opportunities in the political sphere for social blacklisting, division and expulsion. Public fear and revulsion, and the foregrounding of the victim (Walklate, 1998), significantly influences political campaigns and policy decisions leading to the implementation of more severe punishments, without regard for their effectiveness in reducing crime or the effectiveness of prison. Citing Weed (1995), Wacquant explains that it is within the morally charged environs of punitive public culture that 'the technical voices of experts have been drowned out by the emotional drum beat of journalists, elected officials, and especially crime victims and their families who have emerged as major protagonists in the penal field since the late 1980s' (Wacquant: 214). In this vein, the expert and evidence-based approaches have been usurped by a 'moral battle to the death between good and evil' resulting in a public culture that 'vilifies criminals' and attempts to silence alternative perspectives (Wacquant, 2009:214). David Garland (2001) has warned of a 'criminology of the Other… that trades in archetypes images and anxieties' though which fear drives the development and implementation of punitive policies targeted towards groups of offenders (Cited in Kemshall and Wood, 2008; 613). Bottoms (1995:40) has termed this 'populist punitiveness', describing the way in which polices are driven by the demonisation of particular groups, and therefore public opinion and political concerns.

The selection and amplification of fear in the public sphere

The media (Sparks, 2000; 2001a, 2000b) and film industry have profoundly influenced public perceptions of crime over time (Seltzer, 1997). The sensationalising of crime on these fronts distorts reality creating the impression that violent crimes are more prevalent than they are. This selective reporting is amplified by the media who take on the role of 'moral entrepreneurs' (Becker, 1963) deploying representations of evil which, whether deliberately or incidentally, consolidates the offender's relegated status and position, reinforcing mistruths and biases.

In film, it is said that society is obsessed with what Seltzer (1997) termed 'wound culture' to describe our preoccupation with 'torn and open bodies, a collective gathering around shock and trauma' (Cited in Ball, 2000:17). In horror cinematics, gendered narratives often reinforce cultural norms and stereotypes, and perpetuate dread through characterising the monstrous as conduits of these representations (Keith-Grant, 1996). Visual representations of violence and

suffering are deployed to provoke emotional responses as well as moral introspection *regarding the pain of others* as outlined by Sontag, (2003) through her work on conflict. In this view the media and entertainment industries are powerful entities capable of shaping the public consciousness and the collective memory of societies. Their portrayals tap into, reflect and reinforce broader cultural anxieties about the presence and nature of harm and dangerous persons, and ultimately exaggerate social danger by focusing on the most extreme. Cohen (1972) called this 'media amplification', where strategies employed by the media magnify social problems thus creating 'moral panics' within societies. When spectacular cases are harnessed by the media and politicians, the lurid details laid bare act as the fuel required to galvanise support for rough justice and the apportioning of blame.

Pratt (2000b) explains that the rise of 'emotive' and 'ostentatious' punishment can be understood as offsetting the inefficiency of the state to manage risks in other areas (cited in Kemshall, 2003:22). The emotions of the public are tapped into to legitimise punitive and precautionary state responses (Roberts et al, 2003). How effective these strategies are in quelling collective emotions, remains to be seen. The introduction of legislative reforms and measures, as a response to a high-profile crime, tend to be ill-considered. This process seems to have remained constant over time and space as captured by criminologist Edwin Sutherland writing within the context of sexual psychopath laws as outlined in the previous chapter. He explains:

> The community is thrown into panic by a few serious sex crimes which are given nationwide publicity; the community acts in an agitated manner; and all sorts of proposals are made; a committee is then appointed to study the facts and make recommendations (Sutherland, 1950:142).

It is against a backdrop of fear and concerns over 'moral decline' that public and political support is garnered for tougher criminal justice policies, such as the increased use of imprisonment, longer sentencing and supervision measures (Kemshall, 2003:16). Public fear and revulsion, significantly influences political campaigns and policy decisions leading to the implementation of more severe punishments, without regard for their effectiveness in reducing crime or prison resources (Bottoms, 1995). Pratt (2000) explains that emotive punishment is also set against a backdrop of 'widespread disillusionment with the grand narrative of reform combined with a lack of trust in science and experts to deliver the promised rehabilitation of offenders' (Cited in Kemshall, 2003:16). In summary, a cultural approach to crime has great

value in understanding the interplay of moral and emotional sentiments in the implementation of punishment.

The risk society perspective

The main proponents of what has come to be known as the 'risk society' perspective are Anthony Giddens and Ulrich Beck, who emerged in the intellectual milieu of the last quarter of the 20th century. They provide an account of how the nation state's preoccupation with risk as the result of shifting material and economic conditions (Giddens, 1990, 1998a,1998b,1999 and Beck, 1992a, 1992b, 1999). Coined originally by Beck (1992), the term 'risk society' identified the unparalleled levels of risk and uncertainty brought on by processes of industrialisation, globalisation, and technological innovation in contemporary societies. Ulrich Beck describes the shifts of the 20th century from industrialisation, to a new set of social arrangements which are considerably marred by potential hazards. Beck identifies a shift from *traditional* risks, such as natural disasters to manufactured risks; anthropogenic events exacerbated by human means such as technological innovations (Beck, 1992a, 1992b). Such events, whether, financial or nuclear are typified by their unpredictability, 'complexity and potential for widespread harm.

Anthony Giddens in his seminal work '*The consequences of modernity'* (Giddens, 1990) defines the characteristics of the 'risk society' and its consequences. Like Beck, he argues that the coming of modernity has resulted in uncertainty through globalisation, which has eroded traditional forms of security and stability, giving rise to a pervasive and heightened sense of fear and anxiety or 'ontological insecurity' (Giddens, 1990). Giddens (1990; 1991) introduces the notion of reflexivity, referring to how individuals and organisations have increased awareness of dangers and hazards and revise decisions and practices according to the complexities of risk landscapes. Nonetheless, the unintended consequences of modernity have required new systems of governance and new ways of dealing with insecurities.

The risk society and the implications for the control and management of crime, including preventative detention, have been widely discussed (McSherry, 2014; Kemshall, 2003; Lupton, 1999). As a broad strategy, a preventative approach can entail models of situational crime prevention (Clarke and Felson, 1993) or the prevention of further offences through the incapacitation of offenders deemed to be dangerous (Steiker, 1998). In criminal justice, the focus shifts to managing and preventing risks proactively, rather than responding to crimes

after they have been committed. The shift from post-crime to pre-crime is said to erode traditional due process protections of proportionality in punishment (Slobogin, 2011), and the presumption of innocence by targeting individuals based on past behaviour. Preventative sentencing measures, also include detention without trial, lifelong surveillance and control orders (McSherry, 2014, McSherry and Keyzer, 2009:2011). As La Fond (2008) explains, in reference to the sexually violent predator statutes such 'forms of preventative to tension can lead to the erosion of liberty guarantees for us all' (Petrilla, 2011:64).

In relation to risk, Beck (1992a) explains that the risk society is defensive in character and preoccupied with identifying and managing risks. The defensive posturing of the state and the institutions tasked with managing risk has seen the expansion of bureaucratic controls, regulatory mechanisms and laws at the expense of other societal goals. Beck (1992) warns that the pursuit of a risk-free society may culminate in totalitarian effects, through a risk- paranoia and a fear of decision making, having serious consequences for civil society, liberty and autonomy. In this view, the targeting of groups and the marginalising of dissenting voices culminates in the preservation of existing power structures and public discourse.

Theories of governance

Foucault (1972) views punishment as a system of power and regulation (Garland, 1990). A governmentality lens offers to a theory of preventive punishment an analysis of the way that power is used to govern social problems (O'Malley, 2004). The concept of 'governmentality' refers to the way in which the state exercises control over its populations through a combination of governance techniques and knowledge production, to regulate the behaviours and conduct of individuals and groups (Foucault, 1991). Lupton (1999) explains that governmentality as a conceptual framework is useful for explaining power in relation to the politics of neoliberalism in anglophone countries. Foucault concedes that power operates through the interconnected structures and discursive formations of society, shaping behaviours and maintaining order (Foucault, 1991). Power and knowledge regimes are embedded within the formal architecture of the state and diffused through regulatory bodies, surveillance systems (Fyfe and Banister, 1996) and disciplinary institutions such as schools, workplaces, hospitals, and prisons (O'Malley, 1992). Institutions rely on discourse to legitimise existing structures of governance, and it is by examining the techniques, practices and 'rationalities' through which the nation state governs its populations that we gain an understanding of how power is exercised and its knowledges are produced (Garland, 1999:131-33). While there is a declining trust in experts in

the public sphere, they continue to wield significant authority. Technocrats, actors, and experts deploy the surveilling strategies of the state to calculate and quantify risks and hazards. Grouped in bodies of experts, they exert power and influence by virtue of their specialisms and institutional positions, establishing normative boundaries. Expert knowledge shapes values, norms, and practices, defining their legitimate and illegitimate forms, in turn shaping both institutional and social life. Under the gaze of experts, individuals are constituted, subjectified, and objectified as sites of governance and regulation, in accordance with dominant power structures. In the domain of preventive detention, McSherry (2014:59) explains that the proliferation of these regimes has greatly benefited the domain and development of forensic psychology. However, while the authority of experts is extensive, it remains fragile and contingent, dependent on the perceived legitimacy of their knowledge.

The influence of politics and the economy

The ideology and practices of neoliberal governance have resulted in an altering and dispersal of the disciplinary power of the state from old modes of centralised planning and commitment to social welfare as means of social control. The shifts in the material conditions of society, including rapid industrialisation (and deindustrialisation) and the shifting nature of production and consumption, have had profound implications across various arenas such as health, welfare, warfare, the environment, and security. The period after the Second World War, the Ford-Keynesian era was based on notions of a strong state, that aimed to support the economic industrial base, underpinned by a largely unskilled labour force, concentrated within large scale factories, shipyards, and mines (Jessop, 1995). The result was the development of industrial bureaucracies characterised by systematic procedures, rules and norms which aided the organisational goals of efficiency, predictability, uniformity and consistency in decision-making (Merton, 1957). At the same time institutions of law and education and healthcare systems (Jessop, 1995), as well as latent features of the new age, such as culture, ideology and politics, which were integrated into the economic framework (Jessop, 1995). In Marxian theory the interplay, of the mutually supporting mechanisms base and superstructure reflects the relationship between material conditions and broader social and cultural features (Tucker, 1978). In the United Kingdom, Keynesian economic policy and a strong welfare state underpinned by liberal collectivist values were risk-based strategies to offer a modicum of protection (Beveridge, 1942) to the labouring classes by moderating market forces and relieving the impacts of poverty during periods of economic decline (Gray 2002). Welfare state policies and the social solidarities fostered through the mode of production and related trade

union activities (Ginsburg, 1992) were crucial to the post war reconstruction efforts. They also marked a period of consensus building and social contract between the state and the citizenry where the state would provide economic stability and therefore reduce the likelihood of political and social unrest. Mass production was meticulously organised through hierarchical governance structures, the division of labour, and standardisation of processes and products.

The advent of neoliberalism emphasised the primacy of market mechanisms in structuring society advocating the 'devolution, retraction and recomposition' of the state, particularly in the arena of social welfare (Wacquant, 2009:307). Aspects of public policy including criminal justice became marketised, decentralised and decision-making power devolved to local authorities and diffused through new forms of regulation (Braithwaite, 2000). The invisible hand of the market in public service delivery and the privatisation and commercialisation of state services coincided with the rise of managerialism and an emphasis on efficiency, performance measurement, and accountability in the administration of criminal justice and other public institutions (Kemshall, 2003). Raine and Wilson (1993) explain this in relation to the three E's; economy, efficiency and effectiveness. In this way the modernisation of services and indeed criminal justice sought to replace traditional bureaucracy with a more efficient and effective form of management.

Neoliberal logic weakened the commitment to social justice, rehabilitation, health and wealth distribution whilst, at the same time, it increased the power of its regulatory and coercive functions to maintain order and security through what Bourdieu has termed the 'left hand of the state" (cited in Wacquant, 2009:6). Criminal law saw the punitive turn and was characterised by an increase in police powers (Hall et al, 1978; Gilroy, 2007; Reiner, 2007) and a burgeoning of imprisonment in response to Martinsons famous dictum 'nothing works', indicating disillusionment about rehabilitation and its costs (Kemshall, 2003). Wacquant (2009) explains that the philosophy of rehabilitation has shifted, '[rehabilitation which was] hegemonic from the 1920s to the mid-1970s, [shifted] to merely warehousing [prisoners] as the function of punishment was downgraded to retribution and neutralisation' (ibid:292). Alternatively, O'Malley (1999) has argued that this has resulted in a hybrid form of governance where risk is enmeshed with rehabilitative policy approaches. Nonetheless, many jurisdictions have seen an increase in longer and more punitive forms of sentencing as well as the large-scale expansion of prison systems (Alexander, 2010; Garland, 2001; Evans and Goldberg, 2017; Robinson, 2002). Ericson (2007) argues that neoliberalism's response to insecurities is

criminalisation through ‘pre-emptive measures’ which operate forms of ‘counter law’ which suspends traditional legal principles, and the rolling out of new forms of surveillance. This may be seen in preventive practices of punishment which move away from the principal concerns of retribution and deterrence towards future risk.

New modes of regulation

To some extent, the state has repositioned itself as a regulator, and a facilitator of efficiency and a partial provider of services with limited intervention in economic or social affairs. The dispersal of state power has included the introduction of quangos, inspection and auditing bodies, and ombudsmen, to govern ‘the operation of matters that [were hitherto] the remit of the Keynesian State’ (Newburn, 2017: 345). Braithwaite (2000) has termed this new model of governance the ‘new regulatory state’. In this, forms of governance become ‘networked’ and, like the state itself, structures became less linear and hierarchical, with regulatory authority becoming dispersed across multiple domains and organisations. Emphasis is placed on collaboration between the state and its agencies, with other bodies such as the private and third sector organisations. The new regulatory state signifies a departure from conventional interventionist models, prioritising proactive regulation, risk management, and collaborative governance as strategies with which to make key decisions which minimise the burden of regulation on the state while adopting models which share risk and maximise efficiency. According to Power (2003:72) trends of preventive detention have ‘been observed by many as moving towards a paradigm based on risk that emphasises punishment and control in order to respond to both economic conditions and public scrutiny’.

The introduction of a raft of quangos in Scotland, such as the RMA is an example of the encroachment of managerialism as a mode of governance. The introduction of the OLR as well as the provisions for MAPPA through the *Management of Offenders (Scotland) Act 2005* (MOSA) emerged following devolution in Scotland at a time where criminal justice policy making was preoccupied with risk and public protection as outlined in the previous chapter. As Eski et al (2011:1) explain, much of the legislation passed in Scotland since 1999 has been managerialist in its objectives and arguably punitive in its effects. The introduction of the OLR provides a regulatory framework for governing a difficult population. It also reveals how neoliberal imperatives shape contemporary justice through measures of risk assessment and control - disciplining those deemed permanently dangerous. This reflects a broader political and economic logic, which privileges measurable outcomes, accountability, and bureaucratic

control more traditional approaches. In this way, the OLR both governs its subjects and exposes how expertise, risk management, and economic rationalities intersect to structure the administration of punishment.

As McSherry (2014) explains, 'the very introduction of the RMA in Scotland indicates that risk management by the mid-2000s was becoming a central part of governmental criminal justice policy' (ibid:21). Feeley and Simon (1992) describe the embeddedness of risk in new penal forms which incorporate the language of 'rationality and efficiency' as hallmarks of the New Penology (ibid:452). An analysis of annual reports and publications by the RMA show the embedded language of managerialism. For example, the Framework for Assessing, Managing and Evaluating risk (FRAME) provides a structured way of assessing risk across the criminal justice system. FRAME aligns with managerialist principles in criminal justice, as themes of efficiency, quality assurance, accountability, defensibility, and practice standards are embedded in its approach (FRAME, 2011). Accountability and defensibility are hallmarks of what Power (1997) called 'audit culture' where public expectation drives organisational risk management. The latter is an operational safeguard, against reputational and political risks for governments and regulatory bodies (Power, 2004).

The risk management state

The emergence of the new regulatory state significantly transformed the criminal justice system in two main ways: a shift away from a social welfare approach to crime towards a 'culture of control' (Garland, 2001). Secondly, the encroachment of risk management or 'managerialist' practices (Feeley and Simon, 1992) into the sphere of criminal justice saw the introduction of models of standardisation and performance metrics to inform preventive measures. The 1980s and 90s saw the formalisation of risk management as a public good, coinciding with large scale privatisation of segments of the public sector in the UK (Pollock, 2004; Braithwaite, 2000; Dunleavy and Hood, 1994). Government services based on traditional bureaucratic models were redesigned in the image of private sector companies, becoming managerialist and market oriented (Osborne and Gaebler, 1992). In this period 'audit culture' gained traction as a mechanism by which performance could be measured, efficiency achieved, and transparency and accountability embedded in organisational principles (Power, 1997).

The intensification of practices of risk auditability and management can be traced back to several highly publicised events which occurred in the 1980s. These include the Maxwell

financial scandal (Power, 2004) the 1988 Piper Alpha oil platform disaster (Pate-Cornell, 1993) the terrorist bombing of Pan Am Flight 103 (Stolzer, 2008), as well as BSE and salmonella in agriculture (Pennington, 2003). These were sobering reminders of the possibility of hazards and threats. In other arenas other threats emerged, in terms of public disorder such as the race riots/uprisings of the 1980s and the Miners Strikes (Gilroy, 1992), the Strangeways prison riots (Woolf and Tumim, 1991). In Scotland the mass killing of young children and their teachers in Dunblane in 1996 (Kemshall, 2003:59), led to widespread concerns about gun control, peace and security, the legitimacy of policing and criminal justice institutions, calling into question the capability of current systems to mitigate a vast array of risks. These significant incidents which occurred in the UK during the 1980s and 1990s, led to public inquiries and then to legal reform shaping new policy and legislative responses, as well as changing public perception and political discourse on risk (Power, 2004). Moreover, they appeared to encourage accountability and transparency in terms of audit, through the introduction of quality assurance and hazard systems, auditing protocols and procedures, corporate governance codes, regulatory bodies, standards, and guidelines (Power, 2004). In an attempt to risk manage everything (Power, 2004), it is systems, and risk assessment tools which replace professional judgement and autonomy (Kemshall, 2003).

Risk culture has been argued to be the central constituent of governance (Power, 2004), leading to new structures, agents, and practices to manage uncertainty, and yet it is more than a technical assemblage of processes, for it also embodies a new language, new categories, and new aims. In his work, *The Risk Management of Everything* Power (2004), identifies two main sources of risk. Primary risks, which are actual and potentially calculable, and secondary risks which threaten the reputation and legitimacy of organisations themselves. The business of 'audit culture' is to demonstrate accountability and to communicate internal processes to those outside the organisation (Power, 1997). This has developed in part due to a growing 'risk consciousness' (Lupton, 1999) of the public and stakeholders who demand that organisations be accountable, and that risk be made auditable and transparent. As Power (2004) contends, these processes, turn organisations 'inside out' and 'far from being private organisational matters the effectiveness of these systems is now an issue for public policy and formal law' (Power, 2004:25). This is particularly evident when risks have been unanticipated by organisations and experts, resulting in an intensification of processes and attribution of blame when things go wrong. Similarly, Kemshall (2003:12) describes the 'spectre of blame' as resulting in the 'imposition of regulation through the use of increasingly prescriptive rules'.

Secondary risk management exists in response to demands for accountability, following the attribution of blame, and allocation of responsibility when things go wrong. For Power (2004), this is an essential pathology of risk which creates a culture in which there is no place for error, even when such mistakes are made responsibly (Power, 2004). At an individual level, as well as having the effect of eroding professional judgement, what Power (2004:31) has called the 'myth of controllability' can result in a defensiveness which itself creates an aversion to responsibility. This identification of two levels or orientations of risk becomes important for thinking how something like an OLR is governed – how do external (preventing victims) and internal (organisational reputation) interests overlap or diverge, producing on the ground practices and decisions.

In a similar vein, Furedi (1997) is critical of the rise of pervasive risk management which has been born from 'cultures of fear'. Power, (2004) like others have done (Beck, 1992), challenges the narrative of risk, arguing that risk discourses and practices, in their current forms erodes resilience at both organisational and societal levels, and that a more flexible approach to risk and uncertainty is needed to respond effectively to unknown challenges. Power (2004:10) is critical of a 'defensive' risk management which pedals a myth of control and manageability. Reddy (1996:237) has called this the 'myth of calculability' and the triumph of risk management over uncertainty. For (Beck, 1992) this can result in authoritarian defence which necessitates formal bureaucratic procedures which prioritise risk and social control over individual freedoms. As I have explained, regulatory bodies, the state encroaches into the private lives of individuals under the auspices of security and precaution. Graeber has termed this 'predatory bureaucratisation' which has seen the extension of bureaucratic principles in every faucet of modern life (Graeber, 2015:18). In his book *The Utopia of Rules* he writes a fascinating chapter on the '*The Iron Law of Liberalism and the Era of Total Bureaucratisation*' (Graeber, 2015:3-44) in which he describes how neo-liberal nation states, and their 'cadres of grey functionaries' have increased regulation, process, and paperwork. Market reforms, incentives and means of accountability in this view, have not seen the reduction of 'red tape' and the rendering of governmental processes more efficient. Rather these principles have been incorporated 'into the structure of bureaucracy itself' in a 'nightmare fusion of the worst elements of bureaucracy and the worst elements of capitalism' (Graeber, 2015:8). As a result, organisations amass large volumes of data, which as well as shifting away from core tasks surpass their ability to use information and implement processes effectively.

Taleb (2007) highlights the ways in which conventional risk management systems focus on 'black swans', that is, rare and often extreme cases with which to base their strategies. The fact that many societal risks and hazards are generally unforeseen and unanticipated calls into question the drafting of clunky legislation and policy based on rare and infrequent events. Taleb's theory of 'antifragility' outlines how risk models benefit from disorder and unpredictability. Rather than breaking under stress, 'antifragile systems' become stronger and hence more resilient (Taleb, 2012). Power (2004) offers a similar argument advocating for a new model of risk management which embraces a 'politics of uncertainty' where it is accepted that we cannot know the unknowable, or control or predict the future with any accuracy. The function of this new politics would be to 'challenge unfair reporting of risks as well as the foundational elements of reasoning that imply that 'all risks can be managed, and that the state and private institutions through precautionary measures can prevent and or control them' (Power, 2004:63). The risk management of everything, becomes a futile quest tightening organisational control, a system rigged so tightly that it cannot respond flexibly to unknown unknowns (Power, 2004). Clearly, it is seen as the responsibility of regulatory organisations to absorb risk, but how and when risk will occur and with what frequency, remains to be seen. The trend of administrative penality, rationalisation and managerialism has led scholars to argue that traditional forms of criminal justice have been usurped by actuarial justice (Feeley and Simon 1992).

The techniques of the risk management system

The criminal justice system operates an archipelago of risk systems and non-state organisations (Rose, 2000) which in turn operate 'techniques to identify, classify and manage groups sorted by levels of dangerousness' (Feeley and Simon, 1992:452). While Feeley and Simon (1992) have been criticised for overstating the emerging of a 'new strategy' of penality (Rigakos and Hadden 2001; Garland, 2001; Kemshall, 2003; O'Malley, 2004) the 'new penology' offers a lens with which to explore the encroachment of risk management and its relationship directly with punishment. It also provides insight into how the individual/subject is constituted within these new terms. Feeley and Simon (1992) explain that the rise of 'actuarial justice' encompasses a way of managing people by reference to others using large data sets of criminal populations as opposed to direct clinical knowledge. This development of statistical techniques and data modeling into criminal law and practice exemplifies a form of 'governmentality' for controlling populations. Feeley and Simon (1992:466) explain that actuarial criminology constructs the criminal subject . Risk assessment is now a core principle of justice. Current

forms of risk assessment are important as the exemplify the *technologies of power* and the way they operate in the process of constructing the criminal subject on the one hand, and how they operate as a 'regime of truth' on the other. Yet they are fraught with interpretive difficulty, raising important ontological and epistemological questions about how future risk is both known and controlled.

First generation clinical assessment

Risk tools have been separated into three main categories, first, second and third generation assessments (Hannah-Moffat, 2005), or put another way, clinical, actuarial and structured professional judgement. This has been described as evolving from 'the era of unstructured and opaque clinical judgement, through the era of prediction to the error of structured clinical judgement founded on best empirical knowledge and best professional practice' (Cooke and Mitchie, 2010:147). The MacLean Committee in setting up the provisions in Scotland explored these three approaches to risk assessment. Outlining the broad processual differences of these methods the committee acknowledged that 'no approach had been fully validated for a Scottish offender population' (Scottish Government, 2001:9). At this time in Scotland, a clinical model of risk assessment was predominantly used in hospitals for forensic purposes as well as in the justice system. Based on a review of current evidence, the committee acknowledged the subjective and 'impressionistic' nature of a clinical approach used in medicine and in the legal profession to make decisions about future violence (ibid, 2001:9). An unstructured clinical approach was deemed to be a poor predictor of future violence and the MacLean Committee stated that such an approach ought to be replaced. Clinical judgment fell out of favour due to the reliance upon the experience and judgement of practitioners. Bonta (1996) has defined this mode of assessment to be based on judgement, intuition and gut instinct. Hannah-Moffat (2005) explains that clinical judgement was discredited due to its lack of empirical grounding and low reliability. Kemshall, (1996) explains that studies have found high error rates and bias. Nevertheless, it continues to be used to some extent in criminal justice (Kemshall, 2003).

Actuarial methods emerged against this backdrop from the 1970s onwards (Cooke and Mitchie, 2011; Johnstone, 2011). Bonta (1996) describes these second-generation tools as being more structured, systematic and based in empirical evidence. Actuarial risk assessment tools are numerical models with origins in finance and commerce where insurance premiums are calculated based on a statistical likelihood of risk (Berk, 2012; Hacking, 1987). Lupton (1999) has described two main strands of risk; 'artefact' risk, where risk is measurable and calculable

through the application of scientific methods, and 'constructivist' risk where risk is socially and culturally constructed, acquiring significance and influence through social, political, and ideological processes that shape governance strategies. Actuarial models use algorithms to quantify risk through applying statistical techniques to aggregate large datasets from groups of known offenders who share similar characteristics (Cookie and Mitche, 2011). This data will be used to calculate a statistical association with the shared group and from this, a risk score in applied. The gathering of large-scale empirical data, and the standardisation of process was considered a means of enhancing, objectivity, efficiency and increasing objectivity in risk prediction.

Actuarial models identify likelihood of recidivism and attribute a statistically derived prediction of risk scores thus providing a justification for measures which regulate the conduct of individuals. Many of these tools measure 'static' factors; meaning that the focus exclusively on unalterable historical variables. Static tools have been criticised for applying fixed attribution score, so the attribution of 'high risk' may render a person as being beyond intervention or treatment due to the fixed nature of the risk measured (Kemshall, 2003). The MacLean Committee acknowledged that, although these predictive tools offer greater accuracy than unstructured clinical approaches, they also have notable limitations (Scottish Government, 2000). Four key limitations of actuarial tools are acknowledged here. Firstly, actuarial tools rely on historical and thus unchanging factors (Kemshall, 2003) and are applied across broad groups (Gruben and Wingate, 1996). Secondly, actuarial tools are themselves, built on group data which is then used to make predictions about individuals (Cooke, 2010a, cited in Cooke, 2011). Thirldy, actuarial tools have been developed using data from male samples. This has been criticised for failing to take into account the ways in risk factors, and pathways into offending, differ significantly between men and women, (Hannah-Moffat, 2019). Lastly, for transforming structural factors such as racial inequality in to measure of individual (Slobogin, 2010; Hannah-Moffat and Maurutto, 2010). As Sullivan et, al (2005) explain, this 'can result in the over prediction of risk' (Sullivan et al, 2005 cited in McSherry, 2014:49). This raises fundamental questions about the reliability of these models (Hannah-Moffat, 2013). In Scotland, the MacLean Committee acknowledged the limited evidence of the applicability of actuarial models to a Scottish population, leading them to determine that they should not be used alone for the measurement and prediction of future risk.

Third generation risk tools

Unlike earlier tools, third-generation risk assessments merge actuarial and psychological approaches, reflecting an evolution toward more nuanced and evidence-informed risk management in criminal justice (Bonta, 1996; McSherry, 2014). This has been termed structured clinical judgement (Hannah-Moffat, 2005) or structured professional judgement (McSherry, 2014). These aim to categorise offenders by risk but also in terms of treatment and responsiveness (Hannah-Moffat, 2003; Hannah-Moffat, 2004). The incorporation of criminogenic needs, such as the presence of substance misuse or antisocial attitudes, that increase the likelihood of offending, is thought to result in a more comprehensive form of risk assessment and management due to their incorporation of 'dynamic factors' which are amenable to change. Other authors such as Hanson and Thornton (2000) explain that the inclusion of dynamic factors would increase predictive accuracy (also see Hanson and Harris 1998). This approach was highlighted by the MacLean Committee as it assists in both the identification and management of risks, which at the time, they argued was empirically supported by the current evidence. These systematic, psychologically informed tools are widely used by practitioners and are generally regarded as being grounded in more robust evidence, rendering them more credible and reliable. However, this acceptance does not preclude a critical perspective, which would question their assumptions, limitations, and impacts of the contexts in which they are used.

Current classifications of risk tend to fall into descriptions of low, medium, or high, which indicate the level of the risk of reoffending as well as the level of needs that a person has which should be met to mitigate that risk (Hannah-Moffat, 2005). The Risk Management Authority now validates risk assessments for the Scottish Population which incorporate both static and dynamic tools (FRAME, 2011). However, as I have suggested, these methods have not been without some criticism, and can be evaluated using a critical 'constructivist' lens (Lupton, 1999). This approach focuses on managing individual risk through cognitive behavioural programmes and thinking patterns. In doing so, it neglects the wider social and economic contexts that exacerbate risk (Roger, 2000). For Hannah-Moffat (2016), the use of risk assessment has received little conceptual or critical analysis and the exclusion of structural forms of risk may contribute to the further entrenchment of disadvantage and discrimination. She further explains that most third generation risk models distinguish between criminogenic and non-criminogenic need, intervention will usually focus on the former (Hannah-Moffat,

(2016). To compound matters these governmental tools of risk require the evaluation and interpretation of results. This requires subjectivity and judgment rendering this process impossible to undertake without the introduction of moral and subjective assumptions and biases (Maurutto and Hannah-Moffat, 2007).

Other criticisms include concerns that risk assessment in sentencing is in that that they may erode the independence and autonomy of the judiciary in a trend towards evidence-based sentencing which has been growing since the 'tough on crime' era in the 1990s (Klingele, 2015). It is also possible to adjust and override risk scores known as 'criteria tinkering' (see Hannah-Moffat, 2013:285). Risk assessment may include collateral information; that is, information gathered out-with formal evidential procedure for use in risk assessments which shows that 'an assessor's choice of informants and his/her interpretation of the authenticity of informants claims' determines what information 'counts' and becomes part of the 'official record' (Hannah-Moffat, 2013:285). In Scotland, for example the use of allegation information is permissible in the Risk Assessment Order. This has been tested in court (also see Gailey and colleagues, 2017; Ferguson, 2021). This may be considered a means of obtaining a wide scope of comprehensive information to inform risk, or a means of circumventing of legal process (Hebenton and Seddon, 2009).

Ontological black boxing

One of the key risks of any scientific model of risk assessment is its own ontological premise of neutrality and objectivity (Hannah-Moffat, 2016). Ashworth and Zedner (2014) explain that all risk tools have a normative base which influences every aspect of their development, implementation, validity, and efficiency. The normative values which underpin risk models can be most clearly exemplified in the risk assessment of those convicted of sex offences. For example, questions in scales that clinicians use today the Psychopathy Checklist–Revised (PCL-R) such as 'evidence of promiscuity' sets a benchmark for a standard of sexual morality. Further, Ward and Beech (2015) have explained 'a lack of critical engagement with risk assessments is due to an acceptance and overdependence on empirical generalisations, and an inherent failure to critically evaluate prominent rehabilitation theories' (Cited in Hannah-Moffat, 2016:34). Elsewhere, this has been referred to as 'black boxing' (Hannah-Moffat, 2005:37), within which, there is a reluctance to critically interrogate risk assessment science, and the constructed nature of risk assessment instruments.

These ontological limitations may be understood as part of what Foucault (1972) has termed 'discursive formations' in which knowledge power /systems are communicated through historically and socially contingent mediums such as language, and technologies. Risk tools are ultimately cultural artefacts and embedded within particular '*epistemes'*, that is, historical, institutional and cultural epochs which shape ways of defining and knowing, as well as limiting, and setting ontological boundaries around what can be known. Foucault introduces the concept of 'regimes of truth' (Foucault, 1980:133) which shows how dominant systems of discourse validate certain 'knowledges' over others in a way which shapes and influences reality. Risk assessment is a form of governmentality but also constitute a 'regime of truth' which limits and demarcates what can be known about individuals. The construction of risk tools evaluations and assessments have a normative value base and shape the institutional knowledges and understandings of risk. Furthermore, technologies of risk, like taxonomic categories of 'moral insanity' or 'dangerousness' that were outlined at the beginning of this chapter, are socially constructed entities, developed and shaped by socio-scientific and institutional contexts, which reflect the normative values, assumptions, and priorities of the societies that birth them (Hannah- Moffat, 2013; Ward, 2016; Zedner, 2008). In this way, thresholds of risk are also in accordance with economic constraints, which are influenced by resource limitations, cost, and institutional capacity rather than risk alone. This in turn reflects broader governmental and regulatory priorities, as well as political agendas and social values. Graeber (2015) explains that 'in fact from inside the system the algorithms and mathematical formula by which the world becomes to be assessed become, ultimately, not just measures of value, but a source of value itself' (Graeber, 2015:41). In this, the bureaucratic institutions and concomitant technologies of risk are not neutral; they evaluate, assess and predict in ways which are self-referential. They privilege and control certain knowledges over others while yielding enormous ontological and punitive power. Ultimately, the widespread use of such measures seeks to lend a scientific legitimacy to the public's prejudice and fear (McSherry 2014).

Furthermore, as McSherry (2014) cautions, while the use of structured professional judgement may be considered an improvement in the area of risk assessment and management 'it has not developed with the primary aim of preventive detention and supervision' (McSherry, 2014:59). In schemes of indeterminate or preventive punishment, where risk markers cannot be matched with an appropriate intervention, the so defined regulatory strategies and modes of control will

continue placing the person outside the 'limits of civility' (Rose, 2000:334) perhaps permanently.

Conclusion

This literature review has attempted to identify the social, economic and political conditions that have given rise to preventive justice. In drawing upon a range of theoretical perspectives. I have outlined how punishment has been shaped by political, economic, social and cultural systems. The adoption of the precautionary principle has stemmed from notions of moral danger, fear of the 'dangerous' and a preoccupation with the governance of risk.

The uncertainty of the 'risk society' has been exacerbated by the ascension and continuation of neoliberal policies which have further entrenched current forms of punishment. This has coincided with the retraction of the welfare state reinforcing a 'punitive turn' characterised by extended prison terms, indeterminate sentencing regimes and intensive forms of supervision and control. These defensive approaches are set against a background of decline in the state as a mitigator of risk, feelings of widespread insecurity and a lack of trust in experts. Collectively, these occurrences have fuelled the emergence of new forms of regulation and control.

In Scotland, the emergence of new forms of regulation and the non-departmental public body the RMA shows the embeddedness of risk and precautionary logic and indicates a trend towards the managerialisation of crime control. With public protection at its core, this governmental framework is underpinned by market driven principles of efficiency, transparency and accountability in punishment.

The new techniques of the system form a 'regime of truth', raising fundamental epistemological and ontological questions about how we know what we know about risk. An examination of the genesis of the three main techniques of risk - clinical, actuarial, and structured professional judgment - shows that risk tools are cultural artifacts, reflecting the historical, economic, and social contexts which shape them. The modern system of risk management despite its reliance, in part, on predictive science still embodies past assumptions. So, despite that risk practices are held to be rational and scientific, at the same time they can be conceptualised as value laden and symbolic. In the quest for rationality of process, and through the individualisation of punishment, such practices define the limits of knowledge in ways which obfuscate wider structural factors which feature in the commission of crimes.

The entrenchment of risk-based approaches, and their implications for liberty, highlight the importance of a critical examination of how both affective - fear, moral panics - and actuarial logics shape punitive practices, reinforcing the state's coercive functions through public protection. Laying out the theoretical perspectives in this chapter is fundamental to strengthening the foundations upon which a close analysis of the practices of contemporary punishment-as-risk-management are built. It also sets up the need for this study, and we now turn to the methodology and research design.

Chapter 4 Methods

Introduction

Qualitative research is valuable due to its ability to gain an in-depth understanding of experiences, beliefs, feelings and values by asking questions of what, how and why (Creswell, et al, 2011). In using a qualitative approach, I aimed to gain a deep level of insight (Patton, 2015) into the experiences of criminal justice professionals, and the perceptions and meanings they attribute to the work of sentencing, assessing and managing individuals subject to the OLR in Scotland. As I stated in the introduction to this thesis and at the end of Chapter 3, this is an important arena of scientific enquiry due to the dearth of literature and research on indeterminately sentenced prisoners within Scotland.

Despite that there is some literature on how practitioners think about risk more broadly (Robinson, 2002) the OLR has hitherto escaped the critical attention afforded to analogous criminal justice measures such as the Imprisonment for Public Protection (IPP) sentence. (Prison Reform Trust, 2007; Addicott, 2012; Howard League for Penal Reform, 2013; Beard, 2024; Rutherford; 2008; Jacobsen and Hough, 2010;; Annison and Condry, 2022; Straub and Annison, 2020; Harris et. al., 2020; Zanna, 2023; Grimshaw, 2022; Smart, 2019).

This study aims to explore the processes of risk management using the concepts of "*Dasein*" (lived experience) and "*existentialia*" (Heidegger, 1962) meaning the structures of human experience. These are philosophical terms that underpin an interpretivist phenomenological method. These concepts have aided and shaped my approach to this research from my choice of research paradigm, the development of research questions, to methods of data collection and analysis as they place emphasis on lived experiences and their embeddedness within the social context of risk work. This approach used semi-structured interviews to explore the lived realities of risk labour, focusing on how participants experience and make sense of their roles,

the decisions they make, and the institutional frameworks, processes and practices that shape their work. Another feature of this research regards the analysis of documents to allow for a situating of risk work and how it is performed within a wider set of institutional frameworks and structures.

This chapter sets out the research questions, the methodology and methods used, as well as details of changes to my initial design and further impacts of the Covid-19 pandemic on this research. I highlight important considerations for carrying out sensitive research and interviewing criminal justice agents, some of whom can be considered elites. Research in criminal justice by its nature is sensitive (Cowles, 1988; Dickson-Swift, et al., 2008) with the potential to expose respondents and researchers to mentally and emotionally harmful situations and content (Jewkes, 2014). Carrying out research on the indeterminate sentencing of those convicted of serious violent and sexual offences may therefore lead to research becoming emotionally demanding through bearing witness to distressing information and materials (Burrell et, al. 2023). In this chapter, I outline how protective measures were taken through supervision and debriefing to preserve my own wellbeing as well as the integrity of the research through reflexivity, support and adherence and ethical standards.

Sensitive research involves laborious ethics processes and this research required me to navigate six separate organisational ethical processes, each having their own gatekeepers with the ability to accept or reject a research proposal. In my case, several amendments were required to these ethics submissions ostensibly designed to safeguard the organisations with stringent requirements about time limits, number of interviews and changes required to the wording used in the proposals. Participant recruitment methods were purposive, with some use of snowball sampling through my new or existing contacts allowing me to extend the scope of my interviews. In terms of data analysis, I opted to use the approach of reflexive data analysis as outlined by Braun and Clarke (2022) with which to analyse my data. This is informed by my methodological choice of interpretivist phenomenology, which recognises that a researcher is an active participant in the interpretation of data, guided by a participant's own understanding and interpretation of their world. A reflexive approach allowed me to be present and aware of my own subjectivity during the process.

The findings of this research aim to contribute to the wider discussion about the impacts of indeterminate sentencing on prisoners, parolees on licence in the community, and on the

professionals working with this group. In doing this, I hope that it will inspire further research in this area and provide insights and considerations for criminal justice policy and practice.

Research questions

What is the Order for lifelong restriction and how does it work in practice?

How did it emerge in Scotland in the particular form that it takes?

How do professionals experience the sentencing, management and provision of care for those subject to the Order?

The first two questions are also explored to some extent in earlier chapters. But the practical aspects of how the Order works in practice and how professionals experience this fuel the analysis in the ensuing chapters.

Methodological approach and research design

As this work is principally concerned with lived experience, it is a qualitative project. Methodologically, it is situated within the interpretivist paradigm. This paradigm, in opposition to positivist notions of social inquiry - which might govern a study, for example, claiming to offer an objective evaluation of the effectiveness of the OLR - contends that the study of the human and social world requires a different approach than that of the natural sciences (Hammersley, 2013, p. 26). Interpretivism is a research paradigm which denotes a relativist ontology in which a single phenomenon or experience can have multiple meanings and interpretations rather than a singular 'truth' which can be determined by objective measurement. Hammersley (2013) explains that multiple interpretations are developed in and between individuals and that while interpretivist researchers can *describe* objects such as law or policy, professional roles and processes, we can also *deeply understand* them, and their performance within a particular social context. From this point of view, social reality is neither singular nor objective but shaped by experience and contexts which shapes attributed meaning.

A phenomenological approach is itself a qualitative research methodology within the interpretivist paradigm (Whitney and Tronsten-Bloom 2010). It seeks to uncover the meanings of lived experiences, as derived from the philosophical traditions of Husserl, Schultz and Heidegger, emphasising the importance of understanding experiences from a lived perspective (Groenewald, 2004; Gubrium and Holstein, 2000). A researcher employing a phenomenological approach is centrally concerned with understanding lived experience

(Holloway, 1997). Phenomenological approaches suggest that researchers cannot be detached from their own beliefs with Hammersley (2000) explaining that researchers should not overlook this. Phenomenology facilitates the application of interpretivist principles by focusing on rich, detailed accounts of human experience, and is therefore a common method used by researchers working within an interpretivist paradigm (Bryman, 2012). In doing this, it seeks a rich description of experiences without imposing preconceived theories, or categories, emphasising the importance of subjective realities and the complexity of human experience and sense making (Holloway, 1997). Therefore, my research did not begin with a general theory or hypothesis and as much as possible I tried to keep an open mind about themes that would emerge. This is reflected in the broad nature of my research questions as I will show. I adopted an inductive approach which is crucial in the development of new theories and knowledge (Eisenhardt, Graebner & Sonenshein, 2016; Locke, 2007) meaning that I did not determine a hypothesis prior to my data analysis as practiced in a deductive approach (Bryman, 2016). This allowed for the data analysis to emerge as fully as possible from the research data in an open-ended way. This allowed me to establish themes, patterns and eventually an overall analysis of the research.

Adopting reflexivity as a research strategy

An interpretive phenomenological approach may adopt a strategy of phenomenological reduction sometimes referred to as ‘bracketing’ (Giorgi, 2011; Creswell, 2007) or ‘epoche’ (Thomas and Sohn, 2023). The goal of this is to restrain, as much as possible, preconceived ideas, assumptions and biases in approaching the research to allow unexpected meanings to emerge from the data (Creswell, 2007). In research practice, the process of bracketing helps to minimise researcher influence allowing engagement with the research matter as an ‘unknower’ (Tufford and Newman, 2010). This has alternatively been called, adopting a ‘phenomenological attitude’ (Finlay, 2008:1) which enables researchers to consider the experiences of participants without mapping one's own external ideas onto those experiences. This was an important consideration due to my professional experience of working within secure settings. This experience and my wider life experiences meant that I would, like any researcher, approach the project with a series of biases assumptions, views. This approach aligns with what Finlay (2008:1) terms a ‘phenomenological attitude’, which seeks to engage with participants’ experiences without imposing the researcher’s own assumptions.

However, rather than attempting to suspend my prior knowledge entirely, I adopted a reflexive approach, recognising that subjectivity is an inherent and productive element of qualitative inquiry. By making my positionality explicit, I sought to enhance transparency and analytical rigour.

My motivation for this research is shaped by both academic interests in punishment, risk, and social justice, and professional experience across community education, law enforcement, and secure settings. My background in community education, grounded in values of social equality, inclusion, and empowerment, has informed a critical orientation towards structural and inequalities within the criminal justice system. In contrast, my experience in law enforcement exposed me to the practical imperatives of risk management and legislative compliance. Navigating these contrasting fields has provided a dual lens, one oriented towards care and social justice, and the other towards enforcement which have undoubtedly informed my approach to the research.

My experience of working with care-experienced children and young people has also been central to shaping my epistemological stance. Through this work, I have observed how bureaucratic and institutional systems, while framed as protective, can reproduce harm through processes of assessment, and categorisation of risk. Repeated exposure to these dynamics has fostered a deeply personal critical awareness of how institutional knowledge is constructed and legitimised, and how it can obscure the voices and agency of those subject to intervention. This has informed a position that is sceptical of purely technocratic or administrative accounts of vulnerability and risk, and instead privileges relational, experiential, and contextually grounded forms of knowledge. It has also reinforced a sensitivity to the ways in which individuals can become objectified within systems designed to manage them, shaping my approach to research as one that seeks to foreground lived experience, while recognising that these are mediated through professional interpretations.

My work with the families of those in custody and individuals subject to long-term and indeterminate sentences further deepened my awareness of the enduring social and emotional consequences of penal interventions, shaping my interest in the Order for Lifelong Restriction (OLR). I therefore entered the research not as a neutral observer, but as a practitioner-researcher with a critical perspective on indeterminate sentencing, viewing the OLR as highly punitive in its effects. However, sustained engagement with case materials introduced a sense of epistemic disruption, unsettling some of these prior assumptions necessitating ongoing reflexive scrutiny.

Detailed analysis of individual cases foregrounded the gravity and complexity of harm complicating more linear critiques of indeterminate punishment. This created a productive tension within the research process, as I grappled with the challenge of critically examining a sentence I viewed as punitive, while simultaneously encountering examples of significant harm.

This tension reflects a shift from a justice-oriented standpoint towards a position that required engagement with competing forms of knowledge - namely, experiential, institutional, and risk-based epistemologies embedded within the criminal justice system. At points, this produced a sense of dissonance, as I recognised that my analysis involved, arguing for those who have caused significant harm with enduring consequences for victims while maintaining a critical stance on the power structures governing their detention. Rather than seeking to resolving this tension, I treated it as analytically generative, prompting deeper reflexive engagement with the limits of my own perspective.

Finally. my positionality as a woman and a mother informed how I interpreted themes of risk, care, punishment, and vulnerability. Attending to these intersecting dimensions of identity and experience was central to maintaining analytical integrity.

Overall, adopting a reflexive epistemological stance enabled a more nuanced analysis - grounded in participants' accounts while remaining critically attentive to the contested and often uncomfortable realities underpinning both serious harm and the use of indeterminate sentencing, thereby strengthening the credibility and depth of my research.

While bracketing requires researchers to set aside their biases, a reflexive approach acknowledges that complete suspension of bias is often impossible (Braun and Clarke, 2022). It has been argued that reflexivity is a central tenet of qualitative research with most qualitative researchers keen to address their own role in the construction of knowledge (Banister et al., 1995. Reflexivity emphasises the importance of the researcher in shaping the research and how my professional and personal background influences my positionality in the research, data collection and analysis of my data (Braun and Clarke, 2022). Reflexivity facilitates critical reflection on the researcher's own role in designing the research as well as how meaning is constructed and data interpreted. Reflexivity as a research strategy is used in qualitative research to illustrate rigour as well as credibility and trustworthiness, and 'self-scrutinisation of the lens through which the researcher views the phenomenon studied' (Berger, 2013:22). It has been argued that self-reflexivity is complicated particularly in sensitive research (Band-

Winterstein et al., 2014). By adopting a reflexive approach, I aimed to examine and make explicit how my own subjectivity informed the research process to enhance, transparency and trustworthiness. In summary, rather than attempting to reduce my subjectivity through 'bracketing', as I have explained, I opted for a reflexive process of critical self-awareness.

Epistemological approach to Practitioner Accounts

In this thesis, the accounts of criminal justice professionals are not considered neutral representations of the experiences of those subject to the sentence. Rather these representations are considered situated forms of knowledge that offer insight into how the (OLR) is understood, imposed, operated and experienced. These accounts are positioned within the interpretivist framework and are understood to reflect not only observations of the experiences of OLR subjects, but also the interpretive frameworks, institutional and bureaucratic logics, and professional discourses through which those experiences are mediated. This is important given that direct access to the lived experiences of those subject to the OLR was beyond the scope of this study. Practitioner accounts therefore function as a form of indirect or mediated access to these experiences.

In methodological terms, these accounts are treated as accounts of practice rather than as proxies for the voices of those subject to the sentence. They are analysed not for their factual accuracy in representing individual cases, but for what they reveal about the social organisation of risk, decision-making, and progression within the OLR system. This aligns with qualitative approaches that prioritise meaning-making, context, and the co-construction of knowledge. Practitioners occupy unique epistemic positions at the intersection of legislation, policy and lived reality: they both interpret and manage the OLR, translating frameworks of risk into everyday decisions that shape lives. Their accounts therefore provide critical insight into how institutional processes are experienced, justified, and navigated, as well as how tensions between care, control, and risk are managed and experienced in practice.

At the same time, the use of practitioner accounts necessitates careful reflexive consideration of their limitations and partiality. These narratives are shaped by professional roles, organisational expectations, and wider penal discourses, and may reproduce dominant assumptions about risk and rehabilitation. They are therefore not taken at face value, but are analysed critically, with attention to what is foregrounded and normalised within these accounts. This approach acknowledges that practitioner perspectives can both illuminate and

obscure aspects of the experiences of OLR subjects, particularly where professional norms, cultures and frameworks shape how individuals are perceived and described.

Practitioner accounts are thus justified not as a substitute for prisoner voice, but as a means of examining the relational and institutional dimensions of the OLR, and the ways in which its impacts are understood and mediated by those responsible for its implementation, care and control of those subject to it. This is consistent with the thesis's reflexive epistemological stance, which recognises knowledge as partial, situated, and shaped by power relations. By critically engaging with these accounts, my research generates insight into both the operation of the OLR and the interpretive frameworks through which it is sustained, while maintaining transparency about the scope and limits of these accounts.

The advent of the Coronavirus pandemic and its impact on the research process

In the original design for this project, I intended to focus the research evenly between perspectives of those professionals responsible involved in decision-making through sentencing and post sentence management and those who are subject to it. The advent of the global coronavirus pandemic in 2020 impacted the project in three main ways. First, it affected the feasibility of the original design, necessitating an adaptation of the project. Second, it influenced data collection. Third, it shaped the pace and context in which the research was carried out. In terms of the first issue, my plan was revised to exclusively consider the impacts on penal agents, experts and decisionmakers, as access to anyone in prison – where the majority of those sentenced to OLRs remain - was closed off by pandemic restrictions imposed by the Chief Scientist of Scotland. The effects of lockdown and the restrictions on in-person interactions also had an impact on data collection meaning that face to face interviewing was replaced with the virtual method of video conferencing.[11] My data collection was facilitated by video conferencing from late 2020 to 2022. The pandemic also affected the pace at which the research was carried out principally due to having to work from home, as well as having home schooling responsibilities. The difficulties of balancing caring responsibilities as well as conducting research or working in academia have been acknowledged by a range of feminist scholars (Kasymova, et al., 2021; Kwon et al, 2023; Hjamsdottir and Rafnsdottir, 2021; 2022). Isolation and stress during the pandemic also affected my ability to work as effectively as I would have under normal circumstances. I opted to try to work during quiet times during the

[11] The lockdown and ensuant Covid restrictions and its impact on research were highlighted in an article published by The Lancet (2020) and by Bradshaw (2020).

night making it more difficult to decompress or gain distance from the research, particularly regarding some of the sensitive and potentially trauma inducing materials (see section on researcher vulnerabilities). The lockdown measures imposed on us through the pandemic also had an impact on PhD networking in the early years.

Undertaking a review of the literature

The literature review sought to trace the historical development of the OLR and its implementation into law and policy in Scotland. This meant carrying out a synthesis of academic, policy and legal literature, as well as theoretical frameworks, scholarly perspectives and empirical findings that form the basis of existing knowledge on preventative detention. This facilitated an understanding of the key debates, and gaps, in the literature. This work being partially ground in policy, practice and legislation offers a nexus between theory and real-world application. Together these sources allowed me to locate my findings within both the academic discourse and the legal and policy landscape, ensuring that my research was both rigorous and practically relevant. I carried out a review of the literature using academic databases accessible through the university. Using key words and phrases I identified journals and online book sources as well as open access articles on Google Scholar as well as Hansard and Official Reports of the Scottish Government. Although extensive searches were conducted across these multiple sources, it is possible that some relevant literature was missed due to limitations in search terms, indexing, access, time, and the evolving nature of the field. Open sources included government reports, sentencing statements, significant case reviews, and policy documents. I used an iterative approach to build upon the early literature review as the existing work on the OLR was unable to fully situate the complexity of my findings. Thus, the literature review was left open and amended as the research progressed allowing me to continuously refine and enhance the thesis as new findings, insights, and developments emerged. In this way the literature would assist in developing meaning from my data to by drawing on existing theories (Bingham and Witkowsky, 2022).

Data collection methods

I employed three different approaches to the collection of data. The development of a database from a collection of open-source information on OLRs including news articles, judicial sentencing statements, and appeal case law; the analysis of various policy documents, such as government white papers, as well as Annual Reports provided to me by the Risk Management Authority and the use of semi-structured interviews.

OLR database

The starting point for my research was to develop an OLR database which aimed to enhance my understanding of the Order and the types of cases and persons upon whom it is imposed. This was used as a baseline to build my research to fully understand the uses and cases for which this form of indeterminate sentencing is used in Scotland. Indeed, McSherry and Keyzer (2009; 2011) and McSherry (2014) offer case vignettes in their work which assisted my early understanding on some of the justifications given for exceptional measures across jurisdictions. As well as this, important case law had emerged since its introduction which have shaped the application of and policy on the OLR. The database provided a rich overview and understanding which proved to be an important part of preparing for the interview process. Developing this knowledge base helped to facilitate better understanding of the use of this 'exceptional' sentence (Scottish Government, 2000: 34) thereby enhancing the research process.

The database on OLR prisoners collated the characteristics and profiles of those receiving an OLR, including ages, offence types, offending histories and profiles, length of punishment parts, any diagnosis of mental ill health, considerations of neurodiversity, or other clinical diagnoses. Until recently this information did not exist in a single place, although the RMA have subsequently published a research project in 2023 regarding the characteristics of those subject to the OLR (RMA, 2023).

Analysis of official documents

This involved the analysis of the original report produced by the Maclean Committee *The Report of the Review of Serious Violent Sexual Offenders (*Scottish Government, 2000a) - an extensive document which recommended the new sentence. I also analysed a series of annual reports and other documents from the Risk Management Authority. In the initial months of the research, I made contact with the Risk Management Authority (RMA) to advise them of my intention to carry out doctoral research on the Order for Lifelong Restriction. I was invited to a meeting with my principal supervisor Professor Sarah Armstrong during which I requested copies of annual reports that were no longer in the public realm. This request was granted by the Chief Executive, and annual reports were made available from 2006-2015 with the remaining Reports being available on the website. These reports were analysed using a thematic approach to coding (Miles et al, 2019; Saldana, 2016) by which I printed out and annotated each copies highlighting codes which would assist my enquiry. These documents contained

information regarding the strategy, operation and development of the RMA over time but dedicated a very small proportion to information regarding the Order for Lifelong Restriction, which in itself was informative, but also somewhat disappointing.

In total, I examined annual reports spanning 16 years as well as additional policy documents and materials relating to its statutory functions. These documents largely contained information relevant to those functions and setting the standards for assessment and management of risk in criminal justice, as well as accreditation and training, the development of research and policy. This information was accessed with minimum resourcing implications. I was also able to access the Scottish Prison Service (SPS) policy framework for sentence progression (SPS, 2018) - available on the SPS website, to map out the OLR in terms of sentence progression. This aspect of the research was essential for developing a comprehensive understanding of the OLR as well as aiding the research design process.

Semi structured interviews and matters of sampling

The main source of data analysed in the following chapters are interviews conducted with a range of professionals who have some role in OLRs. As I outlined in Chapter two, the OLR sentencing and management framework fuses together an archipelago of institutions and professionals each with their own role to play in the administration of this form of punishment. The experts involved are a diverse group who occupy distinct occupational spaces, have specialist and diverse training and have separate organisational, cultures, regulatory bodies and codes of practice and conduct. I aimed to collect primary data using semi-structured interviews which would allow me to dig beyond the descriptive and official account of the OLR and explore the many unknowns about the process and the experience. According to Smith (1995) semi-structured interviews are able to offer a deep insight into a topic by exploring beliefs and perceptions. The structure allows the researcher to steer back to the research questions where an unexpected avenue is explored. This was particularly useful as much of the OLR process seemed to be hidden behind the official ramparts of policy documentation. Silverman (2013) explains that this method allows for a balance to be struck between open ended enquiry and structure. It is my view that this style of interviewing would provide the results for qualitative analysis.

Sampling methods

Distinct research traditions have different traditions and different ways of understanding sampling (Gentles et al, 2015). In phenomenological approaches sampling means 'choosing informants' (Cohen et al., 2000:45). For this research, I set out with the intention of using purposeful sampling (Patton, 2002): a non-probability sampling technique, appropriate to use in a small jurisdiction like Scotland and involving a small world of professionals involved in working with the number of those currently under an OLR. I intentionally selected participants who would provide relevant, and diverse information key to the study. Patton (2002; 2015) emphasises the utility of purposeful sampling for gaining a deep insight into data. Patton (2002) explains that 'the logic and power of purposeful sampling lie in selecting information-rich cases for in-depth study' Patton, (2002:30). This informed my strategy of selecting the groups of individuals who are directly involved in the risk management process. However, due to some of the difficulties of access outlined in subsequent sections of this chapter I was required to also draw upon the technique of snowball sampling.

Snowball sampling

This form of sampling is common in qualitative research (Parker, 2020) where a researcher may begin with an initial group of contacts or 'seeds' who are asked to suggest further contacts. Again, this is a form of non-probability or convenience sampling (Biernacki and Waldorf, 1981) a technique where researchers begin with a handful of initial participants who then help to recruit additional subjects from their professional networks, creating 'snowball' effect as the sample grows. As I have said, I initially I drew upon my knowledge of the criminal justice system to identify participants who had specific experience relevant to my research aims. According to Biernacki and Waldorf (1981), this method aids the research process where a research population is hidden (Atkinson and Flint, 2001) or deemed hard to reach (Becker, 1963). My research aimed to interview individuals who are leading specialists, policy makers and other high-ranking officials who operate in closed social circles (Goodman, 1961) where direct access was limited. Snowball sampling facilitated a degree of access to these professionals by harnessing the connections of initial participants. However, a concern was that, as Ritchie and Lewis (2003) explain, these contacts or 'seeds' may select those with similar viewpoints distorting the research, impacting diversity (Ritchie, et.al 2014) and thus introducing bias into the sample. In most cases, rather than me explicitly asking, research participants nominated colleagues as potential contacts, but this did not always prove fruitful.

Despite this, it remained a practical and necessary approach for making contact with elite participants (also see below).

Studying up and getting past the official line

It has been argued that in qualitative research, interviewees can engage in socially desirable acts during the research process (Hughes, et al, 2020). This reflects a concern that I had at the outset of the research due to the somewhat ethically sensitive nature of indeterminate sentencing. My worry was that professionals might be unwilling to share views which deviated from the official discourse. This, however, did not seem to be the case and interviewees were able to share examples of their work freely. I was interviewing a well experienced cohort of individuals who, as I would later find out, were keen to share their views even when they were perhaps edging on the unorthodox and occasionally, this exposed the underbelly of risk work. Naturally this was with some caveats, examples of this included, "*Can I say something totally out with the record…."* and *"you canny say I said that"*. These comments were not about disclosures of harm, which might have required me to disclose otherwise confidential information to others, these were merely personal views about the work, procedures or organisations. However, in the interests of integrity, trust and confidentiality as well as an expressed desire to have these excluded from the interviews, they were redacted from material which I plan to lodge with a data repository as required by my funding. As Tsai, et al. (2016) have suggested, there should be no expectation that secondary users have access to a complete unredacted transcript as there may be information that simply cannot be shared (cited in Campbell et al, 2023). For more information on redaction see later on in this chapter. Some statements were given with some apprehension about critiquing risk work, this included '*I'll probably get sacked for saying this*' or that they were '*glad to have the opportunity to rant*' showing that they were at ease and able to speak freely and confidently.

In total twenty-two semi structured interviews were undertaken with policymakers, criminal justice and clinical professionals who are involved in making decisions about, managing and caring for those subjected to an OLR at various stages of the criminal justice process. This included members of the judiciary and practitioners of criminal law, consultant forensic psychiatrists, prison-based psychologists, prison personnel, community justice social workers and current and former members of independent institutions such as the Parole Board for Scotland and the Risk Management Authority.

Interviews took place using video conferencing on Microsoft Teams and Zoom and ranged from half an hour to over one hour. There were some drawbacks to using this form of interviewing, particularly those undertaken at home during lockdown, such as internet glitches, and frequent disruptions (both on my part and on the part of interviewees) although the trials and tribulations of this were taken in good humor. Further complexities of using video conferencing will be addressed later in this chapter in relation to transcription.

Developing the interview schedule

The interview schedule was developed in the knowledge that there would be multiple organisational stakeholders who had policy, practical, clinical, or decision-making responsibility for OLR policy and practice. They would be asked about their professional background, trajectory and current role in the criminal justice process, their work in relation to the OLR. A description of direct involvement with OLRs would be sought, asking persons to recount in more detail their day-to-day involvement in OLR process and how this is experienced in practice.

Semi-structured interviewing schedule has several advantages. It offers a framework which structures specific questions as well as allowing the flexibility to deviate from this to follow the natural flow of conversation, during which issues not anticipated in the research design might emerge. Hence, the semi structured interview schedule provided structure but also flexibility allowing for the exploration of further questions further to explore topics in greater depth. This proved to be helpful due to my lack of contextual understanding of many aspects of OLR work and qualify answers by asking additional questions. Using this approach fosters reciprocity and engagement allowing interviewees to express their thoughts and feelings, leading to increased nuanced and insight into their experiences and meaning of these. Overall, the balance of rigor and flexibility makes semi-structured interviews particularly effective in qualitative research (Patton, 2002; Kvale and Brinkmann, 2008).

My key aims were to establish the participants' understanding and perspectives on the purpose and function of the OLR sentence, their sense of the legislation and administrative framework governing them and importantly their sense of the purpose of OLRs. I intended to explore their views and understanding of the profile of those receiving OLRs, and their experience or knowledge of persons subject to the Order as well as the work is experienced in practice. I sought to explore the perspectives of interviewees regarding how effectively targeted and managed OLRs are and any flaws, challenges and issues that have emerged in practice with a

view to considering an alternative approach to address the problem(s) that the Order is designed for. The open-ended nature of the interview schedule would also allow the interviewees the opportunity to raise any issue or topic OLR not already covered.

List of Interview questions

1. Tell me about your role or professional background and how this relates to the OLR. What are the values underpinning your role?

2. What can you say about your understanding of the historical background of the Order, why it was needed and what influenced this?

3. What is your understanding of the aim of the Order, who is it for? and what does it achieve? How effectively targeted is it and do you have any criticisms of the Order or potential alternatives?

4. What is the nature and extent of collaboration with other professionals and your understanding of the process.

5. What is your perceived impact on those subject to the OLR?

6. What are the wider implications of the sentences, how well does this fit with rehabilitation and community resettlement?

7. Are there any other points you would like to make?

Some reflections on researching elites

Criminological research is no stranger to researching elites. Notable work has examined the crimes of the powerful (Pearce, 1976; Tombs and Whyte, 2003) and more recently considered by (Barak, 2015 Rothe, and Kauzlarich, 2016). Elites are individuals who occupy positions within professional or corporate worlds and who have significant power and control. Carrying out research with them can be difficult (Richards, 1996; Beizsley, 2019). Scotland is also a small jurisdiction, and the OLR a small, but nonetheless important, sentence within our criminal justice system. It has been variously argued that researchers of elites can face

difficulties of access, due to the political nature of research and concerns about outsiders (Reiner, 2000b).

Gaining access can be an onerous task due to the measures that organisations take to protect themselves from external scrutiny. This may be particularly true in spheres of 'dirty work' (Ericsson, 2021) where individual professions and the limitations of these professions in mitigating risk can be misunderstood. This is particularly salient where professionals have been blamed and reputations have been damaged following abuses or incidents (Jones, 2018; Munro, 2011; 2018; Reid and Misner, 2001); including in criminal justice (Dingwall and Hillier; 2016) and in psychiatric services (Independent Inquiry, 2006; Coid, 1994). This may render practitioners less inclined to discuss the intricacies of work with outsiders. Many organisations operating within the field of this study are governed by regulatory bodies and codes of conduct which bind them in their work. Therefore, research scrutiny may be seen as a further burden or vulnerability, potentially resulting in negative consequences. Ostrander (1995) notes the use of alternative access strategies to manage difficult to access research subjects where the boundaries are patrolled, and where access can be refused to protect the establishment. Having read some harrowing accounts of research access failures (Beizsley, 2019), I am pleased to acknowledge that my access journey was not nearly as dramatic.

Navigating multiple ethics processes and negotiating access

Negotiating access and navigating ethical processes are imbued with power weighted in favour of organisations. Access can result in restrictions and specificities that may be an additional challenge to the work of a researcher. Navigating the gatekeeping processes was a crucial aspect of this study from gaining entry and obtaining permission to conducting the study. Gatekeepers, in the form of research review boards or ethics committees, played a role in obtaining permission to carryout research and on occasion determining the nature of my access. Understanding and navigating the multiple gatekeeping process required persistence and adherence to the bureaucratic and procedural requirements set out by the gatekeepers throughout the process.

I made initial access enquiries to seven separate institutions and authorities including; Three Local Authorities, Parole Board, Scottish Courts, Scottish Prison Service, and the Risk Management Authority. Following this, I was required to undertake six separate ethics processes (see later in this chapter), including individual requirements of these institutions, amendments to statements of confidentiality, length of interview and required to agree to

undertake additional work due as some institutions requesting relevant summaries of research at the end of the process. Of all organisations contacted only two provided nil response. Where this happened, I relied upon snowball sampling as detailed above where the research process was aided greatly by my academic supervisors as well as research participants. Positively, on some occasions, gatekeepers actively nominated or suggested participants for the project.

Prior to recruiting participants, I was required to gain ethical approval for the project through the University of Glasgow, College of Social Sciences ethics process. This was sought initially in early April 2021, and having passed its administrative check on the 8/4/2021 my application was then sent to the Ethics Committee for review. My application was initially refused as I had not included a statement to the effect that 'absolute anonymity' may not be guaranteed despite that all reasonable due diligence would be exercised.

This was an important point of contention when applying to interview members of the judiciary, specifically, High Court judges (see below section on SCTS). My application was resubmitted on the 13/4/2021 and I was granted approval in May of that year. These processes helped enhance the integrity of my work with the obvious downside regarding the time required for writing up the ethics forms and tailoring and amending them.

Recruitment of participants

The paragraphs below set out the range of professionals who participated in my work. Here I will demonstrate why they were chosen, their significance and role in relation to the project and outline any institution-specific requirements of research access and reporting.

Scottish Courts and Tribunal Service

Owing to their central role in the OLR process, the research was designed to include interviews with judicial office holders. Judges presiding over the High Court, adjudicate on indictable cases including OLRs; a Sheriff presiding over a case at the lesser court may remit a case to the High Court for sentencing where they consider that the risk criteria for an OLR may be met. Judges oversee the most serious criminal cases, and they are responsible for overseeing the trial process in solemn procedure and providing legal direction to the jury.

I contacted the SCTS in mid-August 2021 and received a response a few days later. I was advised that there was no organisational pro-forma for judicial access and that I was required to set out the nature of my research in a 'judicial access request letter'. This should include the purpose of the research, how the information would be utilised, a list of research questions and

the ways in which I would comply with GDPR. This was completed and submitted by the end of August 2021. I did not receive a reply so, at the end of September, I sent a follow up email. In December, SCTS responded with a list of changes that would need to be made prior to submission to the Lord President.

These changes were as follows; my initial request had stated that my interviews would take place by video conferencing offering both Teams and Zoom. I was asked to remove any mention of Zoom as this was not permitted by members of the judiciary, this was amended to offer interviews by 'Microsoft Teams'. I was required to make an amendment to the sentence 'understanding of the *men* upon whom the Order is imposed' to 'persons upon whom…' as the legislation does not define the Order in terms of gender. The reason I had included the word 'men' in my access letter was due to the fact no OLRs have been imposed on women. Although as mentioned in Chapter 2, two persons underwent gender transition after they had received the Order. It was requested that the statement I provided in relation to GDPR which stated that 'there may be no absolute guarantee of anonymity…' (wording stipulated by the University) to provide a guarantee of anonymity and that this is something that would be 'absolutely required by the Lord President'. Clarification was given about confidentiality of the interview, and that the university urges this clause where for example there may be a disclosure of imminent harm. Amendments were made to elaborate on this, and the request was resubmitted for consideration. SCTS required that a thirty-minute timescale would be better suited to interviewing members of the Judiciary and this was amended accordingly. These changes were resubmitted to the SCTS and in, October 2022, I was granted research access with a limit of two judicial office holders who had been keen to participate.

Criminal defence

I set out to interview at least two legal professionals involved in representing those for whom an OLR was being considered. I was lucky enough to have obtained contact details for one such person through another research participant. I contacted his office outlining my research project and received a response from his secretary. She requested my phone number to allow the senior legal professional to contact me by phone to discuss. Following this, he agreed to participate, and we arranged a date to carry out the interview. At the end of the interview, he provided me with the name of a colleague who I later contacted providing details of my research. This contact agreed to participate but after a number of attempts at arranging a date for interview, I decided that I should abandon this request, as it was clear participating in the

research may not be possible due to demands of his professional role. A third defence lawyer who I contacted, being aware of his work in the public realm on social media platforms, declined to participate citing the demands of his current workload.

The Parole Board for Scotland

I aimed to interview members of the Parole Board as they are responsible for making decisions about the release and recall of prisoners subject to an Order for Lifelong Restriction. The Parole Board also play a crucial role end OLR process as they authorise and determine the conditions of release into the community. The parole board is quasi-judicial body that operates independently of the Scottish Government and the Prison Service it makes decisions based on a case-by-case basis without external interference. I considered the interviewing members of the parole board would be important as their primary function is to make decisions regarding release and continued attention (Watt, 2021).

Therefore, interviewing members of the parole board would give valuable insight into decision making processes and any problems or paradoxes of decision making in respect of this sentence. I sent an initial e-mail query to the Parole Board for Scotland in 2021 and a follow up email some months later but did not receive a reply. As time was progressing with my data collection, and I had not managed to gain access to the Board, my secondary supervisor suggested I make contact with two of his retired contacts who had relevant experience.

I contacted them directly with an email outlining my research, my ethical clearance from the University of Glasgow and I attached the relevant ethics forms. I received no response from one of the contacts while the other replied stating that they were happy to be involved in the research project. During this interview, I was asked if had gained access to the parole board and I replied that I hadn't received a reply. My interviewee, suggested a contact of his and provided an email address, suggesting that I should mention in the email that they had provided the contact details. Again, I received no response.

Local Authority Justice Social Work

Justice Social Work have an important role in preparing parole dossiers and thus informing decisions about parole in Scotland. Scottish Local Authorities have a further duty to provide supervision for OLRs and are thus on the frontline of management in the community. Interviewing this group is important as it marks the end of the qualitative data collection process with professionals.

I made direct contact with three separate local authorities who have a statutory duty to provide services to those subject to a parole licence in the community. As should have become clear from the preceding chapters, those subject to an Order for Lifelong Restriction are subject to supervision and monitoring for the rest of their lives, they will be allocated a supervising officer from Justice Social Work. It was my view that social workers would provide some of the most important insights into the research through their key role in community management.

Of the three Local Authorities contacted in July 2021, the first requested a copy of my approval letter from the university ethics committee. Once this had been done, access was granted in principle although before it would commence, I was asked to contact the head of the relevant department to discuss the research further before proceeding. I contacted the Head of Department by phone, and they were interested and enthusiastic about the research which was encouraging. They provided me with names of two staff members with relevant responsibilities. Again, this authority requested a copy of the research report once completed.

I made contact with the second local authority in Sept 2021, and they agreed following submission of a proposal and copy of the university's ethics approval letter. Once clearance had been given, I was able to commence contact with the authority, where I interviewed one professional. This authority also requested that I provide them with a copy of the research report once the PhD was completed or provided to them in presentation form.

The third local authority was contacted in Dec 2021 and, despite two attempts at contacting them, I did not receive a response from this Authority. A further former social work professional was interviewed as part of this research: this person was contacted again through snowball sampling. They had extensive experience of working in an anonymous specialist housing facility for high-risk men some of whom were subject to an OLR as well as extensive experience of working within children and families.

Scottish Prison Service

As the majority of OLR prisoners are held in Scottish Prisons it was crucial to be able to interview prison personnel to gain an understanding as to how they experience the OLR and the management thereof. The prison also employs civilian staff, chaplains and forensic psychologists, all of whom can play a critical role in the care and management of OLR prisoners.

Prison personnel and psychologists have specialist knowledge and experience of OLR policy, process and procedures. They will also encounter the OLR subjects within residential prison halls and within the case management processes. Insight from this professional group was crucial to understanding how decisions are made to inform prison progression, and to understanding Integrated Case Management and Risk Management Team processes as well as a more nuanced insight into the perception, assessment and management of OLR prisoners.

To gain access to the Scottish Prison Service, I was required to apply to the Head of Research, at Scottish Prison Service HQ for conditional clearance. I submitted my ethics form to the Research Access and Ethics Committee in February 2022, and this was approved in March of that year.

I interviewed five prison employees including a prison chaplain (also see below), with whom I made contact through my primary supervisor. I also interviewed a prison manager and three prison based psychologists. These professionals have key roles in supporting, caring for and managing OLRs within the prison environment as well as specialist knowledge and responsibilities.

Former members of the Maclean Committee

I had fully intended to interview Maclean Committee members whose work twenty years ago led to the recommendations which created the RMA and OLR, among other things (Scottish Government, 2000a). As noted in Chapter 2, the Maclean Committee comprised 13 members from a variety of disciplines. It is clear from both the Maclean Report and from the way that the OLR was written about in its formative years (see McSherry and Keyzer, 2009;2011) that it was heralded as unique and aspirational penal policy. I aimed to invite 2-3 former members of the committee to give a reflective account of the wider socio-political context in which the recommendations were made and to consider in a retrospective sense the research questions set out above. I hoped this would provide valuable insight into the discursive context in which the recommendations were made.

I sent three emails to former members whose contact details I found on the internet. However I did not receive a response from these persons. I was assisted by my secondary supervisor Professor Richard Sparks who put me in touch with a colleague of his. This psychiatrist, while not an original member of the Committee, was happy to be interviewed, and he put me in touch with two former colleagues. One individual, who was not an original member of the committee,

expressed interest and was subsequently interviewed. The remaining original member did not respond to the invitation.

Forensic psychiatry

By method of snowball sampling, I made contact with two consultant forensic psychiatrists, both long-standing members of their profession, and both were working in the field at the time the Maclean Committee was undertaking its review. Forensic psychiatrists may become directly involved with OLRs as independent assessors accredited by the RMA. Or they may become involved with such persons as patients, who become mentally ill in prison, those subject to an OLR with a hospital direction will require specialist psychiatric care at the State Hospital. Forensic psychiatrists may also become involved in providing continuity of care after release for any out-patient subject to the sentence. Both persons contacted agreed to be interviewed as part of the research and these interviews were carried out in 2021.

This provided very useful background information into the context before, during and after this the OLR was introduced. As noted above, these participants were recruited by using snowball sampling strategy due to the difficulty of accessing and identifying professionals from the arena of psychiatry. An email was also sent to a medium secure forensic hospital 12/12/2020 to enquire as to who may wish to be involved but I failed to receive a response.

The Risk Management Authority

The Risk Management Authority have overall responsibility for the risk management plans for OLR prisoners and were keen to learn about the project, which was beginning around the time, they were planning to carry out their own research. They had recently recruited a new research team and were looking to expand their research strategy in alignment with the organisation's key strategic objectives (RMA, 2020). The RMA were keen to better understand 'the profile of those subject to the OLR, their risk management, progress from custody into the community…' (ibid, page 7). These areas were also central to my research project and therefore indicated mutual benefit and possibilities for knowledge exchange. The RMA are key to understanding the OLR yet despite much information being available via official documents as I stated earlier in this chapter they offered very little information on many aspects of the Order.

I met key officials of the RMA in April 2020 who expressed an interest in supporting the research, providing me with policy documents for analysis and recruiting a number of staff. In total, I interviewed five members of the Risk Management Authority who have a raft of relevant

experience from policy making, and senior level management, as well as social work and forensic psychology. Unfortunately, the audio file for one of the interviews was corrupted and I was therefore unable to use this.

State Hospital

I did not give due consideration early in the project to interviewing personnel working at the State Hospital in Carstairs. This is unfortunate as several OLRs are resident within this facility to date. However, while interviewing staff from the Hospital would have given an insight into the profiles of those receiving OLRs with a hospital direction and would have helped broaden my understanding of the differences between those who subject to a Compulsion Order with Restriction Order (CORO) - the OLRs counterpart in mental health - I determined that this may complicate and broaden the scope of my project beyond that of what was required. Furthermore, I had already carried out many interviews and wondered about taking on too much and being unable to dedicate the long hours of analysis as fully as would be required. Below is a table which shows the total interviews undertaken relative to the targets set at the outset.

Table of interviews and organisations included in the research

Organisations	Min interviews	Max interviews	Actual interviews
Scottish Prison Service	4	5	5
Criminal defence	2	2	1
Criminal Justice Social Work	3	5	4
Parole board for Scotland	2	3	1
Members of the judiciary	2	3	2
Risk Management Authority	5	5	5
Forensic psychiatry	3	5	2
Scoping interviews	2	2	2
Total			22

Ethics

Informed consent

All participants in this research are experts in their fields with many having accumulating decades of professional experience. Although there may always be some degree of participant vulnerability (Mikecz, 2012), this is very different to people whose backgrounds or circumstances (such as being imprisoned) make them vulnerable in a more fundamental way. Regardless of whether a person is objectively vulnerable, informed consent remains a bedrock principle of ethical research (Ritchie and Lewis, 2003: Bryne, 2001). Explicit details about the research project, the process and the use of the research data was explained at initial contact with research subjects through the proposal and through the use of written consent forms and provide information using plain language statements. This would allow time and opportunity to discuss any questions or concerns about how data will be managed and presented. Consent forms were returned by interviewees, before or at the time that the interviews were carried out, where this was not possible these were collected at a later stage and where this was the case express verbal consent was requested at the outset of the interviews. These considerations were made with reference to the university ethics process and the wider literature on research integrity.

Participant and researcher vulnerabilities

The nature of the work of the OLR necessitates varying degrees of engagement and exposure to accounts of violent and sexually violent crimes in case records. However, the research itself was not designed to explicitly explore individual cases. Rather it focused on the technical operation of the Order and how its processes were experienced in practice. As stated above, participants in this research are highly skilled and qualified to work with the OLR group and therefore these risks were assessed to be relatively low.

Discussions of people on the Order who had perpetrated serious acts of harm occasionally were mentioned during interviews without prompting. I had made provision for but in the end, did not feel it necessary to steer these conversations, pause, or stop the interview. Had this been necessary, I would have been able to identify participant distress through drawing on my many years of professional experience and using my judgement would have halted the interview. In the research, practitioners spoke about bearing witness to the complexity of risk work. In doing this, they provided examples of relating to serious violent offending and sexual offending. Researcher exposure to stories about violence is also a concern (Campbell, 2002). In my

research, these implications as well as the many heartfelt examples of the plight of some of the vulnerable prisoners and parolees subject to an OLR, and the experience of caring for high-risk individuals, means that researching this topic is emotionally exhausting and demanding work. The semi-structured design allowed for natural digression into these areas and allowed empathic engagement with interviewees as well as understanding and reciprocity through emotional validation of the interviewees.

Researcher wellbeing and vicarious trauma

Sensitive research can take a toll on researchers (Burrell et al, 2023). It would be difficult for anyone qualitatively examining preventative sentencing to engage with it in an unemotional way, hence highlighting the importance of self-care and self-reflexivity in research (Karcher et al., 2024). Researcher positionality, for example, gender, being a parent, plays a role in the experience of working on certain types of research (Burrell, et al. 2023). Yet at the outset of my PhD, with several years of professional experience in the field and as a mature student, I found the embeddedness and repetitiveness of exposure more emotionally demanding than I had encountered in professional settings. This was heightened by the fact that this work was undertaken during the global Covid-19 pandemic and lockdown, contributing to a lack of disconnect from the work and overwhelming isolation within it.

At the time of carrying out my PhD, I also participated in an adjacent SSSGS internship on life sentenced prisoners and OLR prisoners in 2021-2022. Together, these resulted in a deeply immersive experience into an arena of macabre and graphic accounts of lethal violence, the murder of babies and children by parents, sexually motivated homicide, child sexual abuse, and of bodily dismemberment and disposal. I felt, at times, saturated with horror, although my own professional curiosity and desire to master the subject and the prison and post-prison mechanisms that confined perpetrators was seemingly unrelenting. This resulted in having some difficulty in switching off due to the repeated nature of exposure to the data. Learning about the details of the crimes and backgrounds of people covered by the Order (and those on long sentences) had a multi-layered impact on me as, including my emotional wellbeing but also on my biases and sympathies.

I was aware of issues of vicarious traumatisation within my professional work in the criminal justice and the residential childcare sector, and I have professional experience of using the strategies for enhancing wellbeing, supporting organisational standards such as collegial support, debriefing, supervision and supporting reflexive practice that are embedded within

organisational procedures as addressed by Hawkins and Shohet, (2012) and within academia (Delamont, 2004). This compounded the solitude of PhD research, as noted by Janta, et al. (2012) and Hockey, (1994) but I also I felt I was 'copping out' if I admitted weakness, feeling that given my experience I should be hardened to the trauma experienced by and meted out by others. In these times, I was thankful of the support and supervision I received through my supervisors and the Emotionally Demanding Research Network.

My professional experience of emotionally demanding work was important for feeling able to manage my emotions and for using reflexivity in the research process. Importantly, I learned to filter my conversations with others regarding my research in non-PhD settings. I became acutely aware of the latter and employed a range of strategies to divert away from things that didn't need to be said. My solitude as a PhD researcher was also increased by the topic of my research and I found myself adopting strategies to sanitise the research for fear of provoking disgust in others not familiar to the nuances of this work. This approach was inspired by an interesting paper by Guerzoni (2020:6) who writes in his post-doctoral reflections about the ways that he experienced 'discomfort, disgust and at times disapproval'.

In carrying out this sensitive research I was able to practice reflexivity by examining my emotional responses to the research and to take steps to manage emotional entanglement and use resources to mitigate the emotional toll of the work while maintaining ethical and professional integrity (Dickson-Swift at al., 2009). The experiences outlined in this section have been key to my growth as a researcher and as time has gone on the impact of trauma-inducing materials and anecdotes, has waned through time and distance from them. As I have suggested, the trouble with any type of emotionally demanding research is that in provoking emotional responses, there may be a risk of vicarious trauma (Hubbard and Backett-Milburn, 2001). Emotionally demanding research has been defined by Kumar and Cavallaro (2018) as research which 'demands a tremendous amount of mental, emotional, or physical energy and potentially affects or depletes the researcher's health or well-being' (Cited in Burrell et al, 2023:1). This nature of emotionally demanding work has been well researched by others in the field such as Hochschild (1983).

Analysing my data

The preceding paragraphs in a way foreground the reasons why I opted for a reflexive thematic analysis in my research methods. Braun and Clarke (2022) argue that a key strength of a reflexive approach is its value in contexts where there is a risk of vicarious traumatisation, as

it helps researchers identify their own vulnerabilities and reflect on how these may shape their engagement with the research. Reflexivity in research can allow the researcher to see the emotional, uncomfortable, and messy aspects of the data and assist in fine tuning the analysis in consideration of this. Moran and Asquith (2020) urge that many gains have been made in attempting to make meaning from the seemingly unbearable in research and that valuable learning, networks of support and knowledge exchange are all part of the methodological process.

In my analysis, I followed Braun and Clarke's (2022) reflexive thematic analysis. Thematic analysis generally speaking involves the systematic identification, coding, developing and interpretation of thematic areas in and across the data set (Braun and Clarke, 2006). A reflexive thematic approach is an enhanced method of thematic analysis which locates the researcher's positionality as central to the analytic process (ibid, 2022). According to Braun and Clark (2022) such an approach is firmly situated within a qualitative paradigm. In this way rather than attempt to 'bracket' off experience, biases and pre-existing assumptions as mentioned at the start of this chapter, it acknowledges the subjectivity of the researcher in interpreting, shaping and constructing meaning from the data. A reflexive approach would allow me to critically examine and reflect on how my professional background, experiences and assumptions, as well as my own emotional responses to the data which may influence my analysis. Reflexive TA allows researchers to approach the data in an organic way following general guidelines and a clear process rather than fixed rules as found in traditional TA approaches (ibid, 2006).

Becoming familiar with the data

I employed the six-step guide for doing reflexive TA outlined in Braun and Clarke (2022:35). The first phase of this involved data familiarisation via a period of immersion in the data. I began this early on in the research process as I had made the decision to transcribe my own interviews. Transcribing the interviews also gave me a deeper level of proximity to the data going beyond descriptive aspects of the research as I listened and re-listened to the accounts that my participants had shared numerous times (also see below on transcribing interviews). This was a conscious and natural way of becoming familiar with the interviews, reliving the experience and picking up on nuances, which were missed in earlier iterations.

Selecting codes and themes

As I reread my transcripts after the initial draft, I spent time making notes on each document, highlighting insights and picking out semantic codes such as "I could be blamed if something goes wrong" (coded as 'blame') as well as latent codes which implied meaning rather than explicitly stated it, i.e. "cloak and dagger is the best way I can describe it" to describe organisational responses or behaviours. I began the process of coding the data extracts through systematically working through the documents, identifying segments of data that were relevant. For these, I applied full descriptions and one or two code labels which captured the analytic meaning within the transcripts (Braun and Clarke, 2006). The development of themes was carried out by noting initial impressions from reading a small number of transcripts, then increasing that number, and revising my impressions. This allowed me to make distinctions between themes and codes which can be understood through their 'levels of abstraction' that is a code would be 'specific and descriptive' and such as burden of paperwork in risk management and this would fall into the wider and more general description of what I termed the 'bureaucratic burdens' of risk work. In summary the codes were narrow and usually single features of the data and such as 'pressure' or 'stress'. The development of initial codes allowed me to interpret thematic areas across the dataset to provide the framework for the overall analysis.

Having coded the entire dataset, shared patterns of meanings emerged and groups of codes that shared a central idea or concept were compiled into themes relevant to the research questions. As I reviewed and developed my themes in relation to the overall analysis they began to form a broad story of the data that is, that the performance of risk labour is imbued with a series of burdens, which have emotional, psychological and professional implications in relation to my research questions (as will be seen especially in Chapters 6-8). During this process some codes were collapsed into each other to form a single thematic area, and one thematic area was divided to make two separate but interrelated chapters (two and three). Some codes were discarded altogether. Those that were discarded were not deemed to fit the core focus of my research.

The later phases involved clearly defining and naming the themes and subthemes followed by writing these up to form chapters to bring together the overall narrative of the dataset. This still involved some iteration and swapping sections from chapter to chapter. The TA framework allowed for this flexibility, which was crucial in bringing the data together and in reflecting on

decisions made throughout the research process regarding data placement, coding, and thematic development.

Transcribing data

As noted above, I opted to transcribe my own data which was beneficial but with some challenges and drawbacks. Charmaz (2014) explains that transcription is a crucial step in constructing theory which is grounded in the data. As I set out, I aimed to submerge myself in the data, picking up nuances and identify codes early on, and this situating myself in the data is why I elected to do this. However, this was hugely time consuming. Some interviews were longer than anticipated providing me overall with a large dataset which required a significant amount of time for transcribing. The first iteration of transcriptions also contained large amounts of errors, which then had to be revised often several times creating an intensification of my workload. An additional issue was listening for the ways in which things were said and where a phrase was strongly emphasised, I used italics as well as annotations such as "t*hat's what I mean*" (emphasis in original) or (emphasis added) where this was my own (Bailey, 2008; Roberts, 2004). Other issues that emerged were trying to preserve the authenticity of the text to represent the linguistic Scots through words like "canny" or "it's a system that shafts you when the wrong decisions are made". As Bailey (2008) explains, "even using standard written English, transcribed talk appears faltering and inarticulate. For example, verbal interaction includes false starts, repetitions, interruptions, overlaps, in- and out-breaths, coughs, laughs and encouraging noises (such as 'mm')" (p.129) Following her approach, I removed as much as possible these aspects of a transcript for example where there was excessive repetition, "*yeah, no, well, it's just, (pause) you know, erm*" to smooth out the text for better reading. As well as this, due to the nature of the mode of recording via teams or on a Dictaphone, there were interviews where internet connectivity was poor causing glitches, during the interviews, external disruptions were frequent as most interviews were carried out during the pandemic. This required significant patience during the interviews and while undertaking the laborious task of transcribing and correcting the transcriptions.

Data protection and confidentiality

Participants were made aware that confidentiality may be impossible to guarantee where there was disclosure of harm or danger to participants or others. Participants were also made aware that data may be shared/archived or re-used in accordance with Data Sharing Guidance provided on Participant Information Sheet.

All research subjects would be referred to by pseudonym in any publication arising from the research, and care was taken to anonymise participants and, where relevant and deemed necessary, specific roles within organisations under broad terms 'policy official' to further provide anonymity and protection of the identity of interviewees. This was because there may be some risk of identification of participants; for example, a small number of participants were directors of their organisations. In Scotland (as mentioned earlier), the small size of the sector I was researching means most people in it will know each other and might be able to identify participants. For this reason, consent forms included the statement: 'While steps will be taken to ensure anonymity, absolute anonymity may not be guaranteed'. As noted, I used brackets within the text to indicate where information had been redacted in the transcripts.

In terms of keeping data confidential and ensuring data processing, I undertook the required GDPR, Freedom of Information, research integrity and data management and protection training during my PhD. In reference to my interview data, audio files which were both stored in SharePoint/OneDrive file storage, and on an electronic recording device. These were deleted once uploaded. Any transcription files were encrypted with a password as stipulated by the Information Security guidance. My own laptop is password protected and locked away in my home when not in use alongside any relevant paperwork. Written transcripts were anonymised as quickly as practicable after the interviews. No other person, with the exception of my supervisors, have had access to the research data; and my supervisors did not have direct and unmediated access to transcripts. I occasionally shared longer extracts from transcripts to discuss with them.

The following methods of managing data appropriately were also implemented, the retention and disposal of any personal data as defined by GDPR. This included email correspondence which contains identifiable personal data. After the formal submission of my PhD, I removed all data from PCs, laptops and network drives. Any handwritten notes for interview or otherwise and hard copies of documentary data were shredded, any audio-recordings were erased and electronic data on the laptop/PC was deleted. Interview transcripts will be deposited into an acceptable repository, either at the University of Glasgow or the UK Data Service.

Limitations

A number of authors write about the limitations of small-scale qualitative research projects. Generally, these limitations relate to the use of methodology and the introduction of researcher bias and subjectivity in the sample (Charmaz, 2014) or small sample size (Miles and

Huberman, 1994; Silverman, 2013; and O'Reilly and Parker, 2012). However, much of this criticism is to do with a powerful positivist discourse which underpins research which emphasises the quantitative measurement and observation of objective and measurable data through statistical means with the aim of providing statistical and empirical generalisability (Maxwell and Chmiel, 2014). Having said that, these methods do not account for a nuanced understanding of social reality and how this is shaped and maintained through meaning and interpretation (Blaikie, 2007). It is on this basis that has been argued that generalisability should not be a key concern of qualitative researchers and argue for the term transferability to determine how research may be applicable in a broader sense (Braun and Clarke, 2022).

While these limitations may may well apply here casting some doubt over the application of this research to the broader context, its importance lies in the depth of these findings which raises pointed questions about the nature and experience of those labouring under the framework for the Order for Lifelong Restriction in Scotland.

Impacts

By conducting research with those at the frontline of risk management I was able to draw on the voices and perspectives of administrators and technicians of the order at all stages of the offender management process. This project has the potential to develop insight into the process in a unique and engaging way, being of utility to the RMA, practitioners, academics, and students. By examining the OLR as a whole process, this research offers an opportunity for a dissemination of good practice and an exchange of knowledge between the with the potential to improve policy and benefit the welfare and safety of both prisoners and the public.

CHAPTER 5 Constructing the OLR subject: In search of Proteus

> *"At midday he rises from the flood, and sleeps in the shadows… around him lie the monsters of the deep. Anyone wishing to compel him to foretell the future, was obliged to catch hold of him at that time; he, indeed, had the power of assuming every possible shape in order to escape…"* (Encyclopedia Mythica, n.d)

This first findings chapter sets up those that follow. It places the OLR subject centre stage, defining him not by law, or policy, for this has been covered in chapter two, but in the words of those who encounter him through the criminal justice apparatus. In doing this, it lays the foundations for a detailed understanding of the particularities, burdens and peculiarities of managing indeterminately sentenced prisoners under the OLR framework in Scotland. And so it is that this first chapter seeks to bring to life the enigmatic protagonist that is the OLR subject, who is variously defined within the context of this research. The OLR subject embodies societies deepest terrors and greatest compassions all at once, reflecting humanity's complexity.

In many ways the analogy of Proteus is well applied here. Proteus was a figure of Greek Mythology, a god of the sea who held the gift of vast knowledge and prophecy, able to foretell the future and hidden aspects of reality which, it was thought, he would reveal if he were captured. Yet Proteus was known for his ability to adapt and change his forms making him elusive and difficult to identify. As legend has it, once captured, Proteus having shown his various forms, would finally relent and reveal the truth (Encyclopedia Mythica. n.d).

In contrast to the OLR subject as an ideal type, reflections of participants across the range of their specialisms reveal a shifting, fragmented, incomplete, and contradictory picture. The criminal imaginary belongs to a class of persons, who in the Homerian sense, shares common characteristics with other monsters of the deep. Among them, the modern-day Pied Piper, the bogeyman who lurks in the undergrowth to prey on the innocent woman and child. The upstanding pillar of the community, hiding in plain sight, concealing his predatory and deviant proclivities that we suspect are there even though we can't see them. He (as almost all OLRs so far have been applied to men) is at once an unruly, incorrigible psychopath, 'a bastard' (Cavadino 1998:5), whose mental disorder drives his harm causing behaviour. But as interviewees also understood him, he is a traumatised and vulnerable subject, who is potentially

amenable to change, whilst at the same time, potentially not. He is a manipulative shapeshifter, ready to subvert professional intuition to carry on in his debauched and dissolute ways. He is who we imagine him to be, and not who we imagine him to be, he may be all these things, and none of them at all.

Such fragmentations and contradictions are at the core of this chapter. They illuminate the complexities of the OLR which throws together a group of dangerous people in an uneasy and imprecise way. This chapter traces the development of the penal subject as initially constructed by the Maclean Committee and its re-imagining through the perspectives and views articulated in the interviews. The term 'imaginary' is borrowed from the work of Pat Carlen, (2008) to exemplify how illusions of justice are 'imagined' by policy makers and are tempered and reconciled by those who work in the system. The OLR sentence was implemented for an 'imagined' subclass of dangerous criminals who did not meet the criteria for detention in the state hospital or meet the threshold for the mandatory life provisions. While programmes and interventions embody possibilities for reform and change, the challenges posed by this group thwart attempts of the criminal justice system to carry out its official mission. The problems posed by such persons, who are no stranger to both mental health and criminal justice institutions, are well documented throughout history (Nuttall, 2013). Measures of compulsory care and criminal justice control oscillate over time and space between these options, and something in-between (see DSPD programme, Duggan, 2011; Mullen, 1999; Feeny, 2003), shaped by prevailing discourses (Prins, 2015). The OLR was designed to fill this gap particularly following the exclusion of the 'psychopathic' personality from the sphere of mental health (Barnes, 2021).

The members of this motley crew of individuals, who find themselves trapped in the grip of risk-based control, continue to pose problems (and paradoxes) for society at large, for the institutions and professionals charged with their care and containment, and importantly for themselves. The risk confinement system is faced with the difficult task of identifying and capturing the Protean subject, confining him beyond the ramparts of prison walls to temper the risk to, and fear of, concerned publics. It employs technologies of risk to examine, sort and sift the group into categories. It compels the captured Protean subject, perhaps successfully and perhaps not, to reveal his hidden elements, thus foretelling his future, and exposing his 'truth'. Nikolas Rose (2000:333), in his seminal paper Government and Control captures this process in another way: 'On the one hand, confinement becomes a way of securing the most risky until

their riskiness can be fully assessed and controlled. On the other, a group of individuals emerge who appear intractably risky – 'monstrous individuals', who either cannot or do not wish to exercise self-control…' (2000:333). It is the psy-disciplines (Rose, 1999a) that play a key role in the identification and classification of these individuals, determining who can be governed within "the open circuits of community control" (Rose 1999:261) and demarcating those whose behaviours require management within closed circuits to contain their risk (Rose 1999). In theory, the OLR subject, once captured, is provided with civilising opportunities, to demonstrate compliance with the requirements of risk management, to neutralise his risk, so as to become a reconstituted subject capable of self-management and control. If he fails, the system has the additional safeguard of locking him up and throwing away the proverbial key and in so doing places him 'beyond the limits of civility' (Rose, 2000:334).

This chapter begins by re-visiting the MacLean Committee's concept of the OLR subject as a person who presents a monstrous risk but falls between the nets of extant legal and medical systems before moving on to the views of research participants. Such views are shaped by the institutional discourses that train them in their craft(s) and through their own experiences of working at the coalface of risk labour. This shapes the ways in which penal experts think about and perform care and control and importantly influences the way in which they construct the OLR subject, shaping who is considered dangerous and why, showing how categories of risk and threat are socially, culturally and professionally produced.

My analysis reveals the nature of the seemingly intractable problem of *what to do* with the OLR subject when he is caught in the machinery of risk. In this way tensions are raised to the fore by penal actors who are unlikely to be able to fulfil their official mission, but who in performing risk labour, are required to act as if they can (Carlen, 2008). This reveals the almost insolubly contradictory and ambiguous quality of the OLR subject, the exceedingly dangerous offender, who is in fact a representation of many different types, for whom an exceptional and ridged disposal is required.

The Maclean Committees 'imagined' penal subject

The Maclean Committee's remit has been discussed at length and therefore there is no need to repeat in any detail its function here. You will recall from previous chapters that in law, the OLR considers either the gravity of an individual act, *or* a pattern of offending *as well as* an evaluation of the interpersonal characteristics of the offenders as defined in Section 210E of the *Criminal Procedure (Scotland) Act, (1995*). Thus, the indeterminate and preventative

sentence is imposed where there are reasonable grounds for believing that the offender presents an ongoing risk to the public to such an extent that he requires lifelong restriction.

The committee advanced the view that special sentencing measures were required to safeguard the public from 'exceptional individuals' (MacLean Committee, 2000:34) in the view that current measures were deficient in affording the required levels of protection from harm. Rather than focus on notions of 'dangerousness', the committee concluded that risk is influenced by both psychological or personality traits, and situational factors (p7). Therefore, the sentence would focus on the levels of risk informed by the offences committed and an evaluation of 'antecedents' *and* 'personal characteristics' (p35). A focus on risk rather than on offence type or personality characteristics would take into account the heterogeneous nature of the group and acknowledge the variable and diverse risks and needs which contribute to serious violent and sexual offending (p1). The committee's remit was also to include consideration of a medical protocol for those with a diagnosed personality disorder (p3).

The Maclean Committee anticipated at the outset that the OLR would target a small group (p17) of largely male offenders (p6) comprising of those who had spent time in special prison units (p5) and those who were 'paedophiles' and/or 'model prisoners' who did not require special management in prisons but who would pose a significant risk to public safety if at liberty (ibid). It may also include those convicted of less serious crimes, but who would be assessed as having the potential for escalation to serious offending (p8). The group may or may not have a diagnosis of personality disorder, 'substance misuse disorders, psychosexual disorders [or] learning disabilities', which may or may not be pertinent to risk (p46). In the light of these acknowledgments, the likely subjects of the OLR are ill defined and therefore the Committee argued that a categorical approach, may not adequately determine the level of risk or establish individual needs where they are relevant to risk (p5). Further to their aims of avoiding a categorical approach, the committee expressed concern that severe personality disorders or a diagnosis of psychopathy could preclude individuals from receiving services (p71). You will recall from the literature review that this is a problem that has beset the mental health and criminal justice terrain for well over 100 years.

Although a detailed discussion of the legal and clinical terminology surrounding mental and personality disorder is beyond the scope of this thesis, some attention has been given to this in chapter three. That said, the Committee acknowledged tensions in the application of diagnostic categories as well as the variability of clinical judgment (p80). However, they noted that most

dangerous offenders would not require acute mental health treatment (p35) and therefore they did not recommend a medical protocol for those with a sole diagnosis of personality disorder (p46). Those offenders with a treatable mental illness who required hospitalisation would be subject to a hospital direction or a CORO as described in Chapter two. A comprehensive risk assessment would be the basis for informing judicial decision as to whether an Order for Lifelong Restriction would be appropriate, as well as determining factors related to severity of risk and the possibilities for treatment and requirements of management.

During the fieldwork undertaken to inform the report, the committee visited a number of provisions across jurisdictions (p111). They determined that the group would likely be difficult to manage, and may not fit easily within mental health or criminal justice systems (p71). Some facilities had substantial problems in coping with highly antisocial persons. It was also acknowledged that such persons had the propensity to be disruptive to regimes 'exposing fault lines' within teams, posing a threat to staff cohesion as well as being liable to make threats of litigation (ibid).

Furthermore, the Committee cited a lack of evidence in terms of treatment of this complex group. It noted that disorders may not be amenable to change, requiring any treatment or therapy to be implemented over a long period of time and even then, approaches and their impacts may be difficult to evidence. Individual packages of intervention to address risks and needs would be required, (p69). The focus would be predominantly on the management of the risky person and their behaviours both in prison and in the community. With this in mind, the Committee emphasised the need for a prison-based rather than a care-based disposal to control this group. In doing this, they laid the groundwork for a confusing and contradictory subject: one who needs treatment but who may be untreatable, who should be in a place of punishment but not solely for punishment.

Unmanageable subjects: perspectives from inside the system

From the MacLean Committee's imaginary of the ideal typical OLR subject, I now consider how the participants in this research view those subject to the sentence. In current practice, those under consideration for an OLR will usually be perceived as unmanageable, meriting a need for an assessment of risk to establish whether the lifelong sentence is required. Also, it is typical in risk assessments for such candidates to be characterised by a disinclination to engage with any previous requirements of management in the community under supervision evidenced by previous breaches of licence or civil orders (See OLR statistics in Chapter 2). It is also likely

that a previous sentence of imprisonment has failed to deter an individual from harm causing behaviour. Such obstinacy is also characterised by a failure to engage with the requirements of risk management in prison. Ostensibly, these collective 'failures', in part, necessitate the need for lifelong restriction which is in keeping with the aims of the MacLean report. Alan (pseudonym), a retired social worker and former member of the Parole Board for Scotland provided an account of his understanding of the need for the disposal.

> So, there was this issue of what were we going to do with these potentially erm, most risky offenders who came into the system. So, the work that was done in terms of looking at that and what was involved in the [Maclean Committee's] report and what have you, was about finding a way of putting some degree of control, in the long term, over people whose behaviour was the most risky.

He explains that the need for such measures appeared to stem from practical concerns about the manageability of a cohort of individuals who came into the criminal justice system. In this way the OLR was seen as a fix to the problem of a person who stood out as being the 'most risky'. Accordingly, the OLR would resolve some of the concerns about what could be done, exercising long term control over risky subjects.

Kerry has decades of service and extensive experience with prison progression as a senior worker within the Scottish Prison Service (SPS). In her interview, she was asked who she considered the OLR to be for. She explained,

> [OLRs are for] the people that you would probably think [at the outset] that you would never be able to reintegrate back into society; those are the ones that it should apply to, because people that you think that you could actually manage, progress, and rehabilitate, they're not OLRs.

Kerry is clear in her view that the OLR is for a particular type of individual who is beyond rehabilitation and thus permanently irredeemable. The term 'never' consolidates this permanence and highlights a sense of the impossible task of rehabilitation for a critical few. She also draws a clear picture of the 'ideal' subject as those who 'would never be able to reintegrate back into society'. For Kerry, those who she perceives as manageable and able to fulfil the requirements of prison progression do not fit with her notion of the OLR. And yet the

OLR prisoner in practice is funnelled into the progression pathway of prison sentence management, part of which, we may assume, is to identify whether he is capable of self-change and thereby falling within the circuits of inclusion as defined by (Rose, 2000).

A person serving life or another indeterminate sentence can demonstrate, at least in theory, compliance with prison rules and the requirements of sentence progression to the Risk Management Team and the Parole Board, creating a path of moving through and eventually out of prison. Kerry also explains that the unmanageable few are the people the OLR "*should* apply to" (emphasis added) which indicates a cynicism about both the application of the OLR and indeed, its whole purpose. This illustrates the problem of reconciling preventive punishment with notions of prison-based progression and therefore the progression pathway. Later in the interview, she speaks about this in terms of a systems-based approach to individual progression. She explains,

> See [the process is] alright in theory, all processes are great in principle, but when we are applying it to actual people then it doesn't work because not all of these people are the same.

Kerry explains that within prisoner groups there are distinctions and differences, which shows how a one size fits all system renders the notion of individual level intervention difficult. Progression is also at odds with the idea of being permanently dangerous. Therefore, in a system-led approach to progression there will be differences in the ability of persons, as well as external factors, that contribute to success or failure in progression. As you will recall from Chapter two, there is also significant diversity in the tariff lengths, offences and profiles of those receiving OLRs. Two recent cases exemplify this (*HMA v Young* and *HMA v McKinlay-Sullivan)*; both indicted on sexual offences receiving punishment parts of 10 years and 18-months respectively. Recently, HMIPS (2024), in their review of sentence progression and management in Scottish prisons, highlighted that many policies and processes are 'dated and disparate and in need of review', and that staff were lacking in knowledge and time to deliver 'person-centred management plans' (pp. 11-12).

In short, the very notion of an Order for Lifelong Restriction does not easily reconcile with a standard model of prison progression where the offender moves through the system supported by rehabilitative interventions and opportunities. It can be argued that the standard model of progression is more suited to non-OLR long-term imprisoned persons. As a person subject to an OLR enters prison having already been assessed as posing a persistent and potentially

unmanageable risk. This shows that even after two decades of the OLR approach, the original uncertainties about what, if anything, can be done for the 'exceptional offender' still exist. In this, there are difficulties not only in separating out OLR candidates into redeemable vs apparently unredeemable subjects but also for what this means for practitioners and prisons more generally. Following a discussion about the criminogenic needs of OLR subjects, I asked,

> Nicola — And so did you feel as if, that the OLRs (pause) were actually more of a needy group?
>
> Kerry — (pause) they were *perceived* to be (emphasis in original) because they were so resource intensive

Here Kerry frames 'needs' as problems of perception and of resource. Thus, highlighting the ambiguities about whether the risk is there because the system says it is, and ergo, it has to erect the OLR specific risk-based structures, of daily observation and monitoring, risk management planning, annual implementation reviews *in addition to* the standard and routine tasks of prison-based work. This also suggests that problems of 'manageability' may indeed be problems of managing the intensity of resource, or put another way, the intensity of the problems are there because the system itself has created them. Issues of bureaucratic structure and burden are more fully explored in Chapter 8 of this thesis.

The fact that, as shown in chapter two, more than 74 percent of those subject to an OLR are beyond the punishment parts of their sentences (RMA, 2023) offers some evidence of the system's inability to progress this group. Alternatively, this could be viewed as the successful management of enduring risk.

Adam who is an expert who has worked directly with people on OLRs takes a direct stance regarding the numbers of OLR prisoners who are still in prison beyond their punishment part end date or 'tariff'. He explains,

> I kind of think though, if the right people are getting OLRs then all of them should go past tariff because (pause) if you are giving it to the right people then they all should still be too dangerous to release after the punishment period, that's the whole point, right?

Adam feels that there is a distinct category of people who would remain too dangerous to be released after their punishment part end date. Adam accepts the notion of an 'ideal type' a permanently risky person which is also reflected in the MacLean committees' proposals, and

which, it can be argued, is the *raison d'etre* of the OLR. In his view, the sentence is about the containment of the most dangerous, as envisioned by the MacLean Committee. What is interesting is that he makes a hypothetical point about the Order being applied correctly on the 'right people' perhaps hinting at the imprecision of defining the permanently dangerous. The system then is required to sort and sift, not merely along lines of normativity but to identify the most dangerous of the dangerous (Feeley and Simon, 1992).

Some of those receiving OLRs are given very short tariffs (see chapter two of this thesis), a feature that will be more fully discussed in Chapter 8. However, the following discussion is useful in that it allows for a conceptual understanding of permanent risk in relation to the purpose and nature of the OLR - defining who is beyond the 'universe of civility' (Rose cited in O'Loughlin, 2019:6)

Adam explains,

Adam There was this guy I'd seen clinically while he was on bail for doing something which didn't look that serious where he'd tried to barge into two women's houses, right?

Nic Yeah

Adam And he got a fairly minor charge and er we saw him in the community when he was on bail. He's got three previous rapes. He's got all sorts of things, he was a diagnosed psychopath, and you don't meet many of them, you know really… and he got an OLR with an 18-month tariff and it was like "*oh my god*" (original emphasis). But that is the whole point with it, he'd done something that didn't deserve that much punishment in terms of sentencing principles… in terms of retribution and deterrence and all that kinda stuff (pause) but risk isn't about that you know, and I think this is why some people struggle [with low tariffs because] risk is about the pattern of offending over a lifetime and, and there is a small number of people because of that, are just too dangerous

He offers a rationale for the application of the OLR in terms of the short sentence and ostensibly less serious conviction being only one point on an enduring pattern of risk. Adam's claim about the low numbers of psychopaths highlights one of the tensions of preventative sentencing in that it is exempt from the notion of proportionality in sentencing. The preventative nature of

an indeterminate or preventative sentence coupled with a short tariff part can set in motion a chain of ambiguity for professionals the public and for those subject to the Order themselves as demonstrated later in this thesis. Adam understands the meaning of the OLR as creating the power to place controls over those who are considered both dangerous and unmanageable. As Von Hirst and Ashworth (2005:1) explain, that preventative detention conflicts with the principle that a sentence should be commensurate to the seriousness of the offence and this a matter of continuing scholarly debate. The notion of proportionality becomes distorted in risk logic where an indication of a psychopathic personality even following conviction for a low-level offence is taken as a marker of potential for the worst kind of harm, and therefore a justification for the most extreme form of control.

Glen, a judge who was interviewed for this research, articulates his views on the OLR subject as an ideal type as determined from a reading of the risk assessment. The risk assessment provided to the court informs the judge's decision of whether to impose an Order for Lifelong Restriction. Glen distinguishes the 'exceptional' OLR subject from other offenders, and in doing this he reiterates this dichotomy as well as the purpose and function of the OLR sentence.

> The OLR in my view is not intended for people who are simply recidivist offenders although it *could be* if you had someone who was absolutely determined that they were not going to engage with any rehabilitating treatment. But that doesn't seem to me to be its primary purpose, it's certainly not its primary use. Its primary use is for people who for clinical or medical reasons are unlikely to stop offending and unlikely to stop offending in a violent way. So, everything I tell you about OLRs will come back to that central theme that, in my experience, it is for people who exhibit psychopathic traits and who therefore give no cause for optimism at all.

Here, Glen reiterates the point made by others that the OLR is not simply for a person who is a repeat offender - though the allowance that it 'could be' shows how expansive the criteria of the OLR subject is - and explains that it is only applicable to a subgroup of the offending population. The purpose of the RAO is to help with that sorting and sifting process. The OLR is constructed as a permanently unmanageable subject for whom there is not only no cause for hope, but for whom there is no alternative.

Part of that assessment concerns the identification of a person unable to be co-opted into the circuits of civility (Rose, 2000) a point also made by Maclean (2000a). For Glen, the primary

purpose of the OLR is to issue sentence within the judicial parameters of proportionality and fairness but, like Adam, proportionality is a level of control proportional to the person's risk. Due to the apparently permanent nature of the risk, and his persistent rejection of efforts to engage with rehabilitative interventions, the OLR subject himself has demonstrated that there is little scope for an alternative option.

Given that the MacLean Committee explicitly considered and rejected psychopathy as a sole basis of triggering control, it is prudent to make clearer the link between psychopathy and risk as the interviewees saw this. For Glen,

> The thing about the OLR that I have found in practice since becoming a Judge, I think it was Lord Clark in *Ferguson* who said they are intended for 'exceptional cases' and it seems to me that is right, because the characteristics of someone who will receive an OLR, certainly in my experience, is somebody who exhibits psychopathic traits and those psychopathic traits are a driver towards violent or sexual offending. And the thing about psychopathic traits is that they are virtually untreatable, so unless there is some way of breaking the nexus between the psychopathic traits and the offending, it's highly likely to recur, and it is highly likely to recur in a way that causes really significant harm to those who are in the way. I have imposed, since becoming a Judge, [a number of] OLRs and they have all been on people with a risk assessment that comes back saying they are a high risk of reoffending, but that also says that the driver to that offending is some element of psychopathy.

Glen shows how in imposing what he later termed 'a disposal of last resort' he relies upon the risk assessment report which is a guiding instrument as to whether the risk criteria set out in Section 210E of the *Criminal Justice Scotland Act (2003)* are met. His understanding of 'exceptional cases' is where individuals have been diagnosed with psychopathic traits which drive offending. Glen is clear in his determination of risk by explaining that the findings of the Risk Assessment Reports frame his decision making, which is their intended purpose. He also makes clear that the risk assessment which will also state within it the amenability of the offender to treatment over time and therefore treatability is a key issue which would determine the decision to impose the Order.

Glen is drawn to the notion of psychopathic traits being the ultimate proof justifying an OLR, but this requires proof outside of legal knowledge, requiring the imprimatur of medical experts.

What is also interesting is that a diagnosis of psychopathy is all important for the OLR yet remains in other areas of Scot's law a contested diagnosis (see Chapter 2 and Barnes, 2021; Crichton, 2001). Furthermore, behavioural classifications are informed by normative judgements meaning that these are open to contestation. But where this categorical label is all-important for one judge in issuing an OLR, but is excluded from the protections of the Scots law mental disorder defence (Barnes, 2018), it is a diagnosis which consolidates the OLR subject's dangerousness in a permanent way, rendering him untreatable and leaving the judge feeling that he has no other option. This is unsurprising given the limitations in evidence as to treatment and behaviour modification with personality disordered groups as outlined in the Maclean Report.

Issues of effective management of those with a diagnosis of psychopathy emerges again later in the interview with Adam. As it is a term which is subject to longstanding contestation and debate (Prins, 2002; Nuttal, 2013; Prins, 2010), and given that there was some emphasis on treatment in the MacLean Review, I wished to seek clarity on this point.

Nic So what about treatment then; is that something that would be considered?

Adam Any treatment is about making them manageable so that's the best we can do is make them manageable, but manageable with lots of scrutiny as opposed to *treatment* that makes people live as autonomous. Most people whether they are violent or sex offenders, with or without treatment, can live a life where they can be autonomous and desist and manage themselves and that's fine, but you have a group of people at the high end who may not get to that point, and you have lots of people who at this point in time [on OLRs], we don't know if they are going to get out.

Again, he highlights the difficulties of knowing who may be amenable to intervention and change and those who will not. In so doing, he also makes a distinction between the treatable subject and the untreatable subject, and, while both may be subject to management, the former can self-manage but those for whom there are no treatment options they are required to be relegated and controlled. This reflects dominant practices regarding the disposals for and treatment of this group which are reflective of wider trends from the 1980s; away from 'treatment' towards new modes of control. Interventions themselves seem to be dystopian and imaginary, meshing together treatment, rehabilitation and management - a haphazard approach to an intractable problem in the hope that something will be effective. If rehabilitating efforts

fail, the mechanisms of management and control are in place as a default approach. The mishmash of diagnostic tools, criteria, categories and assessments of risk justify this disposal, blending medical, legal, and also moral concerns about certain criminal types. This is illustrated by Adam:

> I think, you've sometimes just got to account for the fact that some people might respond and in which case if they respond and they show you that they can desist then good …. but you also have to be able to reign in some of these really dangerous guys who really aren't manageable. I mean my thing is psychopaths...you can make some of them manageable, but you can't make them completely safe… most are going to desist anyway but we know for example that psychopaths don't, psychopaths don't desist. I mean it's really clear from the research that they don't and really, really prolific sadists and paedophiles don't desist.

Adam collapses treatment into manageability; a significant move. Again, a line is drawn between those who can be influenced by treatment, and those considered untreatable, transforming intervention into manageability, which has largely meant keeping individuals separated from society at large. He concludes that that while some will be rendered manageable by the system - is a kind of desistance by way of incapacitation - some members of this group may not ever be safe to release from the external controls of the prison system. In this way the system perpetually manages rather than resolves the issue and this is precisely what MacLean envisaged in the review. Again, this is indicative of the theory proposed by Rose (2000) where subjects of control will be either co-opted into the system as redeemable, treatable subjects, or managed out as those who are beyond repair (also see O'Loughlin, 2018). So, when Darjee and Russell (2011:230) conclude that 'there remains a large question mark over whether Scotland can meet the treatment needs of OLRs' the issue may be that this is a group already seen as untreatable.

Managing Proteus as a psychological subject

The OLR subject is produced through a range of knowledge paradigms - legal, medical, risk management, rendering them a kind of Frankensteinian beast of many parts. In a Foucauldian sense, systems of regulation construct, define and regulate individuals, shaping what is considered normal and abnormal in an attempt to rationalise and order the seemingly irrational (Foucault, 1965). As seen in the first section of this chapter, when OLRs come into the risk

management system they are sifted, sorted and constructed in various ways so that the system can neutralise risk.

These techniques influence the way that we view and understand behaviours and thereby are able to classify and control them. The individuals become subjects through the lens of medicalising and psychological constructions shaping individual subjectivities. The risk paradigm dictates that the system employs an assessment of risk, needs and responsivity (RNR) (Andrews and Bonta, 2007) and at least theoretically purports to offer behaviour modification programmes and interventions. This structures the risk management plans and the possibilities for treatment and management.

This section describes these problems of 'management' through the perspectives of risk practitioners. OLRs are defined by psychologically trained professionals in terms of risks and needs, depicted as 'complex' and difficult to manage within the prison, with a strong focus on behaviours which render the task of management difficult. In this way, 'complexity' becomes a marker of extremity, shaping the ways in which interventions and responses are justified. This complexity arises because of the intersection of vulnerabilities such as personality disorder, learning disability, mental ill health, self-harming and addictions. Behaviours such as violence, aggression, trickery and manipulation, and an unwillingness (and even overeagerness) to engage with treatment become evidence of danger. Thus, the task of neutralising complexity becomes seemingly difficult, 'treatment' is usurped by 'management' of the subject that people fear, hence justifying exceptional measures.

Before considering the construction of the OLR within prisons and by psychologically trained professionals, it is important to demonstrate how risk management contributes to the construction of the psychological subject and how it is enacted in practice by professionals in the prison context. Jodie an official who has also managed OLRs in a prison setting explains.

Nic So when you were case managing, what was involved? Because I don't really understand what that looks like.

Jodie So, all individuals on the OLR sentence have a risk management plan. That plan outlines their kind of history, their [risk] formulation and [measures to] support them [and] strategies to manage that. So that would be like supervision, monitoring, intervention, and victim safety planning measures that have to be implemented to make sure that the persons' safe and that the people around them are safe.

Nic So you're doing all of that even within a prison context? So it's not, you're not necessarily thinking, OK, that person is on a x year tariff and we need to get them to this stage and planning forward to the community …. risk management it's actually an integral part of the whole process?

Jodie Absolutely yeah, it's, it's their day-to-day management. Generally speaking, erm, these individuals are more impulsive, they are more aggressive erm they're trickier to manage day-to-day. Eh that plan needs to be there to make sure that things are put in place to sort of keep them safe

As noted, OLRs are subject to a lifelong Risk Management Plan. In prison this means that they have different risk management processes and procedures to other prisoners. The Risk Management Plan is very much focused on a psychological model of risk (see Chapter 2). As Jodie explains, such a model lays out a person's static or "historical" risk factors, their "formulation" which would determine levels of "supervision", "monitoring" and "victim safety planning" as interventions required to address risk. At this stage, this is not a plan for a person to become safe in the community, it is a plan to manage the specific risks and needs of the individual while in prison. Jodie explains that day-to-day management is required due to her general perception of the interpersonal characteristics of this group of offenders. This indicates that, for some individuals on an OLR, behavioural problems are not limited to the risk they pose in the community but also include the general disruption they cause to prison order and the safety of themselves and others, meriting additional levels of control.

As stated above, personality disorder is a feature of this chapter. In the interview with Jodie, it seemed, both from her description and from my reading of the literature, that this was the group she was describing. This was an opportune moment to raise the subject, which was also a significant feature of the MacLean Committees review but did not seem to appear as a feature with any prominence in literature published by the Risk Management Authority. I enquired,

Nicola I looked at sixteen years' worth of annual reports from the RMA…and [given their remit for research] I couldn't really come up with a reason that personality disorder would feature so prominently within the MacLean Committees review and then not within the RMA literature.

Jodie Well I suppose things have moved on in terms of psychology and in the literature and it's a move towards kind of being more trauma focused. There's a move

> towards the Power, Threat, Meaning Framework [so] *"what happened to you rather than what's wrong with you"*.…but personality disorders, is still something that we assess for erm, things have moved forward a bit, in terms of the kinda (pause). There's a reluctance to label people unnecessarily, you know, doing that form of assessment erm it sticks you know, once it's on somebody's record that they've got a certain type of personality disorder, that that's not going to go away and sometimes that can preclude them from accessing services. But equally, in terms of managing someone's risk it, it's really useful to know, kind of how they might present…what traits are most prominent for them how to go about managing that.

These techniques of risk assessment are used to sift, sort measure, quantify and adjudge the risk (needs and responsivity). The danger of the lens of "trauma" or "risk" is that it constructs the person subject to an OLR as someone permanently marked by concern. While this does not necessarily imply permanence, it can contribute to the perception of the individual as presenting a long-term or ongoing concern ("that's not going to go away"). It shows that labelling plays a critical role in structuring her understanding of the OLR and in interpreting behaviours, which informs how she manages the classified individual. Jodie notes that labelling is a trade-off, both aiding and constraining risk management. She raises concerns about diagnostic labels, which can pathologise individuals and overlook broader social and contextual influences. By contrast, she explains that the Power Threat Meaning Framework (PTMF) focuses on the relationship between power, threat, and the meaning of behaviour, which encourages practitioners to consider individual experiences and social context rather as well as static categories (British Psychological Society, 2020).

Complexity as a marker of extremity

In terms of risk, individuals subject to an OLR may be regarded as broadly comparable to those previously sentenced under discretionary life sentence provisions, which the OLR was introduced to replace. Juliana, a psychological professional, explained,

> There are people in the system on discretionary life sentences for all, all manner of things that, you know, had they been sentenced a number of years later, its highly likely they would have had an OLR sentence. So, from a risk point of view, they tend to be quite complex, quite difficult to manage …[and] many of them, they

> probably do require more kind of day-to-day management so there are a few cases that have discretionary life sentences, and they'll have more psychology input because they are such a management problem in custody. I'm thinking of one case in particular in [place redacted] at the moment who has a discretionary life sentenced prisoner, it must have been literally just before the OLR sentence came in to being and managing him in custody is very, very difficult.

OLR subjects are being described here in terms of their complexity. Complexity, "complex personalities" or "complex personality difficulties", attaches the quality to the individual rather than their wider social circumstances. These terms are used increasingly in the psychological literature and associated frameworks for example the Offender Personality Disorder Pathways used in prisons in England and Wales (HM Probation Service, 2020).The function of the term 'complex' seems to work towards the creation of an exceptional category of persons in need of 'exceptional' forms of control (MacLean, 2000:34). Juliana draws a comparison to those subject to a discretionary life sentence which suggests that, at least to some extent, there are shared group characteristics. She echoes Jodie's view that such "difficult to manage" persons require enhanced day-to-day management. In prisons, 'difficult' prisoners tend to be managed within Separation and Reintegration Units; colloquially termed *the seg* or 'the digger' (Sparks, 2002:558) in Scottish Prisons. People sentenced to OLRs are by definition difficult, and so may be disproportionately exposed to more isolating conditions. According to an HMIPS (2024) report on segregation and isolation, SRUs were found to hold those thought to have 'complex characteristics' (HMIPS, 2024: 21) including severe mental ill health, behavioural issues, anxiety, PTSD, stress and psychotic disorders, personality disorders and those who have experienced multiple early years disadvantage.

In one interview, unmanageability was explained in terms of high levels of violence and both interpersonal distress and intrapersonal difficulties. Annalise, a psychological professional, explains how these issues can translate into issues of management in prison. Annalise describes an OLR subject who in her view, cannot be managed without the use of SRU.

Annalise [name redacted] is notorious. He's been in Seg for over a decade

Nicola Is there a disproportionate amount of OLRs in the Seg?

Annalise Not necessarily

Nicola right.

Annalise Erm, but [OLRs] by their nature they tend to be more risky and more guarded… like if I think about [name of prison] just now, erm I don't think there's any OLRs in it but the seg is full…

Annalise describes the prisoner as "notorious", defined by his placement in the SRU for protracted periods of time. She uses this instance of extreme segregation to illustrate the range of behavioural and management issues associated with OLRs, while noting that individuals subject to an OLR are not disproportionately held in the SRU. She describes OLR subjects as more "risky and guarded", getting at generalised traits of personality within the group which although this is an extreme case shows again that there is diversity. "Guarded[ness]" implies a disinclination to engage with the requirements of risk management. It also seems, that OLRs can be very different kinds of people: one who requires Hannibal Lecter type lockdown, but another type that is more 'guarded'. This highlights the nuance of unmanageability, and the multiple meanings and forms it takes within the context of this thesis. Annalise describes what unmanageability looks like for this prisoner.

Annalise …[name redacted] he is extremely violent, he's violent towards staff, so he's managed under special security measures quite a lot of the time. We have a whole heap of strategies to manage his immediate risk.

Nicola Right. Mm hmm. Something else I was going to say. So…if somebody like him that has this kind of difficult behavioural presentation. What's driving that? Is it, is it learning disability? …is it [a] personality disorder?

Annalise Yeah, for [name redacted] its PD (personality disorder) and a really profound LD (learning disability) and a lot of things contribute to that... My view of [redacted] is that he is a very, very vulnerable, very traumatised young man…So, he came into custody, on an assault or something like that, and he was really violent to prisoners and to staff…And he, he got put into seg and moved into the adult estate and …he seriously assaulted staff, [and] assaults other prisoners …. Erm and he just got, he was in seg for so long… because he kept making threats and he kept trying to hurt people…. And is now, so yes, he came, he came back to seg, because he threatened someone and he

self-harmed really badly and he's totally deteriorated since then but eh yeah...(tails off)

Annalise describes this person as extremely threatening and reports violent behaviours and thus why he is seen as unmanageable even within prison. She explains that driving his behaviours are both a learning disability and a personality disorder. It is her view that these factors, as well as adversity in childhood have contributed to his current state. Drawing on her professional training and expertise, she understands him as a highly vulnerable and traumatised individual who struggles to cope in prison. Notably, the vulnerabilities identified in his youth appear to become amplified within the context of the adult prison, contributing to perceptions of heightened risk and danger. He is at once a risky and a vulnerable subject, in need of ultra-confinement which is the single 'appropriate' tool at the systems disposal. In this way, a marginalised individual is also constructed as a dangerous other, to be managed through extreme forms of control. Drawing on Agamben's (1998) notion of a *space of exception* - a juridical-political zone in which legal norms are suspended, and sovereign power is exercised beyond normal legal constraints - such control deepens his marginality and suffering. Furthermore, any goals of treatment and rehabilitation fall away and 'management', alongside forms of ultra-confinement - remain the tools at the disposal of the system.

Feeling that ultra-confinement within the SRU is a wholly punitive measure, I explore whether Annalise has thoughts on alternatives. She explains,

Annalise I think we need, it's called PD (Personality Disorder) units

Nicola Yeah, yeah, I've heard of them

Annalise I think they'd need to be resourced really well…and the PD unit itself needs to be built upon an environment that is conducive to doing therapy.

Nicola Yeah

Annalise Someone like [redacted] would probably need 3 to 5 years of intensive therapy and he would need stable staff that he could

> develop trusting relationships with who are, in essence, going to act as parents and he needs to build better attachments so that he can self-regulate eventually and cope on his own. The root of his issues are attachment and the lack of ability to self-regulate.

Annalise's point raises some interesting thoughts going back to the original remit of the MacLean Committee and what they saw as the role of the Risk Management Authority in relation to research. The Committee also cited a lack of available evidence for the treatment of this "complex" group and acknowledged that any change may occur over long periods of time following intensive individual level intervention (Scottish Government, 2000:69). What is also interesting is that research concerning difficult to manage people, such as those diagnosed with personality disorders, has been largely absent in the RMA's official literature (see chapter 2). It was not until 2022 that the RMA (RMA, 2022) looked at the specific offending profiles of those who were subject to an Order for Lifelong Restriction and this itself appears to be limited to offence types and histories rather than their needs and possibilities for intervention. It may be assumed, that the latter is the remit of the Scottish Prison Service. Although Annalise hopes for Personality Disorder Units, the separate and controversial Dangerous and Severe Personality Disorder Units set up in England and Wales were deemed a failure and subsequently dismantled (Tyrer, et al. 2010) and replaced with Personality Disorder Pathways in mainstream prisons (Minoudis and Cane, 2017). Furthermore, the focus upon a trauma informed paradigm may seem to modify or supplant the notion of risk management and intervention but which could be simultaneously a justification for increasing the intensity of intervention(s) and therefore control. Smith et, al (2021) warns of the 'turn to trauma' in Scotland which on the one hand 'tells us nothing we should not already know' about the impacts of early years trauma (ibid, 2021:4) and on the other psychologically frames social problems in terms of individual deficit and pathology. They explain, '[In] many senses, the prominence given to trauma evokes a degraded image of the human subject as hopeless, lacking agency and prey to external events beyond their control' (Smith, 2021:10).

Learning disability as enhancing risk

Collette, a staff member with case management responsibilities for OLRs shows how conceptualising the OLR as a group of aggregate subjects is a difficult and imprecise task. She explains:

> It starts to get quite individual to each of the cases because you have some individuals subject to an OLR, who maybe have a learning disability and that presents its own individual risk factors. There is also potential for there to be some comprehension issues particularly where there is a learning disability or if they've got low level literacy or IQ. There's [also] a substantial population that have substance misuse issues and of course, that can be exacerbated when they're in custody.

This highlights how disability becomes framed as a criminogenic risk factor and serves to link diverse individuals along a spectrum to create the appearance of a coherent group. Yet, in practice, this attempt at categorisation produces contradictions, revealing the inherent difficulty - and often impossibility - of neatly grouping such diverse individuals. It is interesting how learning disability, like "vulnerability", is articulated as a risk factor rather than recognised as a concern and complication regarding the imposition of the OLR. Gormley's (2018) analysis of experiences of people with learning disabilities in the Scottish criminal justice system explains how this group experience multiple discriminations in these environments. Classified as both 'vulnerable' and 'at risk' to themselves and other people around them, vulnerability here becomes a marker of, and a euphemism for risk, in multiple forms. The protections that are afforded in law for those with disabilities are obfuscated and risk is at the forefront of concerns. This failure to recognise disability (in its own right) may entrench stigma, further marginalising and harming disabled persons by framing disability as and indicator of risk, restricting access to appropriate support, and justifying heightened surveillance or control. At the same time, it signals to the system that these individuals present a higher level of risk, reinforcing their marginalisation. Collette also explains that having a learning disability and substance misuse issues, are also markers of risk. For those with learning disabilities, this can mean difficulties in understanding the risk management and progression system. She emphasises the implications of this:

> And there are some instances whereby you could be reading an annual implementation report and the case manager's written that they maybe don't fully

> comprehend the impact of the sentence, so they make efforts to go through that with them. I know that each one of them, when the OLR is imposed, are provided with information, literature, about what the OLR is. I think obviously there is the potential for them to be… for there to be some comprehension issues, particularly if there is a slight learning disability [or] if they've got low level literacy or IQ… and obviously and (pause) the more, the further they journey through their sentence, the more apparent that becomes. But I do believe that there's efforts made with all the [OLRs] to outline, the processes of the sentence, and you know [and] what that means for them.

As Collette explains, there are issues for some prisoners around understanding the OLR sentence. This was also noted by Gormley (2018) who found that prisoners with learning disabilities experienced difficulties understanding complex sentences and progression plans. While the role of the risk manager is to assist in explaining the sentence, Collette describes how, despite these attempts, comprehension of the sentence and the requirements of risk can remain problematic through their sentence with the extent of the problem becoming more apparent. Therefore, a lack of engagement with the risk regime, which Adam and other informants saw as demonstrating risk, may be a genuine lack of understanding, and an inability to communicate needs effectively due to neurodiverse thinking styles. Through a risk lens that many participants adopted, cognitive difficulties might become seen as obstruction, avoidance, defensiveness and disruption through refusal to engage with prison authorities regarding risk management.

The MacLean Committee concluded that those for whom an OLR was appropriate would be a group who pose similar problems (Scottish Government, 2000). As I have shown, within the context of this research, the people receiving OLRs are diverse, and their problems of manageability are also multifaceted. Disruption in terms of non-compliance with risk management plans, as well as threatening, abusive and harmful behaviour in prisons, therefore, arises from a range of circumstances. Jodie a policy official described commonalities of those on OLRs in this way:

> There's a high incidence of personality disorder in the population, you know regardless of what the offending background is, that is just the case, there is generally that history of previous offences and previous input from statutory

> services and previous supervision failures are very common amongst our guys. Erm so for those with difficulties with working relationships, maintaining working relationships, or benefiting from interventions is very common and obviously contributes to the difficulties these guys have going through the system

Here, she articulates that those on OLRs share common problems with progression and supervision and failures - though, like in many interviews, personality disorder is noted. Supervision failures are in keeping with the criterion for the 'exceptional' nature of OLRs and this is spoken about as a clear justification for the imposition of the Order. Jodie explains that building and maintaining relationships, which are part of successful supervision, can also be problematic. This was also highlighted by Annalise, who recommends a long-term therapeutic and trauma informed approach. However, the extreme framing of OLRs as 'unfixable' and the lack of appropriate resource in prisons (see HMIPS, 2024) means that what can be done with this incontrovertible problem remains to be seen.

Non-engagers

Lack of engagement with their Risk Management Plan was seen as a pressing issue. Darjee and Russell (2011:224) endorse the view that 'a lack of cooperation has been an issue that is rooted in the personal pathology of the offender'. Failure to engage will render a prisoner beyond the circuits of inclusion, at worst it can lead to permanent and lifelong exclusion, held in prisons until they die there. Oliver, a former prison psychologist who now works in a policy role, discusses his experience with those who did not want to engage with these requirements. He summarises:

> You can do as much as you want to try to engage and support someone, but there are OLRs who just will not engage and in order to get out they have to evidence that their risk is manageable in the community, and so if they're not able to do that, and despite all the options put in front of them. It's really tricky…like if someone doesn't engage, what do you do?

Oliver expresses a sense of powerlessness, regarding people who don't engage which, itself, becomes yet another risk factor. This raises questions about the benefit of engagement when those on the order, as with other indeterminate sentences like the IPP, as well as risk

practitioners themselves, understand the difficulties of getting to the point where they can be released. Ultimately it shows that the system is faced with the problem of prolonged periods of punishment, with indeterminately sentenced prisoners trapped within the quagmire of risk. It also evokes the contradictions identified by Carlen (2008) through her concept of *imaginary penalities*, whereby penal policy constructs an imagined good for managing the most dangerous subjects. This places a burden on the technicians of the system, who must operationalise these imagined solutions, often navigating the tensions between policy ideals and practical realities. Here, the technocrats responsible for managing OLR prisoners, articulate the difficulties of working within a system they recognise as limited in its effectiveness. Oliver was subsequently asked, given the nature of the 'complexities' in the OLR cohort, and about the appropriateness of prison as a disposal for this group.

Nicola: … do you think, do you think prisons are the right place for these men?

Oliver: Uh, I think they're part of it, yeah, I think (pause) the thing that stands out … is the, not just the seriousness of the offending, it's often the longevity of that. Now I know that doesn't stand true for every OLR and I wouldn't want to say it does, but you know for a significant cohort of them, I mean the ones I case manage, I could maybe think of one that didn't have like four to six, previous serious offences, and I think and then when you mix that in with like, problems like personality disorder, acute mental health, there are periods where they're so chaotic, they are so unstable that it is difficult to see another environment that is able to, to effectively manage them.

This is interesting, as one line of thinking in the creation of the OLR, was to manage and control the person who is capable of the worst harm, but who might not have an extensive criminal record, but here, Oliver articulates a key concern is a longstanding pattern of (any) harm. As well as this he constructs the OLR subject as a person with multiple vulnerabilities such as personality disorder and mental ill health rendering him both unstable and chaotic. OLR risk

‘management’ seems to mean mainly incapacitation, a warehouse for the motley crew that are difficult to control in any other setting. Such concerns are not new. As I have shown in chapter two of this thesis, these concerns regarding subgroups of people held in mental health facilities and prisons who posed problems of management have been a central concern in the debate on the question of prisons versus hospital. For example, the Fallon Enquiry (1999) found that ‘disruptive prisoners, many of whom showed traits of personality disorder’, were ‘transferred from segregation unit to segregation unit with little or nothing in the way of constructive activity or opportunity to address their behaviour’ (Fallon, 1999, para. 1.35.8). And similarly, the MacLean report stated, that those ‘who had spent time in special prison units were likely to fall into their terms of reference’ (Maclean, 2000:5).

The manipulative ‘model prisoner’

As well as the institutionally disruptive person who is well known and easy to identify, there are also concerns about invisible risks by individuals who present as compliant or engaged. Like Proteus, who hides his true nature, such persons are suspected of concealing ongoing risk. Thus, potentially manipulating the system and its operators into believing that he is safe, while plotting and planning to execute salacious fantasies. This is a description clearly very similar to the notion of the psychopath in which the individual ‘presents a convincing mask of sanity, a façade of normality which conceals their profoundly emotional deficits’ (Cleckley, 1941:67). The central argument here is that while such persons may appear ordinary, rational and able to adhere to prison rules and the imperatives of risk management, inwardly they conceal the parts of them they know they have to hide. In the MacLean Report two kinds of model prisoner were mentioned:

> … notably paedophiles, who present no problems whatsoever in prison but who would be highly dangerous on release. This may be because their criminal behaviour is manifested in ways which would not be possible in prison. There is also a particularly worrying group of prisoners who may present as ‘model prisoners’ but will quickly resume their criminal behaviour when the opportunity presents itself (Scottish Government, 2000:5).

Collette, a legal/policy official, reflects these concerns regarding the ‘model’ subject both in prison and in the community when she explains:

> They know what they need to do to appear compliant. They will do what they're required to do, especially if they are in the community. They know to turn up and give the right answers and you'll stay off their back. And I think, certainly for some of the people that are subject to an OLR they have been doing that, they've been complying with their statutory orders, but they've still continued to go on and offend.

Here Collette depicts the OLR subject as a deceptive individual who may give the outward appearance of cooperating with professionals. Her worry is that any compliance is disguised, a superficial rouse to portray compliance with conditions of licence. This closely reflects the concerns raised by MacLean and others, while also illustrating how the OLR individual is constructed in contrasting ways: one the one hand, as dangerously violent, recalcitrant, *and* vulnerable. And on the other, as deceptive, manipulative and cunning, perceived as ready to exploit a chink in the armour of the decision maker to be able to carry on down his path of criminality.

Conclusion

In summary, this chapter has shown that the MacLean Committee laid the groundwork for an enigmatic, confusing and contradictory subject: one who needs treatment but is untreatable and who should be in a place of punishment but not for punishment. This modern-day Proteus is imprecise and difficult to identify; he has one and many faces, a shapeshifter, able to conceal his wickedness and yet display it in violent and obscene glory. Several issues emerge from these embedded juxtapositions not least the dissonance of practitioners who must work in a system that is as contradictory as the people it is required to control. Despite the dream of risk assessment, the system throws together an imaginary subclass of offenders, the irredeemable, the riskiest, the vulnerable, the violent and disruptive, and of course, the model prisoners. The OLR framework attempts to isolate and draw a circle around this group demarcating them to impose the totalising identity of the OLR. Within this circle may well be the monster that we are all afraid off, but this chapter shows that it is not that clear cut. And yet the people managing persons subject to an OLR have to encourage a sense of hope and progress while operating the ‘penal imaginary’ (Carlen, 2008). This sets up a challenging situation that takes a toll on the person on the OLR as well as risk practitioners themselves producing a series of burdens and a sense of futility.

CHAPTER 6 Fear and anxiety: managing emotional harms in risk labour

"Can we know the risks we face now or in the future? No, we cannot: but yet, we must act as if we do".

(Douglas and Wildavsky, 1982:1).

"I'll go no more; I am afraid to think what I have done, look o'nt again I dare not".

Shakespeare (Macbeth, Act 2 Scene 2)

Introduction

The first of the above quotes highlights the core irony of the precautionary principle, in that we cannot know by any degree of certitude what hazards or risks we will face or when and under what circumstances we will face them (ibid, 1982). Despite this, we must act to address the probability that harm will occur for the management and containment of risk has become a core responsibility of organisations. It is, it has been said, big business (Gigerenzer, 2014). Risk and precautionary practices are deployed to minimise a vast plethora of societal harms and seek to do so through an intricate web of state, public and private sector bodies, who in turn regulate the spatial environment as well as the conduct of organisations and individual citizens (Adams, 1995). Organisations and the professionals in their employ are compelled to mitigate risks in ways that also appease the anxieties of a fearful and distrustful public, through demonstrating due diligence of processes and transparency and accountability in decision making (Power, 2004).

In criminal law, preventative justice operates on the basis that harm is more likely than not to occur and is 'grounded in the assumption that it is possible to inhibit would-be-harm-doers before they cause prohibited harm;' (Ashworth and Zedner, 2014:49). In the trend of what Feeley and Simon (1992) called 'the new penology', there is increasing focus on the prevention of harm through actuarial modelling and risk management to guide decision-makers in what is uncertain terrain. These theoretical frameworks are concerned with new forms of criminal justice governance, overlook the complexity of real people making real decisions in dynamic and uncertain contexts, where human judgement, discretion and emotions play a significant role. Risk decision making also takes place against a backdrop of dominant cultural tropes

about the *types* of offenders that cause the most fear and alarm (Simon, 1998) and against a backdrop of liability, blame (Khatri, et al, 2009) and professional culpability. In criminal justice work, *risk* is central to state mandates for public protection and those who fulfil these requirements, the 'human faces' of public policy and law (Lipsky, 1983) are often faced with uncertain and high stakes decision-making, and individual decisionmakers held accountable when things go wrong.

In this chapter, I seek to explore risk work and the effects and everyday experiences of doing this. I argue that this labour embodies a duality, undertaking the role of state functionaries as protectors from risk (to others) whilst at the same time and with equal measure, protecting themselves from 'stigma' (Goffman, 1963), 'moral taint' (Douglas, 1966; Crewe, 2011) and blame in the aftermath of a high-profile event. The framework for my analysis is partly drawn from Power's (2004) thesis on the *'Risk management of everything'* in which, he argues that experts are required to manage risk in two ways. The management of 'primary risks' refers to the external threat that gave rise to the need for control and for which specialists are educated and trained. The management of 'secondary risks' concerns the internal threats to institutions if they are perceived not to be acting, or not responding effectively to that threat, therefore damaging the reputations of organisations allocated with this task.

I also draw on the work of Isobel Menzies-Lyth (1988) to consider the ways in which organisational 'defences', through increasing bureaucratisation and fragmentation, fail to contain the considerable anxieties of risk work. In doing this, I show how labouring under the rubric of risk and public protection entails a preoccupation with both primary and secondary risks, resulting in several negative effects for human subjects. Risk management becomes personalised and individualised, negatively impacting on decision-makers, and potentially decision -making, during the risk management process (also see Gottfredson, 1988).

This presents a series of challenges which are intensified by the fact that handling risk in criminal justice often entails working with difficult and gritty cases, constituting 'dirty work' (Hughes, 1959). Consequently, under various conditions, a form of 'tainting' (Douglas, 1966) or 'courtesy stigma' (Goffman, 1963) may occur for those who come in contact with risk in criminal justice. This has been variously discussed in relation to an array of justice professionals such as prison officers (Crawley, 2004; Garrihy, 2021; Crewe, 2011) police personnel (De Camargo, 2019; De Camargo and Whiley, 2022; Hurrell et al., 2018; Duran and Woodhams 2022; Duran et al, 2019) forensic analysts (Strickland et al, 2023) within child

protection, (Flaherty, 2017; Brady, 2017) and social work (Morriss, 2015; Munro, 2011;2015) and in probation (Mawby and Worrall, 2013). The experience of dirty work and the social perceptions of this (Ashforth and Kreiner, 1999; Slutskaya and Game, 2023; Valentine, 1994), as well as the embeddedness of risk labour in an environment which is 'trauma saturated' (Burman, et. al, 2018), has a number of implications for workers.

This chapter illuminates the 'primitive anxieties' (Menzies-Lyth, 1988:90) of risk work, that is the emotional and psychological implications of working in the face of 'dread' risks (Slovic, 1987), where fears and anxieties compound the extant (or primary) challenges of risk work. Throughout the course of this research, interviewees conveyed their sense of bearing the heavy burden of responsibility for the protection of the public. These feelings are grounded in prolonged and detailed exposure to the extreme harms caused by individuals under the Order for Lifelong Restriction, which render decision making a heavy emotional task. And yet there are other burdens which accompany this work. This appears to bear the hallmarks of vicarious trauma as defined by Pearlman and Saakvitne, (1995; McCann and Pearlman, 1995). For some, practitioners demonstrate a tendency toward catastrophic thinking regarding reoffending, a preoccupation with risk, indicating that the "what ifs" of offender management extends beyond the boundaries of the professional, seeping into everyday life.

The emotional aspects of risk labour are not singular in nature and instead reveal multiple, layers dimensions and nuances for different individuals and across professions. Some interviewees reported that they experience difficult emotions in relation to their work. Others adopted a more procedural or ritualistic stance (Menzies-Lyth, 1988). While some interviewees did not comment on the emotional implications of risk work. Despite these differences, there are commonalities that unite the experiences of the practitioners in this study. However, despite the largely deleterious consequences of risk work outlined in this chapter, some penal agents explain how they attempt to manage fears and anxieties and their own 'tainted' views of the world by positively reframing their work and its impacts. Some have suggested that it contributes to the enhancement of a finely tuned internal risk compass relied upon to protect themselves, in the course of the everyday, from primary risks.

Among interviewees there was a strong sense that concern for the management of 'secondary risks' to individuals and organisations if the worst-case scenario should unfold. This was just as profound as the implications of managing primary risks. Central to this concern was the sense of the lack of protection of professionals against judgement, scrutiny and investigation if

a prisoner reoffended after release. This would of course trigger intense judgement and scrutiny of decision-makers and the efficacy of the risk apparatus as a whole; how well were the tools and techniques of risk applied, how much can be attributed to an error of professional judgement and were risks effectively monitored? A catastrophic event would be exacerbated by media coverage, framed in terms of systemic failures and individual negligence and demands for more accountability and transparency would result. This, as I explained in the review of the literature, has been the justification for the introduction and maintenance of preventative regimes in every jurisdiction. This contributes to the salience of managing the secondary risks to practitioners, through fear of condemnation and reputational annihilation which compounds the extant fears and anxieties, insecurities and vulnerabilities that professionals face. Ultimately, risk labour is difficult work. It attempts to manage serious risk by ramping up its technical-scientific-rational processes, and because of attempts to instate 'organisational defences' (Menzies-Lyth, 1988) it may not be able to protect the public with any degree of certainty. For one thing, it fails to quell the considerable anxiety which arise and thus protect penal agents from the human consequences of risk work.

Managing emotions and vicarious trauma in criminal justice

In risk work, fear of crime is Janus-faced. It can be both an abstraction, a shadowy figure, a fear of an unknown but yet somehow, anticipated harm. Fear can also be personified and etched into subjective narratives, with faces, names, and deeds as encountered through the course of everyday risk practice. Perceptions of risk are heightened by proximal knowledge heuristics which allow us to structure and make sense of the social world (Tversky and Kahneman, 1974; Kahneman, et al, 1982; Sunstein, 2005). The type of harms caused by those targeted by the Order for Lifelong Restriction can be normatively considered serious or extreme cases. The intricacies of such cases can provoke intense emotions, such as horror, revulsion and fear (Barros, 2014), driving up the emotional heat of individual and collective responses. This means that practitioners need to engage in emotional regulation (Hochschild, 1983).

For risk workers, this can exacerbate the moral conflict and the profound sense of helplessness and despair as well as emotional overwhelm as considered in the preceding chapter. In the wider literature on trauma in the criminal justice workforce, it is acknowledged that practitioners are engaged in emotional labour and embedded within contexts which are 'trauma saturated' (Burman, et al, 2018:5). Emotional labour, as developed by Hochschild, (1983), describes the process by which emotions are managed by employees working in organisations

and has had extensive coverage in organisational studies as well as criminal justice (Phillips et al, 2020; Phillips et al, 2020b). Emotional labour is not synonymous with bearing witness to trauma, which is also a feature of risk work, but refers to how practitioners manage and rationalise the emotional and psychological burdens of this work. Managing dangerous people requires constant mental resilience, with the weight of responsibility reaching far beyond simply controlling one's outward emotional expressions.

The notion of 'vicarious trauma' - that is, the changes that occur within a therapeutic relationship when professionals are exposed to those who have experienced trauma themselves - was developed by McCann & Pearlman, (1990). According to Eriksen and Ditrich (2015) vicarious trauma is a response in persons who have witnessed, or who have had explicit knowledge about, or who have intervened in, highly distressing events (cited in Dominey Howes, 2015). You will also recall from the literature review, the terms, secondary traumatic stress or compassion fatigue (Figley, 1995) which results from empathic engagement with clients and exposure to trauma inducing materials. Further, it has been argued that the implications of trauma on professionals who work with perpetrators of sexual abuse (Ennis and Horne, 2003) and child abuse is less frequently covered in the literature on working with survivors (Coles et al, 2014).

Here, I will show how managing dangerous people results in vicarious trauma as research participants articulate their own stories of exposure. In doing so, they reveal how trauma exposure shapes their cognition, their emotions, and their work, their lives, and importantly, the decisions that they make. Yet, despite the deeply personal implications of working within what Abel (1983:283) has termed an 'emotional world of violence on top of violence', I show how penal actors make attempts to manage a 'tainted' view of the world reframing the experience, as an enhancement of a finely tuned internal risk compass that they rely on to protect themselves and others from adversity.

Jamie, a social worker, explains how her embeddedness in risk labour has led to changes in how she views the world. As the discussion steered toward persons with convictions for sexual offences I asked,

Nic Are you saying that you think this line of work changes our perception of people then?

Jamie What I am saying is that when you do this line of work Nicola… (pause) trust no one, because *everyone is a suspect* (emphasis in original).

Nic: (sighs) I think I agree with you…there are times I wonder if it would be better if we didn't know the half of it.

Jamie: Nah, for me forewarned is forearmed, that's the way that I look at it. We're lucky because we are always going to be on high alert, that's the way I see it. We are the lucky ones in this. Ignorance isnae bliss when the stakes are this high, it's dangerous.

Through her exposure to risk work, Jamie describes her perception of people as characterised by mistrust and suspicion. Risk work can induce a shift in perceptions about the world and people in general, often manifesting as an uneasiness about and questioning of the intentions of others. Jamie's explanation shows how she is impacted by the work that she does and having assimilated 'polluting' narratives she offers direct advice; "trust no one", itself an articulation of her fears and insecurities. For Jamie, vicarious exposure shapes her thinking, she shows that vigilance is omnipresent in that "everyone is a suspect". This aligns with the findings of Farrenkopf (1992) who found in his study that around a third of practitioners were emotionally impacted through increased suspicion of others and hypervigilance due to working with sex offenders. This indicates that the entrenchment in risk labour and exposure to offending narratives can cause a darkened world view (Chrestman, 1999), and a cynicism about human motivations in general (Catanese, 2010) which has a 'persistent and pervasive impact' as well as a 'cumulative effect with each exposure, increasing disruption to the individual's cognitive schemas' (McCann and Pearlman (1990a:17).

However, Jamie manages the potential negative emotional impacts of risk work by positively reframing her vicarious exposure by acknowledging that it provides her with a strategic advantage which acts as a safeguarding mechanism in her approach to risk. In this way she is able to manage emotional 'taint' through identifying what she perceives to be the positive implications. She also shows that she is reflexively aware of these changes and reaffirms the constructive impacts by drawing a line between those who have this insight and those who don't. Rather than see this in negative terms that is, as being in a state of hypervigilance, she views her shift in worldview as advantageous and reassuring in the face of her sense of widespread insecurity.

Rose is also a social worker involved with supervising those on OLRs in the community, describes the emotional challenges of working with this group.

> I think it's a field that you need to *want* to work in, d'you know, because it's not for everyone. And the people that have kids and, and I do…. it does probably slightly obscure how I feel about particularly (pause) trying to think of the best words (pause) quite *difficult* child sexual offences and reading indictments in relation to babies and stuff. But in some ways, it [has] broadened my ways of working with these guys in terms of how to supervise them and what that's about.

Rose acknowledges the challenges of dealing with sensitive cases. In particular, she highlights the difficulties for those who have children of working with those who have perpetrated sexual abuse against children. Focusing on her role as a mum, she explains how this adds complexity to the experience. She explains how she is required to manage her own emotions, thereby employing emotional labour in the provision of support to her clients. She speaks about how exposure "obscures" her way of thinking about difficult cases indicating, that it is hard to detach and become emotionally neutral. This shows a connectedness and a blurring of the boundaries between her professional and personal life. It also highlights a degree of psychological tainting and moral conflict as well as highlighting the emotional tolls of risk work which perhaps reinforce her worst fears as a parent. However, again she positively reframes her experiences by saying that this has "broadened" the way that she works with high-risk individuals, enhancing her understanding of how best to supervise the risk to fulfil the requirements of her role. This echoes findings by Bach and Demuth (2018) who explain that some people working with this group derive satisfaction from it precisely due to its challenging nature. Personal and professional growth as well as gaining a broader understanding of human nature through engagement with this group was also said to inspire professional curiosity in a study by Barros et al, (2020).

Judges may typically not be considered a group who perform 'dirty work' principally due to their independence from external interference and to their prestigious positions. They are a category comprised of the most highly placed members of the legal elite or 'ultra elite' as defined by Zuckerman, (1972:160) carrying out what Anleu (2016:30) described as 'privileged' emotional labour. Yet despite holding this position, their work necessitates managing primary risks by delving into the evidence, including the minutiae of witness testimony and social

background reports, to make consequential decisions that affect people's lives. Although judges do not work closely with OLR subjects, they are subject to repeated exposure to harmful materials as well as making difficult decisions which express society's condemnation. Despite their high standing, it is not unheard of that judges from time to time experience a backlash of public outrage, and 'insidious criticism' for decisions that they make (The Telegraph, 2011). Navigating this complex moral terrain requires judges to manage the dual expectations of balancing legal obligations with public perceptions.

There is also the thorny issue of emotions in the court room. Judges in modern justice systems are required to suppress and manage their own emotions, and those of others in the courtroom, and as such perform complex emotional labour (Barry et al, 2023). The notion that a judge should remain emotionless is a cultural tradition derived from the work of Hobbes who claimed that 'the ideal judge' should be devoid of 'all fear, anger, hatred, love and compassion' (cited in Maroney, 2013:12). It has been argued that, despite little empirical work, that judges across anglophone jurisdictions perform emotional labour (Maroney, 2013; Barry et al, 2023) and are presented with difficult emotional challenges. One judge described his caseload as a 'litany of absolute misery' Maroney (2013:16). This is exacerbated, in part by the notion of the dispassionate judicial officer and yet, as Lerner et al. (2015:4) point out the 'everyday work of judging necessarily implicates emotions' as 'emotions and decision-making go hand in hand'.

Although this research did not set out with the intention to explore these issues, the emotional impacts of dealing with high harm crimes emerged as a theme for judges. Glen, a judge quoted earlier, directly addresses the implications of risk work. He explains,

> I have a skewed view of the world, as you will have after you have done this [research] Nicola. Because you look at all of these OLRs, and I see people coming before me in the High Court because that's the type of work I do, some of whom are incredibly dangerous (pause) and it could give you quite a skewed view of reality.

Glen describes his world view as being "skewed" through exposure to risky people and their deeds. Here, he articulates how he is conditioned through repeated subjection which has given rise to a particular view of the world. The term "skewed" indicates distorted thinking which is consciously assessed as resulting from direct exposure. In his statement, he shows how a cognitive shift or emotional taint (Garrihy, 2021) is not only a matter-of-fact consequence of risk work but that it is a contaminant staining anyone who encounters it. He adds, "as you will have Nicola", indicating an acceptance that emotional taint is intrinsic to risk work. This echoes

findings by Mathieu (2012) who describes vicarious trauma as being accepted as an occupational hazard in some professions. In the management of difficult emotions caused by traumatic exposure, the judiciary is no exception (Brooke, 2017).

Fear and decision-making

Like most risk workers, Glen is repeatedly exposed to trauma inducing materials. This level of exposure determined by caseload and in real time is deemed to be a predictor of vicarious trauma and secondary traumatic stress at an individual level, as exemplified by Bober and Regehr (2006). In performing risk labour, Glen also acknowledges the emotional and moral complexities of his role, describing the sentence as "an avenue of last resort". He describes his work in terms of a cost benefit trade-off between two possible bad outcomes. When asked about the purpose and utility of the OLR he explains;

> Ultimately there is the primary consideration of public protection because you don't want someone going out and raping children. And that is the level of seriousness of offending that we are talking about and it's the level of *risk* that we are talking about and yes, it's the worst possible thing that you can do to someone, to take away their liberty on a life sentence or on an OLR, it is the worst thing that you can do to anybody, but I'm afraid that erm, it's a balance between that and the protection of the public (Glen, High Court Judge).

This indicates the type of person and offences that are at the forefront of his mind when he thinks about OLR cases. While not all OLRs have been convicted of child sex offences, this illustrates something quite significant about how Glen views risk and, in particular, what he views as 'worst-case scenarios' (Sunstein, 2005:36). Kahneman et al (1982) explain that individuals rely on heuristics when they think about risks. In doing this, they 'assess' risk by relying on available examples (Tversky and Kahneman, 1982). For Sunstein (2005) 'the availability heuristic illuminates the operation of the precautionary principle, by showing why some hazards will be off screen and why others will be neglected' (2005:36). He further explains that familiarity and salience are important aspects in influencing our assessment of risk.

This is helpful in that it explains why Glen draws upon this example, not least because of its "availability," which forms the basis of everyday work for a judicial officer. Secondly, and by most evaluations, the rape of a child is normatively considered to be morally repugnant, as

'matter out of place' (Douglas, 1966:35). Here, I draw attention to Sunstein's notion of "salience" to emphasise the symbolic nature of this risk, a universally condemned harm which tears at the collective consciousness, that shared set of morals, beliefs and values (Durkheim, 1893) regarding the sanctity of children. Secondly, through performing judicial 'dirty work' he is both condemning such crimes, as well as mopping up the threat of contamination or moral taint through cognitively reappraising his work (Lazarus and Folkman, 1984) emphasising the value and importance of his role as well as justifying his decisions to thus manage his emotions effectively.

Glen also avoids 'trade-off neglect' (Sunstein, 2005:46) by acknowledging the potentially negative implications of taking preventive action. He is aware that the OLR sentence is one which is itself potentially harm causing for those subjected to it. However, while he is aware of and sympathetic to its negative implications, these concerns are balanced against the protection of the public, appeasing to some extent his fear that a child would be raped. In this way he is empathetically engaging with the implications of both his perceived worst case scenario outcome, and the punitive nature of preventive punishment, to manage and limit his feelings and the negative implications of such a decision.

A similar example was provided by Adam who has both a clinician- patient relationship as well as a role in undertaking risk assessments for high-risk persons. In Chapter 2 , I noted that the role of psychiatry in preventative justice is often considered a dubious one, with some arguing that, the profession is becoming a 'risk industry' (Prins and Soothill, 1999:xi). In legal and penal contexts, there is an expectation that psychiatry should be responsible for and be able to deal with difficult offender-patients who are feared by the public and professionals (Prins, 1999). Yet, the public have traditionally been suspicious and distrustful of psychiatrists (Hopson, 2014), the institutions in which they work, and their patients (Prins, 2010). Working within a context of public-panoptic surveillance creates similar worries for those involved. This comes through in Adam's interview where he highlights his concerns regarding the assessment of a prisoner. He explains,

> He was a psychopath who had a history of sexual offending since he was about twelve, and he had raped somebody in prison, and [he] was getting to know a friend's child (pause) now all he did was breach his SOPO (Sexual Offences Prevention Order) but, again he stands out, you know, you let someone like that have his freedom, and he's gonnae rape someone's child (Consultant Forensic Psychiatrist).

Adam draws on a case which "stands out", showing how he shoulders the responsibility for public protection in a similar way to Glen. One can see how exposure to graphic, distressing harm and working with those who have caused it would be experienced as burdensome. Adam acts as a barrier between the public as potential victims and the offender-Other. On the one hand his risk aversion, while hardly irrational in this context, is motivated by the very real concern of serious harm. On the other, it is also influenced by the wider cultural/symbolic meaning of such offences and the blame and questions of accountability that would be raised if those fears were realised. In this way, as well as managing the potentially catastrophic and primary risk of a false negative, Adam is managing the secondary risks which are risks to his own reputation, to his personal wellbeing and to his profession.

A sense of fear is also experienced in the decision-making processes of the Parole Board. Alan, a former senior member, articulates the anxieties which emerge when a prisoner is progressing towards the community. The decision to release a person from prison conditionally is one of the most critical decisions, made in criminal justice (Hauser, 2019), particularly in cases involving significant harm. Alan frames the Order in terms of alleviating some of the concerns and anxieties of the Parole Board whose decisions may impact directly on public safety.

> We saw men who basically didn't want to get out on a supervision order because they didn't want to have that control on them, so, they were quite happy – I'm talking about small numbers – but they were quite happy to stay in prison so they could walk out without any oversight and often these are the most worrying because these were people who you thought, when this man gets out, he's going to do it again, you know?

Decisions about when to release prisoners serving indeterminate sentences in general are informed by consideration of a wide range of evidence and a determination of risk as well as whether an individual has demonstrated sufficient evidence of rehabilitation (Maurutto and Hannah-Moffat, 2006). For the OLR, this is guided by a completion of the requirements laid out in the Risk Management Plan which has a community facing element. The parole process is not intended as a continued punishment or as exploring harm done to victim(s) (Scottish Government, 2019), yet this may not be how it is experienced by parolees (Kelly et al. 2020), particularly given the nature of the offences which attract the indeterminate sentence. Alan's concerns illustrate that "worry" is intrinsic to Parole Board decision making too as there is a requirement to balance public safety with *just* measures of punishment as well as the Board's

own accountability. Alan's point highlights the value of the OLR in appeasing worry about risk particularly in "involuntary clients" (Ferguson et al, 2020:19), as well as the way in which a licence for the Board gives some degree of oversight and control. In doing this it allows for the revocation of parole if necessary and therefore works to protect the community from risk. Clearly, a lot is at stake in work involving high-risk subjects. The potential for devastating consequences, generates considerable anxieties for practitioners, who, when working in accordance with professional codes of conduct, feel they cannot fully rely on the 'social defences' of organisations for protection.

Taking chances: reputational annihilation and the personalisation of blame

The assessment and management of high-risk people is embedded within a context of public fear, blame, and challenge to professional expertise (Kemshall & Wood, 2008). This causes a series of anxieties in relation to the primary task of risk management, as well as emotional and potential reputational risks to professionals. Blame is a particularly prominent feature in the literature on social work, and particularly of individual social workers following child deaths (MacDonald, 1990; Cooper and Whittaker, 2009; Cooper, 2009) of probation staff in cases of serious (re)offending (the McSweeny Report, 2023; McCann Review, 2020; Bendall Review, 2021) of psychologists (BPS, 2018) of parole board decisions (Parole Board Statement, 2018) and of decisions made by judges (BBC News, 2023).

Adam, a psychological professional, described high-risk decision making in terms of chance. He explains:

> There [was] one guy I met…[details of attempted murder redacted] he got a life sentence and if this was now, he would have got an OLR, but he got a life sentence at the time because discretionary life sentences were available. Now I went to see him in prison *years* later (own emphasis) and I couldn't be convinced that anything had changed with him and he is someone who I think, you know, are you gonnae take a chance with someone like that?

As well as illustrating the type of person who is at the forefront of his mind when he is considering the OLR, Adam suggests that the wrong decisions could have dire consequences. Importantly, it also shows a personalisation of risk, where the defensive structures set up to preserve and protect the system may fall short of protecting individuals. Fears and anxieties come to the fore when a person subject to the OLR progresses toward the community due to

the falling away of the external controls of the prison. Those subject to OLRs may of course offend in custody, but generally, this will occur outwith the gaze of a watchful public thereby reducing to some extent the limits of exposure and blame. Adam's viewpoint is clearly an exercise of professional judgement and yet he also explains how a decision to release this person would ultimately come down to taking a "chance". Given his judgement of the precarious nature of risk, this is not one that he would be willing to take. Unsurprisingly, this uncertainty can also result in defensive practice for practitioners (Taylor and Whittaker, 2018; Trevithick, 2011).

Bill, a social worker, describes the specific anxieties of risk work in managing those released on licence. His concerns capture the view that risk work is perilous terrain. He explains,

> It's a minefield because of the potential effect of what could go wrong in the community. For each one of my cases with them all being RSOs [registered sex offenders], it's a potential minefield for what could happen.

The use of militaristic language highlights the potentially devastating consequences of reoffending. This reinforces a sense of objective danger to the public but also subjective danger to himself as a supervising officer. He captures the multilayered nature of risk in the following quote.

> Bill Working with sex offenders can be extremely stressful and it can take over your life, your way of thinking and you know, you're thinking about what's happening, what was said that day, what's being said about that, or how you've managed that person …and also when you even (pauses) the best example I can give is, is, you're reading BBC news and you're just scrolling down and you see 'Assault in [name of local authority] your instant thought is *shit*...I hope that's not one of my guys.
>
> Nic: Oh god.
>
> Bill And that's it, basically it's my instant, instant thought goes, I really hope that's not one of my guys, I really hope that's not one of my team's guys, because then that's you open to scrutiny as to what work has been done, what hasn't been done, how you started, how you've managed that individual, and you know it's going to become a case review and you, you just hope and pray that's not you at the end of the day.

As described in Chapter two, public enquiries while operating under the auspices of ‘lessons learned’ demand to hold individual experts and decision makers to account (Cooper and Whittaker, 2014). In such cases, MacDonald (1990) explains that there is an assumption that negative outcomes are the result of poorly made or negligent decisions. When blame is allocated to individuals and teams it wholly neglects that uncertainty is a feature of a risk society. Individual experts, the institutional systems within which they operate, and their accrediting bodies have increasingly been subject to public and legal scrutiny, with decisions and practices reviewed, evaluated, and assessed through formal organisational procedures. Individual professionals are required to cope with overwhelming collective anxieties which arise from the emotional and psychological toll of their work (Menzies-Lyth, 1988). In response, organisations are required to develop management strategies or ‘social defences’ a term originally coined by Jacques (1955) in his work on organisational theory. He argued that organisations seek to manage uncertainty or challenges thus, maintaining stability through bureaucratic structures and processes; for example auditing (Power, 1997) and ritual task performance (Menzies Lyth, 1988). However, this can result in what Jacques (1995) described as ‘unconscious collusions’ within organisations which minimise or deny aspects of professional experience such as emotional harms and thus avoiding dealing with them. For example, in the Munro Review of child protection it was found that there was a lack of essential support required to help practitioners manage the harmful emotional aspects of the work (Munro, 2010). Bill’s worry is in part related to a lack of ‘social defences’ for he knows that when a person reoffends on licence the decision-makers responsible will be subject to intense scrutiny. This really highlights the vulnerability of social workers, and the ways in which fear of judgement and blame are intrinsic to risk work. While risk is also personalised in this way it also shows that collective anxiety is rooted in risk work, where colleagues and a shared emotional burden of stigmatisation, and public shaming (Baden, 2023). Bill explains the dual purpose of his work.

> If somebody was to ask me what my role was I would say, to protect the public from harm (sighs and pauses)… trying to, attempting to prevent risk of further offending and (sighs) the other one is trying to prevent yourself from appearing on the front page of a newspaper (pauses) is the best way to describe my job, particularly in today's environment, when there's a blame culture, it's always about *who's* to blame, not *what* is to blame? what is…*what* happened? It's *you* (sighs), it's

> kind of yeah, it's ... and social works evolved even in the ten years I've been in it, criminal justice social work is evolving into that *who*? rather than *what?*

The above quote captures the dual nature of his role with the requirement to manage the primary task of public protection through preventing reoffending and harm to others as well as protecting himself from professional harms. He speaks directly about blame culture and articulates the personalisation of blame as a broader shift in social work. These experiences have been found by others who highlight the extant concerns about risk in social work, where rising levels of anxiety, uncertainty, and insecurity within the context of blame culture have led to greater demands for professional responsibility and accountability (Parton, 1996). Ostensibly, this has created fearful working environments which enhance feelings of vulnerability, resulting in a more cautious or 'defensive practice' as described earlier (Kemshall, 2008; Whittaker and Harvard, 2016; Ferguson, 2018).

Amie, a psychological professional who works with OLR risk management plans, explains how doubt and defence are intrinsic to risk work.

> I do think what does happen - and this is not from my experience but from supporting colleagues in this [situation] - when it gets close to the community, I think there's again that element of panic because you've got an individual who is hyped up to be, this you know, this really, really, dangerous person or high risk…. and you're thinking "well if they are getting closer to the community that that means that we manage that, right*?"* So (laughs nervously) we give this person a chance, but I think at that stage, that's when people start to panic.

Amie shows she views panic as setting in as OLRs get closer to community access. She speaks about the mark or stigma on the OLR subject, in that they are "hyped up", which in this sense means an inflated sense of apprehension and ultimately danger. In Amie's comment - "we can manage that right?" - there is a lack of conviction or perhaps certainty regarding the manageability of the person in the community, which in many ways is one of the inherent contradictions of the Order. If a person is dangerous enough to warrant the imposition of a life-long sentence, then by which means, and with which degree of certitude, has this risk been rendered manageable. Clearly that is a rhetorical question which is made in light of the central thread of this thesis in that we cannot know with any degree of certainty, whether or not a risky

event will occur in future. Amie also speaks about the management of risk in terms of "giv[ing] this person a chance", which again illustrates uncertainty of outcome but importantly shows how risk is present at another stage of the risk management process.

Similarly, social worker Jamie discusses how her work is constrained by fears of the personalisation and attribution of blame in a blame culture. She explains,

> "We are prisoners of that culture - it's a system that shafts you if the wrong decisions are made".

It is Jamie's view that the system unfairly responsibilises those who work within it. She also indicates the way in which social work practice is constrained by the fear of condemnation indicating that it also limits, autonomy and decision-making. Cultures of defensiveness emerge through attributing criticism, and blame, and in some cases undertaking legal action. The organisation's defences create totalitarian 'prison like' cultures which are set up in such a way to protect itself from blame. Her use of the prison metaphor describes a lack of personal agency and autonomy, resulting in her feeling trapped by blame culture but also potentially trapped by a perpetual fear of the retaliation of the system. Ironically then, those working within carceral spaces often experience a form of confinement themselves

A pervasive culture of fear is also identified by penal agents who do not have a direct decision-making role, but who work within the prison system. Russell, a prison chaplain, gives his view on risk decision-making.

> You're asking these professionals - whether it's the psychologist in the programmes or governors or deputy governors who are signing a bit of paper - to progress this prisoner … to sign them off and say they are no longer a risk…who's gonnae do that?...the whole model of thinking...who's going to be brave enough to put their signature to that piece of paper when potentially their career's on the line if this guy goes out?

The notion of 'signing off on risk' in offender management can apply at multiple levels. Here Russell makes a general observation about risk decision-making regarding prisoner progression. This is a multi-systemic process which brings in teams of prison, psychological and eventual parole experts to make decisions regarding progression to conditions of lesser security. The assessment of risk itself is carried out through a thorough assessment of

documentation relative to the likelihood of reoffending as well as an evaluation of risk and needs, made in accordance with legal and organisational standards and guidelines, themselves features of organisations attempt to protect itself from secondary risks. Despite this heavily procedural system (see Chapter 8 of this thesis), Russell's statement shows that even these intensive risk management processes do not mitigate anxiety and apprehension within the context of his own sense making. He questions, "*who's going to be brave enough?"*, showing that risk work is subjective, and risky in its own way and a factor in decision-making; with professional and personal integrity, reputation and ultimately livelihood is on the line. High stakes risk work requires professionals to step forward despite these concerns.

Similarly, Collette a policy official, explains that the high-stakes nature of decision-making drives defensiveness in risk practice. She explains,

> There's many OLRs in prison that are past their punishment parts like you were alluding to earlier Nicola, and the reason that is, I think, is just because they continue to present such a high risk, or they haven't addressed their risk factors. So, for the person who's responsible for getting them back out into the community, if that's on their head and they've not addressed anything, if they can't prove that their risk has changed, would you want that on your professional reputation and conscience? Probably not.

The considerable anxiety that is provoked in high-profile decision-making increases the need for individual self-protection through defensive risk practice. This is because decisions are made within particular cultural environments characterised by fear as noted by Whittaker and Harvard, (2011). The secondary risks regarding decisions in the face of the primary risk to the public is encapsulated by the fact that any decision would be "on the head" of individuals, implying absolute liability. At a profoundly deeper level, any potential hazard is said to be on the "conscience" of a person, implying that the depth of this burden extends beyond the professional realm of decision-making. It indicates an inherently moral risk for human decision-making which cannot be easily dismissed or rationalised by processes.

Systemic harms in risk practice

As well as managing the fear of risk, of blame and the perceived lack of protection from the system, risk management also creates further anxieties which are embedded in the adversarial nature of processes which bring together systems of people who have distinct roles. Bill explains:

> ….with sex offenders... you can't look at the situation and just sit back and go "well this is an easy case to manage". No case is easy, not one, not one of my cases can be classed as "oh he's easy to manage", ….and it's about building that relationship, building that rapport, which can take so long to build and sometimes the parole process can completely hinder that because if you've been ripped apart during a parole hearing it kind of knocks you backwards you know, you've got a lawyer who's telling them, "Yes, you should be released, yes, you should be released, *it's his fault, it's his fault, it's his fault*". It's kind of what's the point? you know what I mean? Because it damages the relationship between you and the client. …It becomes an 'us against them' scenario.

Bill explains that the parole process is a site where social workers can feel under attack and uses a metaphor of physical violence to show how processes can be confrontational and polarising. He explains how working with his client group is fragile and the relationships of trust with clients are undermined as is his credibility, thus damaging the key aims of relationship-based practice. This disempowers Bill, leaving him vulnerable and attacked from another angle. It also places him at an extreme disadvantage where he now has the further anxiety of managing a potentially fractured relationship which is antithetical to good social work practice in which a trusting relationship is key (Simmons; 2018; Ostermann, 2012; Ruch, 2010; Ruch et al, 2018). Bill explains that attack at the parole hearing creates a "them against us", which adds to his sense of apprehension and burden. In doing this he raises important points about the violence of the system which damages key relationships in such a way that promotes distrust and suspicion- which have crucial implications for his work and his ability to manage its embedded anxieties. He articulates a sense of futility showing that, in his view, despite these seemingly rational processes, in practice they are uncaring, depersonalised, and professionals are treated as objects as cogs in the machinery of risk with the emotional challenges of risk work wholly neglected. As Menzies-Lyth (1981) explains, the fragmentation of tasks as features of organisational defences are introduced to protect the organisations, but they can be damaging and distressing to workers. Because the prism of risk becomes the sole lens by which workers perform their tasks, this is to the detriment of the emotional and human dimensions of risk work limiting both individual and organisational resilience.

Finally, Oliver a policy official shares his views on why he thinks the management of those subject to the order causes anxiety for social workers. He explains;

> I think it starts off as an anxiety of like "oh, we're getting this individual [on an OLR] that's coming out" and I think the thing that probably does stand out is the complexity that comes with those cases…[and] the depth of the risk management plan will be a lot more for an OLR…So that can work two ways, I've had people say, "well, actually when [the person on licence has] come to us we've got this risk management plan that's been updated for 10 years, we've got all this information, actually, that's really good, and we're able to take that case and were able to understand them [and] work with them". Whereas there are other people that have potentially looked at it and gone "oh my God this is really quite overwhelming" … and I do wonder whether that is tapping into experience, erm skill set, [and] confidence …[but] you find it goes from sort of anxiety to quickly being like, well, actually this isn't that dissimilar to what we do. It's maybe just more intense. And there's probably an anxiety of just the fact that we are there, you know, like the fact that there's this organisation that you have to report to that is unique, there's no denying that you know.

Oliver reflects the views and experiences expressed at the beginning of this chapter pertaining to the complex interplay of risk of harm although he calls this 'complexity'. This is what he outlines as the first difficulty of the OLR process. Secondly, he explains that the sheer volume of information contained in the RMP is perceived in two ways by social workers; they may view it as comprehensive and useful in its level of detail, or they may view it as worrying - in its own right. He also explains that this will also be impacted depending on the individuals' skills, confidence and experience. This is a somewhat narrow view, for while Oliver recognises the "intensity" of OLR case management, he places the emphasis on individuals rather than on the system. This point being made, he does acknowledge however that he feels that the oversight of the Risk Management Authority exacerbates the pressures and "anxieties" of risk management as it requires an additional and "unique" level of auditing and accountability.

The integration of these last two examples highlights how multiple organisations brought together to manage risks often amplifies extant anxieties within the system. Each agency, driven by its own mandates, imperatives and defensive structures, appears to prioritise the containment of primary and secondary risks over risks to human actors. Partly these fragmented and overlapping systems aim to enhance protections against scrutiny when failures in risk management systems occur. And yet they intensify fears and anxieties at an individual level creating cultures of reputational preservation and moral self-protection. This defensive

environment shifts focus away from the needs of offenders and practitioners, reducing the former to abstract categories and the latter to executors of procedural tasks. This chapter shows that the needs of human actors - professionals attempting to effectively manage complex cases - become peripheral, as the system prioritises ritualistic task performance and inter-agency collaboration.

Conclusion

In this chapter, I have shown how risk labour is performed in volatile terrain. Those who operate the machinery of risk are required to make decisions in changing and uncertain contexts where human judgement and decision-making play a central role. Knowing that we cannot know the risk we face now or in the future as outlined in the quote at the beginning of this chapter means that there is room for error. In cases involving high levels of harm those responsible are therefore not merely lawbreakers; they shatter a sense of safety, and trust, and create dread risks for practitioners and the public alike. The fear of such persons is amplified by the extreme nature of their offences, provoking visceral responses which heighten anxieties about the fragility of the systems instated to meet the ends of public protection. The primary task of serious offender management, which is to protect the public from risk as I have shown, can result in unintended risks to the subjects governed by this system and those governing them. Repeated exposure to trauma saturated narratives causes the transference of trauma to professionals. This, in some cases, was explained as an altering of worldview, where the encroachment of risk narratives and risk itself seeps out of professional boundaries into the everyday lives of risk practitioners. It has been argued in this chapter that risk labour causes emotional ‘taint’ and ‘stigma’ and that some practitioners experience vicarious trauma due to the moral load of handling distressing cases, particularly those involving vulnerable victims (notably children). Risk labour requires mental resilience and the management of emotions which as some interviewees have shown, is performed through positively reappraising its negative impacts.

Risk is governed by the defensive system and by professionals’ dread fear of the worst-case scenario which priorities low frequency high-cost harms in the minds of decision-makers. Uncertain outcomes make it difficult for practitioners to make decisions that won’t result in further harm, and this is exacerbated due to the wider culture of blame in which risk management systems are situated. This exacerbates a fear of “getting it wrong”, a fear of discipline by the system and a fear of reputational annihilation. The range of fears that emerge

at different stages of the risk management process directly impact on the decisions that are made. This leads to a risk aversion or defensiveness as described by some professionals. This is compounded by the intense scrutiny of the system which amplifies these challenges, especially in high-profile cases. Institutional power operates in such a way that the system is able to allocate blame and impose its own forms of sanction, while simultaneously defending itself by pointing to established procedures and attributing failure to individual human error. This argument sees the fear of blame as not being absorbed by the various organisations and their systems of defence; but absorbed at the site of the individual. The system itself offers little protection to risk practitioners, in appeasing these concerns - fear is both externally induced and induced *by* the system. This is important as it illustrates my last point in that the system can ramp up bureaucratic controls, auditing and risk management processes to depersonalise risk, to show due diligence of process yet when dealing with the unpredictable nature of the future conduct of human beings it comes down to "taking chances".

The notion of 'unconscious collusions' (Jaques, 1955; Menzies-Lyth, 1988) within the OLR risk management system may be particularly harmful precisely because such dynamics remain largely unacknowledged; this is suggested by the relative absence of sustained empirical and theoretical inquiry into these processes. Such collusions create cultures where harmful practices persist and where systemic flaws, such as excessive focus on procedures or risk-averse decision-making, are accepted as unavoidable rather than actively challenged. Risk practitioners may be risk averse because they believe that such a decision is the correct one, or because deviating from that position could expose them to scrutiny or blame. The failure to identify and address these issue can perpetuate a cycle of dysfunctional logic and practice where despite some tinkering around systems and processes appears reformative, this overlooks that emotions lie at the heart of this work. Within this risk practitioners are required to manage the primary risks of their work, and the emotional and professional risks to themselves, each as important as the other – exemplifying some of the human costs of risk management.

Chapter 7 The Human Cost of Risk: Between Fragile Hope and Inevitable Despair

The heart dies a slow death, shedding each hope like leaves until one day, there are none. No hopes. Nothing remains. *Memoirs of a Geisha* (Golden, 1997:409)

Introduction

The above quotes strike at the core of this chapter, for they illustrate the significance of hope as central to the human condition. It may be argued that Scotland's Order for Lifelong Restriction is the ultimate sanction available to the Scottish courts constituting, as it does, a permanent and lifelong mechanism of control. With its imposition, comes the allocation of a new identity imposed by the system, which brands the penal subject with the permanent mark of dangerousness. This chapter is reciprocal to the chapter which preceded it, illuminating the core contradictions and challenges of labouring under the conditions of risk and public protection. It brings to the fore a different set of human consequences of preventative punishment, highlighting the significant challenges faced by those subject to the OLR, as well as criminal justice agents, thus raising important questions about the position of the carceral subject within a wider framework of inclusion and citizenship in contemporary Scotland.

The Order for Lifelong Restriction imposes on its subjects a continual state of liminality, between current predicaments and uncertain futures, their fate hinging on opportunities for rehabilitation, parole and compliance with lifelong risk management plans. This chapter explores themes of hopelessness and despair which bleed from the condemned subject, vicariously contaminating criminal justice agents in a way that impinges on their work, and which conflicts with human, professional and criminal justice values. In doing this, it raises pointed questions about the role of hope in the administration of lawful punishment (also see Brownlee, 2021). Those responsible for the care and management of OLRs articulate the emotional difficulties of this work which embodies and communicates a form of punishment which symbolically marks and permanently excludes those upon whom it is imposed. At its most poignant, the mark of the Order signifies a banishing of the risky individual, who through the criminal justice process is colonised and stripped of agency, reduced to an object of

bureaucratic control. Preventative justice as experienced in Scotland inaugurates an extreme form of "carceral citizenship" which shapes the social and economic participation of those subject to it (Loyd, 2015; Miller and Alexander, 2016; Miller and Forrest, 2017). For Brownlee (2021), a framework of punishment ought to consider a 'standard of hope' for it to be legitimate and morally justifiable and compatible with a person retaining hope for the future.

Preventive sentencing as it is articulated in this chapter appears to challenge the normative principles of human dignity, a core concern in evaluating cruel and unusual punishment (Sarat, 2014). Such principles recognise and uphold intrinsic human value, through recognition of personhood and respect for individual autonomy, ensuring that all individuals are treated with equal respect and protection (Donnelly, 2013). I have already noted that these principles are stipulated in domestic law specifically, within the Equality Act 2010, the Human Rights Act (1998) both of which have incorporated the European Convention of Human Rights (ECHR) and the United Nations Convention on Human Rights (UNCHR). This includes protection from inhumane, and degrading treatment as stipulated in Article 3 to the ECHR. These principles collectively aim to support individual development and the fulfilment of potential even and specifically in detention. Accordingly, human rights apply to all persons, including those who become wards of the state, or those subject to preventive punishment (Ashworth and Zedner, 2014), or post-prison supervision and control (Maruna, 2001), or others thought to pose an ongoing risk to public safety (Cole, 2003, McVeigh, 2005; McSherry, 2014).

This chapter explores how practitioners perceive and interpret the experiences of OLR subjects, highlighting the existential realities of the Order - such as hopelessness and despair - as mediated through the professional perspectives of those with direct responsibility for sentencing, managing and caring for them. These experiences are mediated in three main ways: through the imposition of the OLR on the subject, through the complexities and failures of prison progression and the helplessness that this produces, and through the positioning of the person on an OLR as an excluded subject, a "carceral citizen" (Miller and Stuart, 2017) who faces the lifelong consequences of their criminal sanction (Ievins, 2023). This chapter unfolds sequentially. Firstly, it examines theories and the legal implications of *hopelessness* in relation to criminal justice to lay the groundwork for a discussion of hope and its relationship to indeterminate sentencing. Then it looks at the penal agents' interactions with the OLR process focusing on their experiences in the Scottish prison estate. Following this, it examines matters of parole, community supervision, reintegration and the hardships experienced by those who

are released on licence and the implications of this for justice actors, and how this shapes their engagement with risk work. Finally, this chapter draws on the views of policy makers who have a role in OLR policy who articulate the moral and technical complexities for this group and their inclusion in wider society.

Hope and its role in criminal justice

Before embarking on this chapter, it is necessary to briefly recount the importance of 'hope' and its salience and meaning in criminal justice. Hope, according to the Miriam-Webster dictionary, is defined as 'to cherish a desire with anticipation: to want something to happen or to be true'. For prisoners, hope is key to reimagining a future (Crewe et al, 2020), playing a role in determining human self-worth, self-belief and maintaining motivation and resilience in difficult times. Crucially, 'hope' provides a sense of purpose, a lifeline in times of desolation and loss, as Shakespeare so aptly wrote 'the miserable have no other medicine but only hope' (Measure for Measure, Act III, Scene 1, line 2). In regard to criminal justice, hope of an imagined future may be the last vestige of protection following the experience of being publicly and symbolically degraded during criminal proceedings (Garfinkel, 1956) or variously 'pained' (Sykes, 1958) by the imposition of a prison sentence (Crewe, 2011; Liebling, et al, 2019; Wright et al, 2023). Hope inspires perseverance and the endurance of the human spirit in the face of adversity (Mandella Rules, United Nations General Assembly, 2015). To lose hope is to despair, it is an emotional state of overwhelm, helpless in the face of a desired outcome.

Hopelessness and its implications have been well captured in relation to long-term, or life imprisonment (Vannier, 2016; Seeds, 2021) within indeterminate sentencing regimes such as the IPP (Independent Advisory Panel on Deaths in Custody, 2021; IMB, 2023; Prison Reform Trust, 2020), the internment of political prisoners in Ireland (Barry, 1949) and the suffering of those on death row in the United States (Sarat, 2014). Hope is relevant in the context of life imprisonment and has been discussed at the European Court of Human Rights, in terms of culminating in a deprivation of a *right to hope* (Trotter, 2022; Seeds, 2022). In this debate the measuring of a 'standard of hope' against a range of punishments has been recommended (Brownlee, 2021).

In undertaking risk labour, professionals bear witness to the plight of a subset of penal subjects who, by virtue of being designated as bearers of exceptional risk, are vulnerable and marginalised even within the wider prisoner group (Cornish, 2022; van den Berg, et al, 2018) and again when they are released (Ievins, 2023). Much of this work incorporates a duty to care

for, and to support the psychological wellbeing of those within or under their care, which is enshrined in legislation and policy. A professional duty to care for exists alongside a 'duty of care' a legal principle which requires both individuals and organisations to act with "reasonable care" to avoid causing harm to others. This common law principle established in Scottish case law in *Donoghue v Stevenson (1932)* introduces the 'neighbour principle', asserting that there is a duty to provide reasonable care to avoid acts or omissions which would foreseeably injure those directly affected by their actions. In addition, the *Adult Support and Protection (Scotland) Act 2007)* places a duty to protect vulnerable adults from harm in Scotland. Collectively, these provisions aim to ensure accountability and promote safety by mandating standards to prevent foreseeable harm.

These principles apply to the public authorities responsible for OLR prisoners, including the SPS (Prison Reform Trust, 2022), which has a statutory duty reinforced under Article 2 of the ECHR (United Nations, 2015). In this context, there is a legal as well as an ethical obligation to ensure the safety, care and humane treatment of those in prisons, as well as a duty to protect from harassment, abuse and discrimination. There may also be consequences under governance principles for individuals and organisations who fail in meeting their duty of care. Therefore, there must be efforts to prevent harm, safeguard mental health and preserve psychological wellbeing under conditions of confinement. The SPS and Local Authorities are obligated to comply with domestic legislation such as the *Prisons (Scotland) Act 1989,* the *Human Rights Act 1998, Equalities Act 2010, The Duty of Candour Procedure (Scotland) Regulations 2018*), as well as international legal standards, all of which mandate humane treatment and respect for individual rights. Furthermore, the SPS operates under a set of Prison Rules that has established guidelines for the treatment of prisoners, including standards for accommodation, healthcare, discipline, and complaints procedures (*The Prisons and Young Offenders Institutions (Scotland) Rules 2011*).

In the landmark case *Napier v Scottish Ministers (2005),* the Scottish Court of Session held that the practice of "slopping out" - where prisoners were forced to use buckets for passing urine or faeces - violated Article 3 to the UNCHR. The UK is a signatory to the United Nations optional protocol to the Convention against Torture and other Cruel and Inhumane and Degrading Treatment (United Nations, 2002). While prison inspections in the UK date back to the 18th century (McConville, 1981), His Majesty's Inspectorate of Prisons now has a formal obligation to protect the rights of prisoners. This is carried out through inspections guided by

ECHR provisions, ratified into domestic law via the Human Rights Act 1998, reinforcing that all assessments of prisons must take these human rights standards into account.

Sentence progression is a key area of prison policy, central to rehabilitation and community reintegration, as well as to hope and individual aspirations. It is by following the progression pathway outlined in Chapter two of this thesis that prisoners can demonstrate suitability for release. Progression is particularly important with reference to long term, indeterminately or life sentenced prisoners who are required to demonstrate suitability for progression, via engagement with activities or programmes at key points in a prison sentence as determined by the Risk Management Team or Risk Management Plan.

A 'right to hope' as highlighted within European Jurisprudence emphasises the duty of care owed by member states to those in prisons (Trotter, 2022; Seeds, 2022; van Zyl Smit, et al. 2014), stipulating that prisoners should be supported towards release, including the opportunity to access rehabilitative programmes (Prison Reform Trust, 2022). However, progression remains a key issue for the Scottish Prison Service as highlighted in the thematic review mentioned earlier (HMIPS, 2024). These systemic difficulties are said to be set against a backdrop of overcrowding in the prison estate and the pressing implications for the wellbeing, safety and security of prisoners (HMIPS, 2024; Howard League, 2014) and staff (Scottish Government, 2024), as well as for the quality of provision across the board. These systemic issues, and the high needs and risks which have warranted the imposition of the OLR sentence, present several significant challenges for those sentenced to the Order and those tasked with their care.

These pressing weaknesses call into question the commitment of the Scottish state to a 'standard of hope' in punishment. The 'pains' (Sykes, 1959) of indeterminate imprisonment become particularly acute when release is hinged upon meeting the needs of progression in a system which cannot cope with its own demands. For the small number of prisoners subject to OLRs who have been released on licence, support in the form of risk management continues due to the statutory measures of supervision in place. These measures in themselves, may hamper and prevent meaningful integration. However, as discussed in the previous chapter, the anxiety and fear of professionals responsible for managing people in the community suggests that even outside prison supporting hope may compete with risk management impulses and that may hamper and even prevent meaningful reintegration.

Trapped in Hopelessness: Challenges of the Prison Progression System

The *hope standard for punishment* requires that a 'person can sustain hope about [their] punishment whilst enduring that punishment and feel hopeful that [they] will enjoy a minimally decent future - a future worth hoping for - after [their] punishment ends' (Brownlee, 2021: 596). Where punishment is organised around risk, however, this future-oriented hope becomes fragile, as continued confinement and progression are tied less to sentence completion than to assessments of dangerousness. Risk work is challenging, it colours the interactions and beliefs of penal actors resulting in feelings of helplessness, loss of control and ultimately a decline of faith in the system of punishment. Little is known about the lived experiences of those subject to the order, with the exception of a small-scale research project by the RMA, (2023). This chapter offers a valuable contribution in shedding light on the experiences of penal subjects, albeit through the perspectives of those who work with them.

Amie, the psychology professional, has a key role in the case management of OLRs. She explained that, after the sentence has been imposed, and the subject imprisoned, an introduction will take place between the person subject to the order and the designated 'lead person' who may be a prison psychologist or first-line manager from the prison service. This marks the beginning of the process, that will lead to the development of a custodial Risk Management Plan.

Nic So what about the perceived impact on the prisoners themselves?

Amie So yeah, I think a large number of them when they first receive their sentence and [we] go to speak to them [to] explain to them what that means, [and] there's such a naivety about what the sentence means. And I don't know for sure exactly where it comes from, I don't know if it's like a lack of knowledge [on the part of] their legal representation, whether [they are] almost sugar-coating it a little bit. But generally, the contribution they get from their legal representation kind of misrepresents the sentence and almost makes them think they've got a good chance of getting out at their first parole.

Nic Wow seriously?

Amie Yeah, and then we go down and deliver that news, it tends to come as quite a huge blow and you quite often get a kind of resistance and challenge because it's 'oh my lawyer said …' and suddenly there's this horrible situation emerging in front of you when you see them realise that they actually could be in jail, potentially for their whole life…or at very least for a long time. Erm so that that's tricky and it's difficult to experience and you don't see that to the same extent with any other kind of sentence…

Nic Even for lifers?

Amie I think lifers seem to have, I don't know, I feel like their journeys are a little bit more certain so like if you look at like a paperwork for lifers, it's quite kind of mapped out.

Amie explains that her initial interactions with a person subject to the OLR can start on a difficult footing due to a lack of understanding of the sentence and the realities of how it works in practice. In her view, the origin of this confusion is due to a 'misrepresentation' of the sentence due to the way the defence lawyer has explained it. Because the OLR is a risk-based measure added to a criminal conviction, that may have a relatively short tariff, this may be perceived as somewhat ambiguous, and those who receive it may not initially understand they have been issued what is in 'practical terms a life sentence' (Ferguson, 2021:1). This will have an obvious psychological impact when its true nature and extent is fully realised. Amie explains that this is experienced as a shock which marks her experience of working with people on OLRs as distinctive from other life sentences. It is also likely that the notion of a life sentence is better understood generally by people in prison. Despite jurisdictional variations, in nearly all of them life sentences may be imposed following a conviction for murder (Morrison and van Zyl smit, 2020; Van Zyl Smit and Appleton, 2019).

By comparison, the Order for Lifelong Restriction is relatively new, jurisdictionally distinct and can, as already pointed out, be considered following conviction for *any* offence (where risk assessment supports this). Even its name, derived from psychiatric disposals, renders its distinctive nomenclature obscure to those outside (and according to Amie also inside) the system.

In a separate interview, another psychologically trained professional discusses the experiences of those subject to the Order.

Nic: I was going to ask, because you have also worked in prisons, how did you find that the men experience the order? I mean, do they accept it, do they always understand it, do they react against it?

Jodie: Generally speaking (short pause) they're not thrilled, erm understandably so. What I would say is a lot of the guys I worked with didn't really understand, you know they didn't really understand why they got it, they didn't really understand what the implications were, you know long term, what that was going to look like for them, and there was quite a lot of hopelessness, to be honest. Erm so that kind of feeling, of "*I'm never going to get out of here, that risk assessment report is so damning, erm that I'm gonnae be here for ever*" (original emphasis) That was quite hard to work with you know, trying to convince someone that you *can,* you *can* move forward (original emphasis), and you just need to work with me and do these things, but I think it just felt like such, such a long road erm that you know very often that helpless… "arrgh what's the point".

Here Jodie describes how there is a lack of understanding about the sentence, its function and purpose and the reasons why it has been imposed. Again, this may indicate something important about the way in which the sentence is explained by professionals, or, about the way that the explanation is received and understood at a time when a defendant would likely be under considerable stress and anxiety having been found guilty of a serious crime and the OLR imposed. Jodie raises another similar point to that made by Amie, regarding the indeterminacy of the sentence and the unknowingness of the future as well as the possibility of ever being released. She observes that the content of risk assessment reports, and the way risk is constructed within them, contributes to OLR subjects experiencing their punishment as effectively perpetual, fostering feelings of helplessness and defeat. This shows the erosion of hope for the penal subject and a sense of resignation to life imprisonment which in turn has an impact on Jodie, as the level of investment and encouragement required intensifies due to hope's absence. This culminates in issues of management and engagement in the risk work that is required to facilitate prisoner progression. Amie captures the hopelessness of the sentence.

As it stands at the moment, I think it's a terribly hopeless sentence for people and it's also quite damaging and quite risky because you then find these people

> become really hopeless, [and] fatalistic, and then actually become more violent as a consequence.

This is a powerful view of the Order showing that it is experienced as directly causing a loss of hope and thereby, producing further harms; harm to the OLR subject and potentially harm to others. This is in opposition to the rehabilitative aims of punishment and contradicts the judgement in *Vinter v Others (2013*) which determined that a deprivation of a right to hope is a deprivation of the principle of human dignity. This description of hopelessness and fatalism echoes findings by other authors including the Prison Reform Trust (2022) who write about the damaging effects of indeterminate sentencing, particularly when prisoners lose hope of being released. As well as frustration and aggression (Prison Reform Trust, 2020), this can lead to severe deterioration of mental health and chronic stress and heighten risks of self-harm and suicide (Independent Advisory Panel on Deaths in Custody, 2021; Brownlee, 2021; Armstrong et al, 2023). It can also lead to withdrawal from social interactions, and culminate in disillusionment with rehabilitation programmes (Bullock and Bunce, 2020).

Hope, redemption and chaplaincy

Prison chaplaincy has a long tradition. In the UK such practices have existed since medieval times where members of the clergy have provided spiritual guidance to prisoners awaiting execution, in preparation for death. As with many professions, during the industrial revolution these practices became increasingly formalised focusing on moral reform and repentance. Influenced by the work of prison reformers like John Howard, prison systems in the UK and other anglophone jurisdictions incorporated chaplains to address the spiritual needs of inmates (West, 2011). The plight of prisoners and the work of prison chaplains has been illustrated so well in literature, for example, in Victor Hugo's *The Last Day of a Condemned Man* (1829) and more recently in the memoirs of Sister Prejan in "*Dead Man Walking*" (1993). Central to the role of chaplains is fostering hope and advocating for humane treatment. Chaplaincy, derived from the term 'care of souls', has its origins in various religious traditions, and a pastor will provide spiritual and emotional care to support the well-being of those in prisons. Their enduring presence reflects society's belief in the potential for redemption. The Scottish Prison Service operates chaplaincy, employing various representatives from faith groups who provide pastoral care to prisoners (SPS, 2024). Chaplaincy emphasises upholding human dignity, offering a level of care which addresses the needs and concerns of prisoners through a prison sentence, particularly in times of crisis. In the previous chapter I demonstrated the difficult task

of the prison chaplain in providing solace and relief from emotional pain during imprisonment, it will now consider this role in relation to hope. Some of the difficulties of this are highlighted by Russell, a prison chaplain who took part in this research.

Nic: So how does this impact on your work, in terms of spiritual care?

Russell: Pastoral care.

Nic: Oh, yes. What does that look like for somebody who is out of the loop?

Russell: For the OLR population we (pause) a lot of the time I am just a sounding board to listen that's my frustration. I, I can't give them any hope. I'm not going to give them false hope and not just give them some sort of *flannel* just to keep them motivated to keep going [in the hope that] that some of them will get to the finishing line, because they never see anyone else getting to the finishing line. That's the problem so why would they think they will?

Russell explains that the indeterminate nature of the sentence limits the provisions of pastoral care. He directly addresses the implications for hope, which is intrinsic to his work, stating that he is unable to provide hope which is, according to Judge Power-Forde is 'an important and constituent constitutive aspect of the human person' (cited in Trotter, 2002:2). He explains that he is unwilling to give OLR prisoners "false hope". He uses the term "flannel" which symbolises care, warmth and protection but which also implies comfort and meaning in the course of his work. In Russell's view, hope is out of reach for the OLR prisoner. The sentence is a source of frustration for those encountering it and it places limitations on his work resulting in ethical and moral tensions and contradictions. In his refusal to be disingenuous or unrealistic in terms of the despair felt by prisoners, he conveys a sense of frustration and hopelessness himself. This is reinforced in a subsequent quote,

> I, I don't know, I don't know what we are doing with these people anymore, I don't think anyone really does… maybe psychology, but I'm not convinced they do, I know that everybody, not everybody - social work shares our frustrations. Erm… how, do we stop this happening? Where do we go? Who is going to listen? I don't know if I'm helping, I'm just ranting (laughs). I like to take every opportunity to beat this drum and say come and look at some of these. You can't even run and tip off the media because who, who would care?

Russell's despair is embedded in a loss of faith in the system; the hopelessness of the Order for those on it has become a hopelessness that he too shares. He asks, how do we stop this happening? Who is going to listen? This conveys his sense of solitude, disconnect, and lack of support in the system; a view which, he explains, chaplains share with social workers. His question, "And who would care?" reinforces the symbolic position of the OLR within a wider social framework which reinforces the pariah status of those convicted of serious harm. Drawing on the work of Durkheim and, more recently Mary Douglas (1966), symbolic violations of cultural norms, or behaviours which constitute taboos, transgress against the moral and social order. Such propositions show how the perpetrators of particular social harms become to be held as polluting and dangerous. Russell's experience is beyond hopelessness and edges on despair. Through this, he is vicariously experiencing the segregation, stigmatisation, dehumanisation, and isolation ('who would care?') experienced by the OLR group as polluted subjects. At the same time, he is articulating a sense of vocational struggle where he is unable to fulfil his spiritual duties. This shows how bearing witness to the suffering of OLR prisoners is emotionally and psychologically challenging, leading him to deeply question his role, the fairness of the criminal justice system, as well as more existential questions about the position of persons who have caused harm within a wider framework of value and human life. In many ways, this shows that work with prisoners who are facing indeterminate sentences can cause professionals to question their sense of purpose, and this experience can also be one of spiritual challenge compounded by exposure to prisoner narratives. I asked him directly about his view on how the sentence is experienced by those in his care.

Nic I know it's a general question but how do you think it affects the men?

Russell Total, total hopelessness, total, they don't have an ounce of hope…it's just distressing and frustrating and everything just takes agonisingly long…

Nic Do they even try then or does that hopelessness take over?

Russell Sighs … some will give up, some will just accept that they are never getting out and some will do what is asked of them, but when they do that … it's almost like that constant fear as well of "I will do ABC and it will go to another group and it's like, okay we now want you to do D and E now as well and then a wee bit of F". But between the ABCDE and F you are taking about 18 months to a year so".

This really captures the impact of the OLR on the imprisoned subject and the hopelessness and resignation they too experience. As documented in the introductory chapters outlining the key features of the OLR, very few prisoners on the sentence have been released into the community on licence. Russell perceives risk processes to be ambiguous and unfair, with changing criteria and requirements for release seemingly shifting. These bureaucratic hurdles, which will be explored in the next chapter, create a sense of being in limbo through the difficulties of navigating the imperatives of risk management. Any suggestion that this outcome is an unintended consequence of indeterminate sentencing is much too charitable, because it is hard to see how this is not an inevitable result of a sentencing system based on risk and governed through dread fears. This is despite the fact that, in theory, a person who is able to comply to the standards set in their individual Risk Management Plan should experience a corresponding reduction in the level of restriction. It seems that the weight of the emergent consequences of the OLR following the introduction of the sentence may not have been fully foreseen or imagined in much the same way as occurred with the IPP in England and Wales. This is particularly true regarding the human costs of such measures which result in emotional turmoil, trauma and distress. Russell speaks about his perceived unfairness of the OLR:

> I was speaking to a prisoner last week who I know quite well. Actually he was sentenced to 18 months, and he has now done 14 years, and I just think that's shocking. I, I can't see how a judge can pass a sentence, I mean cuz 18 months is 9 in practice…. it's meant to be like the halfway mark. He's been in for more than a decade and he's been recommended for courses that the jail doesn't provide! And the Parole Board won't release people until they've done the courses. What do you say to people like that? What d'you say? And they are testing him because a lot of his behaviour might be rooted in eh, I've forgot the word (pause) eh, Foetal Alcohol Syndrome, so they are going to do tests and stuff to see if he suffers from that…. And then he says to me "so what anyway? because it's just a game, they will just delay it and delay it and say we need to test you for this and that but then probably take another year before that comes around, and then they will take another six months" … I'm very, very, cynical about this…. (Prison Chaplain).

In Scotland, any sentence of under four and a half years is considered a short-term sentence. In general, those subject to a sentence under this threshold are released at the halfway point of their tariff. Russell is correct about the general practice in which an 18-month tariff would be reduced to nine in practice, but the sentence calculation for an OLR departs from this as

outlined in Chapter two of this thesis. This demonstrates how uncertainty over sentence length, shared by both staff and prisoners, gives rise to a profound sense of injustice. Combined with Amie and Jodie's perspectives, it is clear that not only is the preventative function and purpose of the sentence not fully understood but the sentence itself is not either. Russell goes on to highlight very real concerns about recommendations to undertake courses which the Scottish Prison Service does not provide, or where there are significant delays in providing them as noted in *BS v Scottish Ministers.* For the OLR prisoner, such recommendations are set out in the individual specific Risk Management Plan. The issue here is that if the prisoner cannot undertake the specifications in his plan to mitigate future risk, it is not likely that he will be eligible for progression or parole.

Russell conveys a despair such that he can give no answers to the OLR prisoner, and both are immobilised by the strictures of the system. He mentions that this specific prisoner is being variously "tested" to identify the cause of his behaviours, specifically for Foetal Alcohol Syndrome (now known as Foetal Alcohol Spectrum Disorders (FASD)) and that this is happening having spent fourteen years in the prison system. It may be implied here that a suspected neurodiverse condition may be a barrier to his progression. Russell shares that the prisoner is also cynical regarding the purpose of a diagnosis and whether a diagnostic label of this type will be of any material benefit to him. I asked,

Nic: What are we doing with these prisoners?

Russell: We are warehousing them, just warehousing them.

The term warehousing is unsurprising given the overall feeling of this interview and other interviews. It is clear that, despite the aims of OLR law and policy the primary effect is the containment of individuals for public protection. Here, there is an obvious tension between Russell's understanding of the specified function of this form of indeterminate imprisonment and the conflict that this brings with rehabilitation as an organising principle of justice – and therefore his role. This also raises questions about the insidious nature of preventative punishment which, despite the apparently rhetorical commitment to rehabilitation, seems to be ill equipped to deal with the needs and vulnerabilities of some prisoners thereby abandoning them to punitive punishment.

In a similar vein, Edward, a senior and experienced legal practitioner gives his view of the Order.

> "It's slamming the prison door… we've now got a category of people who are less likely to get out than those who commit murder".

The metaphor, "slamming the prison door" signifies the permanent, wholesale termination of liberty and a strong sense of the finality of the physical separation of the OLR from the rest of society. It implies a closing of possibilities for redemption and reform, sealing the individuals' fate within the prison walls in a way that is irreversible and enduring. Edward compares the OLR to the discretionary life sentence, which has largely been replaced by the OLR. He notes,

> "it's, it's become, in its own way, as blunt a tool as the discretionary life sentence... In fact, it is more dangerous…."

Here Edward echoes the views of other practitioners regarding the approach and effectiveness of the OLR. Using the metaphor "blunt tool" suggests that it is both ineffective and unsophisticated, unable to address complexity with a necessary level of skill or detail. In its bluntness, it cannot address the very problem it sets out to address, that is, to neutralise the risk of those who are thought to require an exceptional level of control. He highlights one of the consequences of this approach which is that very few OLR prisoners progress to the community, and that progression for this group may be even more difficult than under the discretionary life sentence provisions. A negative comparison to a life sentenced prisoner is also captured by Russell.

> In practice it's really become, a life sentence or more than a life sentence, I think [the OLR is] actually worse…

A life sentence is one of the most challenging forms of punishment, for not only does it take away liberty for extended periods, and it can mean detention without limit of time in Scotland. The uncertainties of prison progression and parole create considerable uncertainties and have profound psychological implications. Academics and human rights organisations have documented the emotional challenges of prisoners, including those subject to life and indeterminate sentences (Crewe; 2011; Liebling, 2013; Zehr, 1996) and life without parole (Leigey, 2015). When the OLR is described as worse than the mandatory life provisions, it emphasises the extreme nature of indeterminate sentencing, particularly due to the sentence structure, delays in progression and the uncertainties of risk.

George a judge who has remitted cases to the High Court for consideration for an RAO, explains that in many cases an extended sentence is an appropriate measure. He explains the reasons for this;

> I am not an OLR sceptic, but I am OLR cautious, because I have seen the figures. From a relatively early time it became apparent that people weren't getting out. The custodial parts could be very short…you would be expecting people to be released in a few years after the OLR came out and they will still in 10 years on …. I don't know if any have been released now but I know that at the beginning of last year, I think there were about eight at liberty in the community, and there are far more dying during the sentence.

While George explains that he is not sceptical of the order, he explains that he is "cautious" due to the direct implications of the indeterminant sentence particularly where there are short tariff lengths. He acknowledges that far more have died during the sentence which is an indication of his concern and perhaps a reason for his cautious approach. He further goes on to express that the Order may convey a false sense of security for those upon which it is imposed. He explains:

> If he's on the OLR with a punishment part of two half years, his first thoughts might be, that's great, but I think he's going to work out very, very, quickly that he is gonna have to spend maybe the bulk of the rest of his life trying to convince the authorities that he's safe enough to be released, and that's a pretty dispiriting position to be in.

Here he connects dawning awareness of the severity of the sentence on the one who receives it, and the implications for hope. This also suggests, as others have done, that the tariff parts of the sentence can be misunderstood and potentially misleading. As I have said, this also raises important questions about the unclear nature of the sentence and the ability of those on the OLR to fully comprehend its true nature.

Stigma and the lifelong sanction: the enduring impacts of criminal labels

A key theme of this chapter has been the impact of the OLR on the subject. It shows that the order culminates in a heavy symbolic weight and is a catalyst for hopelessness and despair. This occurs through the designation of a highly stigmatised identity, the ousting of the dangerous subject from the "universe of civility" (Rose, 1999) and them being marked as

permanently dangerous, which impacts their future prospects. Edward, the legal professional, describes the severity of the sentence and its impacts on the OLR subject.

> The degradation of the integrity of the individual that long sentences, long times in prison, can cause means that in some ways we would be as well having the death penalty, because you're having the disintegration of the person over a much longer period of time in a way that's actually quite cruel. But it happens so gradually that no one, not many, will notice or even care (Edward, senior legal professional).

His view of the OLR subject as "degraded" echoes Garfinkle's (1959) famous discussion. His work concerned the ways in which 'degradation ceremonies' denounce behaviours and recast identities in alignment with society's contempt and collective social values. Edward explains that the individual becomes degraded by the imposition of the indeterminate sentence. Through the imposition of the OLR, the individual is symbolically marked as dangerous and deviant and his indefinite detention justified thus. When 'degradation' is applied to the integrity of the individual, it indicates that his or her moral character is 'spoiled' (Goffman,1963) and in this case, a disgraced status is imposed from which there is no coming back. The OLR subject becomes a social outcast, expelled and shunned from society, and concealed behind the ramparts of the prison walls where, "not many would notice or care" due to the carving out of symbolic boundaries. Edward articulates the suffering experienced by the person on the OLR which, in his view, is a cruel apparatus whose brutality would be circumvented if the Scottish State sanctioned the death penalty. This is an extreme position, yet it conveys Edward's perception of the 'cruel and unusual' nature of the Order, and of the deterioration of the humanity of the individual caused by an absence of a reasonable standard of hope.

Russell also conveys the isolated and degraded status of the OLR:

> There's nothing I can say to guys coming in on OLRs because many of them will be there when I retire. I just think it's a national scandal because nobody (pause) I mean, who's going to fight for the rights of a sex offender? … (Russell, prison chaplain)

As well as highlighting a sense of futility regarding the long terms of imprisonment the persons on the OLRs are faced with, Russell clearly articulates the spoiled identity (Goffman, 1963) of the designated sex offender. In his view the sex offender is beyond the usual sympathies and advocacy which may be afforded to other prisoners due to the 'master status' of such persons

as discussed by Hughes (1945). He expresses the plight of the OLR group as a "national scandal"; the tone of his comment implying disappointment and despair. Questions of time and liminality were commented on again by Russell who said:

> I mean some of the guys, the one I was talking about with foetal alcohol, he's just like "*I have to accept I'm never gonnae get out of jail, I'm gonnae die in here*" (emphasis in original). He got an 18-month sentence and was slapped with an OLR and he's thinking, *"I could die in this place"* (original emphasis). (Prison Chaplain)

The experience of the OLR in real terms, in that their sentence length could be so long that they may die in custody, echoes findings by Grimshaw (2022) and others, that some sentences are in some ways a resignation to a fate of death in prison, thus representing a 'death row of sorts' due to the feeling of overwhelming finality that reigns with the imposition of the OLR. This exemplifies the vital role and value of hope in maintaining the wellbeing of those subject to unknown futures through the imposition of the OLR. I also make the point that the rights of this subgroup regardless of offences committed, are enshrined in law which in turn stipulates that prison environments must be conducive to the preservation of hope. Without this, the system, by act or omission, invites the conditions for a series of deeply psychological and moral harms. As Brownlee (2021) explains 'any punishment that is compatible with a person retaining hope about his present situation would not force him to wait and wonder indefinitely if and when he will die at the pleasure of the state' (Brownlee, 2021:599).

Parole Board views

Alan is an ex senior member of the Parole Board for Scotland and, as such, he acknowledges the complexities associated with the release of high-risk subjects. You will recall from elsewhere in this thesis that the role of the Board is to make decisions which determine whether a prisoner is suitable for release based on an evaluation of progress, rehabilitation and assessment of potential risks to the public. Alan is asked about his views on the OLR sentence and post-prison outcomes for those subject to it.

Nic And, and then my last question, we've kind of touched on it anyway, is really about how [the OLR] fits into the kind of wider agenda of community resettlement and reintegration.

Alan I mean, it's one of those problems of how do you get people back into the community? One of the…problems for many prisoners is that they may well have progressed very well in prison, people do, people get university degrees, they do all kinds of things. And at the end of the day, the problem is that they have to be released back to where they came from, not, not in law, but because another local authority isn't going to take them on. You know, and often the worst thing for them to do is to go back to where they came from because they are back to where their drug dealer was, where there were all kind of issues, and it makes it harder for them to move on. So that was one of the kinds of regular frustrations about the release arrangements for people you know, and that's going to be the challenge for OLRs, particularly for sex offenders on OLRs. They have to go back to the community. And again, it's going to be an issue if you try and place them in another community, then that's fraught with kind of issues about "We didn't know he was there" and all the rest. And of course, you know that with some people, some of these offenders, as soon as the public get to know that they're there, and the media gets to know they're there, it becomes almost impossible to have them resettled.

Alan makes a number of salient points regarding prisoner progression, parole processes and reintegration more generally. He explains how the prison environment *can* be a place where people appear to thrive, but in his view, this doesn't establish how safe they will be in the community. In his view, the challenge for the system and for those leaving prison, is how to support this when a person is released, and the external controls of the prison diminish. Alan also identifies a systemic precarity which exists due to the requirement to repatriate parolees back to the community in which they commissioned their offences, the same communities that facilitated their criminality, and home to old associates, old habits, and all things familiar in the lifestyle that led to their conviction. He explains that this is particularly difficult for those convicted of sexual offences which cause anxiety amongst the public, particularly if they have generated media interest (Cucolo and Perlin, 2013; Gavin, 2005). This societal rejection of designated dangerous people and the imposition of the OLR takes on a Frankensteinian quality, consolidating the role of such persons as outcasts, who can never fit in, destined to a life of isolation and suffering. Any hope of post-prison reintegration is beset by fears and anxieties of an unknown future. And yet, it is well documented that an absence of social support and connections are risk factors in offending (Jardine, 2014; Maruna and Lebel, 2003). This may be especially relevant for individuals subject to an OLR, who by virtue of their designation as

a dangerousness person, experience significant marginalisation and limited social connections. Furthermore, high profile crimes may incite both fear and potentially reprisal violence, from encountering new acquaintances, further cementing his status. This can also have wider implications beyond the penal subject as family members too, may be tainted by the OLR subjects' offence due to media exposure, hampering support and connectedness required for desistance (Chondry, 2007; Jardine, 2014; McNeill, 2006; Hunter et, al. 2013).

Community resettlement and supervision

The long-term psychological impact of the OLR is articulated in practitioners experiences of the very few post-custodial cases of OLR prisoners who have progressed into the community. Rose, a community justice social worker explains her frustrations with the sentence in terms of both its status and processes, indicating an extension of the negative concerns associated with custody. She noted that her client is subject to the full gamut of licence conditions to the extent that he is *restricted* across all areas of his life. This is in contradiction with the principles of rights based, anti-oppressive practice and least restrictive intervention as detailed within the social work standards of practice, directed by Scottish Social Services Council (SSSC, 2004) and within National Outcomes and Standards for Social Work Services in the Criminal Justice System (2010). But Rose went on to describe how the OLR is both a symbolic and real "burden" on her client, indicating that release from prison is not a release from the burden of the sentence which has immobilised him, placing him in a liminal state between the past and an unimaginable future: She explains:

> He's not motivated to progress with anything in his life though. He is too reluctant three years in [the community] to have any type of relationship, intimate relationship, form peers or get a job because he's like, well what's the point? I've got an OLR… (Rose, Justice Social Worker**)**

Rose's client may have been released from the prison gates, but his confinement has not ended indicating that the hopelessness instilled by the Order prevents him from pursuing the activities of an ordinary citizen. Drawing on the work of Miller and Forrest (2017), it can be argued that the imposition of the Order represents a communication of a person's "essence". This makes him or her translatable as a criminal in much the same way as the criminal record "translates" individuals into dangerous and risky subjects who are "legible, [and] readable, to others" (Miller and Forrest, 2017:537). In this way, the imposition of the OLR sentence is experienced

as an encumbrance both practically and symbolically and it represents a decoupling of the humanity of the person from the risky profile, which supersedes all. Licence conditions are put in place under the rubric of public protection and are enforced through monitoring and supervision. Failure to comply with the conditions can result in an individual being recalled to prison. The exact conditions and their enforcement can vary depending on the nature of the offence, and the individual's unique risk management plan. Clearly, such stringent conditions of licence function as a restraining mechanism through which, the OLR is subject to a tight regime of surveillance and control.

For Rose's client, the requirements of disclosure mean that he would have to disclose his OLR status to any potential employer, or training provider, who may be reluctant to hire those with a history of serious offending (see Kosch and Kirk, 2024; Working Chance, 2022). It is likely that an OLR parole licence will include prohibitions on contacting victims or may include more onerous terms like "must not approach lone females" or may include restrictions on engagement with categories of persons such as the elderly, women or children. They may have to undergo mandatory drug or alcohol screening. Licence conditions may include the demarcation of exclusion zones prohibiting access to particular areas (for example a child sex offender may be banned from accessing green spaces and play parks). A person subject to an OLR would have to disclose new associates to their supervising officers to support risk management planning. There may be further prohibitions on their associations with known persons who have commissioned similar offences. A breach of these conditions and failure to disclose new associates (including an intimate partner who will be contacted by social services) and disclosure provided, may result in a recall to custody. Rose highlights specific implications for her client over a raft of spheres, including barriers to entering the workforce, and for the building of support networks as well as for citizenship more generally. Responding to these forces, her client has absorbed the "burden" of the OLR by imposing a type of self-isolation where he has given up on the ordinary qualities of life. Later in the conversation, Rose was asked about the implications of the order for community resettlement.

Nic You've spoken about, you know, the kind of weight, I think the "burden" I think you said, of the OLR. What are the wider implications of this [sentence]? What does the OLR mean for community resettlement …

Rose My particular guy, right? at his age and stage of his life is quite normal to socially consume alcohol and to do that, for example, in a public house isn't it? At 28 [years old] par for the course, you're a young single guy right? He (pause) is (pause) *prohibited from doing that* and it's been *three years*, (emphasis in original) how can we possibly say that he's integrated into any kind of normal community life?

Nic So what is the argument for that blanket ban on alcohol, or is there something specific to alcohol?

Rose [redacted info but mention of alcohol in relation to index offence] But, it's not like he's going to drink a drop of alcohol and it's going to go to there (moves hands upwards to indicate a rise in risk level). But it's almost just a given, [if] you're an OLR, we can't manage *any,* (original emphasis) would be, perceived risk in relation to you so therefore just don't do it. So, he lives the life of a hermit…I feel like he almost lives the life of a sixty-year-old man do you know what I mean by that? Where it's safer for him just to be in his own bubble in the house, playing computer games, reading books, with no friends, not drinking, not doing anything, not having girlfriends, not having any of these things at all because we would potentially perceive that as *unmanageable* (original emphasis). How would we manage it, it would almost make our heads explode because he's an OLR (silent pause).

It has been argued elsewhere that carceral citizens live in an "alternate legal reality" subject to legal and spatial controls that others are not, and the collateral consequences of this "constrain geographic and social mobility" (Miller and Forrest, 2017:1). Here Rose articulates how the designation of 'dangerousness' acts as a barrier to integration as well as a psychological burden. This quote embodies the marginality of her client who in many ways is managing his own risk through self- isolation. The issues associated with post-release identity and notoriety have been highlighted by former Barlinnie Special Unit prisoner Hugh Collins (2001), who deliberately chose to live in isolation following his release. Collins reflects on the challenges of reintegration, describing how the stigma of his past led him to manage his risk by limiting social contact. Rose explains that normal activities of the citizenry become risky and potentially unmanageable via the *perception* of the risk rather than the risk her client poses per se. This is a similar point to that highlighted by Kerry in her commentary on prison progression. In Miller

and Forrest's (2017) examination of the "carceral citizen", they describe how human characteristics become lost following the criminal "translation", and non-carceral traits of the subject become wiped out or superfluous. Rose states, in a tone of irony, that her client's risk is not going to increase beyond control because he may drink alcohol but allowing him the opportunity is prohibited. Rose speaks more about the burden of the OLR:

Rose

> I'm just being honest... It's absolutely, I find it very frustrating with regard to it and maybe I'm focusing too much on this one case but it's the only community based one I have and maybe as more come out into the community I'll have a different view but… just now, that that's where it's at and for all the best will in the world to try and motivate him, so I've got him involved in a voluntary organisation and they're trying to look at things like how to develop his skills and employability. Erm but he's like, "*how am I ever going to get a reference, whose gonnae take me*?" (original emphasis) ... he's actually like, "*what type of job am i gonnae get*? I would need to have one of those criminal checks, *what jobs do you know that have no criminal checks?"* (emphasis in original) And I don't really know of any so anyway (silent pause) so anyway there's a *burden* (original emphasis) there, I get why we have to have [the OLR] in place for certain offenders....but I don't always think that an OLR is the Order that helps somebody rehabilitate because it goes against some of the principles of social work of how we help people rehabilitate and move on and not always associate with a criminal identity.

Here Rose illustrates the vulnerability of her client who, through a legally sanctioned practice of exclusion, is immobilised in time and space. This creates difficulties for her in her role in supporting and managing her client's progress. In many ways she is articulating the essence of a futile task where they both feel that being subject to an OLR culminates in a life of isolation and solitude. Rose understands how her client experiences the mark of the Order as not merely one of exclusion but also unworthiness, evident in his plea "*who is gonnae take me*?", and she feels this herself. This really strikes at the heart of the OLR experience as one of condemnation, rejection and social abandonment. This conflicts with the values of social work practice and

with the SSSC codes of practice (SSSC, 2024). Furthermore, Rose and her client are both aware of the rejection which may ensue, from new acquaintances or friends if disclosure is made. This may include a backlash from the community and further deepening of his marginality if offences are made public. Therefore, disclosure for the purposes of employment creates its own risks, acting as a further barrier. In a way, Rose articulates the experience of a life which is so restricted that any attempt to live as a full citizen is severely hampered, despite the punishment part, supposedly having been served. In highlighting the contraindications of the OLR for reintegration and resettlement after prison, she shows how it appears to embody the practice of continued punishment. She later explains how the lifelong restrictions are pitted against the values of social work.

Rose Like everything has to be restricted and…I just don't know like (sighs) he feels it more than the guys on life licence, because I worked with a guy…and after ten years, because he had been offence free right, I wrote to the Parole Board and they terminated the supervision element. Like my guy doesn't have the option of that. I mean, if he's a lifer and offence free they can review it but not with my OLR unless I'm wrong? You might know more than me but… is there a review process?

Nic No not to remove the supervision element.

Rose After x amount of time? but that doesn't seem right to me though....

Nic There isn't as it stands.

Rose because surely the big bit about rehabilitation is how to be motivate the guys to want to stay offence free and rebuild their lives (pause) so I really struggle with that, so does he, and I struggle to support him with it because... I don't want to say [to him] "I agree with some of what you're saying" I need to obviously be professional and keep my views to myself, but I don't really get *why* (original emphasis)...like he doesn't, (pause) he can't progress (pause) there's no, there's no review process. It's ludicrous!

Again, and alongside other professionals interviewed during this research, Rose has drawn comparisons with those serving a life sentence, who can apply to have the supervision element of their licence terminated. Like others, she explains that the OLR sentence is more punitive than a life sentence as there is no possibility for the removal of the supervision element. She

questions the compatibility of the OLR with rehabilitative principles and with national standards and codes of conduct - given the mark of stigma that impacts the subject's reintegration back into society. She conveys the difficulties of this work that she calls a struggle which negatively impacts her client and her professional integrity. Conditions of licence have implications for her client's dignity, his ability to make his own choices and exercise autonomy at all levels of his life, whether relationships, employment, and even regarding free access to the community. It also has implications for her own sense of professional purpose and impact, in other words, on her own sense of hopefulness working with people on OLRs. This emerges from an order where the right to exist in conditions that are supportive of hope for a better future are almost wholly constrained. Increased marginality and vulnerability result from these measures, creating a conflict with the core principles of social work, whose key aim is to promote social justice. It also results in a moral and ethical dilemma between enforcing the rules of licence and upholding her own professional values, resulting in internal conflict. Another social worker, Fraser, was asked about the values that underpin his role and the compatibility of those with the OLR. He was asked,

> Nic What would you say are the values that underpin your role? what is it you are doing [with people on the OLR]?
>
> Fraser So I suppose, I think that, I think that varies quite a lot in terms of the balance of the work that we're doing, the balance between our strong belief in public protection but also that we should be working with individuals to understand their own risk, to try and find ways of moving on from their situation, to understand what's happened. I, I think *hope* (emphasis added) is one of the key motivating factors for me and this kind of work, although that can be really difficult with especially OLR guys. I think it's a really complex sentence to have in terms of having hope for things moving on. And I think those kind of standards, your unconditional positive regard with OLRs who have mostly committed really serious offences. And I know what some people say, but trying to understand that people still have value, that they still have worth and rights and those need to be respected.

Here Fraser, like Rose, discusses the tensions of his role and the oft-cited balance in criminal justice systems regarding the requirement for punishment and the rights of those subject to

punishment. Here, balance is concerned with the need for supervision and monitoring and the right to a standard of hope for the criminal justice subject. Fraser explains that the OLR is an impediment to hope, and this makes it difficult to motivate those under it. He also explains that hope is impacted by "what people say", taken to mean here punitive attitudes to certain persons and their offences. Yet he uses the lens of unconditional positive regard with which to view an individual's value. As indicated throughout this chapter, the role of hope in relation to those who are wards of the state has been given consideration at the level of the ECtHR. Here too, Fraser explains that hope is difficult to maintain a situation that conflicts with the standards of practice, which dictates respecting and promoting human value and worth. The symbolic nature of the offences which attract the OLR sentence as well as the excessive post-imprisonment controls erode human value, the humanity of the penal subject and hope for reconciliation and meaningful inclusion.

Policy dreams and the OLR

Jodie who works in OLR policy shares her view of the post sentencing opportunities of those subject to an OLR, highlighting some of her concerns and limitations of the policy process.

Nic: Where do you think that the OLR at the community end of the sentence fits in with rehabilitation and reintegration? Or is it just thinking about managing risk?

Jodie: No, it needs to be the whole picture. As part of the [risk management] plan though, there should be, you know, a consideration of what this person needs. They need to have structure in their lives you know, there are a lot of these guys their history erm has involved that lack of structure, lack of routine lack of meaningful activity, lack of pro social peers, whatever. So yeah, absolutely it's an important point, that they will need to have something to focus on when they get out and yeah ideally, that would be paid employment, because obviously that gives meaning for them and the feeling [that they are] providing for themselves. And that is a challenge, I agree with you. Most of our guys, well, [speaking of] those in custody generally, that's a massive concern for them "how am I going to live if I can't get a job? I don't want to be on benefits, I don't want to do nothing all day". They want to work, but they are worried about, about having to be honest, having to be upfront, but I guess for a lot of our guys with sex

> offences they have to disclose. And that limits their options so, I'd really encourage the Scottish Government to consider how to we promote employment because it's part of inclusion and part of the rehabilitation of these guys and getting them involved and actually contributing to society, and it's a real challenge.

Here Jodie echoes the importance of post release opportunities for those leaving prison. She explains that this is a concern of those who are in custody, which in some ways contrasts with others' views (Chapter 5 notes the diversity of the OLR group). On a general level, she connects employment to providing "meaning" and "taking responsibility" and to contributing as a full member of society. The point she makes lends itself to a broader discussion of citizenship, what this means and the ability to achieve this with the OLR status. She raises similar concerns to others regarding the plight of those convicted of serious offences, particularly sex offences, and how this, on top of the weighty status of the OLR sentence, acts as a barrier to full citizenship. This is not simply a struggle for economic inclusion but a broader concern about the exclusion of those subject to this form of punishment, and who because of this, are largely unable to "move on" with their lives and thus retain hope for the future. Jodie outlines this as a source of internal angst for people on OLRs and those who work with them, as well as a challenge for policy and therefore the Scottish state. This is an interesting point as it locates the problems posed for OLR subjects as outwith the laws, policies and practices that construct and constrain the penal subject. There is an obvious flaw here in that public protection, is a means by which governments appease the anxieties of a concerned public to satisfy demands for tough justice (Pratt, 2007). Advocating inclusion, which might be perceived as leniency, whilst at the same time operating a system of punitive punishment would be self-contradictory and particularly contentious when it concerns individuals who have caused significant harms. For this group of persons, by virtue of the order, is designated as inherently dangerous and requiring lifelong restriction. This would not only be politically unpopular, but it would create mistrust and threaten legitimacy.

Jodie

> At the point that they get sentenced, they are high risk, they are unmanageable, that's why they get that sentence. The Parole Board has released them because that risk is manageable, they're considered safe to return to the community albeit with a plan in place to make sure that they remain that way, but they've done their

sentence, they are ready to come out and try to live a life, if there's nothing in place for them, that becomes very difficult. You know, it's really important that we sort of challenge that perception of continued punishment once they get out of prison.

Nic I agree with you yeah.

Jodie: We really should be prepared to change our culture, actually, and accept people when they come out of custody and help them to live a life that they're happy with.

The tension between safeguarding the public and upholding an individual's full citizenship rights is evidently in conflict. This has been considered by Miller and Forrest (2017) who argue that "carceral citizens" lacks the rights afforded to ordinary citizens and the state does not view these citizens as having equal value. As I have shown throughout this chapter, a subaltern status is imposed on the OLR which is captured by Jodie where she relays the inherent paradox of lifelong sentencing. She states, "they have done their sentence", when in real terms, the sentence endures beyond the tariff, and post-release prospects remain considerably grim. Jodie situates the problems that are caused by the imposition of the OLR in terms of a societal "perception of [the acceptability of] continued punishment" within Scottish culture more generally, rather than look at ways that the practices of the risk apparatus condemns' those trapped within it.

Mike, a policy official, was asked about the compatibility of the OLR with rehabilitation and reintegration.

Nic So would you say that the OLR is compatible with both rehabilitation and community reintegration….

Mike Hmmm, would I say its compatible?…I would say reintegration and rehabilitation are absolutely essential to what the OLR needs to be… I probably think it goes back to what we were saying earlier on actually about public understanding of the nature of offending. …. there is something about engaging with communities and their understanding of risk and these *dangerous people with the big labels* (emphasis added). They are someone's son, someone's dad and quite often that brings a kind of

> dissonance within communities you know where some individuals would project the big bad scary guy. And I guess we've got a role in demystifying, publishing research about, about the complexity and talking about the challenges and experiences of some of those who are on the OLR. [This] is a crucial part of what we get across and that's going to be a challenge. And I know what the label OLR means. I don't know if you have trawled all the reporting of the OLRs, one of the common misconceptions is, he did all these bad things and he got a three-year sentence. I think that's a place for us… I think there is learning for us there, what does that mean for labelling? Employment opportunities? How do we engage with the agencies that work with that?

Mike explains, similarly to Jodie, that there is a need to humanise what he calls the "*dangerous people with the big labels".* This reflects a paradox in the way public protection policies frame and construct the 'problem' of individuals who cause serious harm (Bacchi, 2009). While these policies aim to safeguard the public, they can simultaneously diminish the recognition of the humanity and value of the penal subject, highlighting a tension between policy aspirations and the lived realities of those subjected to, or working under it. To allow for any standard of hope, a balance must be struck between these two ideals. This would involve the consideration of an alternative representation of the problem highlighting, the inherent tensions of the current approach and reasserting a perspective that upholds humanity and value as a core constituent of a standard of hope. It would also involve uncovering the underlying assumptions and the interests of organisations, the polity and the interests they serve, which upholds the othering of certain categories of Others. It would also involve showing that risk is not absolute, but dependent upon context and resources.

As it stands, the 'imaginary' of public protection defines the terms of inclusion for the OLR subject based on socio-political values, legitimising specific courses of action and influencing the dominant representations which have a totalising effect on the lives of those subject to it. This calls into question the compatibility of preventive punishment with a range of human rights legislation, and with the standards and codes of practice that they inform which aim to support the development of potential conducive to these ends.

Conclusion

This chapter has shown that the imposition of an Order for Lifelong Restriction engenders a deep sense of hopelessness and despair in those who are subject to it and those who labour under it. The OLR sentence has three implications: firstly, for the person subject to the order; secondly, for those tasked with the care and control of this group, and who through this, bear witness to this exceptional disposal and its effect on the penal subjects. Thirdly, it engenders a lack of hope in risk work.

Through the symbolic marking of the Frankensteinian penal subject as permanently risky, the OLR imposes ideological and spatial boundaries through a totalising framework of exclusion and control. While the OLR is meant to mitigate harm through providing protection to the public, it significantly harms those subjected to it through stigmatisation and exclusion, showing a complete derogation of the hope principle. This culminates in experiences characterised by despair and futility, a dearth of hope for a better future even after release from prison. Hope plays a pivotal role in addressing the human rights of prisoners and parolees and ought to be a central tenet where rehabilitation is considered an aim of punishment. Hope is integral to personal transformation, personal change, and reintegration. As Brownlee (2021) has argued for a system of punishment to me morally justifiable it ought to be compatible with retaining hope in present circumstances and after punishment has ended.

There is a requirement for Authorities to comply with domestic and international legislative standards which mandate humane treatment and respect for human rights. This chapter has highlighted some of the difficulties of upholding a system of just and humane punishment, which by virtue of its imposition causes harm, fails to safeguard mental health and preserve the psychological wellbeing of those subject to it. In implementing a risk-based system, reasonable care is required to avoid acts or *omissions* which would foreseeably injure individuals, even where they have committed appalling acts of harm. This chapter has aimed to be a starting place for a discussion on the scale of the problem reconciling risk and humane care by considering the impacts of the Order for Lifelong Restriction on the humans subject to them, as well as those responsible for managing them.

CHAPTER 8 Unknown aims of the system: Bureaucratic absurdities in risk management

'It is not necessary to accept everything as true, one must only accept it as necessary'
(Kafka,1975:175)

The introduction of the OLR draws a circle around a seemingly new category of offenders through the imposition of a new framework for the governance of those deemed unmanageable by any other means. This 'exceptional sentence' (Scottish Government, 2000:34) has resulted in unique developments in the administering of Scottish penality (Fyfe and Gailey, 2010). In this, these new measures exemplify a level of bureaucratic expansion, intensity, scrutiny and control of offenders. As well as drawing in an assemblage of pre-existing institutions, the OLR has seen the genesis of new bodies such as the RMA who develop and disseminate standards and guidelines for the management of high-risk subjects in Scotland. It directly manages the complex web of documentation and procedures implemented to manage risk, scrutinising the inputs and labours of those who administer the Order from a hierarchical vantage point. This is carried out through a set of standardised techniques which reduce the OLR subject to an 'object' of knowledge (Foucault, 1972) and bureaucratic control.

The task of offender management is one which is largely administrative and centrally focused on the seamless implementation of an ensemble of calculations, procedures and tactics (Foucault, 1991). Feeley and Simon (1992) and Garland (1997; 2001), despite different analyses, argue that actuarial justice is a system of punishment, which seeks to incapacitate in the face of the decline of the rehabilitative ideal and the failure to accomplish its ambitious promises (Feeley and Simon, 1992). What is neglected within many of these explanatory frameworks is a description of the normative experiences of these new bureaucratic forms of punishment, in particular, perspectives from inside the system. This chapter seeks to explore what it is like to perform actuarial justice. At its heart are the experiences of penal actors who are grappling with the obtuse aims of the system as the task becomes more 'managerialist' and less 'transformative' (Feeley and Simon, 1992:452). Pratt (1995) outlines the way in which the production and exchange of risk knowledge has resulted in a system increasingly based on bureaucratic data and information. Within this model, it appears that the primacy and subjectivity of the offender become displaced under a bureaucratic load.

In this chapter, I illustrate how the experiences of practitioners are characterised by confusion and a sense of futility as they bear witness to the 'absurdities' of the integral logics of the system (Graeber, 2015). This occurs because this relatively new sentencing framework seems to denote a move away from rehabilitation and reintegration as the end game of punishment towards goals which are inherently managerialist. It operates a Kafkaesque system of labyrinthine processes which, rather than providing clarity and reduce complexity, is characterised by opaque objectives which trap individuals in endless loops of bureaucracy, and an arcane maze of paperwork – the latter of course, a vital technology of bureaucratic systems. This leads to a sense of bewilderment and fundamentally a questioning of the aims of the Order and the processes upon which it rests. Ultimately, it shows that bureaucratic processes, rather than being rational and processual, are experienced as irrational, 'through the imposition of impersonal rules and regulations which operate through the threat of violence' (Graeber, 2015:32).

The first half of this chapter will examine how professionals experience the administrative burden and the panoptic gaze of the system over their work. There is a sense that the intended rationality of the system, that is an increased focus on procedures and drive towards efficiency and accountability, produces a number of unintended consequences, with penal actors reduced to operators of the risk apparatus. Of these, several systemic pathologies emerge from the new 'punishment bureaucracy' (Karakatsanis, 2019), causing progression setbacks and delays perpetuating risk through exacerbating existing resource difficulties which beset an already overburdened system (HMIPS, 2024).

The second section of this chapter considers the nuanced expressions of an arbitrary and inequitable system of carceral practices. For as well as the institutional pathologies of risk management, there were epistemological concerns about the nature and dominance of scientific practices which, it is argued herein, should be viewed through the prism of the emperor's new clothes. Practitioners question the prevailing standards and socio-scientific discourse of risk, which locates risk as intrinsic to the individual - and some argued that the use and efficacy of risk assessment instruments are overstated. In this chapter, the power/knowledge nexus is laid bare by practitioners who experience this as not merely incongruent to the aims of rehabilitation, but as an exertion of absolute, and in some ways, illegitimate power over the penal subject. As you will recall from Chapter 6, the threat of judgement and exposure is omnipresent for state functionaries employed to operate the risk system.

This chapter comes to a close by showing how these processes can create a lobster-pot effect as described in *Anderson and Others v Scottish Ministers (2000*) for those subject to preventative measures. The 'weight' (King and McDermott, 1995) of the bureaucratic-prison-complex leads to an intractable sense of futility around producing any fruitful outcomes for prisoners trapped in the system. Given the relatively low numbers of those released on the order, the future of this sentence and the focus of this thesis on the experiences of penal agents, the full sense of these implications is yet to be fully understood - this is perhaps an idea for a new project. Overall, this chapter shows that the strictures of risk logic appear to suffocate the liberal promise of rehabilitation, prioritising the requirements of the auditable system (Power, 1997) rather than the needs of those subject to it. The 'imaginary' of rehabilitation (Carlen, 2008) appears to ebb away and governing subjects are required to act as if the system can produce these outcomes. Their work becomes more about the preservation of the 'punishment bureaucracy' (Karakatsanis, 2019), exemplifying the absurdities of risk work.

Bureaucracy takes over.

The OLR was introduced to fulfil the needs of a system deemed to be deficient in its ability to adequately manage a proportion of high-risk individuals. This resulted in the creation of an elaborate rational-legal authority through which the OLR subject is managed by groups of technical experts who collate extensive documentary information, procure and administer risk assessments and implement and adhere to standardised processes and procedures, all of which are archetypal characteristics of the modern bureaucracy (Graeber, 2015; Best, 2012). In practical terms, the bureaucratic model is designed to streamline service delivery and achieve efficiency in operations in decision-making by organising tasks, roles and responsibilities in a hierarchical manner. Bureaucracies have been long criticised for being overly complex and riged (Ritzer, 1993), and for ignoring the subtleties of human existence, thereby reducing everything to preconceived mechanical and statistical formulae (Graeber, 2012). In literature, there are abundant examples which describe bureaucracies as absurd and incongruous and as employing processes that oppose logic and reason, is written about in the dystopian allegory of Frantz Kafka (1925; 1926), Saramago, (1997; 1999) and Vonnegut (1963). In criminal justice bureaucratic risk management produces standardised 'thinking', 'language' and 'practice' which determines the strict ways in which actors and agencies can perform their tasks (Garland 2001:18). In observing the introduction of the Order, Colin, a psychological professional, explains:

> In the same way that we have built great big prisons, and great big hospitals, with convoluted and complex processes, we have built an edifice around the OLR, much of which is to do with doing something that is an unpleasant task which is making judgements about high-risk people.

Colin's comment is both a literal and figurative conceptualisation of the OLR which conveys architectural significance and structural complexity. It is a reproduction of earlier structures in which monolithic structures were erected to protect the moral order from morally unscrupulous populations as detailed in the literature review. This new sentence brings together an assemblage of risk-based institutions which have proliferated in the wake of the 'new regulatory state' (Braithwaite, 2000) and the emergence of new forms of risk-based regulation (Black, 2005). Collectively these institutions and processes come together to carry out the "unpleasant task" of making difficult and highly consequential decisions about high-risk people within a limited scope of options.

Alan a retired member of the Parole Board, explained his view of the OLR process:

> Essentially the Parole Board was there to receive the reports and deal with them [and] sometimes [there was] feedback that the reports weren't very good to be honest…. And you know, the danger is that the assessment process boils down to filling out a form.

In order to make an assessment of risk and decision about release, the Parole Board will receive the Risk Assessment Plans (RMPs) as supplementary to other parole documentation which will collectively outline the person's risks, needs and readiness for release and the ways that any risk will be managed in the community. Parole Boards increasingly rely on psychological opinion to make their determinations and decisions (Bowers and Friendship, 2017; Shingler, 2018). Alan questions both the standard, function and legitimacy of the reports suggesting that there is a danger that this becomes perfunctory without a genuine commitment to long-term goals. He views the focus on paperwork, as lacking in substance, a simplification and reduction of offender management into a banal task. In his view, nuance is not displayed due to a focus on the procedural aspects of risk work. Such shifts have been identified in the field of social work more generally (Yuill and Gordon, 2018).

The routinisation and bureaucratisation of criminal justice has been well documented (Cohen, 1985; Garland, 2001). Current legal and penal systems are situated within wider contexts of neoliberal politics and policies.

They have become increasingly dominated by trends which prioritise efficiency and standardisation to promote cost effectiveness aligning criminal justice institutions with market driven ideologies (Brown, 2011; Braithwaite, 2000). This shifts justice practices previously centred on traditions of fairness and due process to being one focused on administrative control and demands for efficiency. In this, standardisation and procedural operations aimed at efficiency reduce justice to a series of inflexible, mechanised tasks, such as form filling information gathering and documenting information in ways that are constrained by formal rules. This reflects what Graeber, (2015) has termed 'total bureaucracy' (2016:18).

A prison psychologist explains:

Nicola What is your role with the OLR Process?

Juliana Things like, you know, conducting interventions or looking at various different services, but by and large, our work with OLRs is much less psychological, than the rest of our input to the prison. It's a very bureaucratic process.

Nicola So I'm wondering about that, because you've said that it's less psychological when it comes to OLRs?

Juliana Well the day-to-day processing is without a doubt. It's basically gathering information and recording it appropriately.

The co-option of psychological actors into the framework of managerial governance shapes the roles of professionals, shifting them away from the traditional therapeutic approaches to those which are increasingly managerial, bureaucratised, and focused on standardised and administrative functions. Juliana agrees that her work with OLR prisoners is 'less psychological' and more about adhering to the bureaucratic process and its imperatives. Rather than providing treatments and therapies which are the mainstay of psychological work, her involvement with the process is predominantly concerned with gathering and recording information. Shingler et al (2019) explain that carrying out psychological risk assessments requires significant interaction with prisoners. This insight sits alongside Juliana's experience

raising pointed questions about the objectives of the system. However, the authors also observe that psychologists managing risk assessments work in increasingly challenging contexts characterised by resource pressures which are not conducive to providing quality therapy or treatment (Shingler, et al, 2019). One may argue that the real risk here is that any attempts at rehabilitating or treating indeterminately sentenced prisoners plays second fiddle to administering the techniques of the system.

Alan, speaking from the perspective of a former member of the Parole Board elucidates on this point further, discussing his impression of the OLR in the years following its introduction.

> A lot of what the OLR was about or seemed to be about was the preparation of the risk assessment, which were kinda, great long documents. And I always say that ...whether it was a community care assessment or whatever, that nobody needs an assessment, they need the *outcome* (emphasis in original) of the assessment to be delivered, but too often the assessment becomes an end in itself, you know…

During bureaucracy's heyday in the post war period, Merton (1957) observed the dangers of ritualism, where organisations become focused upon adherence to rules and procedures even when they are at odds with achieving long-term goals. This standardisation, introduced through this new legal regime of risk management, results in the routinisation of form filling and paper-based work which both regulates and constructs the knowledges practices of criminal justice. Alan questions the approach where a focus on risk assessment detracts from any long-term goals. He contextually locates the specificities of paper-based assessment as the central logic of the system, as an "end in itself". This, in his view, is at odds with a more comprehensive situating which considers long-term possibilities and outcomes for human subjects. Reflecting this point, Graeber (2015:52) explains that paperwork becomes a 'maze' unable to 'open up on anything outside itself'. However, if one looks at the aims of preventative detention or indeterminate sentencing, indefinite imprisonment is one of a few possible and apparently 'legitimate' outcomes. Risk assessment forms, tools and techniques are being used as a means of securing this. Alan's comment highlights a disconnect between his ideals and the perceived purpose of risk assessment, which he views as self-referential - focused on justifying its own procedures rather than achieving broader outcomes. This indicates a slipping away of rehabilitation as a central aim of punishment toward one which is increasingly about containment and justifying that containment through paperwork and layers of bureaucracy.

The system is heavily process driven. In another example, Annalise, a psychological professional, outlines her thoughts on the interaction between paperwork and bureaucratic structures:

> Annalise` I think the risk management plans don't help, Parole Boards eh (pause) I'm going to stress this is my personal opinion because it's not shared by others necessarily…. we write an RMP, say a [prisoner is] in closed conditions, we rate it for closed conditions and erm, in reality, he's probably manageable but he's failed a drug test or something, so he canny go to Top End but addiction is manageable in the community! So when the Parole Board see this they are between this rock and hard place, because they don't have a plan for the community, and really he should have a MAPPA plan for the community, but because he's an OLR with an RMP approved by the RMA [this] supersedes all. So the MAPPA plan for the community just disintegrates, just doesn't happen…so of course the Parole Board can't release them!

Annalise's point is twofold. Firstly, in order to be considered for release, the prisoner needs to be recommended by the prison system for progression through the Risk Management Team. They require a MAPPA plan to be made by a local authority social worker, and they need a completed risk management plan outlining the requirements of risk management. The system has become so overloaded with complexities of various forms and procedures which intended to streamline the process and yet over complicate it. Secondly, bureaucratic ritualism (Merton, 1948; Graeber, 2015) produces pathologies where general rules are upheld even when they work against logic - as well as against the interests of prisoners themselves. Annalise shows how the rigidity of rules regarding prison progression, and organisational procedures in which they are embedded appear to thwart sensible decision making. A positive drug test is an impediment to progression to National Top End and yet is in opposition to a realistic and holistic view of drug seeking behaviour which may be as much to do with 'imported vulnerabilities' (Liebling, 1992; Liebling et al. 2005), the stress of imprisonment (Deuchar and Densley, 2024), a lack of hope (Ristroph, 2010; Van Zyl Smit and Appleton, 2019; Vannier, 2019; Seeds, 2021), boredom (Boys et al., 2002; Cope, 2003) and isolation (Liebling,1992; 1999), as it is evidence of continued risk of 'deviance'.

As well as the bureaucratic hurdles and the obscure aims of the system, the process is further burdened by paperwork's heavy load. For, in addition to the RMP and the other paperwork detailed previously, a prisoner on an OLR requires an Annual Implementation Review of the RMP. As outlined in Chapter 2, the annual review supplements the RMP, and this is submitted to the Risk Management Authority on an annual basis as part of its auditing function. In a conversation about AIRs, a prison-based psychologist describes what in her view is the function of the report as well the administrative burden of such.

Annalise So yeah, the AIR is an assurance document, it essentially needs to say, have we done what we said we'd do in relation to the plan? So if we say we're going to have a monthly meeting about this guy and we're going to make sure X, Y and Z is covered. We essentially need to write that down …[and] if we don't do it they can say you failed to implement the plan.

Nicola Right, okay so it's not necessarily, you know, within the space of time, we're going to get the person one-to-one psychology work, or we're going to get them through a program?

Annalise No not unless we explicitly said that's what we're going to do within a timeframe.

Nicola Okay. Jeez, it's quite bureaucratic, isn't it?

Annalise That's exactly the word to use here and I get really frustrated, to be honest, because it actually becomes not at all about the person. So, Joe Bloggs could be doing really well, he could be out of seg and not self-harming, not hit anyone for a year and we all feel really good about it. And the RMA might say "nah you failed to deliver the plan" and we'll be like "what!" (emphasis in original). And it's because we haven't documented that we cell searched him five times or some shit like that. You know so it really takes away from the person at the centre of it and becomes just all about the bureaucracy and I find that really frustrating. And I think some people complain that they find that really demoralising…

Here she explains how working in bureaucratic risk labour can engender feelings of frustration. On the one hand, the work involves the meticulous and accurate recording of risk management data which provides a level of accountability and auditable trail of decisions and actions. On the other, it shows how any positive gains that are made in working with a prisoner can be subordinated by administrative errors. Within the risk paradigm, it seems that, as well as the privileging the smooth operation and maintenance of the system, prisoners' gains are obfuscated and subordinated by the priority of the risk system, *and* by the errors of practitioners apparent 'mishandling' of the paperwork. These technical errors create an administrative burden, for the work will have to be redone, but they also receive notice of 'a failure to implement'; an inference of incompetence, which Annalise describes as having a demoralising impact on practitioners.

In Graeber's (2015:59) work on 'structural violence', he explains how 'bureaucracies are created and maintained by threats of violence even in their day-to-day workings'. Therefore, when bureaucracies aim to rationalise and streamline processes, reliance on human actors means that they will undoubtedly encounter inefficiencies. And, when they do, the consequences are both practical and symbolic. At the same time, the bureaucratisation of psychological work "takes away" from working with the person which again echoes findings within the sphere of social work practice (Yuill and Gordon, 2018). This marginalises the holistic aspects of work for which psychologists are trained and morphs into a role where the overarching requirement to be technical operators of the risk apparatus. In this way any qualitative gains made by prisoners may be rendered invisible or 'lost' (Yuill and Gordon, 2018:284) by adherence to bureaucratic rules, causing stress and strain for themselves *and* the governing subjects who bear witness to the arbitrary application of rules. Clearly the undertaking of administrative tasks in respect of OLR prisoners is both cumbersome and laborious. A delve into the internal workings of the auditable process is illustrated here by Annalise who showed me a risk management document, explaining:

> So this, you can see, is like 55 pages. We have to update this every time [name redacted] does something that constitutes a warning sign. And we have this now for 200 folk in SPS…but for a lot of them, there's lots of stuff going on all the time, so you need to be attuned to the warning signs, and you need to be able to document it… what your contingency measures were and how you have actioned it and then what your follow up has been. So, you kind of need to keep all that in your head as well as all your other day to day work (pause) so it, it becomes (pause) don't get me wrong

> right, I think it's I think it's gold standard risk management, but we need to resource it (laughs) Do you know what I mean?

This illustrates both the burden and the appeal of heavily laden processes and the expectation that bureaucrats capture prisoners' lives in such close detail that virtually every aspect of life in prison is documented. In this way the nature of paperwork takes on an obsessive quality. Graeber (2015) explains that bureaucracies generate vast quantities of data and paperwork which serve to create illusions of efficiency and yet much of it becomes meaningless. Partly accepting this, it can be argued that it is perhaps meaningless for the penal subject, but it is entirely *meaningful* to the auditable system which in turn must be accountable to the legislation that sets outs its parameters. Therefore, the documentation is there to scrutinise and record decisions which are made thereby legitimising the preservation of the system itself (Power, 2004). And while this may privilege the auditable process on compliance with processes rather than with substantive outcomes (Graeber, 2015) it still has an operational function.

This leads to my next point. Annalise adds a caveat in her criticism of the burden of risk procedures and terms it "gold standard risk assessment". Here we can see that bureaucracy and its associated parts may not be always conceived of as hopelessly flawed and that it still has a great deal of appeal. This is because the system is at once underpinned by a hegemonic rational-scientific power which determines how we know what we know about risk. However, as Graeber (2015:149) goes on to explain 'at least some of the time' bureaucracy has 'a kind of covert appeal'. This is because it fuses together the power knowledge axis, which privileges a system based on 'reason over chaos' (ibid, 167).

The sheer encumbrance of this new administrative project unsurprisingly causes resource pressures as well as delays in prison, as Annalise a psychological professional explains.

> …a lot of the bureaucracy, I think, causes some delays you know, so if someone's going to the Open Estate, because it's a [notable] change [in environment], we need to write a new plan, we need to do new risk assessments, a new plan that might take 8 to 12 weeks, the RMA might then take eight weeks to get it back to us. We then need to wait for a space so before you know it, they've had six months to wait.

This highlights the tensions between legislation and policy implementation and a lack of foresight by policy makers regarding the resource implications of an indeterminate sentence, and the laborious requirements of its administrative aspects. Clearly, preventative detention

adopted as a solution to public risk creates its own risks in terms of the realities of practice on the ground as has been evidenced with other sentences such as the IPP in England and Wales Howard League, 2007; HMIPS, 2008; HMPPS, 2024).

The ambiguous nature of sentence lengths, which have been discussed previously, adds to the relative obscurity of the sentence for those subject to an OLR (Inside Times, 2018) and for the professionals managing them. Some of these issues are brought to the fore by Juliana a psychological professional and Alan from the parole board.

> You've got some [OLRs] that have like the tiniest punishment part like you're talking months, up to… a few years. It's a bit more difficult to map out their journey because sometimes when you're working with someone, by the time that the Risk Management Plan is approved by the Risk Management Authority, they've had their first parole hearing. So, by the time they access any kind of intervention they are already post tariff..."

> Towards the end of my time (pause), people who had been in prison for a very short period of time, who were coming up for that first review… often with many of these cases that there hadn't been time to complete the risk assessment…I think one of the concerns was, that the focus up until then was the risk assessment and how this person had been managed in prison, and there was very little thought about how they were going to be managed in the community (Alan former social worker and member of the Parole Board).

During Alan's time on the Parole Board there would have been a number of sentences imposed with short tariff lengths (a situation that is not entirely unknown in recent times, with one imposed in 2024). As noted (e.g. in Chapters 2 and 4), a short punishment part conflicts with the standard prison sentence progression pathway, as well as with the statutory timescale of nine months for completion of the RMP from the point of sentencing .[12] The OLR is called an indeterminate sentence in law, yet as an indeterminate sentence renders punishment parts ambiguous as these are usurped by wider considerations of life-long and enduring risk. As Ferguson (2021:203) put it, 'punishment part[s] should not be regarded as a measure of the appropriateness (or otherwise) of an offender's continued detention'.

[12] Per Section 8(1) Criminal Justice (Scotland) Act 2003.

So therefore, if we consider the principle of integrating the punishment part into the standard progression model for long-term prisoners in Scotland of two years in a National Top End facility, followed by two years at the Open Estate, we find that this is incoherent for many of those on OLRs. This is because the average punishment part for people on OLRs is effectively the same duration as the progression pathway itself, rendering the integration of the two timelines largely incoherent. Such incoherence leaves penal agents in a state of confusion and highlights the problems of wedding a short tariff to a sentence of permanent punishment and then applying the standard progression model. Obviously if those three things are thrown together the system becomes arbitrary and unclear. Furthermore, the milestones on the progression pathway become inverted with the parole hearing taking place before rehabilitative programmes can be undertaken, and a subsequent evaluation of risk carried out. This places the cart before the horse, distorting the logic of progression.

Kerry, a prison manager, explains how the OLR was experienced when it was introduced and the implications of this in terms of her work.

> I think it was just accepted. It's like all these things; you are kind of at the mercy of what happens and the decisions that are made (pause). The numbers were flying through the system and I think the hardest part was the resource and the intensive resource management (pause). We didn't have the capacity…there was no understanding of the numbers that were going to be erm attributed [and] in the first stages of managing it, [OLRs] were few and far between, and then [numbers] got greater and greater and we don't have that sort of capacity to manage them effectively and then it impacts on the others, it impacts on the life population and the other statutory cases so it was, it was just assumed that we dealt with what was given to us, but the actual practical application of managing it was not realised and then it got worse and worse and worse.

Kerry explains how legislative changes created difficult working conditions due to their unanticipated effects which became apparent after implementation. This echoes the view of Bacchi (2009) who describes the way in which policy aspirations or ‘dreams’ often fail to consider the logistical challenges or demands on resource at the outset as seen with the IPP (Howard League, HMIPS, 2008; HMPPS, 2024) and DSPD units (Tyrer et al, 2010). Kerry describes being “at the mercy” of a system of laws and regulations implemented by governments and policy makers who seem to have overlooked the potential adverse effects. In

this way, prison staff being at the bottom of the power structure are caught between the systems imperatives and its shortcomings, all the while forced to carry the full weight of legislative bureaucracy. This pressure at the coalface amplified as the number of OLRs increased, negatively impacting risk professionals who have become overwhelmed with increasing workloads, *and* the displacement of other prisoners.

A lack of resources is also acknowledged by Jodie, a policy official:

> I think one of the biggest flaws for me is that it's under-resourced. So we have 210 OLRs as of yesterday when I last checked (pause) some of these men are the most high risk individuals in Scotland and there isn't enough case managers, there is not enough specialist services… it should be a really intensive support package, but there just isn't the staff for it….and there's no resource (pause) and so they'll get put on one of the mainstream programmes, and it's not the same as what was recommended, it will be something, but it's not enough.

Again, this highlights a lack of foresight in terms of the allocation of time, personnel and resources required to administer the Order in a way that would uphold its operation. As Darjee and Russell (2011:231) cautioned, the management of those on the OLR would "require sophisticated approaches to management and treatment which are not well developed in Scotland". It may be argued therefore that the OLR is at risk of encountering some of the same problems as its English counterpart the IPP, where many more sentences were issued than anticipated. Individuals subject to the sentence were forgotten about with no active review, leaving them (and many still) lost in the system. This is in addition, to there being no specific infrastructure in terms of programmes and progression. A repetition of the conditions that occurred south of the border has come to pass in Scottish prisons with many OLR prisoners being held well beyond their minimum tariffs in overcrowded and underfunded prisons.

The experience of bureaucratic burden is not restricted to the prison and prison-based progression. The Risk Management Plan governing people on OLRs is a lifelong document that is required to be in place in the community prior to release and thereafter. Here Fraser, a justice social worker, explains how having several persons subject to an OLR on his caseload alters his work.

Nicola If you are responsible for ten OLRs in the community, do you get a sense that…that would be different from having ten guys that were, you know, lifers on licence, or guys on extended sentences?

Fraser So, if they were out in the community, yes, in several ways, there would be so much more (pause), there would be an awful lot more paperwork. But part of what that means is, that you're spending a lot of time getting paperwork right…a whole load of risk management planning …that is a huge amount of extra bureaucratic time, with potentially some benefit, but also with an overhead.

In the community, supervision of a person released on an OLR also culminates in an increase of paperwork and pressure to get the paperwork correct also intensifies this process. Paperwork becomes a method of controlling and constraining risk practitioners in professional contexts which are increasingly authoritarian. In this sense, paperwork becomes a form of indirect control: where practitioners internalise organisational priorities such as defensibility, compliance. As Fraser explains, the paperwork required in the risk management of those subject to the order takes up more time in practice than is the case for other prisoners. Fraser concedes that there is some benefit to this system, but it may be inferred here that this is in reference to the level of scrutiny of the person subject to an OLR which is through a lens of unadulterated risk at such a high level of intensity that it provides a sense of consolation for professionals.

The challenges of navigating overlapping systems

Another factor adding to the bureaucratic burden is the interplay of multiple stakeholders in the risk management process. As these systems merge with each other, they create further complexities and additional pressures as described by Adam a psychological professional.

> When you are on an OLR, the system is so rigid and it is so bureaucratic (pause), it's not like any other long sentence because it has so many extra layers of bureaucracy, so it is easier being a life sentenced prisoner, in terms of all the process stuff and even that is a pain in the arse. Then if you had an OLR, it had even more layers cuz you had all the RMA stuff and all the extra reports to do and inevitably when a system's got (pause) it's almost like too much bureaucracy doing the same thing (pause) so one [guy] I had, came within about three systems at the same time that weren't quite the same and he was kinda *stuck* (emphasis in original).

Adam describes this as contributing to the operational challenges for the OLR sentence due to what he terms as “too much bureaucracy”. The regulatory arm of state power operates through an archipelago of independent and yet mutually dependant bodies designed to manage risk. This results in increased complexity, where the objectives of these organisations may not easily align and it undermines the goal of simplification and efficiency to effectively carry out the business of risk management. This results in a frustration as individuals become “stuck” in an overloaded system with excessive procedures, paperwork and red tape leading to a type of bureaucratic inertia. This is expressed as a personal frustration and perhaps comes at the cost of time working directly with the subjects of the sentence. In addition, it leads to trapping them in a web of procedures and protocols that are challenging even to penal professionals, as well as increasing the opportunities of falling foul of the technicalities, and, as some interviewees put it, setting people up to fail.

On the theme of too much bureaucracy, a psychological professional reflects on the role of the RMA who had in the early days provided training, advice, and with whom she continues to have a close working relationship:

> …obviously they evaluate everything, they evaluate all our [RMPs] and AIRs...if we get a rejected RMP erm sometimes we agree with it, sometimes we …I would say sometimes it can be difficult because…they have to uphold the law, and we have to manage the person on the ground and sometimes those two things, because our priorities are different, perhaps sometimes don't always meet very harmoniously.

The role and function of the RMA, introduced as part of the framework for governing Scotland’s dangerous offenders is outlined in Chapter 2. It holds a position of authority over risk work amounting to a supervisory gaze that can feel pervasive, rendering the work difficult due to the competing priorities as articulated here. The goals of the RMA are determined by the legal framework upon which it rests. These priorities result in tightly regulated practice, narrowing the focus of risk work to the meeting of standards, monitoring of performance metrics and targets. In such a system, technical and auditable outcomes can divert the focus away from OLR prisoners towards meeting the specific needs of the system. As Jones (1993:166) observed, ‘what is new is that there is now in the ascendant an ideology which wholly legitimates the pursuit of administratively rational ends over substantive justice goals’. Annalise points out, at the level of practice there are very different priorities which situates these forms of risk management as at odds with each other.

Overlapping authorities: The challenges and merits of extra-judicial oversight

When this new managerial body was introduced almost two decades ago, interviewees' initial impressions included concern and confusion. Russell, the prison chaplain, speaks about his experience of the early days of the OLR.

> Russell When the OLR came out, very much the mantra from SPS that these would be used in very exceptional cases and that we might not even get an OLR prisoner.
>
> Nicola What was your sense of that?
>
> Russell The feeling at the time was there is this quite draconian sentence, which is why as I say, the very first guy and he must of come in say 2005 and I just remember, "we're getting an OLR! we're getting an OLR prisoner!" …*everything* had to be managed *even conversations had to be managed* because *he'd* (emphasis in original) be managed by the Risk Management Authority and it was just OTT, everybody was always in a panic and eh it was almost like I actually couldn't go and speak to them without the permission of the Risk Management Authority cuz his case was being managed so minutely. But then as the numbers grew and grew nobody could keep that level of, that level of eh micromanagement that was actually going on in the early days.

It is clear that, at the outset, the introduction of the new sentence caused confusion about the role and the nature of the oversight provided by the RMA. Russell went on to explain how prison personnel viewed the RMA as a mysterious but omnipotent entity who would exercise control over this group of prisoners. As more prisoners received OLRs, he perceives that the system began to loosen its grip, perhaps not realising the intensity of resource requirements. This also shows the sense of initial confusion regarding the nature of the sentence and the attendant processes and procedures required to effectively manage this group of prisoners within the new framework of accountability. In addition, the RMA was no doubt recognised as a powerful body, able to exercise disciplinary power over the staff and their work. A sense of mystery regarding the RMA arises again in a discussion with Alan, the former Parole Board

member, who is similarly able to reflect on the early days following the introduction of the order:

Nicola What was your understanding of the RMA's roles and responsibilities in relation to the OLR? What was [your] sense of what it was going to do?

Alan: Well, that's an interesting one, though, because at that time the RMA was set up, and I think there was a lack of clarity. They were going to set out the assessment. That, to be honest, I think had a lot of people fairly baffled about what was going on…I'm kind of out of touch now, but I'm not sure what the RMA is, but it seems to me it kind of sits there…

Nicola …it took me a long, long time to establish that they're not involved actually face to face with OLR prisoners. They're simply… they have an auditory function in respect of risk management plans….

Alan But yes, I think that is the problem…as you said, it's essentially a kind of auditing function, but quite how you do that? …You've got this group of experts supposedly that can sit around the table looking at these risk assessments, does that add value? I'm not sure it does. So I think there is a degree of mystery about it.

Alan explains that there was a lack of clarity at the time that the RMA was introduced regarding its roles and its functions. This is allied with other participant views like Russell's that explain that the RMA is a somewhat mysterious entity which, particularly in its inchoate form, "baffled" criminal justice professionals. The RMA in these views, takes on a Kafkaesque quality echoing the mysterious and forbidding archetype of *The Castle* which foreshadows the ominous power that the authority holds. Speaking contemporaneously, Alan articulates a sense of scepticism in terms of the use and value of the governing body questioning the benefits of a system of experts who cast an all-knowing supervisory gaze over the system. Ultimately, Alan questions the legitimacy of this extra judicial gaze which occupies a central role in the governance of risk.

Bill, the social worker also speaks critically about the burden of the regulatory process. He explains:

> The involvement of the RMA is a massive headache, and certainly as a community based social worker, we are involved in risk management planning and risk

> management planning in custody and then that needs to go to MAPPA in the community, the RMT in custody and to the RMA for approval. And all of these bodies can change things and can say that they're not happy with [it] and we need to rewrite it. And then the Parole Board have the actual say on stuff and aren't accountable to any of these other bodies. So, it's just there's a lot of leaders and fewer [and] fewer, servants in the model, which is quite challenging.

Again, this highlights not only that there is a set of powerful institutions, but that they are positioned together awkwardly with the net effect of increasing the administrative load on frontline workers. The segmentation and lack of coordination of agencies and stakeholders brought together into the same framework results in an altogether fragmented process in which decision-making is hampered by each "leader" asserting their authority. As Bill explains, there is no single accountability structure, and other agencies and professionals, are able to challenge and change the course of his work, impairing the overall strategy. Such bureaucratic excess leads to delays and setbacks, prohibiting the smooth functioning of a system and, rather than streamlining it, this increases complexity and renders working within the system stressful, confusing and irrational. In Bill's view there is an imbalance in the power structure where there are not enough front-line staff to perform the functions but seemingly "a lot of leaders"; again highlighting a gap between the policy vision and the execution of the work. Bill explains that the layers of red tape as well as the intrusion of these bodies into the task of offender management and his work constitute a "headache" signifying the arbitrary use of power meted out by regulatory bureaucrats.

A sense of confusion is articulated by Rose, also a community based social worker who outlines the process and input of the RMA.

> Rose I think [the OLR] provides (pause) oversight from the RMA, that is what I think. But (pause) on the ground do I feel that? not really. Because y'know they look at these *huge* (emphasis in original) risk management plans, bloody huge and repetitive I have to say…and that follows that person through their custodial journey into the community and then its reviewed but.... I don't know (sighs) I mean (sighs)…
>
> Nicola … it wasn't until oh my gosh, probably eight weeks ago that I realised that the RMA have no contact with OLRs at all, no face-to-face contact.

Rose *that's what I mean*! (exclaims) ... They seem to have no contact, right? with the OLRs… they keep saying that they have this role. I just, I'm not sure for the life of me *what that role is*? Apart from administrative. So I send a report, and they feedback and say well you've not really highlighted number six…

Rose understands the purpose of the RMA as having oversight into her work. She is able to outline the process in terms of its burden and yet she finds it difficult to articulate the value of the process. Graeber (2015), explains that bureaucratic systems generate layers of complexity which divert focus away from broader goals. For Rose these are unclear, and she is unable to see the wider aims and importantly the value that the RMA bring to the process. This illustrates a sense of confusion across various research participants. For Graeber, (2015:95) bureaucratic processes are confusing, not because those subject to them are 'stupid' but because they are designed to manage structurally violent processes, which themselves are stupid. Clearly, this does little to help the penal agents on the ground who become tied up in forms, red-tape and procedure as well as grappling with the obtuse aims of the system.

So far in this chapter I have illustrated the ways in which a bureaucracy of risk managing OLRs offers on paper an order, efficiency and rationality through standardised procedures and yet, in practice, those working with the order and the people on it perceive it to have the opposite effect. Bureaucratic imperatives get bogged down in the implementation of its own design and so, become increasingly complex and confusing - divorced from any substantive outcomes. The processes of risk management prioritises form over substance, drowning meaningful outcomes in paperwork, layers of red tape and rigid rules (Graeber, 2015). This demonstrates audit culture at work, showing how the system is set up in such a way that the requirements of *documenting* compliance with rules can displace or hinder the practical activities aimed at managing risk of people who have caused severe harm. The ideal goals of the system are diverted to the narrow focus of performance metrics, technical and auditable outcomes, at the expense of substantive outcomes (Falkner, cited in Green and Rutherford, 2000).

Regimes of truth in an arbitrary system

Among many participants, there was also a sense that the risk management process is experienced as one which is both arbitrary and unfair. This is directly related to the ways in which the machinery of power deploys its techniques (Foucault, 1977). The encroachment of managerialism into the sphere of criminal justice (Feeley and Simon, 1992) and into social

work (Burton and van den Broek, 2009) has seen the introduction of risk assessments which have risen to prominence in the field creating a scientific hegemony or 'regime of truth' (Foucault, 1980). The ascension of 'scientific' models of risk marginalise other ways of thinking about and carrying out offender management. The dominance of these practices in turn legitimises the structure and logic of the criminal justice system through the prevailing standards of risk practice as determined by the scientific community. In doing this they establish mechanisms by which to lay out definitional criteria, thresholds, and measurements of risk. The goals of risk management are twofold; to carry out assessments, and to predict and manage risk to the highest standard in a structured, and *defensible* way (Kemshall, 2009) which can withstand challenge if things go wrong. This in turn attempts to neutralise the problem, to eradicate uncertainty and diffuse political (and personal) anxieties and, at the same time, depoliticise the actions of the penal system and its approach towards dangerous subjects (Green, 2020).

This section is concerned with how penal agents experience aspects of relevant legal procedure as well as the use and claims of risk assessment instruments. For some interviewees, issues of inequity, lack of fairness and legal advantage, and disadvantage, were made explicit. This issue was brought to the fore by Edward, a senior legal practitioner. In speaking about the position of the defence in relation to possibilities for challenging the risk assessment report (RAR) he explains:

> If the defence went to challenge, if they wanted to set up a counter report… the problem tends to be, by the time you're engaging someone, they're already the fixed target of a risk assessment report that says [they are] high risk. And it's very difficult for one of their colleagues to come in and say that [the assessment] is completely wrong. They will tend to say, despite these differences, I agree with the overall conclusion. And…the judge can say "all these other things are very interesting, but essentially don't matter". So…you just lodge the report and try and persuade the judge, knowing that you're never ever going to be able to do that, because you've got now two reports that agree on the risk assessment which may disagree in some detail, but you might be as well saying nothing frankly.

Here, Edward outlines the challenges of maintaining the principles of balance in the system after the point an individual becomes what he terms a "fixed target". This metaphor is an analysis of the Order conveyed through the sheer power and weight of science and lack of

ability to evade such a negative consequence. Within this observation is a sense of futility, a fatalism articulated in the face of the power of the apparatus which has a tight hold on the OLR subject once they fall within its purview. It also shows that even legal bureaucrats are powerless in the face of the superior systems of *power/ knowledge* which are diffused through institutions (Foucault, 1972). Edwards statement also reveals the existence of a knowledge-power clique, where it becomes impossible to stand up against the system both inside and outside it, due to its force.

While this research did not specifically focus on the use of risk assessment instruments, practitioners raised the matter in the course of the interviews. The use, nature and efficacy of such instruments was contested. Those working inside the system were dubious about the ethics, application, nature and validity of risk assessment methods. Some of these concerns were of a more epistemological nature:

> The focus was on these risk assessments, the means of proving risk, and there's a whole series of issues about risk assessment tools and what they are. And that is, I suppose [is that] contrast between the psychological view of the world and a criminological and sociological view of the world. And there's a danger of kind of pathologising behaviour and thinking thereby, something like risk can be treated (Alan former senior member of the Parole Board).

Alan questions the dominant narrative of risk, highlighting how it is related to both discourse and epistemological assumptions. He explains how conceptual frameworks determine outcomes through manufacturing particular discursive domains. He draws his own conclusions about the acquisition and evaluation of knowledge, positing that the real 'danger' is a limiting and pathological view of the individual which is understood through a single disciplinary lense. He warns that a risk lens, with its reliance on risk and individual pathology, frames and narrows the opportunity for a wider analysis, distorting factors which are social or structural. It has been suggested by Casey (1997) that the neglect of environmental or contextual factors can result in a 'trait-state tension' leaving room for misclassification and error in evaluating risk (cited in Nuttall, 2013:19), and the encroachment of subjective bias into the risk assessment process (Kemshall, 1998a; 2003). In a sociological view, these are problems directly created and sustained by governments and institutions themselves that create vulnerabilities and social conditions which structure human behaviour. Thought of in this way, the pathologies that Alan articulates are contextually embedded within political norms and institutional structures that

also produce and promote specific forms of carceral practices. A risk management model, which may well have some immediate merits, justifies individual responses at the expense of what Green (2020) has termed ‘population level reform’ which would reduce vulnerabilities and inequities across the board.

Edward explains the difficulty of challenging carceral logics upheld by the oligarchy of powerful experts who have a monopoly on the system. He draws on the example of risk assessment training whose accreditation is determined by the RMA later adding:

> If we're getting a report, we want to get a report from someone else that's approved by the Risk Management Authority, and they are professional colleagues. And so, the critics tend to be around the margins or even if there's something reasonably significant, it's not sufficiently significant that I think it's ever going to make a difference in terms of whether an OLR is imposed or not. So, it feels like a rather futile exercise… there's just this inevitability that the OLR will be imposed.

Edward explains how, in the interests of fairness, he would request a challenge of the report by instructing someone accredited by the same body. Yet those would be professional colleagues, accredited by the RMA, which means that dissenting opinion in matters of risk is unlikely and therefore highlights the concentration of power within a few hands. This suggests the existence of a knowledge clique where a small group of experts dominate the field and control the status quo resulting in the formation of a hegemonic bloc. He explains that any attempt to restore balance is a “futile exercise” due to the imbalance of power propagated by the medico-judicial system which privileges particular forms of knowledge and discourses (Hall, 2001).

The power knowledge nexus was brought up again by Colin a psychological professional, who echoes these concerns. He explains:

> At the minute there is neither the funding, nor the pool of expertise for the defence agent to get their own report as the one instructed by the judge. I think the approach generally, of the risk assessment, is one where you have people with a natural bias towards the Crown and that goes through their recruitment, their retention, what they have to do to be accredited risk assessors and so on, and as such, a healthy system would have a pool of independent experts who would challenge them every time from outside of the system.

Here, Colin is directly addressing the nature of how institutions play a role in defining and regulating knowledge and how they maintain the regimes that serve their interests. As commentators have argued, organisations exert power in various ways (Mills, 1956; Abbot, 1988; Friedson, 2001) in spheres of finance, politics, public policy and in access to resources and information. In doing this, they influence the opinion of various publics and structure and maintain the status quo.

Both Edward and Colin are contesting what they view as a significant power which is concentrated in a few hands; elites working for the state who construct and legitimise power without equal challenge. Friedson (2001) explains that professions define the boundaries of and defend their position over domains of expertise and practice which set the standards and norms of practice. Professional bodies form distinct blocs of jurisdictional control characterised by specialised knowledge, training and authority. These strategies concern recruitment, training, accreditation which exemplify how the assert their authority. This position is sustained through the exclusion and marginalisation of dissenting or alternative perspectives of truly "independent experts" whose report may not be given the same authority as it would have had it come from the inside. So, in this way, the notion of the RMA's pool of "independent" experts may be something of a misnomer. They are members of a power elite which draws upon internal modes of technical expertise stemming from shared norms about what constitutes scientific knowledge supported by the Authority and in so doing maintain an iron grip on the system.

Colin later raises the question of balance and procedural fairness,

> The amount of money paid for these reports is so much greater than the Scottish Legal Aid Board are paying out for reports or whatever. So one of these reports might charge £15000: that's not unusual…*but* (emphasis in original) that is the entire budget for the Scottish Criminal Cases Review Commission for independent reports and so there is a real question of what lawyers would call an equality of arms.

Colin's example is important as it highlights a perceived lack of balance, and procedural fairness, calling into question the quality of due process protections which should act as a buffer against the wrath of the state**.** In operation, the power of the system is bolstered through a potential lack of funds available to the defence to commission its own independent report with which to challenge the Risk Assessment Report (RAR).

The 'art' of risk assessment and the emperor's new clothes

> *So off went the Emperor in procession under his splendid canopy. Everyone in the streets and the windows said, "Oh, how fine are the Emperor's new clothes! Don't they fit him to perfection? And see his long train!" Nobody would confess that he couldn't see anything, for that would prove him either unfit for his position, or a fool (Hans Christian Anderson, 1837:6)*

Offering a strong bent of criticism, Colin sums up his dubious view of the current risk industry:

> There is another aspect about risk assessment that is worth you bearing in mind. There is a lot of scientific gloss that is placed on the risk assessment industry that puts off ordinary intelligent people from sensibly scrutinising its function…. If we look at OLRs, you would expect that the OLR might predict bad outcomes for the population of prisoners that are identified as being high risk, but your risk management is about stopping all of those incidents happening at all, so you can't actually tell whether risk prediction items that you have been using are worth a toffee… You can look at some very simple things that just sort of make people think about what's been created which is this sort of magic box of predictive science and what I think is really lacking is the emperor has no clothes approach…

Colin explains that the reasoning of risk management becomes circular where the assessment of risk defines the behaviours the management plans seek to mitigate, each informing and depending on the other. At the same, time its overall effectiveness depends on its own implementation. This interplay makes it difficult to determine where one process truly begins and the other ends. Creatively drawing on the work of Hans Christian Anderson, Colin is urging for a more critical analysis of risk assessment. This analogy is used to symbolise the inability to challenge apparently rational and common-sense approaches thereby illustrating the power of collective conformity in perpetuating such illusions. Colin, also uses the metaphor of "magic box", indicating a critical viewpoint, and he warns against being blind-sided by a scientific approach. He is concerned that a veneer of "scientific gloss "over the risk industry operates in a dominant way, overstating its value, obscuring its limitations and crowding out other ways of thinking.

Later in the interview, he goes on to make subsequent criticisms of the supposed merits of risk management. Echoing a point raised by Alan earlier in the chapter, Colin explains:

> If you look at the Risk Management Plans - engagement with supervision, avoidance of drugs and alcohol, stability of accommodation and activity - if you have these three correct that's going to cover most of the risk for most of the people most of the time, so I mean even our risk management plans aren't that sophisticated erm (pauses). I think an awful lot of this is about the containment of anxiety and I think it makes us feel an awful lot better to have spent thousands of pounds on a snazzy report you know, it makes us feel better.

This is interesting, since, despite being a psychological professional, Colin argues that social, lifestyle, as well as practical and environmental factors are crucial in containing or decreasing risk. Drawing upon his clinical experience he outlines stabilising factors which reduce re-offending. Rather than focus in on pathological or clinical factors he advocates for focusing attention upon areas of practical and supportive structures. He adopts a critical stance about risk management interrogating its value, integrity and utility. In doing this, he is suggesting that the new risk model is about giving the impression of control in a bid to contain the anxieties of various publics. In this way, scientific rationality plays a key role within political contexts of fear in which the system needs to make difficult decisions in the face of public scrutiny. Ergo, institutions create risk management systems, complex auditing procedures and documentation, which reflect their efforts to respond to complex challenges, which if uncritically accepted provide us with the reassurance that such problems are being managed.

Risk assessments may not in themselves reduce reoffending, but they do provide legitimacy to the current set of carceral logics as I have shown. However, in my interviews there was further challenge to the dominant discourse regarding the validity, and implementation of risk assessment instruments.

> [We] would get the parole dossier….and many of the other parole board members were really questioning what was lying behind this assessment. How valid was it? (Alan)

> Risk assessment is not a precise science, and it made me laugh on the basis that there was a claim that it was a science at all. It's clearly very much an art... (Edward)

Again, this shows a broader scepticism across a spectrum of professionals about the validity of, and the claims made about, risk assessments. This echoes Graeber (2015: 41) who explains that the 'algorithms and mathematical formula by which the world comes to be assessed become ultimately not just measures of value but the source of value itself." Alan, Edward and Colin are unconvinced about the validity of risk assessment and its purpose and function. Alan questions whether there is an underlying motivation for the new assessment process. As Edward views risk assessment as not an objective science, resonating with the literature in Chapter three. In his view practice of risk assessment is "an art", implying subjective judgement allied with broader criticisms of risk assessment (Kemshall, 2021). While the tools and techniques of risk, provide a scientific foundation through empirical data and statistical probability, there are significant grey areas which demand professional subjective analysis and decision making. Edward makes a point about the fallibility of risk assessments particularly where they integrate subjective and interpretive aspects. Regarding the compiling of the Risk Assessment Order, he explains:

> One thing I just wanted to mention before when we were talking about the assessment process, I had one case where in the Risk Assessment Report, there was a reference to someone else, and it was very obvious that had been a cut and paste. Now, I can understand that there may well be cases which are very similar, but that was a fairly jarring moment. [I] thought this is the report [that] was going to end up with someone being sentenced to a life sentence and you've cut and pasted from something else (pause) the care that should be required (pause) OK, maybe you found the perfect form of words in this earlier report, but it just made it look as though they are going through the motions. And risk assessors may have been under pressure of time and have lots of other cases to deal with, but it just gave a sense of, you know, they're not even really trying very hard, and [that] they don't need to, [because] an OLR will be imposed anyway.

This point illuminates the concerns outlined by both Edward and Alan which captures precisely the shortcomings of risk assessment where in the end it comes down to the way in which individuals apply the tools and interpret the results (Kemshall, 2003), both examples where the supposedly perfect science of risk is subject to human error or lack of care. Edward articulates a sense of unfairness and lack of reasonable care given to the report, suggesting a hasty approach to an important document which can result in life changing outcomes. This also, as he points out, may be a wider feature of work-related burdens and pressures – some of which

have been described in this chapter. However, he also explains that he experiences a sense of futility in that the subject of the risk assessment, by that stage is already the "fixed target" of the process and concludes that there is an inevitability that the Order will be imposed.

The issue of the epistemology of risk assessment rather than the application of the tools was raised by Colin. In speaking about the HARE Psychopathy Checklist, he explains:

> The problem is, for example with the PCL- R is that it is measuring things very different in their nature. So historical elements that are never going to change such as age of first conviction and interactional elements which may be subject to change like a "glib and superficial manner". So, you know erm where's the logic in that these two should score the same in some sort of dimensional scale? there really isn't much logic there at all.

Here, Colin offers a professional critique of the risk assessment scale used to establish the presence of psychopathic traits. He points out some of the methodological flaws in that it combines historic unchanging factors and other more dynamic or 'interactional' factors and quantifies them by the same measurement (also see Boduszek and Debowska, 2016). This example is provided within a wider critique of the methods by which assessments specifically for personality disorders are made. The evidence used to measure the presence of such a disorder might by definition be found given the person's involvement in the criminal justice system. In the end, establishing a high risk of harm may be tautological. In the words of Ellard, (1989) 'Why has this man done these terrible things? Because he is a psychopath. And how do you know that he is a psychopath? Because he has done these terrible things' (Ellard, 1989:128).

The OLR: a 'lobster pot' of sorts

Perceptions of an unfair and arbitrary system seemingly compound the deleterious effects of preventative punishment where, once in prison, the onus is on the penal subject to prove on the balance of probabilities that they are safe to be released. The OLR, as I hope to have shown in this thesis, creates the 'lobster pot' conditions as described in the judgment of *Anderson and Others v Scottish Ministers and Another* (2000). That is, the OLR has created conditions in which people are readily placed but far less easily able to escape. Kerry, a prison manager, explains how the lobster pot operates in practice, creating pressure inside the system.

Kerry They're almost (pause) in this perpetual world where they are going to keep committing the same behaviours because they've just constantly got pressure applied…I'm thinking of several cases, where you think, it's almost like you're constantly aware of the crimes that they've committed, and the sentence that's been passed down and the *enormity* of the sentence that's been passed down…the nature of the offending that resulted in the sentence, means that every move they make has been interpreted under it, so if somebody kicks off, has a bad day, somebody reacts or walks away from a member of staff in order to cool down or whatever, it can be interpreted, *back through their crime again, back through their crime again, back through their crime again* (emphasis in original)

This is a poignant example of the way in which a system based on previous offending becomes a precursor to a narrow range of possibilities for the future. The index offence and the associated risk, are the lenses through which the person is permanently interpreted. The micromanagement of prisoners and their actions within prison creates "pressure" on the imprisoned subject due to the "enormity" of the sentence and the intersection of these two variables. Not only is the system stacked in looking through a risk lens:

> …there is a tendency not to recognise the good behaviour unless it's the box ticking of these artificial rules… we tend to report the bad (Kerry)

The lens of risk obfuscates any "good behaviour" which becomes lost and unaccounted for, highlighting the way in which the system is stacked against the prisoner in an arbitrary way. This not only shows that Kerry observes the sheer power of the system as juxtaposed against the OLR prisoner, but she explains that the rules are "artificial", conveying a further sense of absurdity. I bring this chapter to a close with a short excerpt from Kerry's interview which really captures this.

Kerry The level of scrutiny intensified and intensified so it almost set them up to fail… because it applied that pressure. …so when we actually took cases on [at NTE], they were kinda... not destined to fail (pause) but there was such a pressure on [them] to be in that [new] environment…and they are put into a situation where they're absolutely under the microscope. I had one (pause) I think I had two get to the Open Estate.

Nicola *Is that it?* (emphasis in original)

Kerry We couldn't get them there (pause): just couldn't get them there.

Nicola Why?

Kerry They just (pause) failed, they just kept *failing,* (emphasis in original) basically.

Nicola Jesus.

Kerry But it's the *perception* (original emphasis) of failure, so the perception of failures... were maybe things that other people wouldn't have failed for.

Nicola So it's barriers that the system kind of put in place?

[pause]

Kerry The level of scrutiny would be difficult for anybody (pause). People's lifestyles, especially OLRs, are so chaotic… [that] placing them somewhere where they have to be (pause) holier than thou. They have to be, you know, the conformance to the prison rules I get that, but when you add in an introduction back in a society where their lives are chaos and that order is gone then it's obviously unachievable. Cuz you're just scrutinising (pause) but I get the reasons why [we] do it, but you're scrutinising everybody's every move, every emotion, every outburst. And we spend a lot of time in programmes, telling people that anger is fine, and anger is good it's okay it's what you do with that anger, but when these people show anger, they are…

[notable pause]

Kerry Punished is the wrong word. But they are (pause). I'll think of another word for it. Every emotion is logged almost, so they're under such a microscope, that…I think they're almost destined to fail (pause). It's almost like trying to get them to erm (pause) It's even more difficult than conforming to society's norms its

> conforming to norms or measuring them on a scale that (pause) *any* human would fail...

This illustrates the way in which the risk bureaucracy is beset by hurdles of its own making. Kerry shows that any progression for this group should be a cause to celebrate but instead it is a cause for worry and increased restrictive measures. In placing prisoners under a "microscope" of such an intensity, they are bound to err, with the bureaucratic reaper lurking in the shadows ready to take note. The expectation that prisoners are required to be "holier than thou" indicates that they are expected to behave in such a way that shows off their moral or ethical reform demonstrating their right to be included within the circuits of civilised society (Rose, 2000). The outperformance of normative standards of behaviour within the context of a prison fails to take into account the difficult realities of such environments (Liebling, 2007; Edgar et. al, 2003; Crewe, 2011) thus setting people up at an extreme position of disadvantage. As Kerry explains, risk processes record behaviours at a level of penetrating intensity "that any human would fail". This, coupled with the high levels of vulnerability within this group which makes change and transition difficult, entangles people within a system that is difficult to navigate and ultimately exit.

Conclusion

In summary**,** this chapter shows how the OLR, far from operating a rational, streamlined and efficient process of punishment, operates an extreme manifestation of risk-based penal governance, where bureaucratic structures appear to overwhelm a traditional rehabilitative ideal. The system, while ostensibly designed for efficiency and risk containment, paradoxically generates inefficiencies, confusion, and a profound sense of futility among penal agents. Rather than facilitating rehabilitation or reintegration, it entrenches a Kafkaesque cycle of administrative based control, where both penal actors and those subject to the sentence become ensnared in an inescapable web of paperwork, surveillance, and managerial oversight. The persistence of this approach highlights the extent to which risk logic has overtaken penal rationality, creating a 'punishment bureaucracy' (Karakatsanis, 2019) that prioritises auditable processes over substantive outcomes. As practitioners navigate the contradictions and absurdities of this system, their experiences expose its fundamental dissonance: While it claims to promote public safety through rigorous risk management, it instead exacerbates systemic pathologies of its own making, delaying progress, ultimately rendering the penal subject an object of control rather than transformation. Given the low release rates associated with the

OLR and the enduring power of this risk-based penal framework, the full implications of this sentencing regime remain unclear. However, what is evident is that the liberal ideal of rehabilitation is increasingly marginalised in favour of administrative efficiency and managerialism. The illusion of rehabilitative possibility persists, yet penal actors are compelled to sustain a system that is more about its own perpetuation than the meaningful reintegration of those subjected to it. The contradictions inherent in this framework invite further exploration, particularly into how penal actors reconcile their roles within an apparatus that often appears both arbitrary and inescapable.

Chapter 9 Conclusion

"There is a concern not just to describe the conventions through which we organise our knowledge of ourselves and our world, but also to show the costs of these conventions and the forms of oppression they entail" (Garland, 1990:134).

The aim of this thesis was to provide a qualitative account of practitioners' experiences of sentencing, managing and caring for people subject to the Order for Lifelong Restriction in Scotland. This is an important and significant contribution as, for the first time, it presents an account of the complexities and the burdens of work with people convicted of serious violent and sexual offences and subject to a form of preventive detention. While there is a small body of scholarship on the OLR and a raft of policy literature, the sentence has not been the focus of critical analysis by colleagues in criminology. Furthermore, while there is an abundance of literature on risk, governance, precautionary logic and managerialism in criminal justice it seems that the lived accounts of performing risk-based justice with those subject to preventive detention in Scotland are marginalised within the wider scholarship. To that end, the qualitative methods employed in this research facilitated an in-depth insight into the experiences and perceptions of this work. In doing so, it captured complexity and nuance through providing detailed accounts of vivid descriptions and the meaning of risk-based labour. It is on this basis that this thesis provides an original contribution to the theoretical debates, knowledge and perspectives of preventative punishment from inside the system as it operates in Scotland. In presenting a much-needed exploration of the OLR it yields valuable insights into the premise of the sentence, its particularities as well as the peculiarities, and in so doing, hopes to inspire further academic exploration.

As preventative detention becomes a routine feature of modern justice systems and the number of individuals subjected to life sentences continues to rise, the need to critically examine these practices grows ever more urgent. Beyond legal and procedural concerns, these measures carry profound human costs, affecting both those detained and those responsible for their management. This thesis provides context to the OLR in meticulous detail by first tracing its antecedents and evolution, and the processes which underpin it, and the process for sentencing and management. It has measured up the Order for Lifelong Restriction against international regimes in the USA, Australia and in England and Wales. This is important as, by way of comparison, claims have been made that the Scottish indeterminate sentencing provisions has significant strengths, is more ethical and situated within a framework of human rights (Gailey

et al, 2017; Fyfe and Gailey, 2011; Darjee and Russell, 2011; McSherry and Keyzer, 2009; 2011). The argument for this is most strong in that the sentence has the oversight of the RMA; the national body which sets out the risk management process, the accreditation of experts and sets the standards and guidelines for risk management. The OLR is the only form of indeterminate sentencing that employs a statutory pre-sentencing framework and a framework for lifelong risk management from prison or secure hospital into the community. All of these features set Scotland's OLR apart from similar measures in other jurisdictions.

By drawing on legislation, policy documentation, and existing scholarship, I have outlined the bureaucratic archipelago of risk practices which govern the OLR process, from the instruction of the initial Risk Assessment Order, the development of the Risk Management Plan, prison progression, release, and community supervision.

This thesis presents a discussion of statistical data gained from other sources to provide a robust overview of how the sentence is used. Some small-scale studies have indicated that the OLR group is distinctive in needs and risks. This is in keeping with the purpose and aims of the order as set out by the Maclean Committee. The OLR has been imposed on men, of varying ages with broad histories of either sexual or violent behaviour, or both. Some of those who have been given an OLR have been convicted of lesser offences such as Breach of the Peace but who have histories demonstrating a troubling pattern of behaviour. It should be noted that two OLR prisoners transitioned gender in custody and therefore two women are included in the statistics. This research draws from other available resources mainly from research undertaken by the RMA (2023) Gailey et al, (2017) and Ahmet, (2016 cited in Gailey, 2017) to provide detail of the application of the OLR in terms of offending profiles, demographic information, average sentence lengths and the numbers of people being held in prison beyond their initial punishment parts.

Those for whom a judge has instructed RAOs or imposed OLRs tend to have complex personality traits. These include personality disorders, personality dysfunction, learning disabilities and mental illnesses. In addition, some of these will have received a diagnosis of paraphilic disorders and sexual psychopathology, all of which contribute to clinical complexity (Darjee and Russell, 2011).

I have included relevant case law which has seen changes made to the risk management process which has shaped the direction of the order over time. I have also provided an account of human rights implications which have arisen within a European context particularly in relation to

rehabilitation and what has been termed a ‘standard of hope’ (Brownlee, 2021). At present, the majority of OLRs remain in prison well beyond their designated tariff parts, while small numbers have been released on licence, some of these have been recalled to custody.

Overall, the qualitative findings of this thesis shows that risk labour is emotionally demanding and culminates in a series of emotional, psychological and work based burdens for practitioners. The MacLean Committee laid the groundwork for an enigmatic, confusing and contradictory subject: one who needs treatment but who may be untreatable and who should be in a place of punishment but not for punishment. According to the research participants, the OLR subject is elusive and difficult to define with any precision. I explain this as possessing the qualities of the Greek mythological creature Proteus, a shapeshifter with many faces. He may be, at once, a vulnerable person, a ‘suffering soul’, or a vile and violent creature wearing a ‘mask of sanity’, but at any point ready to reveal his true nature in a horrendous spectacle. Several issues emerge from these embedded juxtapositions. Firstly, there is the dissonance of practitioners who work with them and the balance of humanity with retribution. Secondly, there is the difficulty of how best to support and manage resource intensive people through a system which is as convoluted and contradictory as those it is required to control. Despite the dream of scientific measurement, the system seeks to uses algorithms and formulaic assessments to isolate and control this group. And yet it appears to throw together an imaginary subclass of offenders; the irredeemable, the riskiest, the vulnerable, the violent and disruptive, and of course, the model prisoners. Within this context, the people managing persons subject to an OLR have to encourage a sense of hope and progress while operating the ‘penal imaginary’ of rehabilitation (Carlen, 2008). This sets up a challenging situation that takes a toll on the person subject to the sentence as well as on risk practitioners, producing a series of fears, burdens and a sense of futility. Ultimately, it provides insight into the processes and practices of risk governance, yet it also opens a window onto the figure of the ‘dangerous’ subject: one who is rendered paradoxical as both vulnerable and violent, deviant and damaged. In doing so, these humane portrayals contest the dominant and discriminatory narratives that structure public perceptions of risk.

The performance of risk labour takes place in volatile terrain. Those who operate the machinery of risk are required to make decisions in changing and uncertain contexts where human judgement and decision-making play a key role in deliberations about a person’s right to liberty. The unpredictability of risk, and the high stakes at play means that there is little room

for error. This results in a heightened sense of fear and anxiety creating *dread risks* for practitioners. The primary task of high-risk offender management is to protect the public from serious harm. This creates a significant burden for practitioners. Furthermore, risk labour creates a series of unintended risks where penal actors are required to mitigate their own exposure to serious offences. Repeated exposure to trauma saturated narratives causes the transference of trauma to professionals, as was variously described in this thesis. In some cases, this was described as an altering of worldview, where the pervasiveness of risk narratives seeps out of professional boundaries into the everyday lives of risk practitioners. Key witnesses explain how risk work can lead to emotional 'taint' and 'stigma', through the encountering of distressing cases, particularly those involving vulnerable victims, such as children. Performing risk labour inevitably demands emotional resilience. This is achieved, in some cases, by positively reframing the negative effects of risk work.

Risk management is shaped by defensive planning and the fear of worst-case scenarios, which prioritises the potentially catastrophic consequences of harm in the minds of decision-makers. This challenge is intensified by a broader culture of blame, where fear of making the wrong decision coexists with the potential for disciplinary action and reputational annihilation. At various stages of the risk management process, these fears directly influence decision-making, often leading to risk aversion or defensive practices, as described by some professionals. The intense scrutiny of the system further amplifies these challenges, and there is a fear amongst practitioners that the system will administer its own punishment by presenting its processes as evidence of due diligence while attributing failures to practitioner error. This implies that risk management systems offer little protection against these pressures. Fear is both externally imposed and internally reinforced. This highlights an important point; when it comes to predicting human behaviour, safeguards can only go so far. Ultimately, decision-making in such contexts, particularly relating to decisions about parole and release, involves taking personal chances with true risks for practitioners. The 'unconscious collusions' which are embedded within the risk management system (Jaques, 1955; Menzies-Lyth, 1988) are particularly damaging because they go unrecognised, operating below the level of awareness. Organisational defences through which organisations attempt to contain and manage anxiety, uncertainty, and blame, simultaneously generates procedural rigidity thereby reproducing the dysfunctions they seek to manage. In this way risk-averse decision-making becomes embedded within norms of practice rather than challenged. Defensive decisions may protect against the potentially catastrophic consequences of scrutiny and blame, but failure to acknowledge and

address them sustains a cycle of flawed reasoning and practice. This has serious implications for liberty, rehabilitation, prison progression and release of offenders deemed to be high-risk.

Hope or rather hopelessness is a key aspect of practitioner experience. The imposition of exceptional measures has profound implications for hope which manifests in three ways. Firstly, the indeterminate nature and sense of liminality that the OLR engenders causes a deep and enduring sense of hopelessness and despair for the individual placed on the order. Through the symbolic marking of the penal subject as permanently risky, it imposes ideological and spatial boundaries through a totalising framework of exclusion and control. This culminates in experiences which are characterised by despair and futility, a dearth of hope for a better future. This is evident, even after release from prison, when the rules of disclosure and parole licence conditions mean, that they may be unable to integrate as a full citizen. This imposes an extreme form of 'carceral citizenship' (Miller and Forrest, 2017) in which the fixed targets of control are subject to an alternative legal, spatial and social reality. While the OLR is meant to mitigate harm through providing protection to the public, it significantly harms those subjected to it, through stigmatisation and exclusion exemplifying a derogation of the hope principle.

Secondly, a lack of hope is damaging to the professionals tasked with the management, care and control of OLR subjects who bear witness to the impact of this exceptional sentence. Risk work is challenging; it colours the interactions and beliefs of penal actors resulting in feelings of helplessness, lack of control, frustration and ultimately a decline of faith in the system of punishment. The impact of the Risk Assessment Report results in a ubiquitous sense of condemnation through its construction of the individual as polluting and dangerous. This leads to a sense of helplessness and defeat for practitioners who vicariously experience the stigmatisation, dehumanisation, and isolation experienced by those on the order. In many ways, the hopelessness and inevitable despair experienced by the OLR subjects is to some extent shared by those who work with them. At the same time, many practitioners experience a sense of spiritual degradation, vocational struggle, leading to a moral evaluation of the system and ultimately, what regard it has for human suffering and the value of human life. This leads some to question their sense of purpose, utility and ability to perform their roles.

Thirdly, hope in the context of this research has implications for the wider field of criminal justice as it shows how indeterminate punishment at a general level can result in a pervasive sense of futility and diminished hope. Hope is a core concern in evaluating punishment against

the benchmarks of inhumane and degrading treatment as stipulated in Article 3 of the ECHR. In Scotland, fundamental human rights and freedoms are enshrined in Human Rights instruments which commit signatories to fairness, justice and individual protections. Accordingly, human rights apply to all persons, including those subject to lifelong measures of punishment. The Human Rights Act (1998) has incorporated the European Convention of Human Rights (ECHR) and the United Nations Convention on Human Rights (UNCHR) and associated treaties into domestic law to this purpose. A lack of hope in those who become wards of the state, has profound deleterious psychological effects, contributing to despair, mental health deterioration, and increased risk of self-harm. As an exemplar, the two transgender women who were subject to OLRs have subsequently died as the result of suicide whilst in prison. These examples illustrate only one of the inherent risks of indeterminate punishment.

The OLR is deemed to be a fair, ethical, uniformed and efficient way of processing a difficult group of offenders. It does this through employing a raft of heavily prescriptive, bureaucratic processes and procedures. This has resulted in an intensification of the managerial and bureaucratic goals of the system in ways that are deemed more punitive than the mechanisms for other sentences. The OLR operates an extreme manifestation of risk-based penal governance, where bureaucratic structures appear to outperform any other goals of the system. This is exacerbated by the administrative demands of the order and the wider resourcing issues that have continued to beset the Scottish Prison Service. Ostensibly, the meshing of these systems generates a number of inefficiencies, culminating in a confusion, and disjointedness amongst prisoners and professionals as the ends become dislocated from the means. Rather than facilitating rehabilitation or reintegration in a smooth and streamlined way, it entrenches a Kafkaesque cycle of administrative based control, which constrain both penal actors and those subject to the sentence in an inescapable web of paperwork, surveillance, and managerial oversight. Risk logic has become irrational creating a ‘punishment bureaucracy’ (Karakatsanis, 2019) which appears to prioritise auditable processes over substantive outcomes. As well as navigating the intense emotional harms of risk work, practitioners are required to navigate the contradictions and absurdities of the system. While the OLR has been set up to enhance public safety through rigorous risk management, instead it births systemic pathologies, delays progress and ultimately renders the penal subject an object of bureaucratic control. Despite the fact that the legal framework for the OLR expressly includes the possibility of permanent imprisonment at the outset, it was supposed to embody individual specific risk management planning, treatments and interventions. Due to resourcing pressures and systemic failures,

liberal notions of rehabilitation and treatment are increasingly marginalised in favour of administrative efficiency and managerialism. In prisons, there is a strong sense that the rehabilitative possibility is an illusion which is ebbing away. Penal actors are required to reconcile their roles with a system which is more about its own perpetuation than the meaningful rehabilitation and support of those subjected to it. There is a deep sense that the task of risk management is self-referential, degrading the humanity of those subject to the order, whilst simultaneously, losing sight of the liberal promise of rehabilitation down a sump of bureaucracy and punitive punishment. The contradictions inherent in this framework invite further exploration.

In summary, this thesis has highlighted some of the extant difficulties of upholding a system of just and humane punishment, which balances human rights and wellbeing against measures of public protection. Scotland can no longer afford to neglect the plight of OLR prisoners or consider them beyond the pale. It ought to uphold a system which provides meaningful and appropriate means of rehabilitation, treatment and a means by which they can address the risks they pose. The Maclean Committee, twenty-five years ago, intended that the aim of the sentence be based on long-term risk management and not permanent expulsion in places of confinement. In implementing a risk-based system which deprives liberty for protracted periods of time, reasonable care is required to avoid acts or omissions which would foreseeably injure individuals, even where they have committed egregious acts of harm. In that vein, Scotland has a duty to explore and understand the human costs of preventive measures which are of enormous value and relevance both here and elsewhere. Hopefully this thesis is a starting place for a discussion on the scale of the problem, a discussion which has hitherto been neglected.

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