



Strasbourg, 20 December 2010
pc-cp/docs 2010/pc-cp (2010) 10 rev 5_E

PC-CP (2010) 10 rev 5

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Council for Penological Co-operation
(PC-CP)

**THE SENTENCING, MANAGEMENT AND TREATMENT
OF 'DANGEROUS' OFFENDERS**

FINAL REPORT

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CONTENTS

1. INTRODUCTION.....	3
2. DEFINING, IDENTIFYING AND MEASURING THE ‘DANGEROUS’.....	4
Defining Dangerousness	5
Previous serious harm	5
A high probability of re-offending.....	6
- Looking back - recidivism	6
- The reliability of predictions	7
Clinical expertise.....	7
Actuarial risk predictors.....	8
Conclusion: the ethical challenge	9
3. MENTALLY DISORDERED OFFENDERS	11
Those who are not criminally responsible for their actions	11
Mentally disordered offenders	12
4. OPPORTUNITIES FOR RESOCIALIZATION AND REINTEGRATION	16
The aim and structure of sentences.....	17
Determinate (fixed term) sentences	18
Indeterminate (life) sentences.....	20
What works to reduce re-offending?	21
Psychological interventions.....	21
Social, economic and community opportunities	22
Monitoring and supervision	23
Surgical/medical interventions.....	24
The seamless sentence: custody and community linked	24
5. SECURE PREVENTIVE DETENTION.....	27
Categorising laws	27
Assessing risk.....	29
Places and conditions of detention	30
6. Conclusions and Recommendations.....	31

1. INTRODUCTION

Background

1. The treatment of long-term and 'dangerous offenders' has become an important question in many Council of Europe member countries, and thus for the CDPC, with concerns raised from a number of different perspectives. The PC-CP decided to carry out a study of the concept of dangerous offenders, following the conclusions of the 14th Conference of Directors of Prison Administration (CDAP), organised jointly with the Austrian Ministry of Justice (Vienna, 19-21 November 2007) which had discussed issues relating to managing prisons in an increasingly complex environment and more specifically the management of vulnerable groups of prisoners (women, juveniles, foreigners, elderly and mentally disordered) as well as of prisoners detained for terrorism or organised crime.
2. Meanwhile, the First Resolution of the 29th Council of Europe Conference of Ministers of Justice (18-19 June 2009), held at Tromsø, Norway, (on preventing and responding to domestic violence) resolved (at paragraph 23):

to entrust the European Committee on Crime Problems (CDPC), in co-operation with other competent bodies of the Council of Europe, to examine existing best practices in member states, in full respect of human rights, related to:
 - a. the assessment of the risk of re-offending and the danger to victims and society posed by perpetrators of acts of domestic violence;
 - b. the supervision and treatment of such perpetrators in serious and repeated cases, in closed settings and in the community, including surveillance techniques;
 - c. programmes and measures aimed at helping perpetrators improve self-control and behaviour-management and, where possible, repairing the harm done to victims.
3. The PC-CP considered this resolution at its 62nd meeting (21-23 September 2009) and shared the opinion of the CDPC Bureau that this study should be carried out within the framework of the intended study of the concept of dangerous offenders and of their supervision and treatment.
4. The author of this Report was invited to the 63rd meeting (17-19 March 2010) after which a draft scoping paper was prepared, which was discussed at the 64th meeting (5-7 May 2010). The final scoping paper, outlining the work which it was proposed would be carried out over the following four months, was presented to the CDPC at its meeting on 7 June.

Methodology

5. The ground covered by this Report is vast: the sentencing, management and treatment of 'dangerous' offenders, throughout the 47 countries of the Council of Europe. The author was approached early in 2010, with a view to producing a Report within the calendar year 2010.
6. Initial discussions explored the possibility of researching the relevant law in all countries. This possibility was rejected for a number of reasons. A thorough and reliable review of the law would take much longer than the timescale permitted. Reliable and detailed data collection would have been very difficult to gather, and in any case, this is a fast moving field, with many countries considering legislation at the time of writing. It was agreed that a review of the law which was either out of date, or contained significant inaccuracies would not be useful to the main project, which has remained to identify themes and trends. Examples of existing good (and perhaps bad) practice in the management of 'dangerous' offenders would be discussed.
7. In early 2010, the PCCP had received two papers which proved invaluable background material to this Report: Valloton (2010) and Canton (2010). As well, a brief questionnaire had been sent to representative of member states by the PCCP secretariat asking five wide-ranging questions relevant to the project. The responses were few, and rather generalised. Since, the Report was required to be concluded in draft by the end of September, it was agreed therefore that the Report would not attempt to analyse individual laws in detail. This is not to say that a major report which

compared in detail law and practice in the countries of Council of Europe would not be valuable. Simply, this project does not enjoy the time or resources to achieve that challenging aim.

8. Instead, the author sent a draft scoping document to a number of personal contacts, largely academic, in a number of countries. The final scoping document was presented to the PCCP in May (see PC-CP (2010)10 rev). Members of the PCCP were invited in person at the meeting in May to contact the author with practical examples from their own countries. They were reminded of this request by email a month later. Members of the CDPC were also invited to comment. A draft version of the report was circulated to both the PC-CP and the CDPC for comments. As well, the author has sought to research a broad spread of relevant literature. Due to the limited time available, and the author's limited linguistic skills, the literature reviewed is only that available in English and French.
9. The work therefore fell into three phases:

March-June: the scoping phase.

June-September: the main phase.

October-December: refinement and development.
10. It was conducted by one academic, working part-time on the project. It is hoped that the exploratory nature of the Report may encourage significant further research and analysis. The Report contains illustrative examples¹, but these should be used with caution. Full descriptions of national differences are not offered. As the project developed, it became increasingly clear that realistic hypothetical and generalised examples (rather than country-specific examples) might be more effective in focusing the debate on key issues. Again, although the bibliography contains a wide range of sources, references in the main text have been kept to a minimum in order to keep the Report more easily readable. Anyone interested in discussing issues raised is encouraged to contact the author, Nicola Padfield, at nmp21@cam.ac.uk.

2. DEFINING, IDENTIFYING AND MEASURING THE 'DANGEROUS'

11. The definition of a 'dangerous offender' adopted for the purposes of this Report by the PC-CP is '**an offender who has caused very serious personal physical or psychological harm and who presents a high probability of re-offending, causing similar (i.e. very serious) harm**'.
12. This definition was agreed in May 2010, after much debate. The term 'dangerous offender' is sometimes used in national laws, and much used in popular discourse. The PC-CP agreed that the term may be useful as a shorthand label, but was clear that it is potentially misleading. Are people dangerous, or is it the acts that they do that cause danger? Many acts or activities may be dangerous (paragliding? mountaineering? caving?) but that does not mean that all mountaineers are dangerous people. Conversely, many people may be inadvertently dangerous (the learner driver, or the person whose drinks have been laced with alcohol without them realising that this has happened). We shall explain here why our definition is not limited to specific offences; nor to all those punished to lengthy terms of imprisonment.
13. Importantly, the definition adopted here is deliberately narrow. It has two limbs: the offender has in the past committed a very serious harm, and is predicted to do so again. Both will be explored in a little more depth².

¹ Some of the hypotheticals are loosely based on examples used in MAPPA annual reports: www.probation.homeoffice.gov.uk/output/Page30.asp

² Some concern was expressed late in the project that the definition might exclude those who caused serious harm to public institutions or public service employees. The author considers these cases to be within the definition agreed.

Defining Dangerousness

Previous serious harm

14. Clearly those who commit the most serious harms in society are likely to be considered 'dangerous'. Terrorists, murderers, sex offenders are frequently labelled dangerous. But already we must be careful. Let us start by defining these labels. A terrorist may be very dangerous: someone committed to waging an on-going murderous war. Yet recent developments in anti-terrorist laws often include within the concept of 'terrorist' people who play a distant and merely ancillary or preparatory role: thus, the French concept of *association de malfaiteurs* (conspiracy), or the Italian offence of assisting in "any other activity described as terrorist by international instruments signed by Italy" (see art 270 ter, *Codice Penale*). As well, as a result of European initiatives³, many countries are introducing recruitment offences, offences of "glorification" or incitement to terrorism.
15. Are all such people necessarily 'dangerous'? Correspondents have suggested that many people consider political extremists (including neo-fascists or neo-nazis) to be dangerous. But dangerous views should surely be transformed into dangerous acts before the law can impose particularly severe penal sanctions. This is a traditional minefield for penal lawyers: intentions may be more important than outcomes for criminal liability, but how far back from completion should liability lie? Planning a murder may perhaps make a person dangerous, but no European legal system would impose liability unless at least some step beyond 'thought crime' had been taken towards commission. Again, many recent laws have broadened the scope of criminal liability for uncompleted offences. The French Penal Code (see article 222-14-2) has a new crime which penalises someone who participates in a gang with the intention to commit violent acts⁴. This Report simply raises the dangers caused by very broad definitions of criminal liability, including the danger that this may lead to over-inclusive definitions of 'dangerousness'.
16. Not only are definitions of criminal offences broad, they also vary significantly between countries, even within the Council of Europe. For example, all murderers may have proved that they are prepared to kill. But definitions of murder vary widely across the Council of Europe, and may include some people who many might not consider 'dangerous'. Let us choose a controversial example, the husband who helps end the life of his beloved terminally-ill wife at her request. In some countries, he might commit no offence. In others he might face a mandatory life sentence for murder. Another relevant example is domestic violence. In some countries, it used to be the case that domestic violence was treated less seriously than offences committed against strangers. Indeed, it is only recently in some countries that a husband who had non-consensual sexual intercourse with his wife was considered to be a rapist (the early 1990s in both France and England). In this Report, those who commit serious domestic violence are treated every bit as 'dangerous' as those who commit violence on strangers. We report on good practice in relation to the treatment and management of those who commit domestic violence later in the Report. Of course an enormous problem here is the relative powerlessness of the state in offering protection to those behind the walls of their homes. There is a corresponding need to develop political, social, cultural and economic mechanisms to provide women (and men, of course) with alternatives to violent relationships: but this is beyond the scope of this Report.
17. Sexual offending stands out in the recent literature on 'dangerous offenders' for two main reasons. First, the public concern that the subject provokes, particularly in relation to those who offend against children. Sex offenders have become modern 'folk devils'⁵, and the subject of 'stranger danger' provokes media 'moral panics' (despite the fact that it is abuse within the family, or by adults whom children trust, which is the more common form of sexual abuse). Secondly, it is an

³ For example, Council of Europe Convention on the Prevention of Terrorism (2005); Council Framework Decision (EC) 2008/919/JHA amending Framework Decision 2002/475/JHA on combating terrorism.

⁴ The French *Conseil Constitutionnel* (Constitutional Council) upheld the constitutionality of the new offence in its decision 2010-604 DC of 25 February 2010

⁵ A term much used by criminologists since it was adopted in Cohen, S (1980) *Folk Devils and Moral Panics* (2nd ed, Routledge)

area where psychiatrists and psychologists have focused their work in developing convincing treatments. We will return to these later. But are all sex offenders dangerous? Clearly some are, within our definition. But others will not be. Some sexual offending is relatively minor: defining serious harm in this context is particularly difficult.

18. The definition adopted here is therefore not limited to specific offences. Some might not agree with the decision to limit the Report to discussion of those who have committed serious personal harm. This means that we are excluding those whose crimes have no obvious victims. Thus those who are guilty of corruption or illegal drug importations or arms dealing will fall outside the definition. The harm inherent in some offences is also much disputed: the harm caused by those who use pornography, for example. But we seek to limit the definition: as the definition widens, so it becomes increasingly less useful.

A high probability of re-offending

- Looking back - recidivism

19. Not all those who can be labelled recidivists or dangerous recidivists or habitual repeat offenders within existing legal frameworks are dangerous within our definition. The fact that an offender has committed a crime before may (or may not) be a reliable predictor of future offending. In many jurisdictions, certain offenders may be identified by the law for more severe punishments or longer sentences of imprisonment (or other preventive measures), on the basis of the number and/or severity of their past crimes. But this word 'recidivism' has very different meanings in different jurisdictional contexts: in ordinary language, it may simply mean 'a falling back into crime'. This immediately raises three difficult issues:
- (i) For recidivism to increase sentence levels, it must be based only on conviction records. Any other measure would be unjust. Yet it is well understood that conviction records do not properly reflect re-offending levels. They can only be taken as very approximate predictors of future offending (see below).
 - (ii) Is the law to be concerned with all recidivism (previous convictions), or only serious previous convictions (however identified)?
 - (iii) What is the justification for increasing sentence lengths because of recidivism? Is it because the offender is more culpable and 'deserves' more punishment, or is it for public protection? We return to a brief assessment of the general aims of sentencing in Chapter 4.
20. In some countries, the legal impact of previous offending on sentence levels is somewhat vague. For example, in England and Wales, s. 143(2) of the Criminal Justice Act 2003 provides that
21. "in considering the seriousness of an offence ("the current offence") committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular, to
- (a) the nature of the offence to which the conviction relates and its relevance to the current offence, and
 - (b) the time that has elapsed since the conviction".
22. In other countries, the law is more precise. In France, the *Code Pénale* provides detailed rules on increases in sentence levels because of *récidivisme* (repeat offending by those already convicted of an offence subject to a 10 year penalty) or *réitération d'infraction* (less serious recidivism). Thus if someone has already been sentenced for an offence punishable by 10 years or more, the usual maximum of 20 or 30 years is raised to life, and a 15 year maximum is raised to 30 years (Art 132-8). In some other countries, minimum sentences are imposed for certain categories of repeat offenders. The law in other countries (for example, Greece) focuses on the concept of a habitual offender, rather than a recidivist (see Art 92 of the Greek Penal Code).

23. Thus, the level of recidivism (both the seriousness and the number of previous offences) which is used to justify an increased sentence varies from jurisdiction to jurisdiction. There is no 'agreed' answer. At a theoretical level, it is difficult to justify longer sentences simply on the basis of recidivism: desert theorists argue for proportionate sentences based on the seriousness of the current offence; a more utilitarian approach may justify longer sentences for repeat offenders if they are indeed 'dangerous', but that leads us to consider the reliability of predictions.

- The reliability of predictions

24. Having accepted a definition of the 'dangerous' offender as someone who presents a high probability of re-offending, causing similar harm, it becomes essential to identify whether one can with any degree of certainty identify or measure the risk of future serious re-offending. And to ask who should do the assessment. We start by identifying the most common ways used in Europe to identify 'dangerous' offenders.

Clinical expertise

25. Before offenders receive special sentences for the 'dangerous', judges are often assisted by reports written by experts. Clinical assessments by psychiatrists, psychologists and other experts are used to help judges make assessments, in both sentencing and other decision-making (e.g. before an offender can be sent to a mental hospital as an involuntary patient; or given treatment for drug or alcohol misuse). In most European countries, assessments are exclusively clinical (as opposed to actuarial – see below). Giovannangeli et al (2000) studied the ways the 'dangerousness' of alleged or convicted sexual offenders were assessed in 15 European countries. In virtually all of them, only clinical assessments were made. Even where traditional personality tests, such as the Rorschach or the Minnesota Multiphasic Personality Inventory (MMPI) were used, the assessment was essentially clinical⁶.

26. It is important to clarify:

- who is an expert in assessing dangerousness. There is increasing concern in many countries that experts may not be as expert in predicting dangerousness as might commonly be assumed. For example, Garraud (2006) discusses the poor status and pay of forensic psychiatrists in France, and recommends that priority should be given to improving training and conditions. Protais and Moreau (2009) encourage us to ask why a psychiatrist should be considered to be better equipped than anyone else in assessing a concept such as 'dangerousness', which is essentially a political and flexible label. Are we expecting too much of their expertise to ask them to predict with any certainty who may re-offend?
- the independence of those writing reports. If the writers are not 'independent', those affected should be able to access independent advice and expertise⁷.
- the reliability of such assessments. Clinical assessments are obviously subject to subjectivity. Training and consistency of practice are particularly important here. Clinical assessments, in a risk averse political culture, will inevitably be cautious. This may well be particularly true in the case of serious sex offenders (Ansbro (2010), Hood and Shute (2002)). We should also be careful to assess the impact of these assessments on judges: the status of the person doing the clinical assessment can make the ultimate user of the assessment (normally a judge, but also penal administrators) ignore or underestimate the inherent weaknesses and dangers in any prediction.

⁶ Some personality tests used to support clinical assessments, particularly those which have been simplified in order to be easier to administer, may in fact have deeply engrained cultural, gender and social biases. They should be carefully evaluated.

⁷ Note European Probation Rules, rule 46: Offenders shall be given the opportunity, where appropriate, to be involved in the preparation of [reports], and ... its contents must be communicated to them and/or to their legal representative.

Actuarial risk predictors

27. In some countries, a variety of different actuarial tools are used, for different purposes and at different stages in the process. Many of these tools have been developed in North America, and may or may not be adapted to local conditions. The Risk Management Authority in Scotland maintains a detailed directory of approved assessment tools, including summaries of the published evaluations of each tool (see www.RMScotland.gov.uk). Some of the most commonly used tools are mentioned here by way of example:
- VRAG (Violence Risk Appraisal Guide) and its companion SORAG (Sex Offender Risk Appraisal Guide) was developed in Canada, and contains a 12-item actuarial scale which has been widely used to predict risk of violence within a specific time frame following release in violent, mentally disordered offenders.
 - OGRS (Offender Group Reconviction Scale. OGRS) was introduced in England and Wales in 1996 to establish a uniform national reconviction score. It calculates the probability that a convicted offender (18 years plus) will be convicted at least once within two years for any type of offence. The latest version (OGRS 3) is based on age at the date of the current caution, non-custodial sentence or discharge from custody; gender; the type of offence for which the offender has currently been cautioned or convicted; the number of times the offender has previously been cautioned and convicted; and the length in years of their recorded criminal history (see Justice, 2009 for an excellent account). These factors are static: they do not change and take no account of the individual's personal characteristics. So if someone has a 70% chance of reconviction within the next two years – OGRS gives no hint as to whether this individual is more likely to be in the 70% or 30% category.
 - OASys (the Offender Assessment System), developed in the late 1990s by the Home Office Probation Unit and HM Prison Service for use in England and Wales, is very often used in post-conviction, pre-sentence, reports. Similarly, Repeat Offending Assessment Scales scores are widely used in the Netherlands. These consider static factors (age, previous offending) as well as dynamic (social, economic and personal) factors. Actuarial assessments which take account of dynamic factors may be more accurate in some senses – but they also allow for subjective person-by-person judgements. There are also concerns whether they have been adequately adapted and evaluated in relation to the assessment of the risk and needs of women offenders (Caulfield, 2010).
 - There are also more dynamic predictors focused on criminogenic needs, used widely within prisons, that have implications for treatment, such the Level of Service Case Management Inventory (LS/CMI), which is an assessment and management tool that incorporates the principles of “risk, need and responsivity”. LS/CMI is a substantial revision of an earlier, widely used Level of Service Inventory - Revised (LSI-R) assessment tool.
 - There are various tools designed specifically for sex offenders: QIPAAS (Questionnaire d’Investigation pour les Auteurs d’Agressions Sexuelles) developed in 1997 is widely used in French prisons to assess the risk of re-offending by sexual offenders; Risk Matrix 2000 (RM2000) (also known as the Thornton Matrix) is a risk assessment tool, using static factors, for men over 18 with at least one conviction for a sexual offence. It is included in all parole assessment reports in England and Wales involving sexual offenders. STABLE 2007 examines the enduring dynamic risk factors amenable to intervention; ACUTE 2007 assess factors suggestive of sexual recidivism taking place within a short period of time.
 - Numerous tools are used for identifying psychological disorders: for example, the PCL-R (The Hare Psychopathy Checklist-Revised); SAPAS (the Standardised Assessment of Personality-Abbreviated Scale). It is important to note that these are not risk assessment tools, but tools for identifying psychopathy and other disorders.
 - Different tools have been developed to identify and to predict domestic violence. For example, the Spousal Assault Risk Assessment (SARA) was developed in Canada to identify violent spousal perpetrators with high risk of specific recidivism, and has been adapted for use in a number of European countries.

28. Assessment tools will never be truly accurate in predicting re-offending. We have already noted the vital differences between re-offending and re-conviction rates. Buchanan (2008), an academic psychiatrist reviewing actuarial approaches to predicting violence by psychiatric patients, states “a range of methods consistently predict violence at levels of accuracy better than chance.... [but] current approaches can prevent the violent acts of a few only by detaining many”. A probability calculation is only ever a prediction. It will be accompanied not only by human errors, but also by many other uncertainties. The rarer and more dangerous the behaviour predicted, the harder it is to predict. In many countries evaluation procedures are developed combining elements of various different evaluators and predictors (see the work of Volker Dittman in Switzerland discussed in Vallotton (2010). Whatever methods of evaluation are chosen, it is important that those who use them are well trained in their use (and their limitations)⁸.
29. A risk predictor may help predict risk, but it should always be used in an individualised way as part of a structured clinical judgement (Farrington et al, 2008). This well-respected analysis of the usefulness of risk assessment tools for violence concludes that “users should always bear in mind the difficulties involved in moving from predictions about individuals, and should be extremely cautious in drawing any conclusions about a person’s risk of future violence” (at page 2). It is thus vitally important to highlight the limitations and dangers of using both clinical and actuarial methods to label (‘box’) people and to identify the enormous consequences of such labels⁹. The purpose of any risk assessment tool must also be clearly identified.
30. What happens when clinical and actuarial assessments conflict? Practitioners are more likely to override actuarial information that indicates a low risk of harm rather than a high one, confirming the existence of risk aversion, or the ‘precautionary principle’ (Ansbro (2010)). Thus, Ansbro identified “a reluctance to reduce sexual offenders’ risk of harm even when evidence of all types was compelling, and conversely, a willingness to reduce non-sexual offenders’ risk on the basis of only flimsy dynamic evidence, and counter to actuarial pointers”. She concludes that a more sophisticated understanding of the evidence around dynamic factors would enhance assessments¹⁰. Standardised tools must be carefully assessed for evidence of racial, gender and cultural bias.

Hypothetical Case A

Mr A is arrested for a serious sexual assault, and subsequently prosecuted, convicted, and sentenced to a lengthy term of imprisonment. He is eventually released on conditions into the community, and does not re-offend. In many countries a huge battery of different clinical and actuarial assessments will be made on him, as he progresses through the criminal justice process. These could usefully be catalogued as a case study in order to question (i) their validity and (ii) the use to which they are put, particularly the extent to which they may be useful in facilitating his path to reintegration (or, conversely, used as hurdles preventing his re-integration).

Conclusion: the ethical challenge

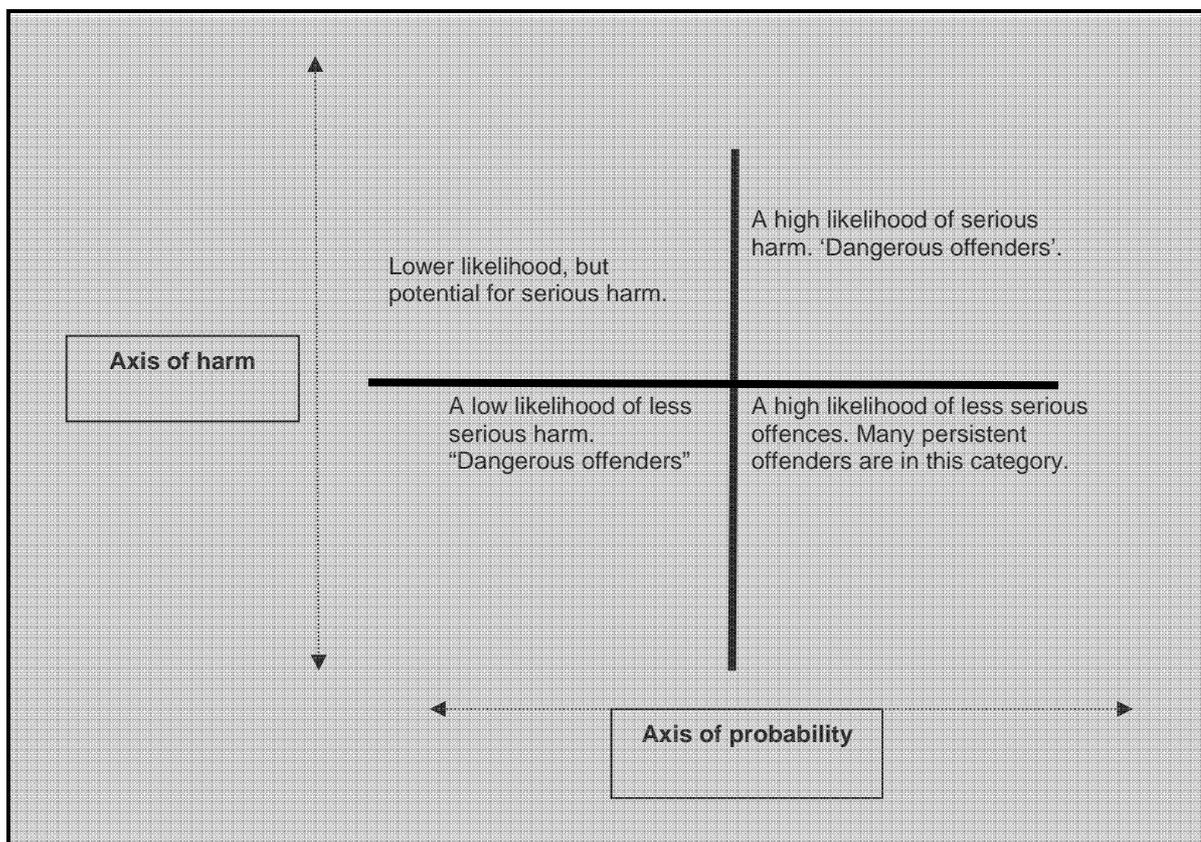
31. It cannot be emphasised too much that prediction tools can never be truly accurate. Another way of looking at the problem of identifying ‘dangerous offenders’ is to identify the number of offenders deemed ‘dangerous’ or meriting indefinite detention in different jurisdictions. In some countries, a significant number of offenders may be so labelled, in other very few. Reliable comparative data would be very useful. Many people who commit dangerous acts will not have been convicted of any offence previously. By using the term ‘dangerous’ offenders, we are well aware that there is a

⁸ Recommendation (2003)22 of the Committee of Ministers to member states on conditional release (parole) recommends the use and development of reliable risk and needs assessment instruments to assist decision-making but also identifies the need for training programmes for decision-makers, with contributions from specialists in law and social sciences.

⁹ See European Probation Rules, rule 71: Where national systems use assessment instruments, staff shall be trained to understand their potential value and limitations and to use these in support of their professional judgment.

¹⁰ Hood and Shute (2002) showed that in England and Wales, the paroling rate for sex offenders with a risk of reconviction score (ROR) of 7% or less for a ‘serious offence’ (one likely to result in imprisonment) during the parole period was only 22%, whereas the paroling rate for non-sex offenders with a similar ROR was 60%.

danger that we are seen to validate its use. There will be false positives (those who are predicted to re-offend, and who don't) and false negatives (those who are predicted not to re-offend, but who do so). Canton (2010) provides a simple diagram which illustrates the importance of keeping separate the risk of harm from the likelihood of its occurrence:



(Source: Canton (2010))

32. Assessments of 'dangerousness' or 'lack of dangerousness' can be used for many purposes: to prioritise resources, for example. Many countries have created higher hurdles for 'dangerous' offenders (however defined, whether recidivist or sexual offenders) in prison, in the sense that it is more difficult for 'dangerous' offenders to get out of prison than for less serious offenders – why should this be so? We have already noted that predicting rare events is particularly difficult. Bottoms and Brownsword (1983) argued that people should only be detained because of the risk that they present if that risk is 'vivid'. The concept of vivid danger has three main components: **seriousness** (what type and degree of injury is in contemplation?); **temporality**, which breaks down into **frequency** (over a given period, how many injurious acts are expected?) and **immediacy** (how soon is the next injurious act?), and **certainty** (how sure are we that this person has acted as predicted?). Lippke (2008) calls preventive detention "pre-punishment" and points out that non-punitively confining those who have not re-offended may only be marginally different from punitively confining them. Whether it is punitive or not, any involuntary detention is likely to be perceived as punitive by the recipient. Even if predictions were reliable, we should be uncomfortable with the concept of the punitive or pre-punitive confinement of individuals simply for their unwillingness or inability to change.
33. As Vallotton (2010) points out, 'dangerousness' is essentially a political concept, with perceptions of dangerousness changing over time and place. These categorisations are often based as much on political imperatives as on criminological evidence. Fear of the "dangerous" has grown in Europe in recent years for many reasons: sociological explanations focus on the uncertainties of modern societies, and the perceived need to control risks (Garland (2001), Beck (2004)); the media focus attention on crime and 'bad events' (Mucchielli (2008)). Much more publicity is given to the 'false negatives' (those who commit unpredicted future serious crimes) than the invisible 'false positives' (those who remain in custody but would not have re-offended in the community). This

explains why this Report seeks to limit the definition of 'dangerous offender': the identification of people as 'dangerous' is likely to be unreliable and over-inclusive: to include the dangerous, but also those who are not truly 'dangerous', according to our definition. It is vitally important that the public debate focuses on the position (human rights) of these 'false positives' as well as on the 'false negatives'.

34. This Report suggests that the PC-CP should focus attention on the limited utility of the term 'dangerous offender': at the minimum, it should only be used to describe those who have committed serious harm and who pose a significant risk of committing future serious harm. Both clinical assessments and predictive tools may contribute usefully in identifying both differing risk levels, and the underlying causes behind offending behaviour, but in themselves should not be used to justify longer sentences.

3. MENTALLY DISORDERED OFFENDERS

35. This Report includes a chapter on mentally disordered offenders in order to underline the fact that mentally disordered offenders are a particularly vulnerable sub group of 'dangerous' offenders. Let us start with some important warnings. 'Mentally disordered offenders' are not an easily identified or indeed a homogenous group. It is all too easy to vilify the mentally ill or disordered as particularly 'dangerous': the same sociological and political explanations which have led to a focus on 'dangerous' offenders (see Chapter 2) have also focused inappropriate scare mongering on the mentally ill. Those with mental illness and mental disorders are not more likely than the general population to commit serious crime; mental disorder may correlate with some kinds of offending, but it is rarely causative; psychiatric patients who kill are more likely to kill themselves than others (on which see Bonta, Hanson and Law (1998), Peay (2007), amongst many others).
36. 'Dangerous offenders' may suffer from mental disorders. But many of those who commit dangerous acts and who are seriously mentally disordered may be held not to be criminally responsible. The treatment of the mentally disordered outside the criminal justice system lies largely outside the scope of this Report, but the subject cannot be ignored: there is no clear and agreed division between those who are prosecuted and those who are not. Those detained involuntarily in civil institutions are quite as vulnerable to inappropriate management and treatment as those within the criminal justice system. And many offenders may zigzag in and out of the criminal justice system.

Those who are not criminally responsible for their actions

37. Most countries have a procedural test which focuses on the ability of the suspect to understand court proceedings. Those who are not able to understand court proceedings will not be prosecuted. As well, a person is not criminally liable who, when the act was committed, was suffering from a mental disorder which 'destroys his discernment or his ability to control his action' (to cite the French Code Penale, Art 122). In practice, this test may be applied in very different ways.
38. The subject of the detention of mentally disordered people has already been much discussed at the highest levels within the Council of Europe. Thus, Recommendation (2004)10 of the Committee of Ministers concerning the protection of the human rights and dignity of persons with mental disorder was adopted by the Committee of Ministers on 22 September 2004. This provides detailed recommendations on, for example, minimum criteria for involuntary placement (article 17), criteria for involuntary treatment (article 18), principles concerning involuntary treatment (article 19) and procedures for taking decisions on involuntary placement and/or involuntary treatment (articles 20 and 21). Further to this, Recommendation (2009) 3 of the Committee of Ministers on monitoring the protection of human rights and dignity of persons with mental disorder (adopted by the Committee of Ministers on 20 May 2009 (at the 1057th meeting of the Ministers' Deputies) included a checklist (general questions and supplementary indicators) designed to form the basis for the development of monitoring tools to help Governments monitor their level of compliance with Recommendation (2004)10.

39. Despite these initiatives, there are major concerns, well summarised in September 2009, by Thomas Hammarberg, the Council of Europe's Commissioner for Human Rights in a published "Viewpoint"¹¹ in which he stated that the rights of persons with intellectual disabilities across Europe "are still not taken seriously enough". He called on governments not merely to plan for action, but to take action. Commenting on both *Shtukaturov v Russia* (see Annex One) and the UN Convention on the Rights of Persons with Disabilities, he concluded clearly: "Any restrictions of the rights of the individual must be tailor-made to the individual's needs, be genuinely justified and be the result of rights-based procedures and combined with effective safeguards".
40. The number of mentally disordered offenders detained in hospitals needs to be carefully monitored. In many countries, the number of involuntary patients has been rising steadily. This, in England and Wales, in 2009, there were 4,300 restricted (involuntary) patients, an increase of 8 per cent on 3,900 in 2008 (NOMS statistics, 2009).

Hypothetical Case B

Mr B, who suffers from schizophrenia and depression, stops taking his medication. He is arrested having attempted to rob a shop by brandishing a toy gun and apologetically asking for money. He is in bedroom slippers, and a customer prevents him leaving with the money which frightened staff hand to him. Arresting police officers realize that he is mentally ill¹². What happens next? What does good practice suggest? How long can he be detained in a civil hospital if not charged with an offence? On whose authority and what is the legal test? In practice, will he be supported by an independent legal advisor and/or independent psychiatric opinion?

41. The answers to these questions, of course, vary from country to country. It is important to distinguish the original decision to detain from the later decisions not to release. In many countries special courts (for example, social protection commissions (Belgium) or Mental Health Review Tribunals (England and Wales) exist. Much more detailed monitoring and research should be conducted into the detention of the mentally ill or disordered outside the criminal justice system. This includes monitoring the legal tests applicable in different countries to ensure that those who should not be prosecuted because their mental state reduces or diminishes their penal responsibility to such an extent that they are not deemed fit to stand trial. But the study of actual practice is even more important than a study of legal tests: particularly given the range of institutions in which people may be detained (including privately run psychiatric hospitals). The spotlight must be kept on guaranteeing the rights of those detained under civil law.

Mentally disordered offenders

42. Many people who are mentally ill or mentally disordered are prosecuted and convicted of criminal offences. Custodial institutions in all Council of Europe countries hold many mentally ill offenders. In some countries and in some circumstances, those who are criminally responsible but mentally ill may receive less punishment because they are considered to be less culpable. This may be explicit (see Art 34 of the Greek Penal Code, for example) but paradoxically even those offenders who receive shorter sentences because of their mental illness, disorder or disability, may still find that they serve their sentence in a more restrictive, even if supposedly non-punitive, way. Even at the end of a prison sentence a prisoner may not, of course, be released into the community. They may be transferred to a hospital or other institution (see chapter 5 on secure preventive detention).
43. Of the 2 million prisoners in Europe, at least 400,000 suffer from a significant mental disorder, and more suffer from common mental health problems such as depression and anxiety (World Health Organisation, 2010¹³). Individual country statistics may be more illustrative of the problem: in England and Wales, for example, of those in mainstream prisons, a recent study (Stewart, 2008) estimated that 10% of newly sentenced prisoners were likely to have a psychotic disorder (with the rate for female prisoners being double that for males (18% as opposed to 9%), and 61% were

¹¹ See www.coe.int/t/commissioner/viewpoints/090921_en.asp

¹² This example is loosely based on the facts of an English case: the man, a recidivist, was convicted, received a life sentence, which was reduced on appeal to three years (*Offen (No 2)* [2001] 1 Cr App R 372)

¹³ www.euro.who.int/en/what-we-do/health-topics/health-determinants/prisons-and-health/facts-and-figures

assessed as having a personality disorder (using SAPAS). Again, it may need underlining that this does not necessarily reflect the offending patterns of the mentally ill – they may simply be more easily detected than other offenders.

44. A look at the journey a mentally ill or disordered offender may take through the criminal justice system raises some simple questions:

Hypothetical Case B (again)

Mr B, who suffers from schizophrenia and depression, stops taking his medication. He is arrested having attempted to rob a shop by brandishing a toy gun and apologetically asking for money. He is in bedroom slippers, and a customer prevents him leaving with the money which frightened staff hand to him. Arresting police officers realize that he is mentally ill.

- Arrest: steps taken to discover mental health issues?
- Immediate detention: police station, or prison, or hospital? Mental health assessments?
- Period of pre-trial detention: where? how long? legal criteria? Was mental health support and treatment available?
- Post conviction and sentence: prison? hospital? hospital wing of a prison? treatment available? who decides and on what criteria? how are transfers between various different institutions decided? health care delays?
- What are the criteria for release?

45. A key area of concern is the unconvicted mentally disordered suspect. Diversion services for offenders with mental health problems or learning disabilities are essential. All police stations should have access to mental health services to allow for the screening of vulnerable people and for assessing their needs. The Council of Europe could lead on the collection of more detailed data¹⁴ to assess the number of mentally disordered individuals who are remanded in custody and how many are so unwell that they require transferring out of custody for treatment.

46. Convicted mentally disordered offenders are particularly vulnerable to the abuse of rights as they may move backwards and forwards through the two different systems, criminal justice institutions (prison) to civilian institutions (hospitals). Many may wait months or even years before being transferred from a prison to a suitable hospital. In many countries there are also institutions which may be difficult to classify between the penal and the civil: for example, French '*centres socio-médico-judiciaires de sûreté*', institutions for social defence (Belgium) or *casa di cura e custodia*, and *ospedale psichiatrico giudiziale* (Italy). There are mixed institutions in which people may be detained under either criminal or civil law. The complexity of this categorisation is revealed in the most recent SPACE data¹⁵. Country respondents were asked whether the total number of prisoners given included various different categories of persons (and if so, how many), such as:

- Prisoners with psychological and/or psychotic disorders who were considered as non-criminally liable by the court, held in psychiatric institutions or hospitals
- Prisoners with psychological and/or psychotic disorders held in psychiatric institutions or hospitals in order to execute the main or the supplementary sanction (i.e. sexual offenders)

¹⁴ The Annual Penal Statistics of the Council of Europe (SPACE) provide invaluable data: for example, the ECtHR cites the 2006 data in *M v Germany* (2009) at para 68: "the total number of prisoners sentenced to terms of imprisonment ranging from 10 years up to and including life imprisonment on September 1, 2006 was 2,907 in Germany, 402 in Estonia, 1,435 in the Czech Republic, 3,568 in Spain, 12,049 in England and Wales, 8,620 in France, 172 in Denmark and 184 in Norway". But since these statistics are based on national data, there is always room for more detail in order to facilitate reliable comparisons. It is important that the quality of all national data is carefully analysed and verified. See

http://www.coe.int/t/e/legal_affairs/legal_co%2Doperation/prisons_and_alternatives/statistics_space_i/1List_Space_I.asp#TopOfPage

¹⁵ See [www.coe.int/t/e/legal_affairs/legal_co%2Doperation/steering_committees/cdpc/documents/1PC-CP\(2010\)07_E%20SPACE%20Report%20I.pdf](http://www.coe.int/t/e/legal_affairs/legal_co%2Doperation/steering_committees/cdpc/documents/1PC-CP(2010)07_E%20SPACE%20Report%20I.pdf), at p. 33.

- Prisoners with psychological and/or psychotic disorders held in especially designed sections inside penal institutions in order to execute the main or the supplementary sanction (including sexual offenders)
47. Here we give two examples of the variety and complexity of the responses. For Portugal, “256 prisoners, including 86 prisoners held in penitentiary psychiatric institutions or hospitals, and 170 prisoners held in non-penitentiary psychiatric institutions or hospitals. 256 is the total number of persons considered non-criminally liable by the court, who are not *stricto sensu* sentenced prisoners, but persons under a security measure (which is rather therapeutic). These persons are under the authority of the Prison Administration and their files are managed by the Court of Execution of Sentences. Nevertheless, all decisions concerning this category of persons are taken on the advice of medical authorities”. Secondly, the Swiss response explains that “there is a number of persons sentenced or interned (non-criminally liable), who are placed in special psychiatric institutions which are not under the Prison authorities, but are managed by special medical authorities; “The deprivation of liberty for the assistance purposes”: persons under these measures are placed by medical (psychiatric) authorities, but their detention is managed by the Prison authorities of the cantons”.
48. Clearly, there are many difficulties in understanding practice even within individual jurisdictions: institutions may be managed by health or prison authorities, and detainees’ rights may be safeguarded under mental health or prison rules. Even where the law appears clear, there may in practice be significant ambiguity. Thus Pradel (2008) points out that the French label ‘*centres socio-médico-judiciaires de sûreté*’ (see art. 706-53-13, al. 4) is deliberately chosen to illustrate the double responsibility of the penal system and the health authorities. But he suggests the division of responsibility is unclear. Are health or prison authorities in charge? In several countries, institutions may be under the joint administration of both health and prisons. Countries with federal constitutions may face even more difficult questions of accountability: as in Belgium, where an institution may be under the joint administration of the federal Ministry of Justice and a regional Ministry of Public Health. Regional variations in provision need to be monitored quite as much as international variations.
49. Dressing and Salize (2009), who surveyed 24 European countries, concluded that the vast majority apply a ‘mixed model’ of prison health care, with deeply inadequate levels of care:

mental state screening at prison entry by a psychologist or a psychiatrist, fulfilling the quality standards of general mental health care, seems to be a rare event across Europe. In many countries, inadequately trained staff are appointed to conduct a mental state screening at prison entry. The experts collaborating in this study were asked to provide an overall verdict on the extent to which the standards of mental health care in prisons approximate those of general mental health care standards. Answers showed that almost two-thirds of the included countries seem to suffer a considerable gap between general mental health care standards and those for prison inmates. In particular, Austria, Belgium, Bulgaria, the Czech Republic, England & Wales, Germany, Greece, Hungary, Iceland, Ireland, Italy, Lithuania, The Netherlands, Portugal, and Spain were evaluated in this way, although these ratings must be seen as subjective opinions lacking sufficient supportive data. The most frequently mentioned shortages included lack of places for (psycho-) therapeutic treatment programs, beds for psychiatric inpatient treatment, and appropriately trained staff. Other deficiencies were insufficient mental state screening routines, deficient or absent psychiatric aftercare, underfunding, and insufficient cooperation with the general health systems (at page 809-810)¹⁶.

50. The reports of the Council of Europe’s Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (the CPT: see www.cpt.coe.int), which regularly raise concerns about the interface between prison and public health care services¹⁷ are vital sources of

¹⁶ See also Bradley (2009); and Edgar and Rickford (2009) on how the needs of prisoners with mental health problems are not being met in England and Wales.

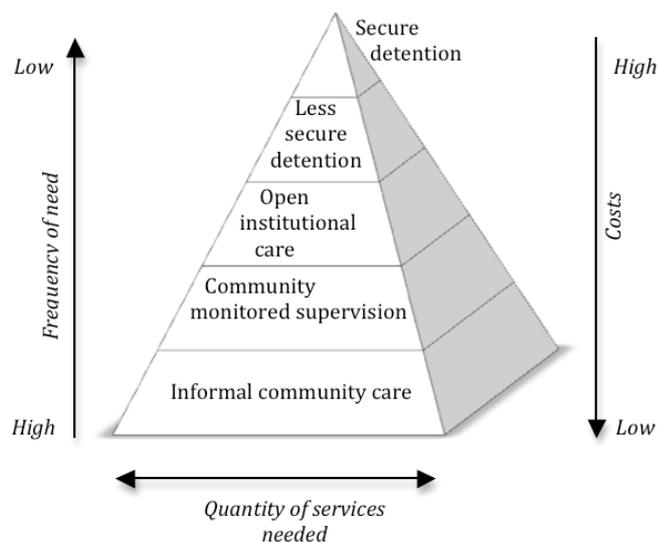
¹⁷ Some recent examples: the report on Romania (August 2010) discussing Nucet Medico-Social Centre and at Oradea Hospital for Neurology and Psychiatry; the report on Belgium (July, 2010) raising concerns about the Hôpital d’Accueil Spécialisé (HAS) of the Fond’Roy psychiatric clinic in Uccle; the report on Italy (April 2010) commenting on the unacceptable standards of care in the Centre for Neuropsychiatric Observation (CONP) at Milan-San Vittore Prison; the report on Bosnia and Herzegovina (March 2010) with criticisms of Sokolac Psychiatric Clinic and Zenica Prison; the

information. Recurrent themes are poor staffing levels; poor general conditions; the need for individualised treatment plans.

51. A key issue is cost, and whose budget is to be spent on providing care. Some hospitals or psychiatric prisons may resist accepting mentally disordered 'dangerous' prisoners, particularly on the basis that they are 'untreatable': for example, the Slovak government's recent response to the CPT's criticisms that most of the prisoners in the high security unit of Leopoldov Prison appeared to be in need of psychiatric care, was that "most of the prisoners did not need psychiatric care as they are affected by personality disorders". This raises important questions not only about the use of the label 'personality disordered', but also about where people with personality disorders should be detained. In several countries there are significant initiatives to limit the use of secure psychiatric hospitals (Italy; England). But it is vital that the mentally ill don't simply end up either in prison, or unsupported/supervised in the community.
52. In most systems, there are prisons and hospitals of varying degrees of security: offenders in both prisons and hospitals should be held in the least restrictive environment possible. Similarly, prisoners held in hospital should be allowed opportunities for rehabilitation and reintegration (for example, escorted or unescorted temporary community leave). Buchanan (2002) provides a multidisciplinary and multi-authored guide to the care of the mentally disordered offender in the community (see also Kemshall, 2008). Yet often both mentally disordered prisoners and patients are held in conditions which are more secure than strictly necessary for what may be largely administrative convenience. In some systems, a mentally disordered prisoner may face double hurdles to freedom. Thus in England and Wales, a prisoner held in a secure mental hospital may have to convince a Mental Health Review Tribunal to release him back to prison, and then face the hurdle of the Parole Board to be released into the community (Padfield, 2010). Grounds, Howes and Gelsthorpe (2003) explored the views of psychiatrists on their decisions to admit offenders to hospital from prison. A hierarchy of managerial and other non-clinical constraints had an impact on their decision-making role. They identified the difficulty of achieving and maintaining a balance between the individual patient's rights and needs, and a proper concern for public safety. The focus on risk adds another pressure on those working in mental health, people who are already operating under practical constraints such as limited capacity (bed space), as well as within a risk averse culture. Prioritising cases may work differently in hospital than it does in prison. With the boundaries between private and public health care becoming increasingly blurred in some countries, the question whether decision-making might be different in the private sector also needs to be explored.
53. This Report includes a chapter on mentally ill and mentally disordered offenders in order to underline that greater priority should be given to meeting their needs: appropriate care and treatment in institutions of the minimum level of appropriate security. The Pyramid Framework (see below) may be a useful way of presenting the fact that supporting offenders at the lowest suitable level of intensity and security may be both cheaper and more effective. Only a very few need secure detention: the focus should be on pushing offenders down the pyramid.

Pyramid Framework

Adapted from WHO Mind Project, available at http://www.who.int/mental_health/policy/services/2_Optimal%20Mix%20of%20Services_Infosheet.pdf



54. Mentally disordered prisoners should be prepared for release, and released as soon as possible. A key question is whether more detailed research would provoke real action. Mentally ill and otherwise mentally disordered offenders are often a 'hidden' population within a penal system. It is to be hoped that more research would lead to more attention being paid to them: in the interests of both wider society and the individual concerned that wider recognition is given to the needs and basic rights of the mentally disordered.

4. OPPORTUNITIES FOR RESOCIALIZATION AND REINTEGRATION

55. The right to liberty, which lies at the heart of the European Convention on Human Rights, applies to those who have served their penal sentences. During their sentence, the fundamental rights of the prisoner also require decent living conditions, active regimes and constructive preparations for release¹⁸. It is, of course, in the public interest that prisons should not be overcrowded and that offenders should be successfully reintegrated into mainstream society. In Chapter 2 we discussed the problems which arise in defining 'dangerous' offenders, and the very real risks associated with unreliable and false predictions. In this chapter we turn to the law and practice on dealing with 'dangerous' offenders, with an emphasis on what might be considered good practice.
56. Central to this study is an analysis of how dangerous offenders can be helped to lead law-abiding lives. Readers should keep in mind Recommendation (2003)23 of the Committee of Ministers to member states on the management by prison administrations of life sentence and other long-term prisoners, in particular the key general principles for the management of life and long-term prisoners which it identifies: individualization, normalization, responsibility and security. This Report underlines the fact that the resocialisation and the reintegration of offenders lies at the heart of the criminal justice system.
57. We start this chapter by briefly reviewing the aims of punishment, before identifying the basic structure of custodial sentences: usually divided into determinate and indeterminate sentences. This leads to a review of what is understood to help to reduce re-offending, in order that best practice in applying this knowledge within the sentencing structure can be identified.

¹⁸ Recommendation (2003)23 of the Committee of Ministers to member states on the management by prison administrations of life sentence and other long-term prisoners

The aim and structure of sentences

58. There is no easily agreed fundamental aim of punishment. Some constitutions grant a constitutional right to rehabilitation: for example, article 27(3) of the Italian Constitution provides that punishments must aim at resocialising the convicted. Other countries have legislated the aims of sentencing. Some distinguish the aims of the implementation of sentences from the aims of sentencing more generally, particularly in systems which recognise the formal separation of the administration of sentences from the initial imposition of a sentence (as in France or Italy). Different aims may have priority at different stages in the sentence: for example when the initial sentence is imposed and later during its implementation. In England and Wales, where there is no such formal separation, on the other hand, the judge must have regard to the following broad and often inconsistent purposes of sentencing (see s. 142 of the Criminal Justice Act 2003):

the punishment of offenders,

the reduction of crime (including its reduction by deterrence),

the reform and rehabilitation of offenders,

the protection of the public, and

the making of reparation by offenders to persons affected by their offences.

59. This is not the place for a full discussion of the aims of sentencing, save to remark that without clear objectives, it is impossible to assess the efficacy of a penal system. In penal theory, there has been a long-standing debate between retributivist and utilitarian aims. The Council of Europe has been clear that while sentences should be proportionate (imprisonment should be used only as a last resort and for the minimum period necessary), it is also important that there be “constructive means of preventing reoffending and promoting resettlement, providing the prisoner with planned, assisted and supervised reintegration into the community”¹⁹. These forward-looking aims appear utilitarian. But retributivist theorists, those who argue for deserved and proportionate sentences, are also likely to agree that punishment should be rehabilitative and seek to re-integrate offenders into mainstream society. This is a message underlying this Report.

60. The most famous exponent of modern retributivism is von Hirsch (see von Hirsch, 1986, 1993 amongst many other writings). For von Hirsch, punishment is and should be a blaming institution; and the severity of the punishment expresses the stringency of the blame. The key concept of just deserts sentencing is proportionality. The acceptance of a ‘just deserts’ model may lead to a decrease in the prison population since it will lead to a penalty scale which may be “anchored” in order to reduce overall punishment levels. Of course, political pressures impinge on sentencing policies but it is important to note that modern desert theory offers a coherent and humane way of allocating punishments, appropriate for a society that treats convicted offenders as citizens whose rights and choices should continue to be respected (see von Hirsch, 1993). Many penal theorists, even those who prefer a more utilitarian or ‘neo-rehabilitationist’ approach welcome desert as putting a proper upper limit to penal interventions: no-one should receive longer sentences than they deserve, even if they may not be ‘treatable’ (see Morris, 1998, Cullen and Gilbert, 1982). Whilst those who commit more serious offences, may often ‘deserve’ longer sentences, questions of personal culpability must be carefully assessed. ‘Desert’ should not be used to justify disproportionate, or unduly long, sentences on any offender, including those who may have been labelled ‘dangerous’. Establishing appropriately ‘proportionate’ sentence lengths is a challenge for all criminal justice systems.

61. Utilitarian aims of sentencing focus on the prevention of re-offending, by a variety of means. One aim which remains popular with sentencers is deterrence. We must distinguish individual deterrence (the deterrence of the individual offender) from general deterrence (the deterrence of the general population). General deterrence can be achieved by some penalties for some length of time, some types of offence, some types of offender, and in some situations. However, more effective is a high probability of detection and conviction. Does deterrence through heavier

¹⁹ Recommendation (2003) 22 on conditional release (parole)

sentencing work? In a major review of the literature on deterrence, Von Hirsch et al (1998) concluded that there were certain logical conditions which must exist before an increase in the severity of deterrents can work:

- (i) Potential offenders must realise sentence levels have increased
- (ii) Potential offenders must think about heavier sentence levels when contemplating their offences
- (iii) Potential offenders must believe they have at least a reasonable chance of being caught
- (iv) Potential offenders must believe that if caught the heavier sentencing policy will be applied to them
- (v) Potential offenders must be prepared to desist where (i-iv) are present.

All these conditions must be present for general deterrence through heavier sentencing to work. Thus, it will only rarely work.

62. *Incapacitation* and the *protection of the public* are also utilitarian aims. These aims can be pursued within the limits of 'just deserts': but particular vigilance must be shown to protect the rights of offenders if their liberty is restricted for the protection of the public, and not for punishment. We return to this when we consider the topic of secure preventive detention, particularly incapacitative measures enforced beyond, or on top of, 'just desert' or proportionate sentences. The next aim is *reform*. The individual may be *reformed* or corrected, either by deterrence or by other more subtle means; but it is important to notice that the percentage of cases in which it matters whether imprisonment or non-custodial sentences are used seems to be small. We have already mentioned the blunt instruments which we have by which to measure effectiveness: normally, reconviction rates. If only perhaps 3% of reported offences result in a conviction, what does this tell us about the frequency of criminal activity? Finally, *rehabilitation* can be distinguished from reform in that it is often used to describe efforts which are made to make it easier for offenders not to re-offend for example, by improving their employment or social skills.
63. There are three other important preliminary factors to acknowledge. First, whatever the aims of sentencing, the protection of the rights of prisoners during the implementation of these sentences remains fundamental (see Snacken and van Zyl Smit, 2009). Indeed, the choice of sentencing aim should have no consequences on the protection of the fundamental rights of prisoners during the implementation of these sentences. Secondly, the huge amount of change in sentencing law and practice must be noted: the majority of Council of Europe countries have been undergoing significant changes. Austria, Cyprus, England, France, the Netherlands, Romania, Spain have all introduced vast reforms within the very recent past. Thirdly, alongside the challenge of change, is the increasing squeeze on financial resources. Academics throughout the Council of Europe have commented on the underfunding of support services, both in prison, but particularly, in the community. It is not only the support services which are struggling: courts and parole boards in many countries (notably in Belgium, Italy and England) are facing a huge backlog of cases, an overload on supervision judiciary. Legal aid budgets are squeezed making it ever more difficult to find skilled lawyers to work in this difficult area. Justice and fairness for sentenced prisoners can easily be overlooked: this is inappropriate both from the prisoner's perspective, but also from society's.

Determinate (fixed term) sentences

64. Most 'dangerous' offenders will receive long term, but fixed term, sentences. It is rare in the Council for Europe for a fixed term to be served in its entirety, but the way in which countries organise their release systems varies enormously, sometimes within countries as well as between countries (see Padfield, van Zyl Smit and Dünkel, 2010). Although many countries have systems which allow automatic, or semi-automatic, release to many prisoners, very often only discretionary conditional release is available for the most serious or 'dangerous offenders'. There is a wide variety of practice in relation to conditions on release: in some countries conditions are routine and standardised, in others much more individualized. There are very different forms and degrees of freedom (van Zyl Smit, 1998). Even within jurisdictions there are many different sorts of prison, and a prisoner may proceed through his sentence from secure establishments to prisons of different levels of security. Some prisons will be better equipped to provide training and treatment opportunities. Yet the prisoner is unlikely to be able to select his or her prison, or his or her route

through the penal system. Most decisions will be taken administratively. Thus, for example, in many countries, it is accepted that temporary leave (day leave, semi-detention, work or home leave) is granted by the prison administration, while courts decide only longer periods of conditional leave²⁰. The distinction between those decisions which can be taken administratively, and those which require judicial authority vary between countries, and may have far-reaching impact: for example, since a court may not grant conditional leave to those who have not enjoyed successful periods of temporary leave, it is in effect the administration and not the court who hold the keys to release. If a court decides that a prisoner must complete a certain course before he will be released, it will be those who control his priority on the course waiting list who in reality delay his release, not the court.

Hypothetical Case C

Mr C is sentenced to 10 years imprisonment for rape, having spent one year in prison pre-trial. He is immediately taken to prison (where he may have been on remand). He is assessed as a medium risk of escape, and sent to a secure prison for sex offenders. He is assessed as in need of a variety of programmes, and agrees to follow a sentence plan. His first release eligibility date is noted on his file, and after two years he has completed two courses, and moved to a less secure prison. He seeks the right for a temporary release in order to make plans for his eventual release. Who decides? What are the factors that the decision-maker takes into account, and how are these factors assessed?

65. This simple story, and the answers to these questions which country respondents may suggest, reveal immediately the variety of types of decision-making involved: different bodies in different countries will be responsible for categorising and assessing an offender, at different stages in their penal career. Dünkel et al (2009) in their review of long-term imprisonment (available on the internet) make it very clear that serving a sentence of the same length in two different European countries turns into two very different sanctions, differing in severity and length: not least because freedom is curtailed in varying degrees in different prison regimes. Different regimes also result in release rules being applied differently. Of course the differences are not only between different countries: the severity of a prison sentence varies within countries according to the particular institution or institutions to which the prisoner is sent. Again, the literature on decision-making underlines the need for careful analysis of the reality of criminal justice decision-making in practice (see Gelsthorpe and Padfield, 2003).
66. Automatic conditional release (at half time, or later for recidivists) may be the rule, or a fixed term prisoner may have to apply (or be referred to a special court for release). Many decisions which may impact on the decision to release may be taken by prison or probation/social work bodies. Rules may be applied differently in privately run prisons than in public sector prisons (and indeed, different rules may be applied). Even before we note differences between states, a number of researchers have commented with concern about the variations within their own countries: in Italy, between the north and the south, for example (see Gualazzi and Mancuso (2010), or in Austria, between different regions and individual prisons (Bruckmüller and Hofinger, 2010). Where the system is discretionary, there will usually be a court hearing, and indeed this is required by article 5(4) of the European Convention on Human Rights. But the nature of the 'court' varies enormously: Belgium's *Tribunal d'application des peines/strafuitvoeringsrechtbank* is multi-disciplinary, made up of a judge and two lay experts, whereas the French *tribunal d'application des peines* is made up only of professional judges²¹. The English Parole Board²² is composed of judges, lawyers, criminologists, and independent members who sit in panels of three.
67. The rules which these sentence implementation or review courts follow also vary greatly, in particular in relation to the legal thresholds and criteria for release. The height of the hurdle varies enormously. The criteria laid down in the Austrian Criminal Code include a requirement that the

²⁰ In Ireland, exceptionally, all conditional release is considered temporary

²¹ At the present time, France is considering whether to include lay members on the tribunal: already the "tribunal d'application des peines" attached to the Court of Appeal includes a representative from both victims groups and from reintegration organisations.

²² which now decides few determinate cases (its main jurisdiction is indeterminate and recall cases) was held not to comply with the requirements of Article 5(4) of the ECHR in *R (Brooke) v Parole Board* [2008] EWCA Civ 29

conditional release has at least the same preventative effect on the offender as serving the remainder of the prison term. In Germany, a 'justifiable' degree of risk is acceptable for some offenders. There has been little empirical research on how these rules are applied in practice, on actual decision-making in sentence implementation courts (though see Padfield, van Zyl Smit and Dünkel, 2010 for an exploratory comparative study).

68. What is the evidence on which the body deciding release relies? Some jurisdictions explicitly look at behaviour in prison and see conditional release more as a reward for good behaviour (Turkey, Cyprus) than as a step in a journey towards resettlement. Sometimes it is the prisoner himself who has to present a 'reintegration plan' (Belgium), whereas in many others, the offender remains a more passive recipient of a release plan prepared by others. In France, the *tribunal* appears to be more influenced by attempts to resocialise, than by actual evidence of success, and also considers the offender's actual payment of financial compensation to his victim as evidence in favour of release.
69. Clearly, the court's decision is influenced by the evidence presented to it, and the way in which this evidence is presented. For example, it has been suggested that reports by the Italian *uffici di esecuzione penale esterna* (UEPE, or penal social services) are often not followed by the *tribunale* as they are too general or excessively positive (see Gualazzi and Mancuso, 2010), whereas the probation reports given to the Parole Board in England are often particularly cautious. The Board rarely recommends release if not recommended by the probation officer. It is thus the probation service in England who in effect hold the key to release (Padfield, 2002).
70. We should also note recall procedures. It is common in some countries, and rare in others, that released offenders are recalled to prison when in breach of their conditions of release. On Germany, Dünkel and Prins (2010, p 185) comment that it is very positive that less than half of all conditional releases are revoked. In England and Wales, a total of 13,900 determinate sentenced offenders were recalled to custody during the year 2009-10, up 18 % from 2008-09 (when 11,800 offenders serving determinate sentences were recalled to prison); in 2006 more life sentence prisoners were recalled to prison (164) than were released on license (135)²³. In other countries many fewer are recalled: in Finland there are only about 10 recall cases a year. It seems a fair assumption that prisoners are more likely to be recalled when they are more closely monitored/supervised, which seems somewhat perverse: where supervision is poor or non-existent the offender who breaches conditions is not penalised. Yet the low recall rate in Finland is not due to poor supervision. The impact of recall or the revocation of a license varies: in some countries, the court or tribunal responsible for reviewing revocations may simply make the conditions on release stricter. In others, a recalled offender may spend significant time back in prison without a court hearing. The mechanisms of recall also vary enormously: whether initiated by public prosecutors or probation officers, for example. Recall practice seems to have been studied very little nationally, yet alone comparatively (see Padfield and Maruna, 2007, Digard, 2010).

Indeterminate (life) sentences

71. Some European countries (Croatia, Norway, Portugal and Spain) have no provision for life sentences. Of those that do have life sentences, some have mandatory life sentences for some offences (UK, Turkey), for many, life is only ever at the discretion of the sentencing judge or judges. Some countries permit full or whole life tariffs (there are for example about 30 prisoners in England who know they are serving their whole life in prison), but most have an upper limit. Many systems do not individualise the tariff, but simply specify that a certain minimum term is to be served: 10 years in Belgium (for recidivists 14 years²⁴), 12 years in Denmark and Finland, 15 years in Austria, Germany and Switzerland (in the latter this term might exceptionally be 10 years), 18 years in France (for recidivists 22 years), 20 years in the Czech Republic, Greece (with a possible remission to 16 years) and Romania, 25 years in Poland, Russia and Slovenia, 26 years in Italy and 30 years in Estonia and in certain cases in Hungary (Data here are from Dünkel, 2009, and van Zyl Smit, 2009). When Turkey abolished the death penalty in 2002, it was replaced by life-long aggravated (or heavy) imprisonment. In England and Wales, and in Scotland, the judge who

²³ see Offender Management Caseload Statistics, 2009, Tables 9.6 and 9.11

²⁴ Raised to 16 in 2006

sentences someone to life imprisonment, whether the sentence is discretionary or mandatory, may and usually does set a minimum period or tariff to be served.

72. A life sentence may therefore be seen to fall into three stages: a minimum term (or tariff), a post-tariff period of secure prevention detention (see Chapter 5) and then a period on release. However, there is usually more flexibility in those systems which allow sentence implementation courts to vary the sentence imposed by the sentencing judge or judges. Obviously a key difference for life sentence prisoners is that they have little idea at the beginning of their sentence when they will be released. This adds the enormous stress of uncertainty, for both them and their families, and it makes it very difficult to press forward with precise sentence plans. There is also a question of legitimacy: if prisoners perceive the system as unfair, it is much more difficult for them to work with the system.
73. The rules on release for lifers again vary very greatly (see van Zyl Smit, 2002). Even where countries have seemingly similar rules, the practice can be very different. Again, it is important to remember that not all life or indeterminate sentence prisoners are dangerous: many are first time offenders who have never previously committed a crime of violence. We need much more research: statistical data on comparative release and reconviction rates (to discover variations within countries as well as between different countries) but also qualitative research identifying the reality of decision-making in practice. Appleton (2010) highlights the difficulties faced by released life sentence prisoners through interviews with both those who have successfully reintegrated and those who have been recalled to prison to continue their life sentences. Throughout Europe both the quality and length of probation supervision and support varies enormously.

What works to reduce re-offending?

74. Establishing what works to reduce offending by any offender, or proving any causal connection between individual interventions and an individual's desistance from crime or a criminal career, is fraught with difficulty. These difficulties are multiplied when it comes to those who are considered 'dangerous'. As we have noted, serious criminal acts are likely to be rare, difficult to detect and even more difficult to predict. Identifying a causal connection between different rehabilitative and protective initiatives may be equally difficult – but this is far from arguing that 'nothing works'.

Psychological interventions

75. Many countries have adopted and adapted treatment programmes based on cognitive-behavioural psychology. These are often aimed at identifying offenders' risks-needs and then seeking to modify their behaviour. Treatment may include cognitive 'self change' programmes, targeting high-risk offenders and including group and individual sessions. They may include anger management or violence reduction strategies, or specialised sex offender treatment programmes, domestic violence or healthy relationships programme (such as the Integrated Domestic Abuse Programme (IDAP) and the Community Domestic Violence Programme (CDVP) and the Healthy Relationships Programme (HRP)). Most programmes dealing with domestic violence, for example, conceptualise it as a multidimensional problem and consider the links between the social and psychological characteristics of individual perpetrators (e.g. his development, experiences of abuse, degree of empathy), his immediate patterns of interaction (e.g. his environment and patterns of family interaction) and the influence of his social context (e.g. his work and friendships) as well as wider influences (e.g. cultural norms endorsing male power and control, patriarchy). They also draw on social learning and cognitive-behavioural theory (see for details on domestic violence programmes in England, Bullock et al, 2010) . Alongside cognitive-behavioural group work, there may be individual one to one components, risk assessments, and structured victim contact. In many countries great emphasis has been put on accreditation of programmes and careful monitoring of their implementation. However, this can be seen to limit creativity and adaptability. To generalize, these programmes are generally found to have a small but significant treatment effect, even if it is difficult to predict for whom they will be successful and why (Lösel, 2007). There are concerns that resources must be spent appropriately: are the right offenders allocated to the right courses? Are waiting lists appropriate? Are courses for perpetrators funded at the expense of support for their victims?

76. In recent years, some programmes have become increasingly sophisticated, and are being used with more complex offenders, for example, those suffering from psychopathic disorders²⁵: “there is no good evidence that psychopathy can be treated reliably and effectively – but neither is there any good evidence psychopathy is untreatable” (Hemphill and Hart (2002)). There are some obvious pre-requisites to success: programmes must be well structured, and implemented by well-trained, well-supported and well-supervised staff²⁶. They must be carried out in an adequately supportive environment – there is evidence that some programmes are more effective if carried out in the community than in custody. It would appear that poorly run treatments may even impact negatively on an offender’s cognitive needs. There are many examples of implementation studies which focus on the delivery of programmes²⁷. Such evaluations often mention concerns about uneven implementation, the difficulty of the work for staff as well as for offenders, and the problem of lengthy waiting lists.
77. Serious challenge to ‘risk-needs’ programmes has come from advocates of what is often called the ‘good life’ model, which gives greater priority to adopting a positive approach to treatment: a ‘strength-based’ rather than ‘needs or risk based’ approach. Here the emphasis is on the relationship between risk management and ‘good lives’, the importance of identifying and encouraging offender motivation, and the impact of therapists’ attitudes toward offenders (Ward and Brown, 2004, Ward et al, 2007). Those who successfully desist from crime often have to make sense of their past lives, to reconstruct their life story and to take control (Maruna, 2001).

Social, economic and community opportunities

78. Treatment programmes alone are unlikely to be effective in reducing re-offending. Or rather, psychological interventions are more likely to be effective if they aren’t used in isolation from an offender’s other needs. Offenders must be helped to take control of their own lives. Releasing offenders into the community without practical support is not a realistic way of reducing offending. They may need help to find accommodation and employment. It is important not to underestimate the challenges that face someone who has been convicted of a serious offence, and served a custodial sentence, to find employment, accommodation and social networks. Many may not have had stable accommodation or employment for many years before their imprisonment. Prison may well have fractured already weak family and other social support networks. In many penal systems, not enough is done to foster and encourage social, family and community links. The problems are particularly acute for foreign prisoners. The use of modern technologies (such as skype, email) should be explored to encourage cheaper and more effective ways of maintaining contact with families.
79. Education and basic skills training is also essential, though again enforced learning, or what Hardy et al (2001) call *l’aide contrainte*, is less effective than where an offender is genuinely motivated. There are many other skills as well as literacy: many ‘dangerous’ offenders have poor budgeting skills, and may need help setting up a bank account, for example. Access to community-based health services is important. Social support networks can be offered not only by professional staff but also by volunteers: church groups or other ‘circles of support’²⁸. Voluntary organisations which may have greater legitimacy as helpers in the eyes of offenders, have traditionally been important in many countries, and are also growing in importance in others. A key can be sentence planning which recognises the need for ‘through care’ from the custodial setting to the community.

²⁵ For example, ‘Chromis’ is a complex and intensive programme developed in England aiming to reduce violence in high-risk offenders whose level or combination of psychopathic traits disrupts their ability to accept treatment and change.

²⁶ see the work of the Correctional Services Accreditation Panel in England and Wales for an example of one Government’s attempts to maintain high quality offender programmes: www.justice.gov.uk/publications/csap-annual-report-2008-9.htm

²⁷ see Bullock et al (2010) on the implementation of domestic abuse programmes in England and Wales in prison and the community, for example.

²⁸ See www.circles-uk.org.uk: a group of volunteers from a local community form a Circle around an offender. They provide a supportive social network but also require the offender to take responsibility (be ‘accountable’) for his or her ongoing ‘risk management’.

Monitoring and supervision

80. It is likely that, once they are released into the community, 'dangerous' offenders will be managed by monitoring and supervision. Granting liberty in stages (graduated freedom) can be effective. But any intrusion or limits on personal freedoms must be justified: if close monitoring is no more effective than releasing someone without such close monitoring, it should not be used.
81. Many countries use electronic monitoring and, a few, GPS satellite tracking of offenders. More research into the effectiveness of such monitoring should be carried out. While offenders being monitored may reduce their offending, and studies have reported offender support for 'tags', they may also either adapt their offending or indeed simply offend more when the monitoring ends. Satellite tracking was piloted in the UK between 2004 and 2006 (see Shute, 2007) but was abandoned, largely because it was both ineffective and expensive. Where electronic monitoring is used, it should always be combined with other interventions designed to support desistance²⁹,
82. Thus, one has to explore the reality of monitoring. In many countries, there is now a register of sex offenders (the sex offender register in England, the *fichier judiciaire national automatisé des auteurs d'infractions sexuelles ou violentes* (FJNAIS) in France, for example). The mere existence of such registers is unlikely to be effective in either public protection or in rehabilitative terms. It depends, of course, on what is done with the information in the register, and indeed on the reliability of the information held. In several countries huge sums of money have been invested in improving the computerization of records, but not always successfully. As well as efficient usage, the sharing of this data between different agencies raises human rights (particularly privacy) issues. Vigilance and effective safeguards are required to ensure that there is no inappropriate access to information about offenders, particularly 'dangerous' offenders. Information should not be made public,
83. Monitoring may take place by the police, by probation or social services, or by various agencies (including private sector or non-governmental organisations) working together. Thus, in England and Wales, multi-agency public protection arrangements (MAPPA) were introduced in 2001 to supervise dangerous offenders in the community. Whilst this joint working seems to be working well, a vast numbers of offenders have been categorised as needing MAPPA supervision, thereby 'flooding' the system. There are currently more than 30,000 registered sex offenders (32,336 in 2008/09); all violent or other sex offenders who have received a sentence of more than 12 months (11,527 in 2008/09) as well as 'other dangerous offenders' (898 in 2008/09). These offenders are managed on one of three levels from ordinary case management to intensive multi-agency supervision. Clearly significant work has to be done to identify properly those in need of the highest level of monitoring.
84. Close monitoring is expensive, and there are also important questions about both efficacy and the human rights of those monitored. Craissati (2007), a psychologist, identifies the paradoxical effects of stringent management, focusing on sex offenders, concluding that:
- there is a fine line between control and persecution, one that is difficult to detect at times, and that social exclusion – in the current climate – seems to be an unavoidable consequence of rigorous risk management... The possibility that stringent risk management approaches embodied within the MAPPA re-creates – for some offenders – the disturbing experiences of their early lives seems absolutely clear. That it may paradoxically result in triggering greater levels of offending is an uncomfortable idea, as is the suggestion that in order to reduce risk, sometimes professionals and agencies may need to take risks. (Craissati 2007, at page 227)
85. Some forms of monitoring and surveillance may be useful, but these must always themselves be monitored: are they the least intrusive appropriate forms of monitoring and are they regularly and thoroughly reviewed?
86. Probation services throughout Europe appear to be becoming more control and enforcement oriented. But alongside monitoring, consistent support and supervision may be more important. The bedrock of successful supervision is the ability to form and maintain a trusting working relationship with the offender and through it to model pro-social behaviour and attitudes (NOMS,

²⁹ See European Probation Rules, Rule

2006, 26). Given the fractured lives that many 'dangerous offenders' will have lived, it is hardly surprising that the "*continuity* of a stable and supportive relationship" (Appleton, 2010, p 88) is one of the most important keys to successful resettlement, especially during the last year of imprisonment and the first year of release. A "pass-the-parcel" style of supervision is not appropriate, as desisting offenders appear to respond best to one-to-one relationships. Ideally, the named supervisor who engages with one-to-one supervision, over perhaps many years, should be supported by a named backup, who is also familiar with the offender.

87. The following hypothetical problem is designed to provoke debate about the complexity of what works to reduce re-offending:

Hypothetical Case D

Mr D had served a long sentence for the sexual abuse of children. He had been very violent and had no insight into the hurt he caused. Having limited abilities and suffering from psychotic symptoms, he had spent nearly all his life in care, prison or hostels. He lacked any basic skills. A sentence plan was agreed in prison and he slowly completed a number of courses. He was eventually released into the community subject to electronic monitoring and a number of conditions. The police were informed of his release. He was recalled to prison after three months for failing to stay at the approved accommodation. He was subsequently re-released. He is now living in an approved hostel where staff have noticed that he has started to store children's toys and sweets. What should they do?

Surgical/medical interventions

88. Exceptionally, surgical castration continues to be used on some sex offenders. To most human rights observers, the process appears as inhuman treatment. As well, such irreversible procedures raise enormous questions concerning genuine and informed consent, particularly when the person concerned is a prisoner. Thus the CPT report in 2010, with concern, that at least six offenders had undergone surgical castration (testicular pulpectomies) in the Czech Republic in 2008-9. They state that "it is a fundamental principle of medicine that when a medical intervention on a human being is carried out, the least invasive option shall be chosen. In this context, the importance of physical integrity as guaranteed by Articles 2, 3 and 8 of the European Convention on Human Rights cannot be overemphasised. The position of the Czech authorities ignores the divergence of views amongst practising sexologists in the Czech Republic as to the desirability of surgical castration" (at para 9). The CPT reiterates its view that the surgical castration of detained sex offenders amounts to degrading treatment. They suggest that the Czech authorities should facilitate the abolition of surgical castration, by replacing it with other forms of treatment for sex offenders. However the Czech Government respond that "ethically and medically correct surgical castration and subsequent compliance with the prescribed medical follow up by a surgically castrated person can result in the effective protection of society and give that person the chance to return to society. Surgical castration achieves a significant and lifelong decline in the sexual activity of a man; this goal cannot be achieved by other means". The Czech Government state that surgical castration is only ever performed on request and after approval by an expert committee, which consists of a lawyer, at least two physicians specializing in the relevant field, and two other doctors not involved in the surgical operation (Section 27a of Act No 20/1966). This requires a careful analysis of the concepts of 'request' and 'informed consent': offenders may agree to, or even request, invasive and irreversible treatments in ignorance of the reality of the options.
89. An alternative to surgical castration is medication (anti-androgens or gonadoliberin analogues). Such treatment depends on the regular administration of drugs, and can have serious negative side effects (e.g. weight gain, fatigue, nausea, high blood pressure, depression, hypoglycaemia etc). Here, serious consideration should be given not only to the rights of the offender (particularly the right to refuse treatment), but also to the effectiveness of the treatment.

The seamless sentence: custody and community linked

90. Earlier in this chapter, we separated determinate and indeterminate sentences from each other, since an indeterminate (life) sentence prisoner may well follow a more complicated journey through

the prison system. But for both, the system can be unpredictable³⁰. It is difficult to identify a clear line between custodial and community stages in the implementation of a sentence: freedom is often gained in small steps, and, for many of the most 'dangerous' offenders, liberty may forever be bounded by restrictive conditions. This Report has suggested that, from the beginning of any sentence of imprisonment, the focus of the penal administration and the offender should be on his ultimate release and reintegration. This requires:

- (i) meaningful sentence plans³¹ which should be realistic and achievable, and not just aspirational. They should be structured in such a way as to allow the offender to understand clearly the objectives and actions required. They should be regularly reviewed. For example, in most countries, some courses are not available in many prisons: sentence plans must allow a prisoner successfully to negotiate a way through a system which may seem impenetrable and inflexible.
- (ii) Where release is discretionary, as it will be for many 'dangerous' offenders, the offender must be helped in identifying the real hurdles to release and then in jumping them. Since decisions surrounding these hurdles affect release dates, administrative decision-making should be subject to independent judicial supervision. The hurdles may include:
 - security classification: prisoners should be able to challenge this categorisation, especially if the proportion of the sentence which must be served depends on security classification (as in Hungary). They should also be able to proceed swiftly and appropriately to a less secure categorisation. The extent to which countries move prisoners up and down the security classifications varies: in some, such movements reflect the journey towards release; in others, prisoners are very rarely re-classified.
 - detention in particular prisons or regimes: not only 'high security' (for example, Hungary's Special Regime Unit for prisoners serving lengthy sentences ("HSR Unit"))³², but also special units for those belonging to terrorist or mafia organisations (Italy) or dangerous people with severe personality disorders ("DSPD units", England and Wales)³³. Not only is it important for the administration to facilitate the prisoner's reintegration into the main prison system, but also to monitor carefully the assessment or diagnosis that led to the prisoner's detention in the special unit in the first place. The 'stigma' of having spent time in this Unit may well live on with the prisoner (and within his dossier) as he progresses (often very slowly) through the system.
 - completing courses and treatment programmes (particularly if the completion of courses is seen as a way of proving risk reduction)
 - paying compensation to victims
 - securing appropriate accommodation
 - securing work/employment
 - securing temporary release, which is often an important step on the way to more permanent release. Some countries allow systematic prison leave, which may be seen as an important transitional measure to allow a prisoner to prepare for conditional release.

³⁰ For an excellent account of the modern 'pains of imprisonment', exacerbated for the prisoner who knows that he is being constantly measured and evaluated by officers and psychologists, see Crewe (2010).

³¹ See http://psi.hmprisonservice.gov.uk/psi_2010_36_new_chapter_4_for_pso_4700.doc for details on sentence planning in England and Wales

³² See CPT Report on Hungary of June 2007: www.cpt.coe.int/documents/hun/2007-24-inf-eng.htm

³³ National research on the effectiveness etc of DSPD units is available www.dspdprogramme.gov.uk/research.html

- (iii) Having secured release back into the community, the offender must have appropriate support and monitoring. Throughout the Council of Europe, from Finland to Greece, one hears complaints of the severe underfunding of community work with offenders. Workloads vary enormously. In Greece, it is suggested that the new probation service is mainly preoccupied with running routine checks on parolees for technical infractions rather than assisting offenders with employment and housing (see Cheliotis, 2010). An appropriate balance must be struck.

Hypothetical Case E

Mr E was convicted of an offence of serious domestic violence. His partner had children and a social worker was allocated for their protection. The victim was re-housed, and herself supported by social workers.

Mr E was sent to a closed prison, where his sentence plan required him to attend suitable courses. On release, he lived initially at an approved hostel for ex-offenders. A condition of release was that he should not enter the city where his ex-partner lived. He completed a Domestic Violence programme run by the local probation service. He must inform his Probation Officer about any new relationships, and any future partner will be given information about his history. Who should decide if he is receiving adequate supervision? How should this be monitored?

91. Monitoring may involve the monitoring of conditions imposed on the release of an offender. The most common release conditions, as well as a standard condition not to re-offend, may include:
- meeting and keeping in touch with a probation officer
 - a residence obligation, with possible curfew, which may or may not be electronically monitored
 - treatment by a psychiatrist/psychologist/medical practitioner
 - a positive work obligation (or a requirement not to take work with certain groups such as children)
 - an obligation to make payments to victims
 - a requirement not to reside in the same household as children
 - a requirement not to approach or communicate with named people
 - a requirement to avoid a particular area
 - a requirement to attend courses for addictions etc
 - a drug testing condition
92. Conditions should not be too burdensome: not only because this is unfair, but they may also be ineffective or unenforceable. Conditions should be assessed for their utility: many of the therapeutic or practical treatment programmes offered in prisons may be more effectively offered in the community, or an offender may benefit from a repeat or 'booster' programme in the community. As well as consistent support from a probation officer, it is important that released offenders develop relations with mainstream social welfare services. The role that voluntary organisations can play has already been noted³⁴. These voluntary organisations may be effective, but they need to be accountable and supervised.
93. The term 'probation officer' has been used in this chapter, but the term is not universally used³⁵. The label used is of course less important than the authority, skill and independence of the individual. The relative status, power, and influence of different players in the penal process need to be well understood. For example, Belgium's probation officers have become in this context *assistant de justice/justitieassistent*, and English probation officers are being re-rolled as 'offender managers'. Why is this? It is important to assess whether there has been too much focus on risk, and the management of risk, at the expense of reintegration and rehabilitation. We have already noted that emphasizing risk may make it more difficult for some to desist from crime. The proper responsibilities of police, probation and other services also need to be carefully assessed, and expectations of effectiveness must be realistic. Many dangerous offenders will spend many years under supervision: this long-term supervision requires special skills, and takes much time and

³⁴ As well as Circles of Support, an interesting example is *Stop it Now! UK & Ireland* (www.stopitnow.org.uk) which aims to prevent child sexual abuse by working with abusers themselves.

³⁵ (Add reference to European Probation Rules)

many interviews. The work presents special challenges which require specific training of those involved in the supervision process.

94. Two conclusions:

First, there is no magic or easy way of desisting from crime, especially for 'dangerous offenders'. But many do move on from their criminal pasts. As McNeil et al (2005) put it, "desistance resides somewhere in the interfaces between developing personal maturity, changing social bonds associated with certain life transitions, and the individual subjective narrative constructions which offenders build around these key events and changes".

Secondly, the lack of rehabilitative provision offered in practice to many prisoners in Europe must be underlined. In many countries, opportunities are severely limited: the reports of the Council of Europe's Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (the CPT: see www.cpt.coe.int) make depressingly repetitive reference to the paucity of opportunities and rehabilitative programmes available to prisoners. Often, it would appear that those serving the longest sentences have fewer opportunities than other prisoners³⁶.

5. SECURE PREVENTIVE DETENTION

95. For our purposes, 'secure preventive detention' can be defined as the detention of offenders for the purpose of public protection (beyond the deserved, or proportionate punishment).

Categorising laws

96. The subject poses enormous challenges for those seeking to do comparative analysis and categorisation. The following categories can be identified (though several countries may fit into more than one category):

- (i) systems which explicitly do not allow secure preventive detention, or non-punitive sentencing (for example, Slovenia). This clearly demonstrates an approach that recognises the right of an offender to be reintegrated into society once he or she has served their deserved sentence. It is consistent with just desert principles. The remaining question here may well be whether such offenders receive adequate support to help them be successfully reintegrated (see Chapter 4).
- (ii) systems which use life (or indeterminate) sentences as a public protection (secure preventive) measure. As we saw in Chapter 4, most European countries allow some form of life sentence. These may be imposed for desert reasons (including 'whole life' sentences, or life without parole, on those who have committed the most heinous crimes), but several countries explicitly use life or indeterminate sentences in order to keep in custody or under supervision in the community those who are considered to pose a significant risk of serious re-offending. The obvious examples are the United Kingdom and Ireland where large numbers of offenders receive a life sentence, where a tariff, or minimum individualised term for punishment, is fixed by the sentencing judge and the prisoner is only subsequently released, on the direction of a panel of the Parole Board, when they determine that it is 'safe' to do so. Many prisoners spend many years in prison post-tariff and so this can be seen as a form of secure preventive detention. The implementation of such sentences varies: for example, Switzerland's "*internement à vie pour les délinquants sexuels ou violents jugés dangereux et non amendables*" is also indeterminate but functions differently: it is only subject to review after an expert commission has reviewed therapeutic possibilities.
- (iii) systems which identify longer than commensurate sentences for certain categories of offender such as recidivists or dangerous recidivists (see Chapter 2). This is sometimes justified because the repeat offender 'deserves' more punishment, or may be simply for public protection. The penal justification is not always made explicit in the law.

³⁶ Although this is not always the case: some systems give priority to long term prisoners with the result that short term prisoners may do little useful during the course of their sentence.

- (iv) systems which use measures explicitly of public protection (for example, *detention de sûreté* or *Sicherungsverwahrung* or *misura di sicurezza*), imposed at the time of sentence to allow for an extended period of public protection. These measures of prevention may be imposed as well as, or instead of, a proportionate punishment. They may be for a fixed term, or indefinite. In several countries there has been debate whether such a measure is a criminal penalty or a civil order (see *M v Germany*, discussed in Annex One). These sentences pose significant human rights concerns: the offender is being detained simply because of the risk that he or she is perceived to represent: it is vitally important that their use is monitored to ensure that there is clear understanding about their use and potential abuse.
- In Austria both the dangerously disturbed and dangerous recidivists may be subject to preventative measures (see s. 21 ff of the Criminal Code). This may be for up to 10 years for dangerous recidivists and there is no upper limit for dangerously disturbed offenders.
 - In England and Wales an extended sentence may be imposed on 'dangerous' offenders: this is an ordinary prison sentence with an extended period of supervision in the community after release (up to 5 years for violent offenders, and 8 years for sexual offenders). Since a released offender remains liable to recall to prison throughout this extension period, and may not be released again until the end of that period, this can significantly extend a custodial sentence.
 - Similarly, in Spain the Criminal Code was amended in 2010 to introduce *libertad vigilada* (see Art 106 of the Penal Code). This may be for a period of up to 5 years for less serious crimes, and 5-10 years for more serious crimes. The person released from prison on *libertad vigilada* may be subject to a number of conditions, including electronic tagging, regular judicial reviews, residence, contact and educational requirements.
 - In Belgium an offender may be placed 'at the government's disposal' for a period from 5 – 20 years, according to the nature of the case: see the Social Protection Act 1964, as amended in 1990, 1998 and 2007. This may be implemented either by way of additional deprivation of liberty or by way of a conditional release. Currently, the decision whether or not to release is (controversially) taken by the Ministry of Justice, but this will be transferred shortly to Sentence Implementation Courts.
 - In Germany secure preventive detention can be imposed by the court if the offender is to be sentenced for an intentional grave offence (for which is provided minimum two years of imprisonment) and who on the basis of an overall assessment is considered to pose a danger to the general public. The upper limit of detention is traditionally 10 years, but in cases where there is still a risk of committing serious offences resulting in serious emotional trauma or physical injury to the victims the time frame can exceed 10 years.
- (v) systems which use secure preventive detention reserved at the time of sentence, to be decided later in the sentence. E.g. in Germany, the sentencing court may impose reserved secure preventive detention. In this case, at the time of the offender's earliest release the court has to make an assessment whether the offender is dangerous to the general public. If the offender is assessed to be dangerous, secure preventive detention can be imposed.
- (vi) systems which use secure preventive detention measures, imposed at the time of release or subsequently. Some countries allow measures of prevention to be imposed at the end of the criminal penalty, or at the end of the custodial part of the penalty. Often these measures impose limits on the offender's freedom by way of conditions (post-sentence preventive surveillance), but they may also be custodial (secure). For example, in France, the law of 25 February 2008 *relative à la rétention de sûreté et à la déclaration d'irresponsabilité pénale pour cause de trouble mental* controversially increased the powers of the *Commission pluridisciplinaire des mesures de sûreté* to recommend the continued detention, post sentence, of someone sentenced to at least 15 years imprisonment, who is deemed 'dangerous' with a high risk of re-offending because of a serious personality disorder (see art 706-53-13). This Commission was originally created (by the law of 12 December 2005) to advise only on electronic monitoring. It is composed of a *magistrat*, a *préfet* (a senior civil servant), a psychiatrist, a psychologist, a prison governor, a lawyer and a representative of a victim's organisation. Prisoners coming to the end of a sentence for a serious offence who the Commission deem to be dangerous may be referred

to the *procureur general* who takes the case to the *juridiction régionale de la rétention de sûreté* which can order the prisoner's continued detention. The person will be detained in a *centre socio-médico-judiciaire de sûreté*, under the joint governance of the Ministry of Justice and of Health. There must be an annual hearing to decide if the measure should continue, and the prisoner may demand a review at any time.. The *Conseil Constitutionnel* held in its decision n° 2008-562 DC – February 21st 2008³⁷ that post-sentence preventive detention is neither a penalty nor a sentence of a punitive nature. This meant that any argument based on the principle of legality³⁸ failed. But the *Conseil Constitutionnel* did hold that the law could not be applied to people convicted of offences committed prior to the enactment of the statute, so the first cases are unlikely to be heard before 2023. In Germany, too, there has been much controversy surrounding the introduction of post-sentence preventive detention. Fewer than 10 out of the more than 400 offenders currently held in preventive detention are being held under the very controversial subsequently ordered (post sentence) preventive detention (see Dünkel, 2010).

(vii) As we saw in Chapter 3, at the end of a period of imprisonment, or indeed before it, during it, or as an alternative to prosecution, a prisoner may be transferred to a civil secure mental hospital. All European countries permit to some degree the civil detention of those deemed to be a danger to themselves or others.

97. It is important to underline that these distinctions are not entirely convincing or indeed necessarily useful. First, the line between a 'secure' sanction and one served in the community can be blurred, especially where a prisoner is liable to recall if the conditions of his release are breached and he then serves a longer than proportionate sentence. Many prison systems use supervised hostels in the community which may be labelled 'open prisons' or 'community hostels': they reveal an unclear borderland between custody and community. Secondly, the line between proportionate penal sanctions and secure preventive detention is often blurred (see Annex One for the jurisprudence of the ECtHR). Even where there is a clear differentiation between criminal sanctions and measures of public protection, these differences may not translate into different practice.

98. This is the third and most important challenge: the differences between 'ordinary' imprisonment and secure preventive detention may often be illusory. If the person is in custody (in prison, hospital or elsewhere), perhaps indefinitely, any post-sentence detention restricts liberty. Such detention must therefore be fair and proportionate. We repeat the concern raised earlier about prisons and places of detention run by private sector or non-government organisations. Whilst these may prove cheaper to run (an important consideration) this may be inappropriate. For example, the CPT noted recently in its report on Hungary that the Government acknowledged that the National Penitentiary Establishment at Tiszalök, run by a private contractor, has had enormous difficulty recruiting medical staff because of the poor pay offered. Where 'dangerous' prisoners endure restricted regimes, it is important that prison authorities are clear whether this is disciplinary or preventative. An interesting example is the Turkish Government's regime for prisoners serving aggravated life sentences. Under Turkish law (Art 67(4) of Law No 5275 on the execution of penalties and security measures), the 'committee of administration and observation' of a prison may decide that prisoners who "present an absolute danger for society" are not allowed to receive radio or television broadcasts. Prisoners who maintain leadership of armed organizations may be banned from making all phone calls. It is not surprising that the CPT criticised these rules: they appear to be a form of punishment, rather than a necessary form of secure prevention. In many countries, the line between administrative convenience and disciplinary punishment can be a fine line: again, vigilance is required in seeking the minimum interference with prisoners' rights.

Assessing risk

99. Just as there is no easy common language distinguishing 'ordinary' sentences from 'preventive' detention, neither is there agreement on the level of risk which an offender must present before

³⁷ See for an English version of this decision www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a2008562dc.pdf

³⁸ See Article 8 of the French Declaration of the Rights of Man and of the Citizen of 1789: "The Law must prescribe only punishments which are strictly and evidently necessary and no one shall be punished except by virtue of a statute drawn up and promulgated before the commission of the offence and legally applied".

he/she can be detained 'preventively'. The levels of risk for detention and for release may not be the same: it is important to monitor both the tests which qualify an offender for secure prevention detention, as well as the hurdles he must jump before he can leave this 'box'. In several countries the threshold of risk assessment appears to be higher for those serving secure preventive detention (or dangerous recidivists) than for 'ordinary' prisoners: it is more difficult for them to achieve their freedom. This is an area of some complexity, involving comparisons of both procedural and substantive law. A detailed review of the law is beyond the scope of this paper. But it would be an invaluable project to explore in greater detail the law and practice in different countries. Such a review should involve not only a comparison of legal rules, but their application in practice.

Hypothetical Case F

Mrs F has served a sentence for murder and other violence offences. At the end of her sentence, she is assessed by a court as still being 'dangerous', with a high risk of re-offending because of a serious personality disorder. Where is she held? What are the conditions in this institution? Are all the restrictions on freedom justified and necessary? Who decides? What are her opportunities to prove that she can be released under appropriate conditions of supervision and surveillance? Is the burden of proof on the state to prove at regular intervals the necessity for her detention? Once (if) released, does she remain liable to be recalled to closed (secure) conditions? What are the mechanisms for review?

Places and conditions of detention

100. Those who are being detained for preventive reasons, do not 'deserve' this punishment: with Lippke (2008), we might argue that they should be compensated for it. They are being detained not as punishment, but for public protection. At any rate, they should be detained in ways which respect their rights as far as possible. We have already noted that there are a wide variety of institutions used to detain dangerous people. In particular, their conditions of detention are sometimes worse than those imposed on offenders serving a sentence as punishment. As Walker (1999) puts it "The quality of his life is being sacrificed because it has been decided, correctly or incorrectly, that others will be safer as a result....making conditions as tolerable as possible should at least be a declared objective" (p. 183). A first step is to recognise and to highlight the special status of people whose detention is being prolonged solely for the sake of others. As with (even more than with?) people held in punitive detention, anyone held for preventive reasons only should be entitled to a written sentence plan which allows him to address specific risk factors, or clinical symptoms.
101. However 'secure preventive detention' is defined, it is essential that those detained are able to challenge their detention, or the limits on their freedom, before a court at regular intervals. The frequency of review may vary not only between jurisdictions, but also depending on the 'box' in which the offender finds himself. As we have seen, the nature and composition of courts and tribunals vary (judges only, or multidisciplinary), as do their powers. In reality, the 'gatekeepers' may be those professional and/or administrative officers advising the court, and responsible for preparing release plans. A court is unlikely to recommend the release of a 'dangerous' offender unless this is recommended by appropriate 'experts'.
102. What measures are in place to ensure a person's release as soon as practicable? Many systems allow preventive surveillance, though it may not go under this name. Offenders on conditional release may be closely monitored and supervised. There are numerous ways in which the freedom of a 'dangerous person' can be limited in the community. We have already noted (in Chapter 4) conditions which may be imposed on release. Some countries also allow civil protective orders such as England's Sex Offender Protection Orders and Foreign Travel Orders, breach of which constitutes a criminal offence. These measures themselves are deeply controversial (not least because they are obtained in a civil court without the benefit of the usual 'due process' safeguards). Most controversial of all are control orders, a form of home detention for suspected terrorists. It is vital that such intrusive measures are imposed only on those who would otherwise be detained: and not unnecessarily on those who should be trusted with greater freedom. They are mentioned here to encourage a move away from custody as the default position, or normal response: supervised release or preventive surveillance, rather than detention, may be a more appropriate form of public protection.

103. In conclusion: those who are in custody simply for the protection of the public (as a measure of prevention), must have enhanced opportunities to rebut the state's view that it is necessary to detain them. Those who are being held not as punishment, but simply for public protection, should be held in conditions as tolerable as possible. Yet in many countries they will be held in ordinary prisons. Where they are held in separate wings of ordinary prisons, the conditions may not be any better than the conditions in ordinary prisons (indeed, they may be worse). This Report calls for a detailed and independent review, across all the Council of Europe, on how 'secure preventive detention' is being used, in practice and not just in law, and whether it is necessary, appropriate and effectively monitored.

6. Conclusions and Recommendations

104. The European Committee on Crime Problems (CDPC) and the Council for Penological Cooperation (PC-CP) have chosen to look at a crucially important area of European penal practice: the sentencing, management and treatment of 'dangerous' offenders.
105. This Report has not sought to provide a detailed comparative study of law and practice³⁹ throughout the Council of Europe member countries. That would have been impossible within the time frame and available resources. It is of significance that there was some dispute between some correspondents even within the same jurisdiction as to the interpretation of relevant rules. It was therefore decided not to focus on these disputes which would have distracted from the paper's main purpose, a focus on general issues and concerns, not an analysis of specific laws. This is not to suggest that greater clarity is not an important prerequisite of a fair system. Over-complex laws themselves contribute to injustice.
106. The enormous difficulties in extracting reliable information from many quarters should not be underestimated, and the Council of Europe's work with the CPT, SPACE etc. is essential. This report has not itself provided quantitative data: attempts to verify published data often resulted in debates and discussions between correspondents. In many countries this is a subject studied very little by academics. Given the political prominence given to public protection, and the potential for ineffective management and the huge human rights issues, it is of concern that, within many countries, the research spotlight is not focussed more carefully on the subject matter of this Report. Future work by the Council of Europe should encourage Ministry of Justice officials to work closely with independent academics to explore the subject further, as well as with professionals working in the field (including independent legal practitioners). Complex laws may need simplifying to work fairly and efficiently, but an over-simplified analysis does not lead to better understanding.
107. Comparative work in this area is of course, fraught with dangers: the possibilities for misunderstandings are endless. Not only is language a very obvious barrier to understanding, but key concepts, in law and theory, may be understood very differently. Is an offender on conditional release still a 'prisoner'? Is a convicted prisoner transferred to hospital a 'prisoner'? Is an open prison a 'prison'? What is the relevance of the title or distinction? What is the significance of the labels applied to various players and tribunals within the system? As we move towards more frequent transfer of prisoners from country to country⁴⁰, it is vital that these differences are better explored and understood. Both quantitative and legal data should be collected and analysed, but practical empirical qualitative research would be particularly valuable in order to assist an understanding of how 'dangerous' offenders are in reality managed and treated.
108. In chapter 2 we explored the concept of 'dangerousness'. It was clear that the term itself is dangerous – it is impossible to predict who will commit future dangerous acts with accuracy. Poor

³⁹ Both qualitative and quantitative data have been studied in the preparation of the Report, though empirical qualitative work on decision-making in many countries seems difficult to access. This may be because the researcher was working only in two languages. It may also be that, despite the importance of the subject, there is little reliable published research.

⁴⁰ Council Framework Decision 2008/989/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. By Article 29, Member States are obliged to implement this Framework Decision by 5 December 2011.

predictions not only mean many people may be detained unnecessarily, they also fail to protect the public and may lead to greater public anxiety. The label should be used with very great care.

109. The consequences of being labelled 'dangerous' are often enormous. Those who have been labelled 'dangerous' must therefore be given every opportunity to remove the label, to reduce their apparent level of risk. Where static factors have been used to predict risk, it is vital that dynamic factors and clinical assessments are also used. But clinical assessments may also be over-cautious and unreliable. The impact of categorisations and labels must be well understood, as well as routes in and out of these categories. Dangerous offenders must have sentence plans which include achievable targets. They must have access to good quality and independent legal advice. They must be able, regularly, to challenge the evidence of the state which is used to justify their detention.
110. The levels of risk presented by 'dangerous' people can be reduced. But public expectations are often unrealistic. This Report has given examples of risk reduction practices, and of ways risky people may be 'managed'. One conclusion of this Report is the importance of acknowledging the inadequacy of provision for the supervision and support of 'dangerous' offenders in the community. Many correspondents have pointed out that the better way to protect the public is not through new laws, but through better support and protection. The shortage of qualified staff, reflected in the large number of offenders on many probation officers' case lists, has been a common refrain. Successful supervision requires consistent and appropriate support.
111. However, the overriding message of this Report is that a focus on 'dangerousness' and 'risk' may not be the most effective way of reducing re-offending. Public expectations of safety have been encouraged by the media coverage given to dramatic and rare crimes. Policy makers, politicians and academics should seek to create a more informed public debate. People must understand the limits of risk assessment, and that they cannot be protected from unpredictable events. A time of sharp budget cuts throughout Europe is a good time to re-appraise our dependence on prison as a way of protecting people from 'dangerous offenders'. But lack of resources must never be an excuse to limit individual human rights. This Report seeks, in particular, by way of simple hypothetical case studies, to provoke serious debate both within individual countries, and within the Council of Europe itself.

Annex One

Any work that the Council of Europe does in this field needs, of course, to be firmly grounded in the law and jurisprudence of the European Convention on Human Rights. This brief Annex may provide a useful if brief check-list:

(i) Relevant Council of Europe texts (as well as the European Convention on Human Rights)

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987)

Recommendation Rec(2010)01 of the Committee of Ministers on the Council of Europe Probation Rules (2010)

Recommendation Rec(2006)02 of the Committee of Ministers on the European Prison Rules e.g. "In the case of those prisoners with longer sentences in particular, steps shall be taken to ensure a gradual return to life in free society" (rule 107.2).

Recommendation Rec(2003)23 of the Committee of Ministers on the management of life-sentence and other long-term prisoners

Recommendation Rec(2003)22 of the Committee of Ministers on conditional release

Recommendation n° R(1999)22 of the Committee of Ministers concerning prison overcrowding and prison population inflation

Recommendation n° R(98)7 of the Committee of Ministers concerning the ethical and organisational aspects of health care in prison

Recommendation n° R(82)17 of the Committee of Ministers on the custody and treatment of dangerous offenders

Reports by the Commissioner for Human Rights and by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

(ii) Some key jurisprudence of the ECtHR⁴¹

The rights of victims and society:

Osman v United Kingdom Application No 23452/94; 28 October 1998; (2000) 29 EHRR 245. 17-3 no violation of Art 2 or 3, but unanimously breach of Art 6 where family unable in domestic law to have the police account for their actions in failing to prevent crime (see also *Gunay v Turkey* (2010) 50 EHRR 19: breach of Art 2 and 3 where the competent authorities had failed to take measures which, judged reasonably, could be deemed appropriate to safeguard against the risk to the life of a suspect who had been arrested and then never seen again.).

Maiorano v. Italy Application No 28634/06, 2nd section; 15 December 2009 Double murder by prisoner on day release. The Court unanimously found a breach of Art 2 doubting the decision to release him (for taking inadequate note of the evidence of his behaviour in prison) and critical of the failure of the prosecutor to refer the case back to the Supervision Tribunal. Nor had the disciplinary investigations by the Ministry of Justice satisfied the procedural requirements of Art 2.

Rantsev v Cyprus and Russia Application No 25965/04, First section; 7 January 2010; [2010] ECHR 22 the Court found a procedural violation of Art 2 by Cyprus, because of the failure to conduct an effective investigation into daughter's death; also breaches of Art 4 by both Cyprus and Russia, and a breach of Art 5 by Russia.

⁴¹ With thanks to westlaw on whose summaries this annex relies.

Relevant rights of the offender:

X v Norway Application No. 4210/69, 24 July 1970

X v Netherlands Application No 6591/74, 26 May 1975

Guzzardi v Italy (1981) 3 EHRR 333

Van Droogenbroeck v Belgium (A/50) (1982) 4 EHRR 443

E v Norway Application No 11701/85, 29 August 1990, [1990] ECHR 17

Dax v Germany Application No 19969/92; 7 July 1992

Aerts v Belgium (2000) 29 EHRR 50: the psychiatric wing of the prison could not be regarded as an appropriate institution since it was not a therapeutic environment and there was no regular medical attention. The proper relationship between the aim of the detention and the conditions in which it took place was deficient, and there had been a breach of Art.5(1)(e)

Erkalo v Netherlands (1999) 28 EHRR 509

Eriksen v Norway (2000) 29 EHRR 328

Litwa v Poland (2001) 33 EHRR 53

Saadi v UK (2008) 47 EHRR 17

Monne v France Application No 39420/06, 1 April 2008

Rusu v Austria Application No. 34082/02; First section; 2 October 2008, (2009) 49 EHRR 28, [2008] ECHR 959 The Court found for the detained person: detention of an individual is such a serious measure that it will be arbitrary unless it is justified as a last resort where other less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained.

Leger v France (Application No19324/02, Grand Chamber, 30 March 2009) (2009) 49 EHRR 41 L had been sentenced to life imprisonment for abduction and murder, complained that his detention for 41 years had violated art.3 and art.5(1)(a). His numerous applications for release had been refused by the Minister of Justice and, following the introduction of a new procedure, by the courts. After he was eventually released on licence, he brought the instant proceedings, but died while they were still ongoing. His lawyer died a few days later. (Chambers judgment of 11 April 2006) A new lawyer sought to pursue the proceedings on behalf of his niece and sole heir. □□Complaint struck out (by a majority of 13-4, Spielmann, Bratza, Gyulumyan and Jebens dissenting) Under art.37(1)(c), the Court could strike out a complaint if it was no longer justified to continue the examination, and it would usually do so where the complainant had died during the proceedings if no heir or close relative had wished to pursue the complaint, *Scherer v Switzerland (A/287)* (1994) 18 EHRR 276 and *Ohlinger v Austria* (21444/93) (1996) 22 EHRR CD75 applied. Here, the request to pursue the proceedings had been submitted by a person who had provided no evidence either of her status as L's heir or close relative, or of any legitimate interest. Furthermore, in view of the introduction of a new procedure and similar issues having been resolved in other cases before the Court, respect for human rights did not require it to continue the examination of the case. (Per Judge Spielmann dissenting: The Court could have determined issues on public policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the Convention states).

Kafkaris v Cyprus (Application No 21906/04)□(2009) 49 E.H.R.R. 35; 25 B.H.R.C. 591 The Grand Chamber is significantly split (10-7) on whether there is a breach of Art 3. For the majority, "at the present time there is not yet a clear and commonly accepted standard amongst the member States of the Council of Europe concerning life sentences and, in particular, their review and method of adjustment. Moreover, no clear tendency can be ascertained with regard to the system and procedures implemented in respect of early release" (see paragraph 104). Yet the minority identify a clear breach of art 3. A majority of 15-2 find a breach of art 7 with regard to the quality of the law applicable at the material time; This complex decision

merits clear analysis: note the impassioned dissent of Judge Borrego Borrego who criticises the Court's "ivory tower reasoning".

Putrus v Germany (Application No 1241/06, 5th Chamber, 24 March 2009) [2009] ECHR 687, (2009) 49 EHRR SE6 The Court decided that the appellant's claim was inadmissible. The appellant argued that his detention for more than 24 years was disproportionate, not least as he had been sentenced to a much shorter term of imprisonment. He further argued that the domestic courts' failure to hear the medical experts who had examined him in person at a hearing, despite the fact that they had taken different views on the question whether his detention in a psychiatric hospital had been justified, violated his rights under Art 6 § 3 (d) of the Convention. However, the Court held that his detention was in conformity with the procedural and substantive rules of domestic law, and was not arbitrary.

Enea v Italy Application No 74912/01 (2010) 51 EHRR 3, Grand Chamber, 17 September 2009 Prisoner held under s. 41bis of the Italian Prison Administration Act for 11 years. In order for a punishment or treatment associated with it to be inhuman or degrading, the suffering or humiliation involved had to go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment, *Jalloh v Germany* (54810/00) (2007) 44 E.H.R.R. 32 applied. The treatment to which E was subjected did not exceed the unavoidable level of suffering inherent in detention. Accordingly, there had been no violation of art.3.

In accordance with the Court's settled case law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of art.3. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. Allegations of ill-treatment must be supported by appropriate evidence. To assess this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (para 55).

Whilst the mere fact that the court had exceeded a statutory time limit for giving a ruling did not amount to an infringement of a guaranteed right, the time it took to hear an appeal might have an impact on the right's effectiveness. In the instant case, the court did not rule on the merits of E's appeal against one of the extensions, and that nullified the effect of the its review of the extension. There had therefore been a violation of art.6(1).

Whilst it was true that a prisoner could not challenge per se the merits of a decision to place him in a high-supervision unit, an appeal lay to the courts responsible for the execution of sentences against any restriction of a civil right, affecting, for instance, a prisoner's family visits or correspondence. However, given that in the instant case E's placement in the unit did not entail any restrictions of that kind, even the possible lack of such a remedy could not be said to amount to a denial of access to a court. Consequently, there had been no violation of art.6(1) as regards E's right to have a dispute concerning his civil rights and obligations determined by a court.

The regime was designed to cut the links between the prisoners concerned and their original criminal environment in order to minimise the risk that they would make use of their personal contacts with criminal organisations. Given the specific nature of Mafia-type crime and the fact that family visits had in the past frequently served as a means of conveying orders and instructions to the outside, the restrictions on visits, and the accompanying controls, could not be said to be disproportionate to the legitimate aims pursued, *Salvatore v Italy* (42285/98) (unreported, May 7, 2002) and *Bastone v Italy* (59638/00) applied. Thus the restrictions on E's right to respect for his private and family life did not go beyond what, within the meaning of art.8(2), was necessary in a democratic society in the interests of public safety and for the prevention of disorder and crime.

The interference with E's right to respect for his correspondence under art.8(1) had not been in accordance with the law, given that the Italian legislation did not regulate either the duration of measures monitoring prisoners' correspondence or the reasons capable of justifying such measures, and did not indicate with sufficient clarity the scope and manner of exercise of the discretion conferred on the authorities in the relevant sphere, *Labita v Italy* (26772/95) (2008) 46 E.H.R.R. 50 applied. Accordingly, there had been a violation of Art.8(1) in relation to E's correspondence.

Scoppola v Italy (Application No 10249/03, Grand Chamber, 19 September 2009) (2010) 51 EHRR 12 An appeal court could not raise 30 year sentence to life imprisonment following change in law: 11 votes to six there had been a violation of Art 7, unanimously a violation of Art 6.

M v Germany (Application No 19359/04, Fifth section, 17 December 2009) [2009] ECHR 2071, (2010) 51 EHRR 41. The Court unanimously concludes that, where the prolongation of the applicant's preventive detention by the courts responsible for the execution of sentences following a change in the law, there had been a violation of Article 7 § 1 of the Convention. This decision contains much useful material (the summary of European preventive detention laws in paras 69-73 is partial, a little dated but a useful introduction) + recapitulation of relevant principles paras 86-91: compliance with national law is not enough: any deprivation of liberty "should be in keeping with the purpose of protecting the individual from arbitrariness". On risk assessment: the potential further offences "must be "sufficiently concrete and specific as regards in particular the place and time of their commission and their victims" to fall within the ambit of Art 5(1)© (para 102) and the "national law must be of a certain quality, and in particular, must be foreseeable [at the time of the original offences] in its application, in order to avoid all risk of arbitrariness" (para 104). The Court rejected the Government's distinction between punitive 'penalties' and 'measures of correction and prevention' (para 113) and recognized that even the distinction between a measure that constitutes a penalty and a measure that concerns the 'execution or enforcement of that measure may not always be clear-cut (para 121). €50,000 non-pecuniary damage.

Onoufriou v Cyprus (Application No. 24407/04, First section, 7 January 2010)

Cypriot national detained for murder did not return to prison after a 24-hour leave; he was then arrested and placed in solitary confinement for 47 days. First chamber found unanimously a breach of Arts 3, 8 and 13.

the State must ensure that a person is detained under conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (see *Kudła v. Poland* [GC], no. 30210/96, §§ 92 to 94, ECHR 2000-XI; and *Cenbauer v. Croatia*, no. 73786/01, § 44, ECHR 2006-III). Further, when assessing conditions of detention, account has to be taken of the cumulative effects of those conditions, as well as the specific allegations made by the applicant (*Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II). It is also relevant to recall that the authorities are under an obligation to protect the health of persons deprived of liberty (see *Hurtado v. Switzerland*, judgment of 28 January 1994, Series A no. 280-A, opinion of the Commission, pp. 15-16, § 79; and *Enea*, cited above, § 58). The lack of appropriate and timely medical care may amount to treatment contrary to Article 3 (see *İlhan v. Turkey* [GC], no. 22277/93, § 87, ECHR 2000-VII). (para 68)

(iii) *Other relevant legal materials*

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