IN SEARCH OF A COHERENT APPROACH TO COMMUNITY PROTECTION IN SENTENCING

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Community protection has been proclaimed as the most important sentencing objective. Despite this, the contours of the principle have not been clearly articulated by the courts. When community protection is invoked by the courts, it is generally applied in a manner to increase sentence severity. However, in some circumstances it has been applied to justify a more lenient disposition; usually to facilitate the rehabilitation of the offender. Given the cardinal status of community protection in the sentencing hierarchy, there is a need to clarify the operation of the objective and the manner in which it should impact sentencing outcomes. It is argued that in order to apply community protection in a jurisprudentially sound manner, there are a number of important premises that need to be acknowledged by the courts. These include that community protection is only necessary where the offender is likely to reoffend. Further, 99% of offenders are released from prison and hence incapacitation is generally only a temporary manner in which to protect the community. Incorporating these considerations into the sentencing process will lead to more informed and accurate decisions regarding the likelihood that an offender will recidivate and enhance the efficacy of the sentencing process.

I INTRODUCTION

Sentencing law has a number of objectives. These include deterrence, rehabilitation, community protection, retribution and denunciation.[1] These aims sometimes conflict. The goal of rehabilitation, for example, generally inclines in favour of a lenient disposition, whereas general deterrence favours a harsher penalty.[2] The sentencing process is made more complex and obscure by the fact that in handing down sentences, courts do not indicate the weight that is accorded

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1 For an overview of the sentencing objectives: see Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) ch 4; Stephen J Odgers, *Sentence: The Law of Sentencing in NSW Courts for State and Federal Offences* (Odgers, 3rd ed, 2015) ch 4; below Part II.

2 *Muldrock v The Queen* (2011) 244 CLR 120.

to any particular objective.[3]

However, increased clarity and efficacy can be injected into sentencing law by a thorough understanding of the meaning and scope of operation of key sentencing objectives, including the circumstances in which they should be most commonly invoked, and the manner in which the objectives can be best achieved.

There is no strict hierarchy of sentencing objectives, however, the only goal which at times has been proclaimed as the most important is community protection.[4] The paramountcy of this aim is underlined by recent legislative reform in some states which expressly declare that community protection is the main objective of sentencing.[5]

Despite the importance of community protection, there has been only scant judicial consideration and evaluation of the concept. When it is expressly invoked as having a role in sentencing outcomes, in the vast majority of instances it is applied to increase sentence severity, without any explanation regarding the manner in which a harsher penalty will make the community safer.[6] Ostensibly, this is understandable given that it is clear that a prison term will prevent the offender from committing offences in the community for the period of the prison term. It necessarily follows that the period of time for which the community will be protected from the offender increases commensurate with the length of the prison term.

However, this linear reasoning process contains a number of unstated premises which may not always be sound and, in any event, require further exploration. First, the community only need to be protected from the offender if he or she would have reoffended during the period of incarceration. Second, nearly all offenders are ultimately released from prison and hence any protection the community receives from incarcerating the offender is temporary.[7] This is especially so given that some studies have shown that prison has criminogenic effects on some offenders.[8] Moreover, it may be the case that other options, such as rehabilitation, provide a more effective and durable means to protect the community.[9]

3 See below Part II.

4 See ibid.

5 *Sentencing Act 2017* (SA) s 3 (‘*SA Sentencing Act*’). See also *Sentencing Act 1997* (Tas) s 3(b) (‘*Tasmanian Sentencing Act*’). A study by the Victorian Sentencing Advisory Council which examined sentencing appeals in Victoria in the calendar years of 2008 and 2010 noted that community protection was a frequently invoked ground of appeal: Sentencing Advisory Council, *Sentence Appeals in Victoria: Statistical Research Report* (Report, March 2012). In 2010, it was the 12th most common ground of appeal raised by the prosecution (under the ground of manifest inadequacy): at 96.

6 See below Part II.

7 See below Part III.

8 See ibid.

9 See ibid.

In this article, it is argued that the current approach to community protection in the sentencing realm is unsatisfactory. The objective is utilised in a cursory (often reflexive) manner, generally to justify increasing penalty severity, without considered analysis of how the objective is likely to be satisfied in a particular case. A framework for applying community protection in a more coherent and intellectually rigorous manner is set out. This involves utilising processes for making more accurate decisions regarding whether defendants will reoffend and making informed assessments regarding whether offenders are strong candidates for rehabilitation. The offence types in relation to which community protection should apply most strongly is also examined.

At the outset, it is important to note a limitation of the reforms proposed in this article. The argument made in this paper regarding the need to more precisely define the scope and operation of the community protection objective in sentencing also applies to other sentencing aims, such as general deterrence and rehabilitation. Thus, if the reforms in this article are adopted, the overall sentencing calculus will still remain somewhat opaque. Nevertheless, increased clarity in any decision-making process is desirable. Further, the methodology adopted in this article could form a framework for clarifying the scope of operation of other sentencing objectives.

In the next part of this article, the existing law relating to the role of community protection in sentencing law is discussed. This is followed in Part III with an evaluation of the manner in which this sentencing consideration is currently applied by the courts. Part IV makes reform recommendations for the manner in which the community protection objective should be applied in sentencing law and practice. The reform proposals are summarised in the concluding remarks.

II ANALYSIS OF EXISTING LAW RELATING TO THE ROLE OF COMMUNITY PROTECTION IN SENTENCING

Prior to examining the role of community protection in sentencing, a brief overview of the sentencing legal landscape is provided in order to contextualise the remainder of the discussion.

A *Overview of the Sentencing Legal Landscape*

Sentencing law in Australia is a combination of statute and common law. Although each jurisdiction has its own statutory scheme, the broad considerations that determine sentencing outcomes are similar throughout Australia. The key sentencing objectives are set out in the main sentencing statutes in each of the nine jurisdictions (the six states, two territories and the federal jurisdiction). They consist of community protection, rehabilitation, retribution, specific deterrence,

general deterrence and denunciation.[10]

The nature and severity of the punishment that is imposed by the courts is strongly influenced by the principle of proportionality, which provides that the seriousness of the crime should be matched by the hardship of the sanction. In *Hoare v The Queen*, the High Court stated:

> [A] basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances.[11]

In a similar vein, in *Magaming v The Queen*, French CJ, Hayne, Crennan, Kiefel and Bell JJ stated:

> The sentence imposed must be proportionate in the sense that it properly reflects the personal circumstances of the particular offender and the particular conduct in which the offender engaged when those circumstances and that conduct are compared with other offenders and offending.[12]

In arriving at a sentence, the courts are also required to take into account a large number of aggravating factors (which increase penalty) and mitigating factors (which operate to reduce penalty severity). The source of aggravating and mitigating considerations varies considerably throughout Australia. The sentencing legislative schemes in two jurisdictions (the *Crimes (Sentencing Procedure) Act 1999* (NSW)[13] and the *Penalties and Sentences Act 1992* (Qld)[14]) each set out more than 20 aggravating and mitigating considerations, whereas the sentencing statutes in the other jurisdictions only identify a small number of

10 *Crimes Act 1914* (Cth) ss 16A(1)–(2) (‘*Commonwealth Crimes Act*’); *Crimes (Sentencing) Act 2005* (ACT) s 7(1) (‘*ACT Sentencing Act*’); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A (‘*NSW Sentencing Act*’); *Sentencing Act 1995* (NT) s 5(1) (‘*NT Sentencing Act*’); *Penalties and Sentences Act 1992* (Qld) s 9(1) (‘*Queensland Sentencing Act*’); *SA Sentencing Act* (n 5) ss 9–10; *Tasmanian Sentencing Act* (n 5) s 3; *Sentencing Act 1991* (Vic) s 5(1) (‘*Victorian Sentencing Act*’); *Sentencing Act 1995* (WA) s 6 (‘*WA Sentencing Act*’).

11 (1989) 167 CLR 348, 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ) (emphasis omitted).

12 (2013) 252 CLR 381, 397 [51]. Proportionality has also been given statutory recognition in all Australian jurisdictions: see *Victorian Sentencing Act* (n 10), which provides that one of the purposes of sentencing is to impose just punishment (s 5(1)(a)), and that in sentencing an offender the court must have regard to the gravity of the offence (s 5(2)(c)) and the offender’s culpability and degree of responsibility (s 5(2)(d)). The *WA Sentencing Act* (n 10) states that the sentence must be ‘commensurate with the seriousness of the offence’ (s 6(1)) and the *ACT Sentencing Act* (n 10) provides that the sentence must be ‘just and appropriate’ (s 7(1)(a)). In the Northern Territory and Queensland, the relevant sentencing statutes provide that the punishment imposed on the offender must be ‘just in all the circumstances’ (*NT Sentencing Act* (n 10) s 5(1)(a); *Queensland Sentencing Act* (n 10) s 9(1)(a)), while in South Australia the emphasis is upon ensuring that the principle of proportionality is applied by the courts: *SA Sentencing Act* (n 5) s 10(1). The need for a sentencing court to ‘adequately punish’ the offender is also fundamental to the sentencing of offenders for Commonwealth matters: *Commonwealth Crimes Act* (n 10) s 16A(2)(k). The same phrase is used in New South Wales: *NSW Sentencing Act* (n 10) s 3A(a).

13 See *NSW Sentencing Act* (n 10) ss 21A, 24.

14 *Queensland Sentencing Act* (n 10) pt 2.

such factors. Despite this, there remains a considerable convergence regarding the mitigating and aggravating factors that operate throughout Australia because most of these considerations stem from the common law,[15] which is supposed to operate in a uniform manner throughout Australia.[16]

The reasoning process by which sentencing decisions are made is known as the 'instinctive synthesis'.[17] This requires judges to identify all of the factors that are applicable to a particular sentence, and then set a penalty.[18] However, in doing so, courts are not permitted to set out with particularity the precise mathematical weight that has been conferred on any particular sentencing factor.[19] Thus, when sentencing courts state that they take a mitigating or aggravating factor into account, it is generally not possible to quantify to what extent that factor actually influences their decision.[20] The same applies in relation to sentencing objectives such as community protection, deterrence and rehabilitation. To this end, Mason CJ, Brennan, Dawson and Toohey JJ in *Veen v The Queen [No 2]* noted:

> [S]entencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.[21]

When sentencing objectives point in different directions, consistent with the instinctive synthesis, it is for the courts to determine how this analysis is to be performed. In undertaking this process, courts do not need to indicate which considerations applied most powerfully. It has been contended that this makes the

15 See *Bui v DPP (Cth)* (2012) 244 CLR 638 with particular reference to the federal sentencing regime.

16 Mackenzie and Stobbs (n 1).

17 See *R v Williscroft* [1975] VR 292, 300 (Adam and Crockett JJ); *Barbaro v The Queen* (2014) 253 CLR 58 ('*Barbaro*'). See also Chief Justice Wayne Martin, 'The Art of Sentencing: An Appellate Court Perspective' (Conference Paper, Singapore Academy of Law & State Courts of Singapore Sentencing Conference, 9 October 2014) 7–9.

18 *Markarian v The Queen* (2005) 228 CLR 357, 375 [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ); *Wong v The Queen* (2001) 207 CLR 584, 611 [75] (Gaudron, Gummow and Hayne JJ); *Barbaro* (n 17) 74 [41] (French CJ, Hayne, Kiefel and Bell JJ); *DPP (Vic) v Dalgliesh (A Pseudonym)* (2017) 262 CLR 428, 433 [4] (Kiefel CJ, Bell and Keane JJ), quoting *Elias v The Queen* (2013) 248 CLR 483, 494 [27] (French CJ, Hayne, Kiefel, Bell and Keane JJ) ('*Elias*').

19 *Pesa v The Queen* [2012] VSCA 109, [10] (Maxwell ACJ and Hansen JA); *Burgess v The Queen* [2019] NSWCCA 13.

20 The only two exceptions are pleading guilty and cooperating with authorities: see Mackenzie and Stobbs (n 1) ch 4; Judicial College of Victoria, *Victorian Sentencing Manual* (4th ed, 2021) 7.1, 7.3 <https://resources.judicialcollege.vic.edu.au/article/669236> ('*Victorian Sentencing Manual*').

21 (1988) 164 CLR 465, 476 ('*Veen [No 2]*').

sentencing exercise obscure and more difficult to comprehend.[22]

B *Role of Community Protection in Sentencing*

1 *Community Protection as the Cardinal Sentencing Consideration*

Community protection is expressly set out as a sentencing objective in all the sentencing statutes throughout Australia, except in the Commonwealth jurisdiction.[23] Despite the absence of express recognition of community protection in the Commonwealth sphere, the courts have noted that pursuant to the common law this is an important sentencing aim in relation to federal offences.[24]

In two jurisdictions community protection is expressly stipulated as the most important sentencing objective. Section 3 of the *Sentencing Act 1997* (Tas) states the purpose of the Act is to 'promote the protection of the community as a primary consideration in sentencing offenders'. Similarly, s 3 of the *Sentencing Act 2017* (SA) states that '[t]he primary purpose for sentencing a defendant for an offence is to protect the safety of the community (whether as individuals or in general)'. In a similar vein, in New South Wales when a court is considering an alternative to prison in the form of an intensive correction order, s 66(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) states that '[c]ommunity safety must be the paramount consideration when the sentencing court is deciding whether to make an intensive correction order in relation to an offender'.[25]

At common law, the cardinal status of community protection when contrasted to other sentencing objectives is even clearer. Brennan J stated in *Channon v The Queen*:

> The necessary and *ultimate justification for criminal sanctions is the protection of society* from conduct which the law proscribes. Punishment is the means by which society marks its disapproval of criminal conduct, by which warning is

22 See, eg, Andrew Ashworth, *Sentencing and Criminal Justice* (Butterworths, 2nd ed, 1995) 331; Mirko Bagaric, 'Sentencing: The Road to Nowhere' (1999) 21(4) *Sydney Law Review* 597; Jeff Smith, 'Clothing the Emperor: Towards a Jurisprudence of Sentencing' (1997) 30(2) *Australian and New Zealand Journal of Criminology* 168, 170; Sarah Krasnostein and Arie Freiberg, 'Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?' (2013) 76(1) *Law and Contemporary Problems* 265.

23 *Commonwealth Crimes Act* (n 10) ss 16A(1)–(2); *ACT Sentencing Act* (n 10) s 7(1)(c); *NSW Sentencing Act* (n 10) s 3A(c); *NT Sentencing Act* (n 10) s 5(1)(e); *Queensland Sentencing Act* (n 10) s 9(1)(e); *SA Sentencing Act* (n 5) ss 9–10; *Tasmanian Sentencing Act* (n 5) s 3(b); *Victorian Sentencing Act* (n 10) s 5(1)(e); *WA Sentencing Act* (n 10) s 6(4)(b). The *Commonwealth Crimes Act* (n 10) s 16A(2) makes it clear that it is not exhaustive of the relevant considerations.

24 See, eg, *Lodhi v The Queen* (2007) 179 A Crim R 470, 490–1 [87]–[88], 491 [92] (Spigelman CJ), 539 [274] (Price J) ('*Lodhi*'); *DPP (Cth) v MHK (A Pseudonym) [No 1]* (2017) 52 VR 272, 287 [51], 292 [66] (Warren CJ, Weinberg and Kaye JJA) ('*MHK*'); *DPP (Cth) v Besim* [2017] VSCA 158, [112]–[113] (Warren CJ, Weinberg and Kaye JJA) ('*Besim*'), citing *MHK* (n 24).

25 For analysis of this section, see *R v Pullen* (2018) 275 A Crim R 509; *R v Fangaloka* [2019] NSWCCA 173 ('*Fangaloka*').

> given of the consequences of crime and by which reform of an offender can sometimes be assisted. Criminal sanctions are purposive, and they are not inflicted judicially except for the *purpose of protecting society*; nor to an extent beyond what is necessary to achieve that purpose.[26]

In a similar manner, a five member bench of the New South Wales Court of Criminal Appeal in *R v Pogson* approved the following statement from *Vartzokas v Zanker*:[27]

> The object of the courts is to fashion sentencing measures designed to reclaim such individuals wherever such measures are consistent with the primary object of the criminal law which is the protection of the community.[28]

While the courts have not engaged in extensive and detailed analysis regarding the precise hierarchy of sentencing objectives, the cardinal status of community protection is supported by not only the above observations but also the fact that no other sentencing aim has been declared by a court to be the most important sentencing aim. Even if community protection is not universally regarded as the principal sentencing aim, it is incontestable that it often plays a very important role in sentencing determinations. This premise underpins the discussion in the remainder in this article: community protection is an important sentencing consideration, which often impacts sentencing outcomes and hence it is desirable to have clarity regarding the scope and nature of its application.

2 *Community Protection Normally Increases Penalty but Is Moderated by the Proportionality Principle*

When community protection does apply, in most cases it serves to increase penalty severity and it most commonly inclines in favour of a term of imprisonment, or a longer term of imprisonment. Thus, in effect the objective of community protection generally operates as an aggravating factor. Thus, it has been noted: 'Protecting the community from the danger posed by an offender is done by incapacitating them, which usually means removing them from society through the imposition of a custodial term.'[29]

However, at common law the extent to which community protection can enhance the harshness of the sanction is curtailed by the principle of proportionality. In *Veen v The Queen [No 2]*, Mason CJ, Brennan, Dawson and Toohey JJ stated:

26 (1978) 20 ALR 1, 5 (emphasis added). This passage has been cited with approval in numerous cases, including *Boulton v The Queen* (2014) 46 VR 308, 326 [68] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA) ('*Boulton*').

27 (1989) 51 SASR 277, 279 (King CJ).

28 (2012) 82 NSWLR 60, 85 [115] (McClellan CJ at CL and Johnson J). See also *Colomer v The Queen* [2014] NSWCCA 51, [65] (Davies J).

29 *Victorian Sentencing Manual* (n 20) 4.4. See also Mackenzie and Stobbs (n 1) 5.

> It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.[30]

Their Honours also stated that

> [t]he principle of proportionality is now firmly established in this country. It was the unanimous view of the Court in *Veen [No.1]* that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender …[31]

Thus, the principle of proportionality does not operate to set a precise penalty. There is no single correct sentence[32] but rather courts can impose a sentence within an 'available range' of penalties;[33] the spectrum of which is defined largely by the proportionality principle.[34] Thus, the principle of proportionality sets an upper limit regarding the extent to which an offender can be punished.[35] Community protection operates to increase the penalty towards the higher end of the spectrum of permissible sanctions.

3 *Community Protection Is of Particular Relevance in Relation to Violent and Sexual Offences*

Community protection potentially applies in relation to all types of offences. However, the prevailing approach is that community protection assumes most relevance in relation to serious violent and sexual offences. As a general proposition, in *Chester v The Queen*[36] the High Court noted that sanctions or dispositions which are designed to protect the community apply most powerfully where there is a need to protect society from physical harm; as opposed to (albeit serious) non-violent offences such as causing financial loss or damage to

30 *Veen [No 2]* (n 21) 473. See also *Boulton* (n 26).

31 *Veen [No 2]* (n 21) 472, citing *Veen v The Queen* (1979) 143 CLR 458, 467 (Stephen J), 468 (Mason J), 482–3 (Jacobs J), 495 (Murphy J).

32 *Boulton* (n 26) 316-17 [27] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

33 See *R v Creighton* [2011] ACTCA 13; *R v Hill* [2010] SASCFC 79; *R v Holland* (2011) 205 A Crim R 429, 441–2 [59]–[60] (Schmidt J); *R v McHarg* [2011] NSWCCA 115, [122]–[124] (Johnson J).

34 *Bradshaw v The Queen* (2017) 269 A Crim R 67, 77 [40] (Kyrou and Redlich JJA) ('*Bradshaw*').

35 In theory, the principle of proportionality also sets a lower limit regarding the minimum level of punishment, but this is not a limitation that is effectively applied: but see *Fangaloka* (n 25) [63] (Basten JA). For a critique of this position, see Stephen Odgers, 'Alternatives to Short Prison Sentences' (2019) 43(4) *Criminal Law Journal* 233.

36 (1988) 165 CLR 611, 618 (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ).

property.[37]

Consistent with this theme, community protection has been held to be of particular importance regarding terrorism offences[38] and child sex offences. Thus, for example, in *Ryan v The Queen*, McHugh J stated:

> Sentencing principles in this country have emphasised the need to protect the community by imposing sanctions that reduce crime by removing the offender from contact with the general population and by deterring the offender and others from committing offences — the so-called 'reductive' justification for prison sentences. The need to protect the community is also particularly important in cases of paedophilia. Even if long sentences do not deter offenders or others with similar inclinations, such sentences at least have the effect of putting paedophiles in a place where they cannot harm children for the time being.[39]

Sexual and violent offences are also the offence types in relation to which legislatures most commonly expressly provide that the principle of proportionality can be violated in order to give a higher priority to protect the community. This greater emphasis on community protection generally equates to longer prison terms being imposed on serious sexual and violent offenders.[40]

4 *Community Protection Does Not Prompt Detailed Assessment of Reoffending Risk*

When community protection is invoked, there is no attempt by the courts to systematically undertake an assessment of the likelihood that the offender will recidivate.[41] Moreover, typically there is no attempt to consider other ways to protect the community other than incapacitation.[42]

5 *In Rare Instances Rehabilitation Is Adopted as a Means of Community Protection*

However, in rare cases courts have gone beyond reflexively turning to prison as a means of protecting the community and considered other means of achieving

37 Ibid. As noted above, this stems from application of the proportionality principle.

38 *Lodhi* (n 24) 490–1 [87]–[88], 491 [92] (Spigelman CJ), 539 [274] (Price J); *Elomar v The Queen* (2014) 300 FLR 323, 462–3 [699]–[704] (Bathurst CJ, Hoeben CJ at CL and Simpson J), discussing *R v Elomar* (2010) 264 ALR 759, 775 [63] (Whealy J); *DPP (Cth) v Fattal* [2013] VSCA 276, [181], [218], [231]; *MHK* (n 24) 287 [51], 288 [54], 292 [66] (Warren CJ, Weinberg and Kaye JJA); *Besim* (n 24) [112]–[114] (Warren CJ, Weinberg and Kaye JJA).

39 (2001) 206 CLR 267, 283 [47].

40 See, eg, *Victorian Sentencing Act* (n 10) ss 18A–18P; *Queensland Sentencing Act* (n 10) ss 9(2)(a), 9(2A), 9(4), 163; *NT Sentencing Act* (n 10) s 65; *SA Sentencing Act* (n 5) s 54; *Tasmanian Sentencing Act* (n 5) s 19; *WA Sentencing Act* (n 10) s 98.

41 See below Part III.

42 See ibid.

this end. The other alternative means that courts have pursued achieving this sentencing aim is rehabilitation. In *Director of Public Prosecutions (Vic) v Buhagiar*, Batt and Buchanan JJA noted that

> [w]hilst the purpose of the criminal law is to bring wrongdoers to justice for the protection of the community and whilst that protection must be borne in mind as primary and paramount, there are cases where a judge may reach the view that suspension of a sentence is appropriate, not because it would be less unpleasant for the offender, but because it may be productive of reformation, which offers the greatest protection to society ...[43]

In a similar vein in *R v Zamagias*, Howie J stated:

> It is perhaps trite to observe that, although the purpose of punishment is the protection of the community, that purpose can be achieved in an appropriate case by a sentence designed to assist in the rehabilitation of the offender at the expense of deterrence, retribution and denunciation. In such a case a suspended sentence may be particularly effective and appropriate.[44]

Thus, in effect community protection is treated as an aggravating factor as opposed to a sentencing objective. In nearly all cases when it is applied, it serves to enhance penalty severity. In light of the above overview of the operation of community protection, we now evaluate the manner in which this consideration is dealt with by the courts.

III EVALUATING EXISTING LAW

A *The Need to Provide a Justification for Invoking Community Protection*

The above discussion raises a number of considerations and potential concerns regarding the manner in which community protection is applied by sentencing courts. These are now discussed in greater detail.

43 [1998] 4 VR 540, 547, citing *R v Davey* (1980) 50 FLR 57, 65 (Muirhead J). See also *Murphy v The Queen* [2019] VSCA 189.

44 [2002] NSWCCA 17, [32]. See also *Azzopardi v The Queen* (2011) 35 VR 43, 56 [39], quoting *DPP (Vic) v Lawrence* (2004) 10 VR 125, 132 [22] (Batt JA). However, it is not suggested in this article that one option that should be adopted as an alternative to incarceration is suspended sentences. As a sentencing option, suspended sentences have been abolished in Australia's two largest jurisdictions (Victoria and New South Wales) because of persuasive criticisms regarding their efficacy as a form of punishment: see Mirko Bagaric, 'Suspended Sentences and Preventive Sentences: Illusory Evils and Disproportionate Punishments' (1999) 22(2) *University of New South Wales Law Journal* 535; New South Wales Law Reform Commission, *Sentencing* (Report No 139, July 2013) 221–42; Emily Bill and Lorana Bartels, 'Suspended Sentences in Tasmania: An Analysis of the Impact of Recent Breach Reforms' (2015) 34(2) *University of Tasmania Law Review* 6.

The first relevant observation regarding the role of community protection in sentencing is the casual manner in which it is normally applied. When the objective is invoked, as we have seen, there is generally no discussion, explanation or analysis regarding the pre-conditions which should underpin pursuit of the aim or how community protection is likely to be achieved in the particular case. To some extent, this is understandable given that community protection generally operates to favour a term of imprisonment, and it is clear that by incarcerating an offender this will prevent him or her from committing crimes in the community. The cursory manner in which community protection is approached by courts is also to some degree explicable by the fact that the reasoning process underpinning sentencing decisions is the instinctive synthesis, which does not facilitate the expression of transparent explanations for sentencing outcomes.

Despite these considerations, it is desirable to have greater exactness and rigour regarding the role of community protection in the sentencing domain. Sentencing law is the forum in which the state acts in its most coercive manner against the citizen; targeting coveted individual interests including liberty and imprisonment is the harshest sanction in our system of law. In order to encroach on such important individual interests, the rule of law requires an explanation and justification for this outcome. In short, if individuals are to be deprived of matters that are important to them, a compelling justification is necessary.[45]

This matter has already been acknowledged in the context of procedural matters relating to sentencing. The High Court in *R v Olbrich* made a clear distinction between the circumstances in which courts can apply mitigating and aggravating sentencing factors.[46] Aggravating factors operate to increase penalty severity and can interfere with the liberty of people, and hence should only be invoked where there is a compelling basis for their application. The High Court stated that the standard of proof regarding aggravating factors (beyond reasonable doubt) should be higher than in relation to mitigating factors (the balance of probabilities) because of the detrimental impact that aggravating factors can have on the interests of an accused.[47]

There is of course a difference between the stricture that is applied to considerations of proof and the application of legal objectives, however, the broader principle that the rights of individuals should not be trammelled on without a clear justification

45 For a discussion of rule of law requirements, see, eg, Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) ch 11, especially at 211, 214–16; John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980) 270–6; HLA Hart, 'Discretion' (2013) 127(2) *Harvard Law Review* 652. For a critique of Hart's view on discretion, see Geoffrey C Shaw, 'HLA Hart's Lost Essay: *Discretion* and the Legal Process School' (2013) 127(2) *Harvard Law Review* 666.

46 (1999) 199 CLR 270 ('*Olbrich*'). See also *R v Storey* [1998] 1 VR 359 ('*Storey*').

47 *Olbrich* (n 46) 281, [27] (Gleeson CJ, Gaudron, Hayne and Callinan JJ), quoting *Storey* (n 46) 369 (Winneke P, Brooking and Hayne JJA and Southwell AJA).

applies in both contexts.[48]

Thus, in applying community protection in the sentencing domain it is desirable to engage in a reasoning process which goes beyond the, albeit intuitively appealing, sentiment that incarcerating offenders prevents them from committing offences in the community. This is especially because there is in fact reason to question the correctness of this belief. Moreover, as is discussed further below, unpacking the premises underpinning this approach is likely to result in this objective being achieved with a higher degree of success.

B *Unstated Premise One: The Offender Would Have Offended*

In light of the above discussion, the manner in which community protection operates in the sentencing of offenders is examined. The first unstated premise that underpins the current approach to community protection is that the offender would have offended if he or she had not been incarcerated during the period of the sanction. Community protection cannot be used as a justification for imprisoning offenders who would not have offended during the period of incarceration. If the offender would not have offended during this period this does not necessarily mean that a term of imprisonment is inappropriate. It could be justified by reference to other objectives such as general deterrence and denunciation, however, it does entail that community protection cannot be used to justify prison terms for offenders who are not at risk of recidivating.

Of course, there is obviously no conclusive manner in which to determine whether an offender will commit other offences. However, it does logically follow that before a court can use community protection as justification for imposing a period of incarceration, it must make the threshold finding that there is at least a real risk that the offender would have committed other offences during the period of incarceration.

This raises for discussion the methodology and reasoning process which can and should underpin such a finding. While extreme accuracy is not possible in relation to such predictions, there are better and worse methods for determining an offender's risk level. The method that courts employ most commonly to determine whether an offender is at risk of future offending consists of unstructured judicial judgments. The extent of analysis which underpins these judgments varies considerably. Often there is no reasoning at all which is undertaken; merely a declaration that community protection is relevant, thereby implying that there is a meaningful risk of recidivism. To the extent that an analysis is undertaken, it

48 *Kalala v The Queen* (2017) 269 A Crim R 1, 13–14, [35]–[43] (Maxwell P and Redlich JA). These observations were endorsed more recently, in *Bradshaw* (n 34) 79–80 [48] (Kyrou and Redlich JJA).

generally involves a cursory discussion outlining some factors that supposedly relate to this assessment; most commonly, a record of prior criminality by the offender.[49]

The unreliability of unstructured predictions of recidivism has at times been noted by courts. In *Fardon v Attorney-General (Qld)*, Gleeson CJ said:

> No doubt, predictions of future danger may be unreliable, but, as the case of *Veen* shows, they may also be right. Common law sentencing principles … permit or require such predictions at the time of sentencing, which will often be many years before possible release.[50]

Despite this, before a court makes a decision regarding dangerousness, there is no need for the courts to base it on a high standard of proof. In *R v SLD*, the New South Wales Court of Criminal Appeal stated:

> A sentencing judge is not bound to disregard the risk that a prisoner would pose for society in the future if he was at liberty merely because he or she cannot find on the criminal onus that the prisoner would re-offend. The view that the risk of future criminality can only be determined on the criminal standard is contrary to all the High Court decisions since *Veen [No 1]*.[51]

Irrespective of the extent to which judges set out their reasoning regarding the risk of recidivism, the empirical data establishes that such unstructured judicial predictions are highly inaccurate, and in fact are the least accurate methodology of this nature.[52] Moreover, this methodology will not improve. This is because there is no attempt to even systematically record and follow up the accuracy of judicial predictions regarding reoffending. When judges imprison offenders by reference, at least partially, to the view that the offender is likely to reoffend, it is obviously not possible to assess the accuracy of this evaluation — given that we do not have a parallel world where the offender was released into the community. However, the rectitude of decisions that offenders are not at meaningful risk of reoffending can be readily tested in relation to offenders who are not imprisoned. Despite the importance of this decision and the relative ease with which it can evaluated, there is no system which methodically evaluates and collates this data. Given the empirical deficit, there is no scope for reflecting upon, let alone improving, the accuracy of such decisions.

It follows that there is considerable scope to improve this aspect of decision-making, so far as the role of community protection plays in sentencing determinations. Other approaches are explored further in the next section of this

49 *Khudruj v The Queen* [2012] VSCA 2, [31] (Buchanan JA); *R v Baxter* [2005] NSWCCA 234, [39] (Hoeben J).

50 (2004) 223 CLR 575, 589–90 [12].

51 (2003) 58 NSWLR 589, 597 [40] (Handley JA).

52 See below Part IV.

article.

C *Unstated Premise Two: Incarceration Provides Temporary Protection*

The other unstated assumption relating to the current approach to community protection is that any protective benefit derived from a period of incarceration is temporary given that nearly all offenders are released into the community. Studies show that approximately 99% of all offenders will at some point return to the community.[53] The fact that the confinement of most offenders is merely temporary is highly relevant to the objective of community protection for two reasons.

The first is that offenders have a high recidivism rate once they are released from prison. The most recent Australian Government Productivity Commission report showed that nearly half (45.6%) of prisoners released in 2015–16 had returned to prison within two years.[54] More than half (54.2%) of this cohort of released prisoners had returned to corrective services (that is prison or a community-based order) during this period.[55] This underlines the transient nature of any protective benefits that derive from incarcerating offenders.

The second telling aspect about the transient protective nature of sending offenders to prison is that there is evidence prison has a criminogenic effect and hence makes it more likely that offenders will reoffend.[56] Accordingly, the protective effects of prison are not only temporary but in fact potentially illusory — in some cases, it seems prison makes the community less safe when considered from the mid- to long-term temporal perspective.

Research in the United States has shown that although initial incarceration prevents crime through incapacitation, each additional sentence year causes an increase in future offending that eventually outweighs the incapacitation benefit. Each additional sentence year leads to a four to seven percentage point increase in recidivism after release.[57] This is broadly consistent with more recent Australian research by the NSW Bureau of Crime Statistics, which in a 2017 report noted that there 'was a 11%–31% reduction in the odds of re-offending for an offender who received an [Intensive Correction Order] compared with an offender who

53 Victorian Ombudsman, *Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria* (Report, 17 September 2015) 8 [46].

54 Australian Productivity Commission, *Report on Government Services 2019* (Report, 2019) pt C tbl CA.4.

55 Ibid.

56 See further below Part IV.

57 See further ibid.

received a prison sentence of up to 24 months'.[58]

The criminogenic impact of prison is generally ignored by courts in determining the appropriate penalty. However, it has been acknowledged in some cases. In *R v Pullen*, Harrison J noted that 'evidence shows that supervision within the community is more effective at facilitating medium and long term behavioural change, particularly when it is combined with stable employment and treatment programs'.[59] In *Director of Public Prosecutions (Vic) v Sokaluk*, the Court in sentencing the accused arsonist stated:

> Not only was there little evidence before the Court as to the likelihood that the respondent would commit arson again when he was released, but there is no basis for concluding that the respondent would be less likely to re-offend when released after a sentence falling within the range proposed by the Crown (24 to 26 years), than if he were released following the service of the 14 year non-parole period imposed by the judge. Indeed, the institutionalisation of the respondent for a period exceeding 22 years might well increase the possibility of him re-offending.[60]

The same sentiment is expressed in *Director of Public Prosecutions (Vic) v Anderson*:

> In general, but by no means always, persons convicted of serious crime are the maladjusted people of the community, and some will have developed serious behavioural problems. … Unfortunately, gaol may well make their anti-social tendencies worse. This is not always the case; sometimes the experience of gaol effects a real improvement. Nevertheless, I think it is well accepted that it is so in most cases; at least where the sentences are at all long. The reasons are obvious enough: the prisoners are kept in unnatural, isolated conditions, their every activity is so strictly regulated and supervised that they have no opportunity to develop a sense of individual responsibility, they are deprived of any real opportunity to learn to live as members of society, their only companions are other criminals, some of whom are bound to be quite vicious, their sex life must be unnatural, scope for psychiatric treatment is very limited, if not non-existent, and employment is limited and stereotyped. To many this must seem one of the most absurd aspects of the whole matter. They may well ask why the system has to be so anti-social in operation, why it cannot be improved so that people for whom there is a prospect of reformation, and who are not so dangerous that they have to be kept in strict confinement, are given a real opportunity for self-improvement. …

58 Joanna JJ Wang and Suzanne Poynton, 'Intensive Correction Orders versus Short Prison Sentence: A Comparison of Re-Offending' (Crime and Justice Bulletin No 207, NSW Bureau of Crime Statistics and Research, October 2017) 1.

59 (2018) 275 A Crim R 509, 531 [89].

60 (2013) 228 A Crim R 189, 199 [45] (Maxwell P, Neave JA and Kaye AJA).

> When, therefore, a court has to consider whether to send a young person to gaol for the first time, it has to take into account the likely adverse effects of a gaol sentence. A distinct possibility, particularly if the sentence is a long one, is that the person sent to gaol will come out more vicious, and distinctly more anti-social in thoughts and deed than when he went in.[61]

Thus, in some instances, paradoxically, incarcerating offenders may in fact diminish community safety in the long run and in rare cases this has influenced sentencing courts in their decision-making.

Given the crime-inducing effect of prison, there is the logical possibility that in relation to some offenders, community protection from the long-term perspective might in fact be best achieved by not imposing prison terms on the offenders. And certainly, there is the distinct possibility that attempting to rehabilitate offenders might be a more effective means to protect the community than imprisoning offenders. The validity of these propositions turns on empirical observations. These are discussed more fully in the next part of this article. However, it is important to note for present purposes that courts in actioning the reflexive understanding that prison enhances community protection rarely acknowledge that prison might be self-defeating and certainly there is no attempt to engage with empirical realities regarding the impact of prison on recidivism and the efficacy of measures to rehabilitate offenders.

D *Unstated Premise Three: The Community Does Not Include the Prison Population*

The third unstated premise regarding the role of community protection in sentencing is that 'the community' which courts seek to protect does not include the prison population. This is an important exclusion from the society in which we live given that there are significantly higher levels of serious crimes in prison than the rest of society.

It is difficult to estimate accurately the extent of violent and sexual crime in prison because the vast majority of these crimes go unreported, largely due to the prison culture of not reporting crimes against other prisoners.[62] However, estimates that have been made of misconduct in prison, report exceptionally high levels of serious crime. In one study it was reported that 25% of males in New South Wales prisons aged between 18 and 25 were sexually assaulted while in custody.[63] More recently, it was reported that in the 2017–18 financial year,

61 (2013) 228 A Crim R 128, 144 [64] (Maxwell P, Neave JA and Kaye AJA), quoting *R v Dixon* (1975) 22 ACTR 13, 19–20 (Fox J).

62 David Heilpern, *Fear or Favour: Sexual Assault of Young Prisoners* (Southern Cross University Press, 1998).

63 Ibid 16–17.

there were 2,997 assaults in Queensland prisons of which 284 were on prison guards.[64] The total prison numbers in Queensland at that time were 8,900.[65] This rate of assaults reflected a 131% increase since 2013–14 (when prison numbers were only approximately 30% less — at 6,076)[66] and the major cause which was identified for the increase was increasing prison numbers, resulting in prison overcrowding.[67] An earlier New South Wales study stated that 'there was a rate of 14.7 per hundred inmates for prisoner-prisoner assaults causing non-serious injuries and a rate of 2.8 per hundred inmates involving minor injuries'.[68] The crime rate is staggeringly high when compared to the rest of community, where the rates of sexual and violent assault are far lower than one in 1,000 annually.[69]

As a matter of principle, it is dubious to exclude crimes which occur in prison from assessments relating to how best to protect the community. The deprivation that should stem from prison is a denial of liberty.[70] Prisoners have no less right to their physical and sexual autonomy than other individuals. Hence, crimes committed in the prison setting should arguably be of no less concern and importance than those committed elsewhere. Despite this, there has been no considered judicial analysis of whether prisons are part of the community. In the absence of such a discussion and the cursory approach to community protection by the courts, it is clear that crimes committed within the prison setting are not factored into the current approach to community protection in sentencing.

This raises for discussion whether incorporating high levels of prison violence into the matrix of the community protection objective could potentially influence the sentences that are imposed on offenders. Theoretically, this is certainly conceivable. From the above data it is clear that prisons are settings which have a disproportionately high rate of crime. Consigning an additional person to this setting necessarily means that they have a higher risk of being a victim or perpetrating crime than would otherwise be the case. In concrete terms, it may be the case that sending an offender to prison instead of allowing the offender to

64 Matt Wordsworth, 'Prisoner Violence at Record Levels, Cell "Double Ups" a Major Contributor, Commissioner Admits', *Australian Broadcasting Corporation* (online, 7 August 2018) <https://www.abc.net.au/news/2018-08-07/prisoner-violence-record-levels-cell-double-ups-major-problem/10070216>.

65 Ibid.

66 Ibid.

67 Ibid.

68 Tony Butler and Azar Kariminia, 'Prison Violence: Perspectives and Epidemiology' (2016) 17(1–2) *New South Wales Public Health Bulletin* 17, 18–19, citing Simon Corben, 'Assaults and Fights in NSW Correctional Centres' (Research and Statistics Unit, NSW Department of Corrective Services, April 2002) i.

69 See Samantha Bricknell, 'Trends in Violent Crime' (Trends & Issues in Crime and Criminal Justice No 359, Australian Institute of Criminology, June 2008); Australian Bureau of Statistics, *Crime Victimisation, Australia, 2015–16* (Catalogue No 4530.0, 2 February 2017); 'Key Figures: Year Ending 31 March 2019', *Crime Statistics Agency* (Web Page, 16 September 2020) <https://www.crimestatistics.vic.gov.au/media-centre/news/key-figures-year-ending-31-march-2019>.

70 See Mirko Bagaric, Sandeep Gopalan and Marissa R Florio, 'A Principled Strategy for Addressing the Incarceration Crisis: Redefining Excessive Imprisonment as a Human Rights Abuse' (2017) 38(5) *Cardozo Law Review* 1663.

remain in the community increases the overall risk that a serious crime will be committed. This is supported by research evidence that suggests that increases in prison numbers, especially if prisons are overcrowded, directly results in increasing prison violence.[71]

Thus, there is a potential shortcoming in the manner in which courts define the community in evaluating how best to promote the objective of community protection. The manner in which to deal with this issue is discussed in the next section of this article.

IV REFORM RECOMMENDATIONS

A *Community Protection Is the Paramount Sentencing Objective*

I now discuss how the approach to community protection in the sentencing calculus can be improved in order to address the above shortcomings.

The threshold issue regarding the role of community protection in sentencing is how it relates to and intersects with other sentencing objectives. As we have seen, there are numerous sentencing aims and generally there is no formal ranking of these objectives, nor any attempt to explain how they operate relative to each other. Despite this, community protection has at times been declared as the paramount objective of sentencing by both the judiciary and legislature (in South Australia and Tasmania).[72] The cardinal status of community protection is also supported by the fact that no other sentencing aims have been declared as being the most important sentencing goal. Thus, it follows that at least as a general proposition, it is accurate to state that community protection is widely regarded as the most important aim of sentencing.

From the logical and jurisprudential perspective this is a relatively non-contentious proposition. The criminal law relates to the most injurious forms of behaviour and the whole criminal law framework is designed to repudiate this type of conduct in order to ensure that its harmful effects do not occur or are minimised. Sentencing is the 'sharp end of the criminal law',[73] and signifies the community's disapproval of criminal behaviour. Accordingly, it follows that sentences should be imposed with the principal aim of protecting the community from the offender. This of course does not entail that other objectives should not be pursued by the courts but

71 Ibid.

72 See above Part II.

73 Mirko Bagaric, Richard Edney and Theo Alexander, *Sentencing in Australia* (Thomson Reuters, 6th ed, 2018) 43.

it does mean that courts, when determining the appropriate sentence, are justified in according considerable weight to community protection. To this end, it is notable that the other key sentencing objectives in the form of general deterrence, specific deterrence, retribution and denunciation all incline in favour of heavier penalties.[74] Thus, pursuit of community protection will generally complement the sentencing dispositions favoured by these objectives. As we have seen, the sentencing aim which often ostensibly conflicts with the outcome favoured by reliance on community protection is rehabilitation. However, as is discussed below, there is scope to harmonise these objectives in some circumstances.

B *Community Protection Should Apply Most Strongly for Sexual and Violent Offences*

The next issue relates to the circumstances in which community protection should apply most acutely. To some extent, all criminal conduct is harmful and hence there is a need to protect the community from its consequences. It makes logical sense to contend that the community need to be protected from offenders who steal from shops, defraud the public revenue and use obscene language in public places, however, the imperative to prevent this type of behaviour is not as powerful as in the case of sexual and violent offences. The empirical data establishes the offence categories which cause the most damage are sexual and violent offences.

Rochelle F Hanson et al reviewed the existing literature regarding the effects of violent and sexual crimes on key quality of life indices.[75] The crimes examined included rape, sexual assault, aggravated assault and intimate partner violence.[76] The key quality of life indicia examined were: role function (that is, capacity to perform in the roles of parenting and intimate relationships and to function in the social and occupational domains), reported levels of life satisfaction and well-being, and social-material conditions (physical and mental health conditions).[77] The report demonstrated that many victims suffered considerably across a range of indicia, even long after the relevant crimes occurred.[78] The report concluded:

> In sum, findings from the well-established literature on general trauma and the emerging research on crime victimization indicate significant functional impact on the quality of life for victims. However, more research is necessary to understand the mechanisms of these relationships and differences among types

74 Ibid 199–200.

75 Rochelle F Hanson et al, 'The Impact of Crime Victimization on Quality of Life' (2010) 23(2) *Journal of Traumatic Stress* 189.

76 Ibid 189.

77 Ibid 190.

78 Ibid 190–4.

of crime victimization, gender, and racial/ethnic groups.[79]

The findings suggested that victims of violent crime and sexual crime in particular, have:

- Difficulty being involved in intimate relationships and higher divorce rates;[80]
- Diminished parenting skills for female victims of partner violence (although this finding was not universal);[81]
- Lower levels of success in the employment setting (this applies especially to victims who had been abused by their partners) and much higher levels of unemployment;[82]
- Considerable impairment and dysfunction in social and leisure activities, with many victims retreating from conventional social supports;[83] and
- High levels of direct medical costs associated with violent crime (over $24,353 for an assault requiring hospitalisation).[84]

Chester L Britt, in a study examining the effects of violent and property crime on the health of 2,430 respondents, noted that '[v]ictims of violent crime reported lower levels of perceived health and physical well being, controlling for measures of injury and for sociodemographic characteristics'.[85] These findings were not confined to violent crime. Victims of property crime also reported reduced levels of perceived wellbeing, but it was less profound than in the case of violent crime.[86]

It is clear that serious sexual and violent offences often devastate the lives of victims, providing a powerful argument for the imposition of stern punishment for the perpetrators of such crimes.

Hence, it logically follows that it is in relation to violent and sexual offences that community protection should assume its most prominent status. The converse of this is that it assumes less significance in relation to offences which do not violate the sexual or physical autonomy of victims. As we saw in Part III, this suggestion is in keeping with observations in a small number of cases. This analysis provides an empirical foundation for consolidating this approach.

79 Ibid 194–5.

80 Ibid 190–1.

81 Ibid 190.

82 Ibid 191.

83 Ibid 191–2.

84 Ibid 193.

85 Chester L Britt, 'Health Consequences of Criminal Victimization' (2001) 8(1) *International Review of Victimology* 63, 63.

86 Ibid 69–70. See also Adriaan JM Denkers and Frans Willem Winkel, 'Crime Victims' Well-Being and Fear in a Prospective and Longitudinal Study' (1998) 5(2) *International Review of Victimology* 141, 141.

In light of the above broad framework, it is necessary to consider more carefully the manner in which community protection should be approached, and in particular to discuss how attainment of this objective can be enhanced in light of the theoretical shortcomings set out in Part III of this article. To this end, there are three changes that need to occur to enhance the efficacy of the sentencing system to achieve the goal of community protection. These relate to the unstated assumptions discussed in Part II of this paper, and they now are discussed more fully in the same order.

C *The Need for Better Predictions of Recidivism*

The first reform that needs to be considered in relation to the manner in which community protection is approached by sentencing courts stems from the often unstated assumption that community protection is only necessary when the offender is likely to reoffend. As noted above, currently there is no systematic method for making this determination. The conventional manner in which sentencing judges make decisions regarding the risk that an offender presents to the community is by reference to impressionistic observations about the offender and his or her prior history. To this end, judges typically place great weight on an offender's prior observance of the law. The conventional view is that offenders who have prior convictions are more likely to reoffend in the future.[87] Other considerations that sometimes influence this decision are an offender's education and employment situation. In nearly all circumstances, sentencing judges do not set out in any detail the factors that have influenced their determination regarding the level of risk an offender presents to the community. Thus, these decisions are unstructured and involve intuitive calibrations. Further, there is no attempt to track the accuracy of these decisions. Thus, there is no systematic follow up to determine whether, for example, offenders who were not imprisoned because they were regarded as being low risk reoffended. It is thus not surprising that this decision-making process has been shown to be highly unreliable and in fact so much so that judicial decisions of this nature are barely more accurate than decisions based on the toss of a coin.[88]

This approach is unsatisfactory given the seminal importance of an offender's likelihood of reoffending to the role that community protection has in framing the appropriate sanction. To this end, there are now a variety of instruments that have been developed which can assist in the process of assessing an offender's risk level. There are two main types of tools of this nature.

87 See, eg, *Veen [No 2]* (n 21) 477 (Mason CJ, Brennan, Dawson and Toohey JJ); *Porter v The Queen* [2019] NSWCCA 117; *Vella v The Queen* [2018] VSCA 30; *Bayley v The Queen* (2013) 43 VR 335.

88 Mirko Bagaric and Theo Alexander, 'The Fallacy That Is Incapacitation: An Argument for Limiting Imprisonment Only to Sex and Violent Offenders' [2012] (1) *Journal of Commonwealth Criminal Law* 95, 104.

The first instrument is what is known as a risk assessment tool. These instruments predict future risk on the basis of actuarial-based assessments[89] that examine past events and seek to identify variables that contributed to their occurrence.[90] Developers of 'actuarial instruments manipulate existing data in an empirical way to create rules. These rules combine the more significant factors, assign applicable weights, and create final mechanistic rankings.'[91]

A large number of risk assessment tools have been developed. They are most commonly used in the United States. The key differences between the various risk assessment instruments are the integers that they use and the weightings that they apply to relevant considerations that have been ascertained as being relevant to the risk of future offending. Typically, an offender's criminal history is a constant base determinant.[92] Other key variables are an offender's criminal associates, pro-criminal attitudes, and antisocial personality.[93] One of the most sophisticated tools is called the Post Conviction Risk Assessment, which is currently used in relation to probation assessments in the United States federal jurisdiction.[94] It is more nuanced than many earlier predictive models because it scores not only static factors (such as prior criminal history), but also dynamic variables, including employment status and history, education and family relationships.[95]

The other mechanism that has been developed to predict an offender's likelihood of reoffending is a 'risk and needs' instrument. This not only assesses the

89 Paisly Bender, 'Exposing the Hidden Penalties of Pleading Guilty: A Revision of the Collateral Consequences Rule' (2011) 19(1) *George Mason Law Review* 291; Melissa Hamilton, 'Back to the Future: The Influence of Criminal History on Risk Assessments' (2015) 20(1) *Berkeley Journal of Criminal Law* 75; Michael Tonry, 'Legal and Ethical Issues in the Prediction of Recidivism' (2014) 26(3) *Federal Sentencing Reporter* 167. Such tools are in fact now used in the majority of states in the United States. See Shawn Bushway and Jeffrey Smith, 'Sentencing Using Statistical Treatment Rules: What We Don't Know Can Hurt Us' (2007) 23(4) *Journal of Quantitative Criminology* 377; Pari McGarraugh, 'Up or Out: Why "Sufficiently Reliable" Statistical Risk Assessment Is Appropriate at Sentencing and Inappropriate at Parole' (2013) 97(3) *Minnesota Law Review* 1079, 1091.

90 McGarraugh (n 89).

91 Hamilton (n 89) 92.

92 Ibid 89.

93 James Austin et al, 'How Many Americans Are Unnecessarily Incarcerated?' (Research Report, Brennan Center for Justice, 2016) 18 <https://www.brennancenter.org/sites/default/files/publications/Unnecessarily_Incarcerated_0.pdf>.

94 Other assessment tools are: COMPAS (Correctional Offender Management Profiling for Alternative Sanctions); LSI-R (Level of Service Inventory — Revised); LSI/CMI (Level of Service/Case Management Inventory); LS/RNR (Level of Service/Risk, Need, Responsivity); ORAS (Ohio Risk Assessment System); Static-99 (for sex offenders/offences only); STRONG (Static Risk and Offender Needs Guide); and Wisconsin State Risk Assessment Instrument, and most of these are used for assessing 'post-sentencing correctional populations': Steven L Chanenson and Jordan M Hyatt, 'The Use of Risk Assessment at Sentencing: Implications for Research and Policy' (Working Paper, Villanova University Charles Widger School of Law, December 2016) 4.

95 Hamilton (n 89) 91–2, 94. Another common similar tool is the Level of Service Inventory, which incorporates 54 considerations. In terms of predicting future violence, it has been noted that dynamic measures are slightly more accurate than static measures for short- to medium-term predictions of violence: see Chi Meng Chu et al, 'The Short- to Medium-Term Predictive Accuracy of Static and Dynamic Risk Assessment Measures in a Secure Forensic Hospital' (2013) 20(2) *Assessment* 230. Given that these tools go beyond the use of static factors and incorporate dynamic factors, they are sometimes referred to as structured professional judgment tools.

risk of offenders reoffending but also identifies the needs of those offenders that, if met, would lower their probability of recidivism.[96] Although these instruments are often referred to interchangeably with risk assessment tools, there are functional differences between them. While risk assessments focus on measuring individuals' chances of reoffending and thus endangering the public, risk and needs assessments attempt to reduce offenders' risk of recidivism by ascertaining which programs and other interventions would meet their needs.[97] The methodology underpinning risk and needs assessment tools is often termed 'structured professional judgment'.[98] It differs from a strictly actuarial approach because the 'primary goal of this type of instrument is to provide information relevant to needs assessment and a risk management plan rather than to predict antisocial behavior'.[99] The score that results from application of this instrument is therefore not designed to reflect definitively the offender's risk of reoffending, and considerations other than those in the instrument can be taken into account to reduce the individual's risk of recidivism.

In the United States, risk and needs assessment tools are commonly used in the probation context.[100] Increasingly, they are also being used in the sentencing process to determine the appropriate sanction.[101]

The use of the instruments is not without some controversy. It has been argued that the instruments are flawed because the algorithms which underpin the tools can contain settings which operate unfairly against minority groups. Thus, it has been suggested that while the tools may not be overtly racist, they can have this effect by possibly incorporating integers which operate as proxies for race, such as the educational level of an offender.[102] The integers which are used by risk and needs assessments tools in some parts of the United States are not transparent

96 Nathan James, 'Risk and Needs Assessment in the Criminal Justice System' (Congressional Research Service Report No R44087, 24 July 2015) 2.

97 McGarraugh (n 89) 1091, citing Brian J Ostrom et al, *Offender Risk Assessment in Virginia: A Three-Stage Evaluation* (Research Report, 12 September 2002) 44.

98 Christopher Slobogin, 'Risk Assessment' in Joan Petersilia and Kevin R Reitz (eds), *The Oxford Handbook of Sentencing and Corrections* (Oxford University Press, 2012) 196.

99 Ibid 199, citing Kevin S Douglas and Kim A Reeves, 'Historical-Clinical-Risk Managment-20 (HCR-20) Violence Risk Assessment Scheme: Rationale, Application, and Empirical Overview' in Randy K Otto and Kevin S Douglas (eds), *Handbook of Violence Risk Assessment* (Routledge, 2010) 147.

100 National Center for State Courts, *Using Offender Risk and Needs Assessment Information at Sentencing: Guidance for Courts from a National Working Group* (Report, 2011) 1 ('*Guidance for Courts*').

101 Ibid; James (n 96) 4.

102 Julia Angwin et al, 'Machine Bias: There's Software Used across the Country to Predict Future Criminals. And It's Biased against Blacks', *ProPublica* (online, 23 May 2016) <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>. See also Laurel Eckhouse, 'Big Data May Be Reinforcing Racial Bias in the Criminal Justice System', *The Washington Post* (online, 10 February 2017) <https://www.washingtonpost.com/opinions/big-data-may-be-reinforcing-racial-bias-in-the-criminal-justice-system/2017/02/10/d63de518-ee3a-11e6-9973-c5efb7ccfb0d_story.html>.

and hence it is difficult to firmly rebut criticism of this nature.[103] Despite this, the first state appellate decision to expressly consider the appropriateness of risk and needs assessment in sentencing was *Malenchik v Indiana*, where it was expressly noted that 'evidence-based assessment instruments can be significant sources of valuable information for judicial consideration in deciding whether to suspend all or part of a sentence'.[104]

There are various versions of such tools. One of the most widely utilised is the Ohio Risk Assessment System ('ORAS'),[105] and this provides an example of the variables that are used by these instruments. The ORAS 'consists of 35 items in 7 subscales: criminal history (6 items); education, employment, and finances (6 items); family and social support (5 items); neighborhood problems (2 items); substance abuse (5 items); antisocial associations (4 items); and antisocial attitudes and behavioral problems (7 items)'.[106] It has been shown that while these instruments are not always accurate, they can predict reoffending patterns with an approximately 70% degree of accuracy.[107] The efficacy of such tools is further enhanced because recidivism levels for high-risk offenders are often reduced if they were placed in programs which are informed by the outcome of the needs assessments.[108]

Risk and needs assessments are also sometimes used in Australia. However, their use is sporadic and when they are used they carry little weight. To the extent that risk assessments are undertaken in the sentencing context, this is typically in order to determine the suitability of an offender for sanctions in the form of community-based corrections orders.[109] The terminology for these sanctions varies throughout Australia, but in essence they are sanctions which require the offender to not reoffend during the duration of the sanction, undertake some community work, and accept conditions or limits which are designed to facilitate

103 As noted below, this is a considerable shortcoming relating to such instruments and the manner in which it can be overcome in the Australian setting is to ensure that all of the variables which inform the tool are disclosed.

104 928 NE 2d 564, 573 (Dickson J) (Ind, 2010), discussed in National Center for State Courts, *Guidance for Courts* (n 100) 13.

105 For an explanation of the manner in which it is used, see Superior Court Working Group on Sentencing Best Practices, *Criminal Sentencing in the Superior Court: Best Practices for Individualized Evidence-Based Sentencing* (Report, March 2016) <http://www.mass.gov/courts/court-info/trial-court/sent-commission/best-practices.html>.

106 National Center for State Courts, *Offender Risk & Needs Assessment Instruments: A Primer for Courts* (Report, 2014) A-54 ('*A Primer for Courts*').

107 Edward J Latessa and Brian Lovins, 'The Role of Offender Risk Assessment: A Policy Maker Guide' (2010) 5(3) *Victims and Offenders* 203, 212, citing Joan Petersilia and Susan Turner, 'Guideline-Based Justice: Prediction and Racial Minorities' (1987) 9 *Crime and Justice: A Review of Research* 151, 170.

108 Latessa and Lovins (n 107) 212.

109 The ABS defines them as: '[Community-based corrections] orders are non-custodial orders served under the authority of adult corrective services agencies. They include restricted movement, reparations (fine option and community service), supervision orders (parole, bail, sentenced probation) and post-sentence supervision orders': Australian Bureau of Statistics, *Corrective Services, Australia, June Quarter 2019* (Catalogue No 4512.0, 12 September 2019).

his or her rehabilitation.[110]

In Victoria, for example, the sanction is termed a community corrections order. Its purpose is to 'provide a community based sentence that may be used for a wide range of offending behaviours while having regard to and addressing the circumstances of the offender'.[111] This sentencing option has a strong rehabilitative component. In *Boulton v The Queen* ('*Boulton*'), the Court stated that a community corrections order is designed to rehabilitate the offender and 'to mitigat[e] the risk of re-offending, through monitoring and surveillance'.[112] To facilitate the rehabilitation of the offender, courts can impose a number of conditions, including medical assessments and compulsory participation in programs that address causes of offending.[113] A pre-sentence report is a prerequisite to imposing a community corrections order.[114] These reports often incorporate a risk and needs assessment, however the utility and persuasiveness of these reports is often compromised by the fact that the reports 'do not provide advice or recommendations concerning the length of order necessary to perform particular conditions'.[115] In *Boulton*, it was also noted that where offenders have psychological conditions or substance abuse issues, courts often obtain expert clinical reports. However,

> [c]linical reports, like Departmental reports, are particularly limited by the difficulty of making reliable risk assessments. This is because the response of individual offenders to interventions or other life-changes is highly unpredictable, thereby undermining any attempt to define prior to sentence the duration of intervention needed to achieve any particular result.[116]

In New South Wales, the sanction is termed an intensive corrections order.[117] A precondition for the imposition of this sanction is an assessment report stipulating that the offender is a suitable person for such a sanction.[118] In making this determination, a range of factors are considered, including: the offender's criminal history and 'likelihood that the offender will re-offend' and 'any risks associated with managing the offender in the community'; drug dependency issues and the report must include 'factors associated with his or her offending that would be able to be addressed by targeted interventions under an intensive

110 *Whelan v The Queen* (2012) 228 A Crim R 1; *R v Agius* (2012) 87 ATR 528, 546–7 [103].

111 *Victorian Sentencing Act* (n 10) s 36.

112 *Boulton* (n 26) 325 [61] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

113 *Victorian Sentencing Act* (n 10) s 48D.

114 Ibid s 37.

115 *Boulton* (n 26) 347 [178].

116 Ibid.

117 *NSW Sentencing Act* (n 10) s 7.

118 Ibid ss 17D(1), 69. See also *EF v The Queen* [2015] NSWCCA 36; *Fangaloka* (n 25).

correction order'.[119] Intensive corrections orders have core components, which include not to commit offences during the period of the order, undertake a minimum amount of community service work and not to use illicit drugs.[120] A number of additional conditions can also be imposed including conditions relating to employment, alcohol consumption, to refrain from going to designated locations and limitations on people that the offender can associate with.[121]

The other main context in which criminal courts utilise risk assessments is when an application is made for the ongoing detention or supervision of offenders once their sentence has expired. A key issue in relation to these applications is the likelihood that the offender will reoffend.[122] The assessment tools most regularly used in relation to sexual offenders are Static-99 and Static-99R.[123] The courts sometimes appear to give some weight to these reports, but this approach is by no means universal.[124] In some cases, courts effectively ignore the findings of recidivism risk assessment tools because of perceived problems regarding their suitability for particular offenders or concerns regarding their validity. In relation to Static-99, Hasluck J, in *Director of Public Prosecutions (WA) v Mangolamara* gave a number of reasons for not being influenced by the observations stemming from this instrument:

> In the end, bearing in mind that the rules of evidence reflect a form of wisdom based on logic and experience, I am of the view, for the reasons I have referred to, that little weight should be given to those parts of the reports concerning the assessment tools. In my view, the evidence in question does not conform to long-established rules concerning expert evidence. The research data and methods underlying the assessment tools are assumed to be correct but this has not been established by the evidence. It has not been made clear to me whether the context for which the categories of assessment reflected in the relevant texts or manuals were devised is that of treatment and intervention or that of sentencing. Dr Pascu acknowledged under cross-examination that the assessment tools

119 *Crimes (Sentencing Procedure) Regulation 2010* (NSW) reg 14.

120 *Crimes (Administration of Sentences) Regulation 2014* (NSW) regs 186, 187(1)(c)(vii), 189C.

121 Ibid reg 187.

122 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *High Risk Serious Offenders Act 2020* (WA) s 123; *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic); *Crimes (High Risk Offenders) Act 2006* (NSW) ss 9(3)(e1), 17(4)(e1).

123 These are actuarial assessment instruments which are based on a consideration of ten variables including the reoffending likelihood of adult male sex offenders. See further R Karl Hanson et al, 'Developing Non-Arbitrary Metrics for Risk Communication: Percentile Ranks for the Static-99/R and Static-2002/R Sexual Offender Risk Tools' (2012) 11(1) *International Journal of Forensic Mental Health* 9; R Karl Hanson, Chelsea L Sheahan and Heather VanZuylen, 'STATIC-99 and RRASOR Predict Recidivism among Developmentally Delayed Sexual Offenders: A Cumulative Meta-Analysis' (2013) 8(1) *Sexual Offender Treatment* 1; R Karl Hanson et al, 'What Sexual Recidivism Rates Are Associated with Static-99R and Static-2002R Scores?' (2016) 28(3) *Sexual Abuse: A Journal of Research and Treatment* 218. They are also sometimes used in relation to parole determinations: see *Hollinshead v The Central & Northern Queensland Regional Parole Board* [2010] QSC 103, [6] (Daubney J); *Weston v The Central & Northern Queensland Regional Parole Board* [2016] QSC 10. A range of other tools that are used are set out in *A-G (Qld) v Eather* [2009] QSC 148.

124 See, eg, *A-G (Qld) v Penningson* [2016] QSC 146.

> are directed not to the commission of serious sexual offences but to sexual re-offending of any kind (t/s 60). She acknowledged also that the database used for the mathematical model upon which Static-99 was based related to untreated English and Canadian sex offenders released back into the community on an unsupervised basis (t/s 68).
>
> Moreover, having regard to the admissions made under cross-examination that the tools were not devised for and do not necessarily take account of the social circumstances of indigenous Australians in remote communities, I harbour grave reservations as to whether a person of the respondent's background can be easily fitted within the categories of appraisal presently allowed for by the assessment tools.[125]

Even stronger reservations about the relevance of recommendations from a risk and needs assessment tool (the '3-Predictor model') were expressed by McKechnie J in *Director of Public Prosecutions (WA) v GTR*, who stated:

> Again, the 3-Predictor model has presently not been validated. Therefore, the court is being asked to rely on opinions of psychiatrists when those opinions are based, in considerable part, on tools that are not validated. There is a possible error of logic to proceed on the basis, as Dr Brett suggests, that even though the tools are unvalidated, when the three give a similar response, there is some validity or relevance in the result.[126]

There have been a number of other related or additional objections to the use of such tools. The most significant relates to the fact that the tools are not totally accurate and supposed unfairness of penalising an individual offender on the basis of group traits which do not accurately define the future criminal trajectory of the offender.[127] This criticism, however, is not sound. While the level of knowledge regarding the efficacy of programs to rehabilitate offenders is not absolute, this is preferable to judicial hunches — decisions based on the best information available are preferable to those based on instinct. Put most strongly, it has been

125 (2007) 169 A Crim R 379, 406 [165]–[166].

126 [2007] WASC 318, [62]. See also *New South Wales v Fisk* [2009] NSWSC 778, [179] (Howie J). More weight was accorded to the tools in *Western Australia v Bellamy* [2013] WASC 467; *DPP (WA) v Dunne* [2013] WASC 359. The tools used here are Static-99, PCLR, HCR20 and RSVP, likewise used in *DPP (WA) v TJD* [2011] WASC 83, [22], [25]; *IK v Secretary to the Department of Justice* [2012] VSCA 12, [53]; *New South Wales v Hippett* [2016] NSWSC 1180, [57]; *A-G (NSW) v Steadman (No 2)* [2016] NSWSC 606, [37].

127 According to Hamilton,

> [a] related complaint regarding the G2*i* challenge applies to criminal justice penalties based on risk: the person is not necessarily being sanctioned on his own merits. Penalizing a person via risk assessment derived from group data means that punishment becomes situated on shared group characteristics and thereby is too de-individualized. The scheme is akin to punishing someone for what other, purportedly statistically-matched persons have done.

Hamilton (n 89) 119, citing Kelly Hannah-Moffat, 'Actuarial Sentencing: An "Unsettled" Proposition' (2013) 30(2) *Justice Quarterly* 270, 277 and JC Oleson, 'Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing' (2011) 64(4) *Southern Methodist University Law Review* 1329, 1390.

stated that omitting to use evidence-based modelling in offender risk assessment is 'a kind of sentencing malpractice'.[128] The inescapable conclusion remains that 'scientists have empirically demonstrated that statistical risk assessment much more accurately predicts recidivism than do individuals relying on intuition and experience'.[129] Moreover, using risk and needs assessment at the sentencing stage 'has real value to protect the public, reduce expenditures, and divert low-risk offenders from incarceration'.[130]

It has also been argued that it is unfair to enhance penalties for offenders that are deemed to be at a high risk of recidivating because this risks imposing penalties that infringe the proportionality principle[131] and effectively results in punishment for future crimes, which may in fact never be committed.[132] These objections, however, can be surmounted given that in making determinations regarding the relevance of community protection, courts necessarily make predictions about the reoffending risk of a particular offender and it is desirable to make these forecasts as accurate as possible. In addition to this, as we have seen, when the courts determine that an offender is likely to reoffend, this does not result in a disproportionate penalty — merely a penalty towards the higher end of the range of a proportionate penalty.

Further, it could be argued that using a risk and needs model will undermine the goal of pursuing 'individualised justice' in the sentencing of offenders.[133] However, the goal of tailoring a sanction to a particular offender does not undercut the desirability of incorporating statistical data into sentencing decisions. Sentencing data is becoming increasingly available and courts are now accustomed to incorporating relevant information into their sentencing decisions. The clearest example is sentencing data regarding mean and median penalties imposed for relevant offence types.[134] Courts often use this data as guidance regarding the appropriate penalty range.

Courts should use data regarding recidivism rates and the success of rehabilitation

128 Richard E Redding, 'Evidence-Based Sentencing: The Science of Sentencing Policy and Practice' (Research Paper No 09-41, School of Law, Chapman University, 2009) 1. See also McGarraugh (n 89).

129 McGarraugh (n 89) 1106.

130 Ibid 1111–12.

131 Tonry (n 89) 167.

132 Michael Marcus, 'MPC: The Root of the Problem' (2009) 61(4) *Florida Law Review* 751, 753, quoting American Law Institute, *Model Penal Code: Sentencing* (Council Draft No 2, 2008) 62–72 ('*Model Penal Code*'). See also Hamilton (n 89) 115, citing *Model Penal Code* (n 132), Marcus (n 132), and Hannah-Moffat (n 127) 277.

133 *Elias* (n 18) 494–5 [27] (French CJ, Hayne, Kiefel, Bell and Keane JJ). The importance of individualised justice is also emphasised in *Bugmy v The Queen* (2013) 249 CLR 571, 592 [36], 594 [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

134 *Crowley v The Queen* [2003] TASSC 147, [21] (Evans J); *R v Bloomfield* (1998) 44 NSWLR 734, 738–9 (Spigelman CJ); *Thompson-Davis v The Queen* [2013] NSWCCA 75, [59] (Campbell J); *Dougan v The Queen* (2006) 160 A Crim R 135, 143 [44]–[46] (Hoeben J). But they are not decisive: see *Hili v The Queen* (2010) 242 CLR 520, 535 [48] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

programs in a similar manner. That is, it should be used to provide a coherent and logical backdrop to a court's evaluation of the likelihood that an offender will reoffend and the prospects of a successful rehabilitative intervention.

While the results of appropriate risk and needs assessments should be the logical starting point for an assessment of these issues, they do not necessarily need to be the end point. Sentencing judges would retain the discretion to make decisions which are contrary to weight of relevant empirical evidence in individual cases (where for example the profile of the offender or nature of the offence was atypical), but by incorporating the recommendations of these assessments into their deliberations, sentencing decisions will be more rational, predictable and accurate.

Thus, there is a strong foundation for using empirical data to guide a court's assessment of an offender's risk of future criminality and what measures, in any, can be used to reduce this risk. However, in order for this to occur, the assessment tool should be as accurate as possible. To this end, it is desirable to use a tool that is adapted and then tested on the offender population to whom it will be applied. As noted by the National Center for State Courts:

> After identifying the most promising tool for use in a jurisdiction, the supervising agency should validate the instrument on a sample that is representative of the local population before undertaking full-scale implementation. Importantly, this should include empirical efforts to norm the tool on different groups of offenders in the target population to ensure that the tool produces accurate risk classifications across subgroups (eg, females, members of various racial and ethnic populations).[135]

Predictive accuracy is affected by a range of factors, including gender and racial differences, sentencing options and practices.[136]

The process of using risk and needs assessments which are adopted to the relevant offender cohort in the sentencing inquiry is in fact not novel in Australia. Such a process was mooted in Victoria over a decade ago with a view to reduce recidivism by focusing on offenders who receive short prison terms (less than six months).[137]

135 National Center for State Courts, *Guidance for Courts* (n 100) 29–30.

136 Ibid.

137 Astrid Birgden and Colin McLachlan, 'Reducing Re-Offending Framework: Setting the Scene' (Paper No 1, Corrections Victoria, January 2004).

The program was subsequently not implemented.[138]

Thus, in order to operationalise this proposed reform, there is a need to better systematise and promulgate data regarding reoffending patterns and the outcome of rehabilitative measures in the Australian setting. A standardised risk and needs assessment tool should be developed for evaluating offenders. It would not be tenable for a risk and needs assessment to be undertaken in relation to all offenders who are sentenced in Australia[139] and hence this methodology needs to be applied in a targeted and efficient manner. It should be utilised in a manner where it is likely to be most relevant and potentially most effective. This relates to situations where a court is disposed to potentially imposing a term of imprisonment. Prior to finalising this decision, the court should request a risk and needs assessment to be completed and factor the results of this into the ultimate sentence.

The development of such a tool is admittedly a long-term project. To this end, the following steps need to be taken to develop a valid risk and needs assessment tool:

> [R]esearchers … collect data (or gain access to data already collected in an archive) from a representative sample of offenders on a large number of potential risk factors (eg, criminal history, antisocial personality, school/work performance) that may be associated with recidivism. The researchers follow the offenders for a set period of time (eg, 1–3 years) after the offenders' prior offenses to determine whether the offenders recidivate. The data from the sample of offenders are entered into a statistical model, and factors shown in the statistical model to have a significant relationship with recidivism constitute the final RNA [risk and needs assessment] instrument. Subsequently, offenders who score high on the risk factors in the RNA instrument are classified as having a higher probability of reoffending; those who score lower on the risk factors are classified as having a lower probability of reoffending.[140]

Once an appropriate tool is developed, it is important to note that no instrument, no matter how nuanced, will be able to predict with total certainty an offender's likelihood of offending. However, the assessment of whether an offender will recidivate is an inescapable aspect of the decision-making relating to the role of community protection in sentencing. The fact that courts typically do not expressly undertake a risk assessment analysis as part of their decision-making

138 However, 10 years later, a report by the Victorian Ombudsman observed high recidivism rates in Victoria and shortcomings in rehabilitative programs: see Victorian Ombudsman, *Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria* (n 53). A trial has also been mooted in South Australia. Indeed, South Australia has recently trialled a risk/needs assessment approach via a pilot project: Willem de Lint, 'Risking Precaution in Two South Australian Serious Offender Initiatives' (2012) 24(2) *Current Issues in Criminal Justice* 145. However, there is no data regarding the success or viability of this program: see Attorney-General's Department (SA), 'Transforming Criminal Justice: Better Sentencing Options' (Discussion Paper, June 2015).

139 There are more than 500,000 sentencing decisions annually: Australian Bureau of Statistics, *Criminal Courts, Australia, 2017–18* (Catalogue No 4513.0, 28 February 2019).

140 National Center for State Courts, *A Primer for Courts* (n 106) 4–5 (citations omitted).

does not avoid the inescapable conclusion that this determination is being made. In light of that, it is important that decisions of this nature are made as accurately as possible. The rectitude of this aspect of the sentencing decision-making process will be demonstrably improved if risk and needs instruments are routinely incorporated into information that is provided to sentencing judges.[141]

D *More Carefully Looking at Rehabilitation as a Form of Community Protection*

The next reform that should occur in relation to the approach to community protection stems from the unstated assumption that incarceration is only a temporary form of community protection. Acknowledgement of this can logically alter sentencing decisions in two ways. The first is to increase the length of prison terms on the basis that the temporary protection derived from prison should at least be as long as reasonably possible. This approach is supported by the fact that empirical data indicates that offenders commit less crime as they get older and hence longer prison terms will enhance community safety.[142] However, the extent to which this approach can improve the efficacy of achieving community protection is considerably limited by the fact that the principle of proportionality limits the extent to which prison terms can be increased to accommodate the desire to protect the community.[143] Hence, the solution to the problem stemming from the transient protection provided to the community from imprisoning offenders does not rest in imposing longer prison terms.

The other reform that could occur in response to the realisation that community protection in the form of incapacitation only offers temporary protection involves exploring durable solutions to the recidivism. This would require judges to think more carefully about other means to achieve community protection and could lead in some cases to shorter sentences, with a strong rehabilitative component. This harmonises with the first reform proposal relating to risk and needs assessments.

141 This could most effectively be accomplished by legislation requiring risk and needs evaluations to be undertaken on serious sexual and violent offenders.

142 Shasta Holland, Kym Pointon and Stuart Ross, Department of Justice (Vic), 'Who Returns to Prison? Patterns of Recidivism among Prisoners Released from Custody in Victoria in 2002–03' (Corrections Research Paper No 1, 1 June 2007). The report showed that that recidivism rates vary considerably according to the age of the prisoner at the time of his or her release. The older a prisoner was, the less likely he or she was to return to prison. It was noted that the reimprisonment rate for prisoners aged 50 years or older was only 4.2%, compared to 55.7% of offenders aged 17–20, and 28.6 % of offenders aged 35–9 returning to prison for reoffending within two years: at 15 tbl 4. Moreover, the study notes that 'each additional year of age reduces the likelihood of returning to prison by 0.09 times. Therefore, prisoners aged 47 years are 2.7 times less likely to return to prison than prisoners aged 17 years': at 17. The study concluded that a prisoner's age at the time of his or her release was a key factor, which significantly predicted the odds of a prisoner returning to prison within two years: at 6. See also Barbara Thompson, 'Recidivism in NSW: General Study' (Research Publication No 31, NSW Department of Corrective Services, May 1995); Jason Payne, Australian Institute of Criminology, 'Recidivism in Australia: Findings and Future Research' (Research and Public Policy Series Report No 80, 1 October 2007) 87–8.

143 See above Part II.

As we have seen, these tools are in part forward-looking and analyse the measures that could be taken to reduce an offender's risk of recidivism.

This raises for consideration the issue of whether rehabilitation per se is an achievable goal. There is no doubt that most peoples' inclination to commit crime is not incorrigible. As evidenced by their conduct, it is clear that most offenders undergo a process of self-rehabilitation throughout their lives. It is well-established that people commit less crime as they get older, although the general trend is that 'those who start early in crime tend to finish late'.[144]

However, an important issue is whether interventions by the criminal justice system can induce internal attitudinal reform. The view that rehabilitation is an attainable objective has only gained current orthodox in recent decades. Following extensive research conducted between 1960 and 1974, Robert Martinson, in an influential paper, concluded that empirical studies had not established that any rehabilitative programs had worked in reducing recidivism.[145] The Panel of the National Research Council in the United States, several years after this work, also noted that there were no significant differences between the subsequent recidivism rates of offenders regardless of the form of punishment. As they stated, '[t]his suggests that neither rehabilitative nor criminogenic effects operate very strongly'.[146]

In recent years, research findings regarding the capacity of the sentencing system to reform offenders has taken on a more optimistic note. Most Australian jurisdictions have devoted increasing resources to rehabilitation over the past decade. The most recent wide-ranging Australian study regarding the effectiveness of rehabilitation is a report by Karen Heseltine, Andrew Day and Rick Sarre for the Australian Institute of Criminology, published in 2011.[147] The report focused on changes and improvements to prison-based correction rehabilitation programs in the custodial environment since 2004, when the previous report was issued.[148]

144 Don Weatherburn, 'What Causes Crime?' (Crime and Justice Bulletin No 54, NSW Bureau of Crime Statistics and Research, February 2001) 3. This trend is supported in a more recent report that tracked the offending trajectory of over 26,000 offenders in New South Wales who were born between 1986 and 1990 and who committed at least one violent offence at 31 December 2014: Wai-Yin Wan and Don Weatherburn, 'Violent Criminal Careers: A Retrospective Longitudinal Study' (Crime and Justice Bulletin No 198, NSW Bureau of Crime Statistics and Research, September 2016). The offenders were followed to 31 December 2015. It was noted that 23% of these offenders committed another violent offence and that the factors that considerably increased the rate of violent reoffending were offenders who committed their first offences aged 17 and under, and those whose contact with the criminal justice system occurred when they were 12 years of age or less: at 1.

145 Robert Martinson, 'What Works? Questions and Answers about Prison Reform' (1974) 35 *Public Interest* 22, 25.

146 Assembly of Behavioral and Social Sciences, National Research Council, *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates*, ed Alfred Blumstein, Jacqueline Cohen and Daniel Nagin (National Academy of Sciences, 1978) 66.

147 Karen Heseltine, Andrew Day and Rick Sarre, Australian Institute of Criminology, 'Prison-Based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia' (Research and Public Policy Series Report No 112, May 2011).

148 Ibid 2.

The report by Heseltine and colleagues, while unable to definitively evaluate the effectiveness of rehabilitation programs currently operating in Australian prisons due to the lack of reliable and wide-ranging data, summarised recent studies into the effectiveness of certain rehabilitation programs. It noted that while there were mixed results, there were some programs that reported positive outcomes. This was especially the case in relation to sexual offender programs, where some studies showed that the recidivism rate of offenders completing the program was less than half of that of other offenders.[149]

The results of programs directed towards violent offenders were less positive, but a wide-ranging review of studies focusing on United Kingdom programs noted that reductions in offending for violent offences by around 7–8% had occurred. Overseas studies reported some success with anger management programs, but an Australian study (of a shorter 20-hour program) showed no positive outcomes related to program completion. There is no cogent evidence supporting the effectiveness of domestic violence or victim awareness programs. However, drug and alcohol programs have been shown to be effective at reducing substance abuse and reoffending.[150]

Thus, there is some support for the view that criminal punishment can assist to reform a portion of offenders who have committed certain offence categories, although there is no firm evidence showing that it can work for most offenders. Accordingly, there is an empirical basis for incorporating rehabilitation into the sentencing calculus of many offenders.

It is difficult to model whether greater emphasis on rehabilitation would enhance community safety. As we have seen, risk and needs assessment tools are not perfect and there will be many instances where offenders who are deemed low risk will commit offences and inevitably some of these will be committed during the period of the prison term that would have been imposed had greater emphasis not been accorded to rehabilitation. Given the greater accuracy of risk and needs assessment tools and the increasingly effective types of rehabilitative programs, it is likely that these 'failures' will be outweighed by the reduction in offending stemming from the more frequent implementation of durable rehabilitative methods.

149 Ibid 14. This is supported by studies cited in Victorian Ombudsman, 'Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria' (Discussion Paper, October 2014) 16–17 [94]–[95].

150 Heseltine, Day and Sarre (n 147) 27. This assessment is consistent with the findings of Ojmarrh Mitchell, David B Wilson and Doris L MacKenzie who undertook a major analysis of studies into the effectiveness of drug treatment programs in prison: Ojmarrh Mitchell, David B Wilson and Doris L MacKenzie, The Campbell Collaboration, *The Effectiveness of Incarceration-Based Drug Treatment on Criminal Behavior* (Systematic Review, 18 September 2006). The studies they focused on related to drug users and compared reoffending patterns of offenders who completed a drug rehabilitation program with those who did not complete a program, or completed only a minimum program between the years 1980 and 2004: at 11. They analysed 66 studies in total: at 20. The report concluded that '[o]verall, this meta-analytic synthesis of evaluations of incarceration-based drug treatment programs found that such programs are modestly effective in reducing recidivism': at 29.

Additionally, apart from the benefits associated with interventions aimed directly at rehabilitating offenders, less reliance on prison will enhance community protection as a result of the greater avoidance of the criminogenic effects of prison.[151] Thus, rehabilitation should have a more prominent role in the sentencing of offenders. The extent to which this should influence sentencing considerations should be heavily dependent on data regarding the efficacy of rehabilitative measures. As we have seen this is very patchy at present. It can only be improved with commitment and action by governments to the ongoing evaluation of rehabilitative measures. However, as we have seen, the weight of evidence suggests that rehabilitation is possible for many offenders and hence this objective should be pursued more regularly as a means of community protection.

E *Recognition That Harm Caused in Prison Is Undesirable*

The final reform proposal relates to the nature of harm, where it occurs and how this should inform decisions relating to community protection in sentencing. In pursuing community protection, the prevailing orthodoxy is not to take into account offences committed in prison. This is despite the fact that the rate of violent and sexual offences in prison is far higher than in the rest of the community.[152] Thus, by sending offenders to prison instead of allowing them to remain in the community, the courts may be merely shifting the location of future criminal offences as opposed to reducing the incidence of such offences. Worse still, sending offenders to prisons may even be increasing the incidence of violence overall given the criminogenic effect of prison and evidence that overcrowding in prison increases the incidence of offending.[153] If prisons are taken to be part of the community, then the protective dividends of incarcerating offenders are reduced and the weight that is accorded to community safety in the sentencing calculus would often be reduced.

Pragmatically, it is not likely that prisons will be taken into account as part of the community. A recommendation to change this position is likely to be too revisionary to be actioned — it is unlikely that the protection of prisoners will be placed above the safety and protection of the community outside prison. However, there is another method for taking prison violence into account in sentencing decisions. This can occur by encouraging courts to better understand the wider effects on their sentences on others. This is not unprecedented; offenders are conferred a sentencing discount if they plead guilty due to the cost savings associated with this course of action.[154] By analogy, the process of sending a likely recidivist to prison will increase the risk of crime in prison and hence this

151 See above Part III.

152 See ibid.

153 See above nn 64, 71.

154 *Cameron v The Queen* (2002) 209 CLR 339, 357–60 (Kirby J).

realisation needs to soften the emphasis on community protection.[155]

It is desirable for the courts when making sentencing decisions to be cognisant of the effects of their decisions. This wider perspective will lead to more informed decision-making. They will still no doubt send many offenders to prison, basing much of their reasoning on the need for community protection, however, in marginal cases where courts are contemplating whether an offender should receive a relatively short prison term or community based order, the realisation that an offender faces an increased risk of being a victim or perpetrator of crime if sent to prison may tip the balance in favour of a community based sanction.

V CONCLUSION

Sentencing is a complex process. There are a number of, sometimes competing, objectives. There is no strict hierarchy regarding the priority of sentencing objectives. However, community protection is the aim which has most commonly been declared as being the most important, both by the judiciary and legislature. Despite this, there has been very little considered attention regarding the meaning of community protection, its scope of operation and appropriate role in sentencing outcomes. This is undesirable, especially given the fact that most typically when community protection is relevant it operates to increase penalty severity and hence results in the additional infliction of hardship on offenders.

There are a number of unstated assumptions that underpin the objective of community protection and influence the manner in which it should be understood and applied by sentencing courts. These include the fact that imprisoning offenders only provides a temporary immunity to the community from the offender; the need for community protection involves the prediction that the offender is likely to have reoffended if he or she was not incarcerated and that imprisoning the offender is the most effective manner in which to protect the community from the offender.

A closer analysis of these assumptions or understandings raises considerable empirical and jurisprudential concerns regarding their validity or the manner in which they are applied. Thus, we have seen that the manner in which courts assess the likelihood of reoffending is crude and inaccurate. This necessarily means that in many instances community protection is incorrectly invoked as a sentencing objective. Moreover, in many cases courts do not seem to adequately consider alternatives to incarceration as a means of protecting the community. From the jurisprudential perspective, there is also a greater need for clarity regarding the

155 Given that the high rate of violence and sexual assault in prison is to some degree attributable to prison overcrowding, this also logically entails that governments should reduce the density quotient of inmates in prisoners, either by building more prisons or alternatively by sentencing fewer low-level offenders to prison. I thank the anonymous referee for this observation.

offence types in relation to which the objective of community protection is most applicable.

Thus, it is desirable to rethink the manner in which community protection operates in the sentencing calculus. There are a number of key premises which should underpin the approach to community protection. Conceptually, community protection should be regarded as the paramount aim of sentencing. It should apply most acutely to offence types which are the most damaging to individuals and the broader community, namely serious sex and violent offences.

In operationalising community protection, there needs to be a recognition that community protection is only necessary where there is a meaningful risk that the offender will reoffend. This means that prior to invoking community protection, the courts should make an informed and considered decision regarding the level of risk posed by the offender. This is best done by giving at least some weight to the outcome of a risk and needs assessment tool. Even in circumstances where the court takes the view that the offender presents a genuine risk to the community, the sentence that is imposed needs to accommodate the fact that incarceration only provides a temporary solution to protecting the community from the offender. Thus, rehabilitative measures should always be actively considered by a court. These are not necessarily as a substitute to a period of incarceration, given that some rehabilitative programs can be undertaken in prison, however, this mindset should inform sentencing dispositions even for offenders who are at a high risk of reoffending.

Thus, these reform proposals do not entail that offenders who are at little risk of reoffending or have good prospects of rehabilitation should not be imprisoned or indeed sentenced to lengthy terms of imprisonment. However, it does mean that the justification for such an outcome needs to derive from other sentencing objectives. There is no shortage of other reasons that often favour the imposition of harsh sanctions, including general deterrence, specific deterrence and denunciation. However, in circumstances where community protection no longer provides an additional gain-weight in support of incarceration, there will logically be a reduction in the number of offenders sentenced to imprisonment and diminution in the length of many prison terms. If careful decisions are made regarding the profile of offenders who are less amenable to prison, this is unlikely to lead to a less safe community.

Moreover, in making decisions regarding how best to achieve community protection, courts need to be cognisant of the fact that sending offenders to prison often increases the likelihood of offending and that any protective benefits gained by the community from prison terms are at the expense of increased crime occurring in prisons. This broader perspective may serve to make courts less inclined to incarcerate offenders who are at the margin of otherwise receiving a

period of incarceration or a community-based sanction.

There are two important caveats that apply in relation to the above recommendations. They cannot be actioned in full at present. For them to be operationalised requires the development of a risk and needs assessment tool which is adapted to the Australian offender cohort, and greater levels of research need to be undertaken regarding the effectiveness of rehabilitation programs. The research and development investment in these programs is an essential first step to enhance the rigour and effectiveness of decisions relating to the all-important need to protect the community from offenders. However, until these steps are implemented the role of community protection in sentencing can still be enhanced if the courts expressly recognise that this aim should (i) apply most powerfully in relation to serious sex and violent offences and (ii) only be pursed in relation to offenders who are likely to reoffend.