HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

MICHAEL ALEXANDER McGARRY APPELLANT

AND

THE QUEEN RESPONDENT

McGarry v The Queen
[2001] HCA 62
Date of Order: 6 September 2001
Date of Publication of Reasons: 24 October 2001
P61/2000

ORDER

1. *Appeal allowed.*

2. *Set aside par 3 of the order of the Court of Criminal Appeal of Western Australia made on 6 December 1999 and in lieu order that the order for indefinite imprisonment of the appellant is quashed.*

On appeal from the Supreme Court of Western Australia

Representation:

S Owen-Conway QC with R E Lindsay and R D Young for the appellant (instructed by Gunning)

R J Meadows QC, Solicitor-General for the State of Western Australia with R E Cock QC and R M Mitchell for the respondent (instructed by Director of Public Prosecutions for Western Australia)

Interveners:

R J Meadows QC, Solicitor-General for the State of Western Australia with R E Cock QC and R M Mitchell intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

B M Selway QC, Solicitor-General for the State of South Australia with I K Haythorpe intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for the State of South Australia)

M G Sexton SC, Solicitor-General for the State of New South Wales with M J Leeming intervening on behalf of the Attorney-General for the State of New South Wales and the Attorney-General of the State of Tasmania (instructed by Crown Solicitor for the State of New South Wales and Crown Solicitor for the State of Tasmania)

CATCHWORDS

McGarry v The Queen

Criminal law – Sentencing – Indefinite imprisonment – Conditions for making order of indefinite imprisonment – Sufficiency of material to support conclusion that an order for indefinite imprisonment could be imposed – Whether High Court should substitute order or remit matter for re-sentencing in the Supreme Court.

Words and phrases – "a danger to society, or a part of it".

Sentencing Act 1995 (WA), ss 98, 99, 100, 101.
Sentence Administration Act 1995 (WA), ss 14, 20, 22, 115.

1 GLEESON CJ, GAUDRON, McHUGH, GUMMOW AND HAYNE JJ. The Court of Criminal Appeal of Western Australia concluded that the primary judge had erred in imposing a nominal term of five years' imprisonment on the appellant. The issue that must be decided on this appeal is whether it was, nevertheless, open to the Court of Criminal Appeal to dismiss the appellant's appeal against the order for indefinite imprisonment that had been made by the primary judge. In particular, was it open to the Court of Criminal Appeal first, to be satisfied, on the balance of probabilities, that when the appellant would otherwise be released from custody in respect of the nominal term of three years' imprisonment which it fixed, he "would be a danger to society, or a part of it", and, secondly, to be satisfied that an order for indefinite imprisonment should be made. Because the first question should be answered "no", the second does not arise. The appeal should be allowed. It is, therefore, unnecessary to consider the appellant's application for leave to amend his grounds of appeal by adding a ground alleging that those provisions of the *Sentencing Act* 1995 (WA) and the *Sentence Administration Act* 1995 (WA) which relate to orders for indefinite imprisonment are invalid.

2 The circumstances of the appellant's offences, and the course that the matter has taken in the courts below, are sufficiently described in the reasons of other members of the Court. As those reasons record, the appellant pleaded guilty to one count of indecently dealing with a girl aged under 13 years. He also pleaded guilty to some summary offences of impersonating a police officer but it was not suggested that those offences loomed large in the sentencing process; they may be put aside for present purposes.

3 It will be observed that we have described the questions that arise as being whether certain conclusions were *open* to the Court of Criminal Appeal. As will appear from the reasons that follow, the majority of the Court of Criminal Appeal applied wrong principles in dealing with the appellant's appeal against the order for indefinite imprisonment, not least because s 98 of the *Sentencing Act* was misconstrued.

4 Section 98 of the *Sentencing Act* provides:

"(1) If a superior court –

(a) sentences an offender for an indictable offence to a term of imprisonment;

(b) does not suspend that imprisonment; and

(c) does not make a parole eligibility order under Part 13 in respect of that term,

it may in addition to imposing the term of imprisonment for the offence (the '**nominal sentence**'), order the offender to be imprisoned indefinitely.

(2) Indefinite imprisonment must not be ordered unless the court is satisfied on the balance of probabilities that when the offender would otherwise be released from custody in respect of the nominal sentence or any other term, he or she would be a danger to society, or a part of it, because of one or more of these factors:

(a) the exceptional seriousness of the offence;

(b) the risk that the offender will commit other indictable offences;

(c) the character of the offender and in particular –

(i) any psychological, psychiatric or medical condition affecting the offender;

(ii) the number and seriousness of other offences of which the offender has been convicted;

(d) any other exceptional circumstances.

(3) In deciding whether an offender is a danger to society, or a part of it, the court –

(a) is not bound by section 6 but is bound by any guidelines on the imposition of indefinite imprisonment in a guideline judgment given under section 143; and

(b) may have regard to such evidence as it thinks fit."

5 Ordinarily, the conclusion that wrong principles had been applied would require that the matter be remitted to the Court of Criminal Appeal for that Court to reconsider the matter. In this case, however, the material before the Court of Criminal Appeal did not admit of the conclusion that an order for indefinite imprisonment could be imposed.

6 It is convenient to begin by referring to the proceedings before the primary judge. In his remarks on sentencing, the primary judge said:

> "I am finding some difficulty with this sentencing exercise simply because, I think, of the lack of clear parameters for a declaration under section 98 but at the end of the day I am persuaded to the balance of probabilities that such declaration ought to be made and I am going to make such a declaration that there will be a term of imprisonment of 5 years. It will date from 1 December. There will be no eligibility for parole.
>
> There will be 3 months on each of the other counts to be served concurrently but upon what is before me and upon this constant history of sex offending against younger females since 1991, on the evidence of the reports, on the evidence of the fact that previous detention has not operated to dissuade this offender I do come to the conclusion that he will be a danger to part of society because of a clear risk that he will commit other indictable offences. So therefore I am making that declaration of indefinite imprisonment."

7 The reference to "declaration" was inappropriate; the section authorises the making of an *order* for indefinite imprisonment. Moreover, the use of the word "declaration" serves to obscure some important elements in the task that confronts a sentencing judge asked to apply s 98. The judge is not required to make some declaration of fact or law. An order is not to be made unless some conditions are met. One of those is that the judge attains the requisite level of satisfaction about the state of affairs described in s 98(2) but the judge need make no order embodying a declaration that he or she was so satisfied. Section 98(1) empowers a sentencing judge, if the relevant conditions are met, to "*order* the offender to be imprisoned indefinitely" and to do so "*in addition to* imposing the term of imprisonment for the offence". An order for indefinite imprisonment is, then, a part of the sentence which is imposed (just as much as, in other cases, will be a parole eligibility order, or an order suspending the imprisonment). Further, and no less importantly, s 98(1) does not oblige a sentencing judge to make an order for indefinite imprisonment in every case in which the conditions specified in that sub-section are met. Nor does s 98(1) oblige a sentencing judge to make such an order if satisfied of the matter specified in sub-s (2), namely, that "when the offender would otherwise be released from custody in respect of the nominal sentence or any other term, he or she would be a danger to society, or a part of it". Even if satisfied of that fact, a sentencing judge has a discretion in deciding whether or not to make an order for indefinite imprisonment.

8 *The Criminal Code* (WA) makes separate provision for appeals to the Court of Criminal Appeal against an order for indefinite imprisonment[1] and against any other sentence[2]. The former lies as of right; the latter lies only with the leave of the Court of Criminal Appeal. That might be thought to suggest that two appellate processes had been engaged in the present case – one concerning the order for indefinite imprisonment and the other concerning the nominal sentence. Even if that were so, it should not obscure the fact that the decision to make an order for indefinite imprisonment, and the decision fixing the nominal sentence, form part of a single sentencing decision.

9 It follows that if an appellate court concludes that the sentencing judge's discretion miscarried in fixing the nominal term of imprisonment, the whole of the sentence imposed by the sentencing judge, including the order for indefinite imprisonment, should be set aside and the appellate court would then be obliged itself to re-sentence the offender. As s 689(3) of *The Criminal Code* provides, if the Court of Criminal Appeal "think that a different sentence should have been passed", the Court should "quash the sentence … and pass such other sentence warranted in law by the verdict or which may lawfully be passed for the offence of which the appellant … stands convicted". The question would not be, as the Court of Criminal Appeal appears in this case to have thought it to be, whether it had been *open* to the sentencing judge to make the order for indefinite imprisonment which had been made. The sentencing discretion being shown to have miscarried, there was no occasion or need to consider whether it could be separately demonstrated that the sentencing judge's discretion to make an order for indefinite imprisonment had miscarried. It was for the Court of Criminal Appeal to pass such other sentence as ought to have been passed.

10 The reasons given by the primary judge proceeded from an understanding of the operation of s 98 which should be rejected. His Honour assumed that the conclusion that an offender will be, at the relevant time, "a danger to society, or a part of it" followed inevitably from a conclusion that it was more probable than not that the offender would commit further indictable offences were he or she to be released at the end of the nominal term of imprisonment. As the primary judge said, he reached the conclusion that this appellant would be "a danger to part of society *because* of a clear risk that he will commit other indictable offences".

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1 s 688(1a)(a).

2 s 688(1a)(b).

11 In the Court of Criminal Appeal, Pidgeon J (who, with Murray J, was of the opinion that the appeal against the order for indefinite imprisonment should be dismissed) concluded that the appellant's offence, having regard to the planned and deliberate way it was committed, was an offence of exceptional seriousness. Further, Pidgeon J concluded that the appellant's criminal history *of itself* would lead to the inference that he is a danger to society and that this inference was "supported by the confidential specialist report" before the primary judge.

12 The other member of the majority, Murray J, treated the primary judge's statement about the risk of commission of other indictable offences as a conclusion that the appellant "would be a danger to that part of society which was young female children because of the risk that he would commit other indictable offences, being offences of a sexual kind against such children". On this basis, it was, in his Honour's view, open to the primary judge to order indefinite imprisonment. Both members of the majority appear, therefore, to have adopted a construction of s 98(2) very similar, if not identical, to that adopted by the primary judge. Nowhere, however, did Murray J identify more precisely what were the kinds of offending behaviour in which it was probable that the appellant would engage.

13 The conclusions reached by the primary judge and in the Court of Criminal Appeal were founded in two sources of information – the appellant's criminal history and a "specialist report" prepared in the Sex Offender Treatment Unit of the Ministry of Justice. It is necessary to say something about both.

14 The appellant's criminal history revealed that, on a number of occasions, he had previously committed sexual offences and that, in some cases, he had done so while on parole. Three times, in September 1985, October 1985 and September 1989, he had been convicted, summarily, of offences of wilful exposure, twice being fined and once being imprisoned for three months. In April 1991, he was sentenced in the Supreme Court to a total effective sentence of 7 years and 8 months on 21 counts of aggravated indecent assault, 4 counts of aggravated sexual assault and 7 counts of wilful exposure. His appeal against these sentences was dismissed. In the present matter, Murray J said that these were offences against children within a familial relationship and included instances of sexual penetration. In August 1994, he was convicted on 2 counts of indecently dealing with a child, being a lineal relative of that child. Some, at least, of the offences of which he had previously been convicted (and the sexual offence for which he stood for sentence on this occasion) were offences of wilful exposure and voyeurism. Other offences, including in particular the serious

offences for which he had been sentenced to a substantial term of imprisonment, had been offences directed at family members and could themselves have been described as "predatory".

15 The report from the Sex Offender Treatment Unit had been signed by a social worker. It was made available to the sentencing judge in response to a request made by the judge for a pre-sentence report. On its face, the report said nothing about the qualifications or expertise of its author. Counsel for the parties, we were told, were entitled to, and did, read the report but they were said not to be entitled to a copy of it. The report was based upon two "clinical interviews" with the appellant, telephone conversations with some other persons, including the appellant's de facto wife and his sister, and a review of documents including previous, unspecified, reports and Ministry of Justice files. The report concluded that the appellant "is an individual with an entrenched range of sexually deviant behaviours", that the appellant "has demonstrated his dangerousness towards female children with whom he comes into contact" and that the appellant has "developed a range of paraphilic activities, such as wilful exposure and voyeurism which he appears to be incorporating into his sexual offending behaviour". It said that "[i]t is concerning that … an element of predatory behaviour has been introduced into his sexual offending repertoire".

16 Under the heading of "risk assessment" the author of the report expressed the opinion that the appellant "*is* considered to present a high risk of reoffending in a sexual manner" (emphasis added). Importantly, the author said that:

> "The possibility of medical assistance was raised previously by [the appellant], and may be useful to revisit, whether it be to reduce sexual drive or to address the compulsive nature. He expressed his willingness for assessment for suitability for medication and interestingly, [the appellant's sister] admitted that both herself and 2 sisters have suffered long term problems with obsessive-compulsive conditions. Upon sentencing, [the appellant] will be re-assessed by the sex offender treatment unit to determine what would be the most appropriate therapeutic options for him, given his response to previous treatment."

Read as a whole, then, the report expressed opinions about the risk that the appellant presented at the time of the report. It acknowledged that there *may* be some medical means of reducing that risk and that it was the appellant who had sought to explore that question. The author expressed no view about what effect such treatment may have.

17 On this material – the appellant's criminal history and the report from the Sex Offender Treatment Unit – could a sentencing court be satisfied, on the balance of probabilities, that, because of one or more of the four factors set out in s 98(2)(a) to (d), the appellant was a danger to society, or a part of it?

18 On the hearing of the appeal in this Court, it was not suggested that the Court of Criminal Appeal was wrong to conclude that the primary judge erred in imposing a nominal sentence of five years, or that the Court of Criminal Appeal erred in re-sentencing the appellant to a nominal term of three years. In those circumstances, it could not be found that the offence for which the appellant was to be sentenced was of "exceptional seriousness". That expression is to be understood as requiring reference to some general scale of criminality not just to whether the offending behaviour was a serious example of the particular offence. Paragraph (a) of s 98(2) must be put aside.

19 Chief weight was placed upon the contention that it was more probable than not that, were the appellant to be released after serving a nominal sentence of three years, he would commit further indictable offences. Because he would be released after only two years in prison[3] it was, so the respondent contended, relatively easy to conclude that he would reoffend. So much followed, so the argument went, from the fact that he had previously reoffended, even when on parole. This, so it was submitted, demonstrated that he was a danger to society, or a part of it. The argument cannot be considered without first construing s 98.

20 Identifying the meaning of "a danger to society, or a part of it" is not without difficulty. A fundamental premise of the criminal law is that conduct is regarded as criminal for the very reason that its commission harms society, or some part of it. On that basis, any risk that an offender may commit some further indictable offence poses a danger to society, or some part of it; the extent of the "danger" would depend only upon the likelihood of the offender reoffending.

21 If, however, s 98 were concerned *only* with the risk of an offender reoffending, the inclusion of pars (a), (c) and (d) in sub-s (2) was unnecessary. Their inclusion suggests that "danger to society, or a part of it" means more than that there is a risk, even a significant risk, that an offender will reoffend.

22 It must be noticed that each of the four paragraphs in sub-s (2) (on which the conclusion that there is a relevant danger must be founded) has a different

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3 *Sentencing Act* 1995 (WA), s 95.

temporal aspect. Paragraph (a), with its reference to the "exceptional seriousness" of the offence for which the offender is to be sentenced looks to what the offender has already done. Paragraph (b), with its reference to the risk of commission of other offences, looks to the future. Paragraph (c), with its reference to the "character of the offender" requires some assessment of the character of the offender as it is revealed at the time of sentencing. Finally, par (d), with its reference to "any other exceptional circumstances", may permit consideration of a wide variety of matters.

23 The breadth of the matters upon which a conclusion of danger to society (or a part of it) may be based suggests that what is required is more than a bare conclusion that it is probable that the offender will commit some indictable offence in the future. That suggestion is reinforced by the use of the word "exceptional" in the phrases "exceptional seriousness of the offence" and "exceptional circumstances". More than the probability of further offending must be shown. Read as a whole, and giving due weight to the repeated reference to "exceptional", the sub-section requires attention to whether, were the offender to be released at the end of the nominal sentence, the offender would engage in conduct, the consequences of the commission of which would properly be called "grave" or "serious" for society as a whole, or for some part of it. Then, and only then, could it be concluded that the offender would be a "danger to society, or a part of it".

24 It is as well to notice at this point the provisions of s 98(3). That sub-section uses the introductory words "[i]n deciding whether an offender is a danger to society, or a part of it". To provide, as does par (b) of sub-s (3), that in deciding that question the court may have regard to such evidence as it thinks fit is understandable. However, to provide, as does par (a), that in deciding that question the court is not bound by s 6 of the *Sentencing Act* is more difficult. Section 6 sets out certain basic principles of sentencing that courts in Western Australia are to apply, including the principle of proportionality[4]. Those principles of sentencing, and in particular the principle of proportionality, say nothing about how a court should go about making a finding of fact about risk of danger to society. There may appear to be, then, some questions about the meaning to be given to s 98(3)(a). It is, however, not necessary to pursue that question beyond saying that the evident purpose of s 98 is to provide for detention of an offender beyond the time that would result from the imposition of

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4 s 6(1): "A sentence imposed on an offender must be commensurate with the seriousness of the offence."

a sentence proportionate to the offender's criminality[5]. It follows that questions of proportionality fall to be considered in the fixing of the nominal sentence but do not fall to be considered in deciding whether to make an order for indefinite imprisonment.

25 Nevertheless, it is necessary to recognise that considerations of public protection are relevant both in fixing the nominal sentence and in deciding whether to make an order for indefinite imprisonment[6]. It is important to recognise that fact because the imposition of a relatively short nominal sentence (as was the case here) may well suggest that the offender's conduct on that occasion was not such as to warrant the description of the offender as "a danger to society, or a part of it". In such a case, a conclusion that the offender would be a danger to society would, therefore, depend upon matters other than the commission of the offence or offences for which the offender was being sentenced.

26 Against this understanding of the section, could a sentencing judge be satisfied that the appellant, two years after he was sentenced, would be a danger to society, or a part of it? First, some of the appellant's previous sexual offending had been of a kind commonly dealt with summarily; some, however, had been serious, predatory, and meriting the stern punishment it received. Secondly, the only material which dealt with the appellant's likely future behaviour, and which was available for consideration, was his own assertions about what he would do and how he was dealing and would deal with his offending behaviour, and the report from the Sex Offender Treatment Unit. The material advanced by the appellant was all directed to demonstrating that he recognised that he had a problem but was trying to deal with it, and to demonstrating that his newly established relationship with his de facto wife would help him avoid reoffending. Even if all of these contentions were rejected, their rejection afforded no basis for a conclusion that the appellant would be a danger to society. It follows that a conclusion that the appellant was a danger could be based only upon his prior criminal history and the written report.

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5 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 473 per Mason CJ, Brennan, Dawson and Toohey JJ.

6 *Veen [No 2]* (1988) 164 CLR 465 at 474 per Mason CJ, Brennan, Dawson and Toohey JJ.

27 The report said that the appellant "*is* considered to present a high risk of reoffending in a sexual manner" (emphasis added). That was a statement about the risk he presented at the time of the report, not at the time that must be considered under s 98(2): the end of the nominal sentence. Further, the report said nothing about what was meant by "reoffending in a sexual manner". That would include (it may even be limited to) exhibitionist offences of the kind for which he had been previously dealt with summarily. In particular, there was no consideration of whether the appellant was likely to commit offences of the kind for which he had been previously sentenced to a substantial term of imprisonment. When it is recognised that the report raised the possibility of medical intervention, indicated that the appellant would "be re-assessed … to determine what would be the most appropriate therapeutic options for him", but did not offer any opinion about whether such treatment would be effective, it is apparent that it provided no basis for predicting that, at the relevant time, the appellant would be a danger to society, or a part of it. The material did not permit a court to conclude that, more probably than not, two years after sentencing there was a risk that the appellant would engage in conduct, the consequences of which could properly be called grave or serious for society, or a part of it.

28 It follows that the appeal should be allowed, par 3 of the order of the Court of Criminal Appeal of Western Australia made on 6 December 1999 should be set aside and in lieu, it should be ordered that the order for indefinite imprisonment of the appellant is quashed.

29 Before parting with this case, it is necessary to say something further about the way in which the prosecution's application for the order for indefinite imprisonment was made and presented to the primary judge. Statements were made in the course of the proceedings before the primary judge that might have suggested that the prosecution's decision, to apply for an order for indefinite imprisonment, was made on the night before the appellant was to be sentenced, and that it was founded upon the report obtained from the Sex Offender Treatment Unit. The decision to apply for an order for indefinite imprisonment is, of course, a decision to be made by the prosecution. It is, or should be, self-evident that it is a decision that is not to be taken lightly or hastily and it is a decision that should be founded on sufficient material. We do not say that the decision in this case was taken lightly, but it does seem that it was taken at a time when it was not possible to give the appellant or his advisers any notice of it before it was made. That is at least undesirable.

30 If such an application is to be made, it should be supported by appropriate material. Although a pre-sentence report obtained at the request of the court may

provide some material which is relevant, it is not to be expected that a report of that kind will ordinarily suffice to found such an application. Section 98(3)(b) provides that a sentencing judge may have regard to such evidence as he or she thinks fit in deciding the question of danger. It is to be noticed, however, that the section refers to "evidence". It does not, in terms, permit a sentencing judge to be informed in whatever manner seems fit. It is, however, not necessary to decide whether, in this respect, the express provisions of the *Sentencing Act* are to be treated as modifying the general practice of receiving at least some material on sentence without requiring its admission or its formal proof. Because sentencing judges who are asked to make an order for indefinite imprisonment are required to make a prediction about future behaviour, there will usually be a very large amount of material that is relevant to that question. In that regard, it would be expected that the prosecution would place *all* available and relevant material at its disposal before the court. If it is contended that the offender has some psychiatric condition which predisposes him or her to reoffending, it would be expected that the prosecution would lead expert evidence about that matter. If reliance is placed upon the offender's past conduct, *full* details of that conduct, including all of the evidence that related to it, should be available to the sentencing judge. In this, and all other respects of the matter, it would be expected that the offender would have a proper opportunity to meet the prosecution's case.

31 Orders for indefinite imprisonment are not lightly to be made. An application for such an order should be treated with commensurate care and attention to detail.

32 KIRBY J. In this appeal from the Court of Criminal Appeal of Western Australia[7], this Court was required, once again, to consider the meaning and application of the laws of Western Australia providing for orders of indefinite imprisonment following a criminal conviction[8].

33 After special leave to appeal was granted, a motion sought leave to amend the grounds of appeal to permit an argument that the laws in question were invalid because they conferred on the courts of Western Australia powers that were incompatible with the role and function of those courts as envisaged by the Constitution[9]. Consideration of the application to add constitutional grounds of appeal was postponed. The Court first heard the submissions of the parties about the meaning of the laws in question. An appreciation of the constitutional setting can sometimes help in the elucidation of the meaning of a law, given that every law must be compatible with the Constitution[10]. However, before questions of constitutional validity of legislation are decided, it is often necessary, and usually convenient, to construe the legislation in question[11]. That is what this Court decided to do in this appeal.

34 Having heard the submissions of the parties addressed to the meaning of the relevant laws, this Court reserved its decision in order to consider whether it was essential to decide the constitutional points. The Court decided that it was not. By order of the Court announced earlier the appeal was allowed and consequential orders were made. I now state my reasons for joining in those orders.

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7 *McGarry v The Queen* [1999] WASCA 276.

8 For earlier decisions see *Lowndes v The Queen* (1999) 195 CLR 665 and *Thompson v The Queen* (1999) 73 ALJR 1319; 165 ALR 219. The decision in *Chester v The Queen* (1988) 165 CLR 611 concerned the provisions of s 662(a) of the *Criminal Code* (WA) which was the precursor to the legislation in question in this appeal.

9 Relying on *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 which held that the *Community Protection Act* 1994 (NSW) was invalid under the Constitution.

10 *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 75 ALJR 1342 at 1350-1351 [41]-[45]; 181 ALR 307 at 318-319.

11 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186; *Residual Assco Group Ltd v Spalvins* (2000) 74 ALJR 1013 at 1030 [81]; 172 ALR 366 at 389.

The facts

35 Mr Michael McGarry ("the appellant") was prosecuted on indictment in the District Court of Western Australia upon a single count that charged him with indecent dealing with a child under the age of 13 years contrary to s 320(4) of the *Criminal Code* (WA) ("the Code"). In October 1998, before the Chief Judge of the District Court (Hammond CJDC), the appellant pleaded guilty to the indictment. He was duly convicted. He was remanded in custody and the presiding judge requested a "sex offender's treatment report" from the Sex Offender Treatment Unit of the Ministry of Justice.

36 On the further hearing of the matter before the same judge in December 1998, the appellant was charged with, and pleaded guilty to, three additional and related summary offences of impersonating a police officer, contrary to s 16(1) of the *Police Act* 1892 (WA). The maximum penalty provided by the Code for the indictable offence was ten years imprisonment. The maximum sentence in respect of each of the summary offences was six months imprisonment or a fine of $500.

37 The conduct that brought the appellant to be sentenced in December 1998 was not contested. In December 1997, in a local newspaper, the appellant had seen a photograph of the complainant, together with six other schoolgirls. Using the telephone directory, he located the complainant's home address and telephone number. Two days after the publication, the appellant went to the complainant's home at about 9.30 pm. He entered the rear yard of the premises and saw the complainant and her 14 year old sister inside their home. He attracted the attention of the complainant by tapping on the window. When she approached the window, the appellant exposed his erect penis and masturbated until ejaculation. He then left the premises, having no physical contact with the complainant. This conduct constituted the "indecent dealing" charge because, by virtue of the Code, such dealing includes "committing an indecent act in the presence of the child"[12].

38 Subsequently, the appellant made three telephone calls to the complainant's home. Two were made on the same day later in December 1997. One was made early in January 1998. On each occasion, the telephone was answered by the complainant's sister. Each time, the appellant identified himself as a police officer. The appellant was traced by the interception of one of the telephone calls. He was interviewed by police. He admitted that during the first telephone call he had been masturbating. He stated in his record of interview, that he had telephoned the complainant's home to find out if his offence had been reported to police.

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12 The Code, s 319(3)(c).

39 At the first return of the proceedings in the District Court in December 1998, the prosecutor submitted that an indefinite period of imprisonment should be imposed on the appellant by reason of his conviction of previous offences of a similar character. The prosecutor admitted conceiving of this penalty only on the evening before the hearing. The defence was taken by surprise. Accordingly, the sentencing of the appellant was adjourned until a date later in the month to permit the issue raised by the prosecution to be explored and complications in the case to be clarified.

40 The proceedings were relisted later in December 1998 when further submissions were made and the subject sentence was imposed. As the sentencing judge noted, there was a "total divergence of approach" between the parties. For the appellant, it was urged that a non-custodial sentence was adequate to the offences proved, described as being "at the lower end of the scale". The prosecution, on the other hand, persisted with its application for an order of indefinite imprisonment which would automatically revive a requirement that the appellant serve approximately 1000 days in custody for breach of the parole conditions imposed in relation to his earlier convictions - a consequence that the appellant's counsel suggested would be "crushing".

41 On neither return date of the sentencing proceedings does the prosecution appear to have been well prepared. The first application for an order of indefinite imprisonment was conceived so close to the first hearing that no notice of it could be given to the appellant. At the second hearing the prosecutor, whilst asserting that the appellant's conduct was "really quite disturbing psychologically", admitted that she had not had the benefit of the pre-sentence report as it was not on file. All she had were "some brief notes" that a person in the sex offender's programme had assessed the appellant as being a high risk to the community.

The sentence

42 The appellant had a long history of offences involving sexual misconduct and his uncontested criminal record was before the sentencing judge. The first conviction, for an act of wilful exposure, occurred in 1985 and the appellant was fined. A second offence of the same character later that year resulted in three months imprisonment. In 1989, a third offence resulted in a fine of $1000. Then in 1991 there followed a number of convictions for more serious offences for which the appellant was sentenced to a total of imprisonment of seven years and eight months. These offences involved aggravated indecent assaults (21 counts), aggravated sexual assault (4 counts), and wilful exposure (7 counts). As appears from an earlier judgment of the Court of Criminal Appeal involving the appellant, which was placed before this Court, those offences were perpetrated

against the daughters, respectively aged 8 and 10 years, of the appellant's then de facto wife[13]. As was recorded in the reasons of that court at the time, a submission was made that commission of further offences of aggravated sexual and indecent assault was improbable. However, the Court of Criminal Appeal expressed the sanguine opinion that there was "no foundation for that submission". Reference was made to a psychiatric report that had been before the sentencing judge on that occasion. It expressed the opinion: "It seems that the prognosis is very poor and that recidivism is probable"[14]. So it quickly proved.

43 In 1994 the appellant was convicted of two further counts of indecent dealing with his own natural daughter. He was sentenced to imprisonment for two years. He was released on parole in February 1996. His relapse involving the present complainant occurred twenty-two months later and involved a breach of his 1996 parole conditions.

44 After recounting this most unpromising criminal record, the sentencing judge recorded various matters that stood in the appellant's favour. These included that the subject offence itself "standing on its own" was not "at the higher end as far as the scale is concerned"; that the pleas of guilty had spared the complainant the unpleasant ordeal of a trial; that the appellant, then thirty-seven years of age, was still a relatively young man; that the appellant had commenced attending a support group known as Sexaholics Anonymous; and that he had the support of his current de facto wife and of her daughter aged 15 years.

45 Against these considerations, the sentencing judge referred to the "extremely disturbing aspects" of the particular offences, involving the tracking down of the victim following the local newspaper report; the context of twelve years of offences of "sexual deviation involving children"; and the opinion of the social worker in the Sex Offender Treatment Unit that the appellant had commenced predatory behaviour and had persistently demonstrated his "dangerousness" to female children with whom he came into contact by engaging in "a range of paraphilic activities, such as wilful exposure and voyeurism".

46 The sentencing judge noted what he described as "the lack of clear parameters for a declaration under section 98" of the *Sentencing Act* 1995 (WA). He then went on:

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13 *McGarry v The Queen* unreported, 1 August 1991 per Malcolm CJ, Pidgeon and Seaman JJ.

14 *McGarry v The Queen* unreported, 1 August 1991 at 6 per Malcolm CJ.

> "[B]ut at the end of the day I am persuaded to the balance of probabilities that such declaration ought to be made and I am going to make such a declaration that there will be a term of imprisonment of 5 years. It will date from 1 December. There will be no eligibility for parole. …
>
> [U]pon what is before me and upon this constant history of sex offending against younger females since 1991, on the evidence of the reports, on the evidence of the fact that previous detention has not operated to dissuade this offender I do come to the conclusion that he will be a danger to part of society because of a clear risk that he will commit other indictable offences. So therefore I am making that declaration of indefinite imprisonment."

47 The appellant was also sentenced to three months imprisonment on each of the charges of impersonating a police officer, to be served concurrently with the foregoing sentences. The appellant applied for leave to appeal to the Court of Criminal Appeal against the sentences to finite terms of imprisonment. He appealed to that Court as of right against the sentence to an indefinite term of imprisonment[15].

The decision of the Court of Criminal Appeal

48 The appeal to the Court of Criminal Appeal was confined to three grounds, namely that the sentence of five years imprisonment was manifestly excessive; that the sentencing judge had erred in refusing parole; and that he had erred in imposing a sentence of indefinite imprisonment. Upon these grounds, the Court of Criminal Appeal divided.

49 All judges of the Court agreed that the sentence of imprisonment for indecent dealing was excessive and should be reduced to three years imprisonment. The appellant was therefore granted leave to appeal and, unanimously, the judgment and sentence of the Court of Criminal Appeal substituted three years imprisonment for the "head sentence" of five years imposed by the sentencing judge. Having regard to this reduction in the sentence of imprisonment and the date upon which the appellant had first entered custody in respect of the indecent dealing offence and the sentencing law of Western Australia providing for automatic remissions[16], it was common ground before this Court that if the sentencing judge had not, in addition to imposing the fixed term of imprisonment, in effect, ordered the appellant to be imprisoned

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15 The Code, s 688(1a)(a).

16 *Sentencing Act*, ss 93-94; *Sentence Administration Act* 1995 (WA), ss 21-22.

indefinitely[17], the appellant would have been entitled to be released by early May 2001.

50 On the indefinite imprisonment order, the judges constituting the Court of Criminal Appeal expressed different conclusions. Although Kennedy J would have allowed the appeal and quashed that part of the sentence, the majority (Pidgeon and Murray JJ) concluded that the order of indefinite imprisonment should stand.

51 In his reasons, Pidgeon J expressed the opinion that it had been open to the sentencing judge to reach the conclusion that the appellant "presented a danger to society within the meaning of s 98(2) of the *Sentencing Act*"[18]. He stated that "[t]he first matter to consider under that section is the exceptional seriousness of the offence". But, even if the offence did not come into that category, it was open to the sentencing judge to reach the view "that the prisoner is a danger to society by reason of the other factors referred to in that sub-section". Pidgeon J said that the offence and the circumstances in which it was committed, involved planning and deliberation. In his Honour's opinion, the appellant had shown that, despite undertakings and supervision, he was "unable to prevent himself from offending"[19]. He then turned to the other considerations mentioned in s 98(2) of the *Sentencing Act*, specifically relating to the character of the offender. Like the sentencing judge, he relied on the conclusion in the sex offender's treatment report. He concluded that the principal reason for reducing the sentence from five years to three years imprisonment was the appellant's early plea of guilty[20].

52 In his reasons, Murray J referred to the provisions of s 98(3)(a) of the *Sentencing Act*, relieving the sentencing judge from the primary requirement laid down in s 6. Section 6 collects "principles of sentencing" to be observed in Western Australia, the first of which is that "a sentence imposed on an offender must be commensurate with the seriousness of the offence"[21]. Whilst this principle of proportionality governed the determination of the finite sentence to be imposed on the appellant, Murray J expressed the view that "the court

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17 Hammond CJDJ incorrectly described his order as a "declaration". See the reasons of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ at [7] ("the joint reasons").

18 *McGarry* [1999] WASCA 276 at [34].

19 *McGarry* [1999] WASCA 276 at [36].

20 *McGarry* [1999] WASCA 276 at [39].

21 *McGarry* [1999] WASCA 276 at [41].

deciding to make such an order [under s 98(1)] is not bound by s 6 of the Act and the principle of proportionality"[22]. Noting that the victim impact statement disclosed that the complainant appeared to be "coping relatively well" and that the offence itself was, in the words of the sentencing judge, "'not at the highest end' of the scale of offending which might be encompassed in such a charge"[23], Murray J concluded nonetheless that the offence was a "disgusting" one[24], the most serious aspect of which was that it had been planned and was not a spontaneous act.

53 Observing that the reasoning of the sentencing judge concerning the order for indefinite imprisonment was "certainly brief" and unassisted by "guideline judgments"[25], Murray J referred to the then recent decisions of this Court in *Lowndes*[26] and *Thompson*[27] as well as to decisions on the subject of the Court of Criminal Appeal itself. He concluded that there was nothing to indicate that the sentencing judge had "misconceived in any relevant way the nature of the discretionary judgment which had to be made if the power to order indefinite imprisonment under the section was to be used"[28]. After referring to the sex offender's treatment report and the objective features of the appellant's criminal record, Murray J rejected the submission that it was not open to the sentencing judge, on the evidence or otherwise, to conclude that the appellant was, or would when released from custody probably be, a danger to part of society "by reason of the risk that he would commit further indictable offences of the kind of which his criminal history was redolent"[29].

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22 *McGarry* [1999] WASCA 276 at [41].

23 *McGarry* [1999] WASCA 276 at [44].

24 *McGarry* [1999] WASCA 276 at [43].

25 *McGarry* [1999] WASCA 276 at [49]. In deciding whether an offender is a "danger to society", the sentencing judge is bound by a "guideline judgment": s 98(3)(a).

26 (1999) 195 CLR 665.

27 (1999) 73 ALJR 1319; 165 ALR 219.

28 *McGarry* [1999] WASCA 276 at [53].

29 *McGarry* [1999] WASCA 276 at [60].

54 For his part, Kennedy J commenced his analysis with reference to the decision of this Court in *Chester*[30]. In that decision, this Court had been concerned with the predecessor to s 98 of the *Sentencing Act*, namely s 662 of the Code, as it then stood[31]. From the unanimous reasoning of this Court in that case, Kennedy J drew the conclusion that s 98 of the *Sentencing Act* had not entirely done away with the principle of proportionality referred to in *Chester*. He regarded as still applicable the test stated in that decision, namely whether the prisoner is "so likely to commit further crimes of violence (including sexual offences) that he constitutes a constant danger to the community"[32].

55 By reference to what this Court had said in *Lowndes*[33] and *Thompson*[34], Kennedy J concluded that the sentencing judge's discretion had miscarried both in respect of the procedures that were followed and the conclusion that was reached. As to the former, Kennedy J was critical of the material that had been provided to the sentencing judge in the present case, noting specifically that no psychological or psychiatric examination of the appellant had been conducted and hence that there was no report of that kind before the sentencing judge[35]. He also noted the very late decision of the prosecutor, on the night before the first hearing, to seek a sentence of indefinite imprisonment. He emphasised, as this Court has done[36] that the power to order an indefinite sentence "should only be exercised following a most careful hearing in which all relevant material is before the judge".

56 By reference to these errors or inadequacies of approach, principle and procedure, Kennedy J concluded that the sentence of indefinite imprisonment should be quashed. In reasoning to this conclusion, Kennedy J obviously took into account not only his own assessment of the objective seriousness of the offence but other considerations, personal to the appellant that had been placed before the sentencing judge, to which his Honour made reference. These

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30 (1988) 165 CLR 611. The reasons of Kennedy J are extracted by Callinan J in his reasons at [123].

31 The Code, s 661 also dealt with habitual offenders: *McGarry* [1999] WASCA 276 at [23].

32 (1988) 165 CLR 611 at 619.

33 (1999) 195 CLR 665 at 670 [10].

34 (1999) 73 ALJR 1319 at 1322-1323 [18]-[19]; 165 ALR 219 at 224.

35 *McGarry* [1999] WASCA 276 at [30].

36 *Thompson* (1999) 73 ALJR 1319 at 1323 [19]; 165 ALR 219 at 224.

included the support which the appellant had from his present de facto wife, the report that he was a good step-parent to her daughter, the confirmation from the Child Welfare Department that they were satisfied about the daughter's safety and the appellant's apparent reconciliation with his other daughters[37].

57 It is from the sentence and orders of the Court of Criminal Appeal that followed these divergent judicial opinions that, by special leave, the appellant appealed to this Court.

The legislation

58 The contested order purported to be based on s 98 of the *Sentencing Act*[38]. That section appears in Pt 14 titled "Indefinite imprisonment". Section 99 provides that the fact that a person is sentenced to indefinite imprisonment does not preclude the imposition, and serving, of another sentence. Section 100 provides that a sentence of indefinite imprisonment begins on the day "when the offender would, but for that sentence, be eligible to be released from custody … while or after serving … the nominal sentence; or any other term imposed". Section 101 provides that a prisoner, sentenced to indefinite imprisonment, may be released at any time after the sentence begins, by way of a parole order made under Pt 3 of the *Sentence Administration Act* 1995 (WA).

59 The structure and contents of the *Sentence Administration Act*[39] reinforce a conclusion that an order of indefinite imprisonment is wholly exceptional, and a significant departure from the principles of sentencing ordinarily observed in Australian courts. Instead of judicial review of the indefinite sentence, as is provided for in other States of Australia[40], the prisoner is dependent upon procedures for reconsideration within the Executive Government. Thus the Minister may request a report on a person sentenced to indefinite imprisonment

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37 *McGarry* [1999] WASCA 276 at [29].

38 Set out in the joint reasons at [4]; reasons of Callinan J at [116].

39 A new *Sentence Administration Act* 1999 (WA) received the Royal Assent on 16 December 1999 on which date ss 1-2 came into effect. The balance of the Act is to commence on a day to be proclaimed (s 2). Such day had not been proclaimed with effect in respect of the matters dealt with in these reasons.

40 *Criminal Law (Sentencing) Act* 1988 (SA), ss 21-24; *Sentencing Act* 1991 (Vic), ss 18A, 18B, 18H, 18M; *Penalties and Sentences Act* 1992 (Q), ss 162-173; *Sentencing Act* (NT), ss 65-74; *Sentencing Act* 1997 (Tas), ss 19-23. *Habitual Criminals Act* 1957 (NSW), s 6(1), conferred power to impose an additional sentence but not one of indefinite imprisonment.

at any time[41]. Such a report may recommend whether or not the Governor should be advised to exercise a power to release the person from custody[42]. If the Minister does not initiate a request for a report, the Board is required to give a report to the Minister one year after the indefinite term commences and every three years thereafter[43]. If a report recommends the release of a person from custody, it must assess the degree of risk that such release would appear to present to the safety of people in the community[44]. However, the rules of natural justice, including any duty of procedural fairness, are stated not to apply to the actions of the Governor, Minister or Parole Board[45]. Upon the assumption that this exclusion of judicial scrutiny is effective, and that initiatives for review, and the decision upon review, are susceptible to ministerial (and hence political) decision-making, the scheme of the Western Australian legislation reinforces the impression that would in any case be conveyed by s 98 of the *Sentencing Act*. The imposition of an order for indefinite imprisonment is, as this Court described it in *Lowndes*[46], a "serious and extraordinary step".

A serious and extraordinary step

60 Apart from the language of the *Sentencing Act*, read together with the provisions of the *Sentence Administration Act*, it is also appropriate to consider an order for indefinite imprisonment in the context in which it takes effect. This is a criminal justice system that follows certain "settled fundamental legal principle[s]"[47]. In *Chester* it was pointed out that "our common law does not sanction preventive detention"[48] and that "[t]he fundamental principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the

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41 *Sentence Administration Act*, s 14(2) read with s 14(1)(c).

42 *Sentence Administration Act*, s 14(4)(b).

43 *Sentence Administration Act*, s 20(2).

44 *Sentence Administration Act*, s 20(3)(b).

45 *Sentence Administration Act*, s 115; cf *Hanratty v Lord Butler of Saffron Walden* (1971) 115 Sol Jo 386 noted Smith, "The Prerogative of Mercy, the Power of Pardon and Criminal Justice", (1983) *Public Law* 398 at 432-433.

46 (1999) 195 CLR 665 at 679 [39].

47 *Chester* (1988) 165 CLR 611 at 618.

48 (1988) 165 CLR 611 at 618.

protection of society from the recidivism of the offender"[49]. Subject to the Constitution, legislation may over-ride such common law principles. However, to do so, any such legislation would need to be unmistakably clear. In the absence of a clear and valid statutory departure from such fundamental principles, a court would ordinarily assume that the settled approach of the criminal justice system continues to apply.

61 In part, the reason why the system of criminal justice treats an order of indefinite imprisonment as a serious and extraordinary step, derives from the respect which the law accords to individual liberty and the need for very clear authority, both of law and of fact, to deprive a person of liberty, particularly indefinitely. In part, this approach rests upon the indisputable feature of almost all criminal sentencing in Australia that limits the sentence imposed to one that is proportionate to the offence of which the person has been convicted. In part, it reflects a tendency to recoil from preventive detention that involves punishing a person "not for something that he has done but because of something it is feared he might do"[50]. In part, it represents a realistic acknowledgment of the limitations experienced by judicial officers, parole officers and everyone else in predicting dangerousness accurately and estimating what people will do in the future[51].

62 On the occasions on which this Court has recently reviewed orders of imprisonment akin to that contemplated by s 98 of the *Sentencing Act*, it has emphasised that such punishment should not be ordered except after the observance of fair procedures and upon the basis of materials that are

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49 *Chester* (1988) 165 CLR 611 at 618 citing *Veen v The Queen [No 1]* (1979) 143 CLR 458 at 467, 468, 482-483, 495; *Walden v Hensler* (1987) 163 CLR 561; *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 472-474, 485-486. See also Williams, "Psychopathy, Mental Illness and Preventive Detection: Issues Arising from the David Case", (1990) 16 *Monash University Law Review* 161 at 170.

50 Victoria, Social Development Committee, *Inquiry into Mental Disturbance and Community Safety: Third Report*, April 1992 at 56, citing Justice Vincent, Chairman of the Adult Parole Board; see also Fairall, "Violent Offenders and Community Protection in Victoria – The Gary David Experience", (1993) 17 *Criminal Law Journal* 40 at 50.

51 *R v Lyons* [1987] 2 SCR 309 at 367 per La Forest J, referring to the problem of "false positives", that is, an erroneous over-prediction of future dangerousness: *People v Murtishaw* 631 P 2d 446 (1981); Alschuler, "Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process", (1986) 85 *Michigan Law Review* 510 at 551.

appropriate, both in kind and quantity, to the exceptional character of the order that is sought.

63 In *Thompson* the Court of Criminal Appeal itself had observed that "the pre-sentence and psychological reports relied upon by [the sentencing judge] were prepared in some haste with the further consequence that the psychological assessment which was carried out was not comprehensive"[52]. In this Court, Gaudron and Hayne JJ concluded that that finding led inevitably to the conclusion that the decision of the sentencing judge in respect of s 98 of the *Sentencing Act*, had miscarried. Inherent in that opinion was the proposition that, for such a serious order, having such profound effects upon the liberty of the prisoner, defects of the kind described in the sentencing materials were not tolerable. In my reasons, I endorsed this conclusion adding[53]:

> "Where there was any possibility that an order of indefinite imprisonment might be made, it was essential that the procedures observed should be regular and scrupulously thorough and that the materials, including the pre-sentence reports, should be as adequate and complete as fairness to the prisoner required."

64 Similar views had been expressed before either *Lowndes* or *Thompson* by Hayne JA, then in the Supreme Court of Victoria (Court of Appeal), in *R v Moffatt*[54]. In the context of the Victorian legislation providing for indefinite sentences for offenders convicted of certain serious offences[55], and by reference to what this Court had said in *Chester*[56], his Honour observed[57]:

> "the fundamental proposition [is] that such powers are to be sparingly exercised, and then only in clear cases".

This opinion was expressed, although in *Moffatt* the Victorian legislation, unlike that of Western Australia considered in *Chester*, provided "safeguards like

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52 *Thompson v The Queen* unreported, Court of Criminal Appeal of Western Australia, 19 October 1998 at 16, cited at *Thompson* (1999) 73 ALJR 1319 at 1319-1320 [2] per Gaudron and Hayne JJ; 165 ALR 219 at 220.

53 *Thompson* (1999) 73 ALJR 1319 at 1322-1323 [18]; 165 ALR 219 at 224.

54 [1998] 2 VR 229.

55 *Sentencing Act* 1991 (Vic), Pt 3, Div 2, Sub-div(1A).

56 (1988) 165 CLR 611 at 618-619.

57 [1998] 2 VR 229 at 255.

judicial rather than executive review and the identification of a narrower list of offences for which indefinite sentences can be imposed"[58].

65 The foregoing remarks apply with even greater force in the case of an application for an order under s 98 of the *Sentencing Act*. If the power there provided is to be exercised "sparingly" and only in "clear" cases it is obvious (as Kennedy J noted in the Court of Criminal Appeal) that a proper evidentiary foundation must be laid for the making of such an order. In short, it is not something ordinarily to be decided by the prosecution on the eve of the hearing and presented to the sentencing judge without "all relevant material".

66 In the present case, there is no indication in the record that the prosecution, which carried the burden of establishing that the power to make an order of indefinite imprisonment should be exercised in the appellant's case, placed before the sentencing judge reports that would have demonstrated that the present was a "clear case" for the imposition of the exceptional order provided in s 98 of the *Sentencing Act*. The only report that was adduced before the sentencing judge was the sex offender's treatment report, a document prepared by a "Social Worker" in the Sex Offender Treatment Unit of the Ministry of Justice and countersigned by the manager of the Unit. The qualifications of the social worker and manager are not stated. I do not doubt that a competent social worker could, if employed for some time in the Unit, gather experience and insight into the management of persons manifesting inappropriate repeated sexual behaviour. However, the sex offender's treatment report discloses no specialist psychiatric or psychological qualifications of the social worker; she is an officer in the Executive Government of the State; and she is apparently employed in the Corrections Department, so that complete independence of outlook would not necessarily be manifest.

67 For such a serious order to be made, one would think that, ordinarily at least, the opinion of an independent expert of appropriate qualifications would be afforded to the judge asked to make it. Normally, in a case such as the present, such a report should be provided by a person with psychiatric, psychological or similar qualifications[59]. With all respect to those who prepared the prosecution case at trial, neither in the way the application for an order under s 98 of the *Sentencing Act* was decided nor in the presentation of evidence and argument in support, was there a sufficient indication of an appreciation of the very great seriousness of the step which the court was being asked to take. In the Court of Criminal Appeal, this point was obviously appreciated by Kennedy J. With respect to the majority in that Court, it is not clear that it was fully appreciated by them.

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58 *Moffatt* [1998] 2 VR 229 at 255.

59 *Lynne Fawcett* (1994) 16 Cr App R (S) 55 at 56.

Miscarriage of the exercise of the power

68 In part, the conclusion of the majority in the Court of Criminal Appeal appears to have been affected by the way in which the sentencing judge and their Honours approached the meaning and application of s 98 of the *Sentencing Act*.

69 The reasoning of the sentencing judge is contained in the passage that I have cited[60]. In the Court of Criminal Appeal, the point is made most clear in the reasons of Pidgeon J. These indicate that his Honour thought it sufficient to proceed directly to consideration of the factors enumerated in s 98(2) of the *Sentencing Act* as governing the making of an order under s 98(1). His Honour did not expressly refer to s 98(1) but, instead, considered *seriatim* the paragraphs of s 98(2) as if that was all that was required.

70 There is an indication that this was also the approach taken by Murray J. In his reasons, his Honour did refer to the power contained in s 98(1)[61]. However, in stating at the outset that the principle of proportionality reflected in s 6 did not control the imposition of a sentence of indefinite imprisonment[62], he failed, in my view, to read correctly the terms of s 98(3)(a). That paragraph relieves the court of the duty to apply the principle of proportionality only "[i]n deciding whether an offender is a danger to society, or a part of it". Whilst it therefore elaborates the phrase appearing in s 98(2), it is not an exposition of the foundation for the exercise of the power to impose a term of indefinite imprisonment under s 98(1). On the contrary, as its language clearly shows, s 98(2) operates as a limitation upon the exercise of the power conferred by s 98(1). Unless the preconditions in s 98(2) are satisfied (relevantly that the offender, when released, would be a "danger to society, or a part of it") the power in s 98(1) is not enlivened. Yet even when, in accordance with s 98(2), the power in sub-s (1) is enlivened, there remains a discretion in the court concerned as to whether it will exercise the power or refrain from doing so in the particular case.

71 The foregoing conclusion follows from the use of the verb "may" in s 98(1). But it is also clear from the context. The stated preconditions to the exercise of the power appearing in s 98(1) are such that, on the face of things, a very large number of sentences would qualify as conferring on the sentencing judge the additional power to order that the offender be imprisoned indefinitely.

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60 Above at [46].

61 *McGarry* [1999] WASCA 276 at [60].

62 *McGarry* [1999] WASCA 276 at [41].

Unless this very large power were confined in its operation, it would completely revolutionise the sentencing of offenders in Western Australia. In effect, it would render a very large number of offenders, sentenced for indictable offences, susceptible to a sentence of indefinite imprisonment. This would effectively restore the system of punishment of a general, indefinite imprisonment order subject to the exercise of discretions of officers in the Executive Government. Such a system might be traced to the sentencing theories of Sir Alexander Maconochie in the Norfolk Island Penal Colony of the 1840s[63]. These theories, in turn, represented a variation on the penological writings of Cesare Beccaria[64].

72 The general tendency of Australian sentencing legislation in recent years, including as reflected in the *Sentencing Act*, has been to emphasise certainty in, and clarity of, the sentences imposed by the courts. The terms of s 98 ought not to be read as converting the sentencing of all (or even most) offenders convicted of indictable offences in Western Australia to additional terms of indefinite imprisonment subject to the kinds of non-judicial supervision described. On the contrary, both in its language and context, s 98(1) is to be read as a source of a discretionary power. Precisely because it is expressed in such broad terms, and because it is so exceptional to the fundamental principles of sentencing observed in Australia, the terms in which the power is granted demand that it be exercised only in a wholly exceptional case where such exercise is necessary to achieve the purposes of criminal punishment and where the ordinary principles of criminal punishment would not suffice for that purpose.

73 This view of s 98(1) of the *Sentencing Act* accords both with the permissive language of the sub-section and with the structure of s 98 read as a whole. Viewed in such a way, the criteria mentioned in s 98(2), upon which the sentencing judge and the majority judges in the Court of Criminal Appeal concentrated their attention, are simply preconditions to the exercise of the power in s 98(1).

74 Even if they are satisfied, these preconditions do not replace the discretion which the grant of the power in s 98(1) requires to be exercised. On the contrary, the language and structure of s 98 make it clear that, even in cases where it is

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63 Morgan, "Parole and Sentencing in Western Australia", (1992) 22 *University of Western Australia Law Review* 94 at 96. A history of nineteenth century experiments in habitual offender legislation is contained in Radzinowicz and Hood, *A History of English Criminal Law and its Administration from 1750*, (1986) vol 5 at 231. See also Morris, *The Habitual Criminal*, (1950) at 126-136 where the former Western Australian provisions under the Code, ss 661-662 are described; cf United Nations, *The Indeterminate Sentence*, (1954) at 10.

64 *Essay on Crimes and Punishments*, 4th ed (1775).

demonstrated that the convicted offender would be a danger to society, and hence that the power under s 98(1) *may* be exercised, it is still necessary for the court, invited to do so, to consider whether the power *should* be exercised in the particular case. In determining that question, regard must obviously be had to considerations of a procedural kind such as this Court emphasised in *Thompson* and Kennedy J mentioned in this case. More fundamentally, the considerations that confine the exercise of the power in s 98(1) of the *Sentencing Act* to sparing use and in clear cases only, need to be taken into account.

75 In the context of the predecessor legislation in *Chester*, this Court concluded that, to warrant departure from the ordinary sentencing principle of proportionality, it would not have been enough to establish financial loss and property damage, larceny, obtaining money by false pretences and the infliction of malicious damage to property. Although those were serious crimes, this Court concluded that they were not of a kind such as would invoke a need to protect society by the imposition of imprisonment of the convicted offender for an indefinite period[65]. The terms of s 98 of the *Sentencing Act* do not draw a distinction between predatory crimes of violence (including sexual offences) and, say, predatory crimes against property, for example the property of vulnerable victims. It is unnecessary to decide in this case the continuing application to the *Sentencing Act* of the qualifications mentioned in *Chester*. But it remains essential for the party, seeking an order of indefinite imprisonment under s 98 of that Act, to demonstrate that the offender would be a "danger to society, or a part of it" and that the offence that creates that danger is one of "exceptional seriousness". The "exceptional" character of the order is further reinforced by the language of s 98(2)(d) that suggests that *all* of the preconditions to the exercise of the power must be "exceptional". And even if that is shown, it remains for the sentencing judge finally to address his or her attention to the discretionary terms in which the power is expressed in s 98(1).

76 Neither the sentencing judge in the present case nor the majority in the Court of Criminal Appeal approached the sentencing of the appellant in the foregoing way. They appear to have assumed that satisfaction of the preconditions stated in s 98(2) of the *Sentencing Act* was sufficient, without more, to warrant imposition of a sentence of indefinite imprisonment. That approach was not supported by the terms of s 98(1) nor the other requirements of that Act. The proper exercise of that discretion required a clear recognition that the imposition of any such term of indefinite imprisonment is a most serious departure from the fundamental principles governing criminal punishment in this country. To justify such a departure it must be clear that the ordinary principles which resulted in the "nominal sentence" will not be adequate to satisfy the needs of society to respond to the offence of which the offender is convicted. This

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65 *Chester* (1988) 165 CLR 611 at 618.

Court in *Lowndes* emphasised the importance of appellate courts respecting the exercise of the power and discretion conferred upon sentencing judges by s 98 of the *Sentencing Act*, confining their intervention to a case where error is demonstrated. However, where it is shown that the sentencing judge and the Court of Criminal Appeal have approached the exercise of the power and discretion conferred by s 98 otherwise than in accordance with the requirements of that Act, this Court is entitled, and may be obliged, to intervene.

77 It is clear enough that, in the present case, Kennedy J was unconvinced that use of this exceptional power was warranted by the circumstances proved. Although his Honour did not spell out the foregoing steps, his reasoning, and references to what this Court said in *Lowndes* and *Thompson*, indicate that this was the approach that he took. The remaining question is, therefore, whether this Court would be warranted simply to substitute for the order favoured by the majority in the Court of Criminal Appeal those favoured by Kennedy J. Or whether this Court, having exposed the error of the majority's reasoning and elucidated the correct approach, should return the matter to the Court of Criminal Appeal for the re-sentencing of the appellant in a way conformable with the *Sentencing Act*.

Correcting the sentence of the appellant

78 The respondent submitted that, if the Court came to the foregoing conclusion, the proper order would be to set aside the judgment and sentence of the Court of Criminal Appeal and to remit the proceedings to that Court for fresh consideration of the sentence appropriate to the appellant's case. In *Thompson* this Court took that course[66]. Doing so recognises the primacy of the Court of Criminal Appeal in matters of sentencing. It conserves the intervention of this Court to the correction of errors of principle demonstrated by the appeal. It respects the greater experience in matters of sentencing ordinarily enjoyed by the judges who participate in courts of criminal appeal. The respondent argued that taking this course would permit the Court of Criminal Appeal to deal with the re-sentencing of the appellant for itself or remit to a single judge of the District Court consideration of whether a term of indefinite imprisonment should be imposed on the appellant. Such remitter would allow regard to be taken of up-to-date evidence about the appellant's conduct in prison, his response to the Sex Offender Treatment Unit and evidence as to the continuing support he would receive following his release. The possibility of remitter by the Court of

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66 *Thompson* (1999) 73 ALJR 1319 at 1320 [3], 1322 [17]; 165 ALR 219 at 220, 224.

Criminal Appeal to a single judge was left open by the orders of this Court in *Thompson*[67].

79 There was, however, an important difference between the circumstances in *Thompson* and those of this case. In *Thompson*, the sentencing judge had imposed a lengthy term of imprisonment (10 years) as the "nominal sentence". It was a sentence that remained in force at the time that the matter was before this Court. This Court was therefore concerned in *Thompson* only with the procedures and decision of the Court of Criminal Appeal in relation to the sentence of indefinite imprisonment.

80 In the appellant's case, it was common ground that the "nominal sentence" imposed upon the appellant had expired. A preliminary question arose as to whether it would be competent for the Court of Criminal Appeal, if the matter were remitted to it, to re-sentence, or request the re-sentencing of, the appellant to a term of indefinite imprisonment. There are two indications in the language of the *Sentencing Act* that suggest that this might not be done. The first is the provision in s 98(1) that states that the term of indefinite imprisonment that may be imposed is to be "in addition to imposing the term" of the nominal sentence. Furthermore, s 100 states that "[a] sentence of indefinite imprisonment begins on the day when the offender would, but for that sentence, be eligible to be released from custody". Having regard to these provisions, there is doubt as to whether an order of indefinite imprisonment could be made as a separate free-standing sentencing order in the appellant's case, imposed in isolation from the expired "nominal sentence".

81 The respondent submitted that such a sentence of indefinite imprisonment could be imposed on the appellant on the footing that the sentence of indefinite imprisonment imposed by the sentencing judge remained in force until set aside by this Court; that it continued to authorise the detention of the appellant in custody; and that, if it were now set aside by order of this Court, this would only be done with a view to permitting the re-exercise of the relevant power and discretion that had earlier miscarried. Upon one view that course might result (as the respondent submitted) in the same order being made. To allow that to happen, and to achieve the purposes of the *Sentencing Act* to protect society from a danger to it, this Court was asked to confine its orders to those proper to a court of error. Doing so, the respondent argued, would result in orders similar to those made in *Thompson*.

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67 (1999) 73 ALJR 1319; 165 ALR 219. The power to remit has been upheld in Western Australia: *R v Thompson* [2000] WASCA 186 at [9]-[11], considering *R v Wong* (1995) 16 WAR 219; *R v T* [1995] 2 Qd R 192.

82 The respondent's submissions on this point were not unpersuasive. I was willing to assume without deciding that, if the matter had been returned to the Court of Criminal Appeal either that Court or a judge to whom the matter was remitted could have imposed on the appellant a sentence to an indefinite term of imprisonment. However, in the exercise of its appellate jurisdiction, this Court, by s 37 of the *Judiciary Act* 1903 (Cth), is empowered to give such judgment as ought to have been given in the first instance. It would have been contrary to principle to permit the re-sentencing of the appellant by the Court of Criminal Appeal or by the sentencing judge upon new and different materials that should have been provided earlier and based upon new and different arguments. The original procedures in this case were so defective and the materials so imperfect to support the invitation to make such a serious order with such grave consequences for the appellant's liberty, that I concluded that the approach which Kennedy J favoured in the Court of Criminal Appeal was the correct one. Had that Court recognised, as Kennedy J did, the need to exercise the power under s 98(1) of the *Sentencing Act* sparingly, and then only in clear cases and on full and appropriate materials, the likelihood is that it would have joined in the order that Kennedy J favoured.

83 So far as the exercise of the power in s 98(1) of the *Sentencing Act* is concerned, it may be accepted for present purposes that the appellant's case evidenced serious and repeated offences. However for those offences the appellant was seriously and repeatedly convicted and sentenced. The appellant's 1997 offences were not of a degree of seriousness as to be described as "exceptional" and such as to require a departure from the ordinary principles of sentencing observed in Australia described in *Chester* as including the "fundamental principle of proportionality"[68]. To have returned the appellant to be re-sentenced would therefore have involved not only procedural unfairness to him, permitting the prosecution, in effect, to have a second opportunity to establish this exceptional sentence upon improved evidence and argument. It would also have amounted to a futility as I find it difficult to accept that the sentencing discretion, exercised in this case on these materials would properly have resulted in a sentence of indefinite imprisonment in accordance with the *Sentencing Act*. There was no reason to conclude that, for such offences the ordinary principles of sentencing would not suffice to meet the needs of the community in punishing the appellant[69].

84 The correct course was therefore to give effect to the orders that Kennedy J favoured in the Court of Criminal Appeal. Having regard to this conclusion, it was unnecessary, in this appeal, to consider the appellant's

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68 *Chester* (1988) 165 CLR 611 at 618.

69 *Chester* (1988) 165 CLR 611 at 620.

challenge to the constitutional validity of s 98 of the *Sentencing Act*. That issue may be left until a case presents where such consideration is essential to determine the orders of this Court.

Orders

85 For these reasons, on 6 September 2001, I joined in the orders favoured by Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ allowing the appeal.

86 CALLINAN J. The question in this case is whether the Court of Criminal Appeal of Western Australia erred in dismissing the appellant's appeal against an order for his indefinite imprisonment that had been made by the District Court of that State.

87 The appellant has a long history of sexual offences against children.

88 On 21 September 1985, he was convicted of wilful exposure and fined $150. A month later he was convicted of wilful exposure and was imprisoned for 3 months.

89 Four years later the appellant was convicted of wilful exposure and a fine of $1,000 was imposed.

90 The next offence of which the appellant was convicted was of evil designs on 3 April 1991. He was fined $100. A fortnight later, he was convicted of aggravated indecent assault (21 counts), aggravated sexual assault (4 counts), and wilful exposure (7 counts) for which a total sentence of 7 years and 8 months was imposed. An order allowing him to be eligible for parole was made.

91 In 1994, the appellant was convicted of indecent dealing with a child by a lineal relative (2 counts) for which he was sentenced to 2 years imprisonment.

92 On 22 February 1996, the appellant was released from prison on parole.

93 On 16 December 1997 a photograph of the complainant who was then 11 years old appeared in a community newspaper. On 18 December 1997, the appellant, who had seen the photograph, visited the home of the complainant.

94 On 24 December 1997, impersonating a police officer, he made two telephone calls to the complainant's home. He was masturbating as he spoke on the telephone.

95 On 4 January 1998, the appellant made a further telephone call to the complainant's home, again impersonating a police officer.

96 On each occasion the telephone was answered by, and the appellant spoke to, the complainant's sister. He claimed that he had telephoned to find out if an offence had been reported to police officers.

97 The appellant was charged with, and pleaded guilty on 30 October 1998 to, the indictable offence under s 320(4) of the *Criminal Code* (WA):

> "A person who indecently deals with a child is guilty of a crime and is liable to imprisonment for 10 years."

He was remanded in custody until 1 December 1998 in order that a Sex Offender's Treatment Report might be obtained.

98 On 1 December 1998, the appellant pleaded guilty to 3 summary counts of personation of a police officer which, under s 32 of the *Sentencing Act* 1995 (WA) ("the Act") were dealt with together with the indictable offence under s 320(4) of the *Criminal Code*. The prosecutor then foreshadowed that an application would be made for indefinite imprisonment under s 98 of the Act, to which detailed reference will be necessary.

99 On 16 December 1998, Hammond CJDC sentenced the appellant to 5 years imprisonment by way of "nominal sentence" and ordered indefinite imprisonment thereafter.

100 The appellant applied for leave to appeal to the Court of Criminal Appeal of Western Australia against the nominal sentence, and appealed against the order for indefinite imprisonment. That Court (Murray and Pidgeon JJ, Kennedy J dissenting) substituted a sentence of 3 years imprisonment for the term of 5 years and affirmed the order of indefinite imprisonment.

101 It is convenient at this point to refer to the personal circumstances and proclivities of the appellant.

102 A pre-sentence report prepared by a social worker employed in a Sex Offender Treatment Unit which was before the primary judge provided an account of the appellant's circumstances and assessed the risks of his offending in the future.

103 The appellant was born on 14 July 1961. He was the youngest of five children. He was almost continually in trouble at school and at home. His father behaved inappropriately both verbally and physically towards the female children and grandchildren within the family. The appellant claimed that he had never been without a girlfriend for long. He did, however, acknowledge to a community corrections officer that he had chosen to associate with women who had children of the age group to which he is sexually attracted. The appellant has fathered five children from three relationships. Not long after his arrest for the relevant offences, he met and formed a relationship with another woman. This woman has a daughter aged 15. She is supportive of him and expresses no concerns for her daughter at his hands.

104 The appellant's employment record is reasonably good. It appears that he has only been unemployed for approximately three months of his adult life when he has not been in prison. He previously consumed alcohol to excess, but claims to have stopped drinking spirits in 1991 and, since the end of 1997, has drunk no alcohol at all. The appellant joined Sexaholics Anonymous after committing the relevant offences. This organisation claims to have established a programme for

the rehabilitation of those who wish to cease their sexually self-destructive thinking and behaviour. It is based on some of the tenets of Alcoholics Anonymous. The appellant is one of four members of Sexaholics Anonymous who meet twice weekly. No expert psychological or psychiatric assistance is provided to members of the group.

105 Kennedy J, who would have upheld the appeal to the Court of Criminal Appeal, summarized these and other relevant matters in this way:

> "In summary, the [appellant] has a 13 year old record of sexual offending, although he admits to inappropriate sexual behaviour from the age of 11. *His sexual offending is described as being well entrenched and it is considered that he does not have any strong personal convictions regarding recidivism which would assist him not to re-offend.* On the question of risk assessment, the report suggests that, given his sexual history, his reponse to previous therapeutic interventions and his self-admitted ability to suspend empathy for his victims, *he presents a high risk of re-offending in a sexual manner*. The report concludes that he has an entrenched range of sexually deviant behaviours, consisting, it is said, of both 'hands on' and 'hands off' offences. *He has demonstrated his dangerousness towards female children with whom he has come into contact and has also developed a range of paraphilic activities, such as wilful exposure and voyeurism, which he appears to be incorporating into his sexual offending behaviour*. The current offences have progressed in seriousness from prior offences, in that *an element of predatory behaviour has been introduced into his sexual offending repertoire*." (emphasis added)

106 In rejecting the appellant's application to the Court of Criminal Appeal so far as it related to s 98 of the Act, Pidgeon J described the indictable offence to which the appellant pleaded guilty as one of exceptional seriousness. Murray J, who also rejected the appellant's application so far as it related to s 98 of the Act, said that the sentencing judge had paid sufficient regard to the relevant provisions of the Act, and had properly applied them. All members of the Court were of the opinion, however, that the sentence of imprisonment of 5 years was excessive and should be reduced to a term of 3 years.

107 After setting out s 98 of the Act and stressing that its application could only be called for in exceptional cases, Kennedy J stated his reasons for dissent:

> "In the present case, the remarks of the learned sentencing Judge in relation to the imposition of the indefinite sentence were brief. He found that, in terms of s 98(2) of the Act, the [appellant] would be a danger to a part of society when the [appellant] would otherwise be released from custody. And he so found because of the risk that the [appellant] will commit other indictable offences – s 98(2)(b). His Honour did not

expressly rely upon the offences for which he was sentencing the [appellant] being of 'exceptional seriousness'. Nor did he expressly rely upon the character of the [appellant] as providing the foundation for the order. And he identified no 'other exceptional circumstances'. His Honour did not elaborate upon the 'other indictable offences' although, obviously enough, they must have been of the nature of sexual assaults or indecent dealings. Loitering and wilful exposure, for which the [appellant] has many convictions, are simple offences under s 43(1) and s 66(11) respectively of the *Police Act 1892*. In relation to the extent of the risk which the [appellant] posed, the letter from his present partner, which was not challenged, suggests that he is a very good step-parent to her daughter, and indicates that the three of them have had individual interviews with the Child Welfare Department (presumably now the Family and Children's Services) and that the department is happy with their situation and confident of her daughter's safety. Nor, it appears, has the department seen sufficient cause to intervene in the [appellant's] access to his other daughters.

Counsel for the [appellant] maintained that the report before his Honour was not sufficiently cogent to allow for the conclusion that the [appellant] would be a constant and continuing danger upon his release. Not without initial doubts, I now agree. In my opinion, the material before his Honour was not sufficient to warrant the ultimate step of imposing an indefinite sentence. In this respect, the material in the present case contrasts starkly with the nature of the material available in *Powell v The Queen*[70], which was cited by counsel for the Crown, and in *Moffatt's case*[71]. There has apparently been no psychological or psychiatric examination of the [appellant], no report on any such examination having been referred to in the report which was before his Honour. The qualifications and experience of the signatories to the report have not been provided. Moreover, the Crown's submission that an indefinite sentence should be imposed was made in less than convincing circumstances. Counsel for the Crown informed his Honour that he had only received the brief on the previous day and that he had only come to the conclusion on that night 'that that ought to be the way it goes'. No prior notice had been given to the [appellant] of the making of the submission. The sentencing was adjourned by his Honour and another prosecuting counsel appeared at the adjourned hearing. She commenced by saying that the Crown maintained its submission 'that your Honour at least considers s 98 of the *Sentencing Act* and I don't resile from what was said before in relation to

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70 Unreported, Supreme Court of Western Australia, 19 October 1995.

71 *R v Moffatt* [1998] 2 VR 229.

that'. It needs to be stressed again that the power to order an indefinite sentence should only be exercised following a most careful hearing, at which all relevant material is before the Judge, that material being as adequate and complete as fairness to the prisoner requires."

The appeal to this Court

108 The appellant was granted leave to appeal on non-constitutional grounds. Subsequently he sought leave to appeal on expanded grounds, including a constitutional ground. A proposed amended notice of appeal was filed, the grounds of which I set out in full because they contain the substance of the appellant's arguments to this Court:

"2. The learned sentencing Judge erred in law in failing to satisfy himself that the Appellant would be a danger to society or part of it at the time the Appellant would be released from custody in that he failed to give express consideration to all the relevant factors specified in *s 98(2) of the Sentencing Act ('the Act')*.

Particulars

(a) His Honour did not refer to the offences for which he was sentencing the Appellant as being of 'exceptional seriousness' under *s 98(2)(a) of the Act*;

(b) His Honour did not expressly rely upon the character of the offender under *s 98(2)(c) of the Act*;

(c) His Honour did not identify other exceptional circumstances under *s 98(2)(d) of the Act.*

Although *s 98(2) of the Act* allowed for his Honour to find that the Appellant would be a danger to society or part of it on one factor (being the risk that he will commit other indictable offences *(s 98(2)(b))* his Honour should have given express consideration to all relevant factors set out in *s 98(2)(a) to (d) of the Act.*

3. The learned sentencing judge erred in law in failing to consider adequately or at all whether or not the Appellant, who in his Honour's opinion constituted a risk of future danger, would necessarily pose a danger at the time he becomes eligible for release and at all times thereafter.

Particulars

(a) His Honour stated that the Appellant 'will be a danger to part of society because of a clear risk that he will commit other indictable offences' without saying whether this prognosis related to the time of his release from the nominal sentence or not.

(b) The pre-sentence report of the social worker, Linda Maule, states the Appellant '(presents) a high risk of re-offending in a sexual manner' without stating whether or not the Appellant is likely to be a continuing and constant risk.

4. The learned sentencing judge and the majority of the Court of Criminal Appeal erred in finding that the evidence was sufficient to require or justify on a balance of probabilities that the Appellant would present a danger to society or part of society at the time of release and thereafter.

Particulars

(a) There was no pre-sentence report from a psychologist or psychiatrist to support such a prognosis;

(b) The pre-sentence report was deficient in failing to set out the qualifications and experience of the signatories;

(c) The pre-sentence report failed to analyse how far the Appellant's relationship with Ms Poole and a recent program of rehabilitation would assist him in not re-offending;

(d) Other factors advanced by his counsel from which inferences were open that the Appellant might not constitute a continuing danger to the public.

5. The learned sentencing judge and majority of the Court of Criminal Appeal erred in determining a sentence of indefinite imprisonment was required taking into account:

Particulars

(a) The exceptional nature of the punishment of indefinite imprisonment and that a general history of recidivism ought not therefore to be sufficient to merit imposition of such a sentence;

(b) that before the offences for which he had been convicted the Appellant had not offended for some years and that his offending was of decreasing severity;

(c) that *s 98(2) of the Act* does not state that where a court is satisfied that an offender is a danger to society or part of society indefinite imprisonment should be ordered but that indefinite imprisonment must not be ordered unless an offender is a danger to society or part of it;

(d) that the sentencing judge did not consider this indictable offence standing on its own as being at 'the highest end' and did not expressly consider all the relevant factors;

(e) the absence of cogent expert evidence that the Appellant will be a constant danger to society or part of it.

6. Further, or in the alternative to grounds 1,2,3,4 and 5, both *s 98 of the Sentencing Act, 1995* and *s 25 of the Sentence Administration Act, 1995* are invalid because the duration and termination of an indefinite term of imprisonment is determined by unfettered Executive discretion and not regulated Judicial discretion and is therefore contrary to the implied Separation of Powers and the provisions of *Chapter III of the Commonwealth Constitution* which reserve the exercise of Judicial Power to Judicial officers:

Particulars

(a) under the provisions of the *Sentence Administration Act, 1995* the Executive and not the Judiciary exercises the power to set the length and to determine the cessation of an indefinite term of imprisonment *(ss 14, 20* and *25 of the Sentence Administration Act, 1995)*;

(b) there is some indicia but no definite statutory criteria to guide the Parole Board in its decision whether or not to recommend to the Minister that a prisoner should be released on parole *(s 14 of the Sentence Administration Act, 1995)*;

(c) in exercising executive power the Governor may not make a parole order to release a prisoner unless a report has been given to the Minister by the Parole Board *(s 25(3) of the Sentence Administration Act, 1995)*;

(d) although the Parole Board must recommend to the Minister at stipulated times whether or not the Governor should be advised by the Minister to release the prisoner *(s 20(2) of the Sentence Administration Act 1995)* there is no corresponding duty upon the Minister to advise the Governor at any time to release any prisoner;

(e) the rules of natural justice (including the duty of procedural fairness) do not apply to the doing of any act by the Governor, Minister or Parole Board under *Part 3 of the Sentence Administration Act* (which provisions include *ss 14, 20 and 25 of the Sentence Administration Act, 1995)*;

(f) there is no requirement to give reasons for a decision to a person serving a term of indefinite imprisonment if it is decided that it is in the interest of the prisoner or anyone else to withhold reasons *(s 114 of the Sentence Administration Act 1995).*"

109 The Court permitted the appellant to argue the amended grounds of appeal on the basis that the constitutional ground should only be argued after the submissions on the other grounds.

110 In this Court, criticism on two bases was levelled at the report provided by the social worker employed by the Sex Offender Treatment Unit. The principal criticism was that a social worker, indeed, presumably any social worker, lacks the qualifications to give expert evidence as to the likelihood of recidivism in a case of this kind. This point was made notwithstanding the fact that the appellant, who was represented at the sentencing proceedings, made no objection to the reception and use of the report. The other criticism was that, in any event, the report does not establish that the appellant would be a danger to society on his release.

111 The first criticism should be rejected. A social worker, by long experience alone[72], might be well qualified to form an opinion about the likelihood of recidivism. Indeed, he or she might, in the ordinary course of repeated exposure

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72 It is clear that experience can qualify a person to give expert opinion. See *Rose* (1993) 69 A Crim R 1 at 9 per Bollen J (explaining that a mechanic, through experience, might understand the workings of an internal combustion engine as well as an engineer); *Harris* (1997) 94 A Crim R 454 (Aboriginal tracker experienced in human and animal foot recognition). Cf *R v Silverlock* [1894] 2 QB 766, where a solicitor who had been an amateur student of handwriting for 10 years was allowed to give an expert opinion on the similarity on two pieces of handwriting.

in their daily work to offenders and offences of the kind of which the appellant was convicted, become extremely well acquainted with the tendencies of particular types of sex offenders. A social worker might, unhappily, see more of this sort of conduct than a psychologist or psychiatrist. A person's expertise may depend upon the duration and nature of the work of the person making the assessment. A social worker employed by the Sex Offender Treatment Unit might well have had special training in the relevant area. And I would not readily assume that the course of formal study undertaken to obtain the qualification of social worker would not include disciplines relating to sexual misconduct, particularly in domestic situations. It is no answer to say that these are matters of speculation. If that were so, the admissibility, relevance and significance of the social worker's report could and should have been challenged by the appellant. In any event, if any assumption is to be made, it is that a professional person, expressing an opinion not otherwise than in good faith, on a subject with which it is likely she would have to deal in the course of her profession, is in fact qualified to express that opinion. On the face of it, the social worker's report was a report by an expert on a matter calling for her expertise[73].

112 It is not difficult to see why the appellant might have been content to attempt to meet the respondent's submission that there should be indefinite imprisonment on the basis of the social worker's report, submissions, and other materials put forward by the appellant, rather than on the basis of a psychiatrist's examination and findings, for, on an earlier occasion, these last had been strongly adverse to the appellant. There was before this Court and the Court of Criminal Appeal the reasons of an earlier Court of Criminal Appeal of Western Australia which dealt with an application by the appellant in 1991 to appeal against the sentence that had been imposed upon him in that year. Those reasons disclosed that a qualified psychiatrist had concluded at that time in respect of the appellant as follows:

"It seems that the prognosis is very poor and that recidivism is probable."

113 The same reasons disclose the likelihood that the appellant should, by the time of the relevant offences, have undertaken – unsuccessfully, it now plainly appears – a programme of remedial treatment. The appellant and his advisers might therefore have decided, and done so on very natural grounds, that they should not seek or obtain a report on the appellant by a professional with different, or indeed possibly better, qualifications than a social worker.

114 In my opinion, the second criticism is also misconceived. The report, taken with other undisputed matters, including admissions, does provide a basis

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73 *Murphy v The Queen* (1989) 167 CLR 94 at 112-113 per Mason CJ and Toohey JJ.

for the formulation of an opinion that the appellant would be a danger to society upon his release. The social worker made this assessment of risk:

> "Mr McGarry has a 13 year old official history of sexual offending, however admits to inappropriate sexual behaviour from the age of 11 years, which effectively means his sexual offending commenced some 26 years ago. His sexual offending is well entrenched, and despite his current desire to cease offending because of his new relationship, it is felt that Mr McGarry does not have any strong, personal convictions regarding recidivism which would assist him not to re-offend. Certainly the philosophy of his current support group appears to place responsibility for his behaviour outside of himself. Given his sexual history, his response to previous therapeutic interventions, and his self admitted ability to suspend empathy for his victims, Mr McGarry is considered to present a high risk of reoffending in a sexual manner."

115 The remaining argument relevant for present purposes is that the sentencing judge and the majority in the Court of Criminal Appeal erred, and Kennedy J was correct, in construing the Act.

116 Sections 98 of the Act provides as follows:

> "**98. Indefinite imprisonment: superior court may impose**
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> (1) If a superior court –
>
> (a) sentences an offender for an indictable offence to a term of imprisonment;
>
> (b) does not suspend that imprisonment; and
>
> (c) does not make a parole eligibility order under Part 13 in respect of that term,
>
> it may in addition to imposing the term of imprisonment for the offence (the '**nominal sentence**'), order the offender to be imprisoned indefinitely.
>
> (2) Indefinite imprisonment must not be ordered unless the court is satisfied on the balance of probabilities that when the offender would otherwise be released from custody in respect of the nominal sentence or any other term, he or she would be a danger to society, or a part of it, because of one or more of these factors:
>
> (a) the exceptional seriousness of the offence;

(b) the risk that the offender will commit other indictable offences;

(c) the character of the offender and in particular –

(i) any psychological, psychiatric or medical condition affecting the offender;

(ii) the number and seriousness of other offences of which the offender has been convicted;

(d) any other exceptional circumstances.

(3) In deciding whether an offender is a danger to society, or a part of it, the court –

(a) is not bound by section 6 but is bound by any guidelines on the imposition of indefinite imprisonment in a guideline judgment given under section 143; and

(b) may have regard to such evidence as it thinks fit."

117 Section 101 should be noticed. It ensures that indefinite imprisonment does not necessarily mean life imprisonment. The section provides:

"101. Release from indefinite imprisonment

A prisoner sentenced to indefinite imprisonment may be released at any time after the sentence of indefinite imprisonment begins by means of a parole order made under Part 3 of the *Sentence Administration Act 1995*."[74]

118 I accept that use of the imperative negative "must not" in s 98(2) imposes a high threshold for the imposition of indefinite imprisonment. So too the reference in s 98(2)(d) to *other* exceptional circumstances serves to highlight the seriousness and exceptional nature of a sentence of indefinite imprisonment. And the fact that a risk of re-offending exists is not enough of itself to warrant indefinite imprisonment. That risk must satisfy the requirements of s 98(2) by giving rise to "a danger to society, or a part of it". However, as pars (a) to (d) of s 98(2) are expressed disjunctively, satisfaction of the mind of the sentencing

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74 Part 3 of the *Sentence Administration Act* 1995 (WA) makes provision for the release of an indefinitely imprisoned person by the Governor on the advice of the Minister following a report to the Minister either made at the request of the Minister or in special circumstances.

judge as to any one of them will provide a foundation for the exercise of the relevant sentencing discretion.

119 The relevant offence here was serious. But, in my opinion, particularly having regard to the sentence of 3 years that was ultimately imposed, it could not properly be described as exceptionally serious and within s 98(2)(a). Nor did the primary judge purport so to describe it.

120 The primary judge held that the conditions of s 98(2)(b) were satisfied. That paragraph does not require that particular offences be identified or that other indictable offences be like offences, although as a practical matter a judge is unlikely to be satisfied that the offender will re-offend without identifying, in at least broad terms, the sorts of offences which the offender is likely to commit. It should be noted, however, that all that is needed for the condition in s 98(2)(b) to be satisfied is a *risk*, not a probability, that the offender will commit other offences. Having regard to the language of the whole of s 98(2), the risk must be a real and substantial one, as the primary judge plainly, and, in my opinion, not unreasonably or incorrectly, held it to be on the material before him.

121 No argument was directed to, and it is not necessary to consider, whether the primary judge might have reached the same conclusion on the basis that the appellant's circumstances and offences fell within s 98(2)(c).

122 I do not, with respect, think that there is any difficulty in construing the words "a danger to society, or a part of it". Certainly, all or most criminal conduct is at least an affront to society. But not all criminal conduct necessarily endangers society or a part of it. Some might think that not all crimes of drug use, however harmful to the user, involve a danger to society or a part of it. And whatever view might be held about the reprehensibility of bigamy[75] or the commission of incest by adult siblings[76], these activities are unlikely to endanger society or any part of it. However, where the part of society involved is especially vulnerable, as in the case of children, different considerations arise. Crimes directed at vulnerable groups, such as children, can more readily be found to be a danger to society or a part of it than other crimes. And it was, of course, with the commission of further indictable offences against children that the primary judge was dealing.

123 Kennedy J in his reasons for judgment referred to two passages from the judgment of Kirby J in *Thompson v The Queen*[77]:

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75 *Criminal Code* (WA), s 339.

76 *Criminal Code*, s 329(7)-(8).

77 (1999) 73 ALJR 1319 at 1322-1323 [18]-[19]; 165 ALR 219 at 224.

> "Where there was any possibility that an order of indefinite imprisonment might be made, it was essential that the procedures observed should be regular and scrupulously thorough and that the materials, including the pre-sentence reports, should be as adequate and complete as fairness to the prisoner required.
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> …
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> As Hayne JA pointed out in *Moffatt*[78], it is fundamental that the power to order indefinite imprisonment should be sparingly exercised and then only in clear cases. I would add that it is fundamental that it should only be exercised following a most careful hearing at which all relevant material is before the judge or judges responsible for making such an order. It is not something to be hurried. It is not a course to be dealt with on materials known to be incomplete or otherwise insufficient."

124 The statements commanding the exercise of great caution in respect of such a serious matter as indefinite imprisonment could, with respect, hardly be gainsaid. But they cannot have full application here because it was not demonstrated that the material was incomplete or insufficient, or, that, if incomplete, making it complete would have assisted the appellant. The sentencing proceedings were, and remain, adversarial. The appellant was represented at first instance and in the Court of Criminal Appeal. He made no effort to seek to introduce material questioning either the qualifications of the social worker or the substance of her report. Whilst the onus of showing that indefinite imprisonment should be imposed lay upon the Crown, neither the Crown nor the court is obliged to conduct a wide ranging inquiry or to solicit a variety of reports from different sources. The prosecution must act properly and honestly in all respects but is entitled to rely, as it did here, upon apparently sufficient and professionally compiled materials left unanswered by any contrary, or better qualified opinions.

125 Further, the procedures were in no way irregular. Indeed, the sentencing judge was entitled, pursuant to s 98(3)(b), to have regard to such evidence as he thought fit. Even taking that to mean, as I do, such admissible evidence as he thought fit, that does not, in my opinion, mean that the trial judge erred. The reception of the report was not challenged and it was, as I have said, properly admissible as expert evidence.

126 The appellant submits, however, that the difficulty for the respondent is that the sentencing judge approached the case upon the basis that the appellant's past history was, in effect, conclusive, and that he did not have to give attention

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78 [1998] 2 VR 229 at 255.

to each or all of the several factors set out in s 98(2) before exercising his discretion to impose a sentence of indefinite imprisonment. It was submitted, in particular, that insufficient consideration was given to the negative expression in s 98(2) that the sentence *must not* be ordered *unless* the Court is satisfied that *when* the offender would otherwise be released from prison (and not, I interpolate, at the time of sentencing) he or she would be a danger to society, or a part of it, because of one or more of the factors set out in s 98(2)(a) to (d).

127 The primary judge did, however, make a finding that the appellant would be "a danger to part of society because of a clear risk that he will commit other indictable offences." Obviously that could not happen when the appellant was removed from society and in prison. It is unthinkable that the primary judge was not conscious of that. And, as I have already pointed out, there was evidence upon which his Honour could reach the relevant satisfaction of mind.

128 The appellant also submitted that the appeal should be allowed because the primary judge's discretion miscarried. Such a submission has a high hurdle to leap. The principles propounded in *House v The King*[79] apply:

> "It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there had been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

129 The penalty of indefinite imprisonment, it must be accepted, is a very heavy one. Perhaps more material of greater cogency might usefully have been obtained and presented to the sentencing judge, but it cannot be assumed that such material would have helped the appellant. I am certainly not prepared to make such an assumption in the light of what was presented to the primary judge and the course of proceedings before him. The offences which give rise to these proceedings were serious. They may not have been, as the sentencing judge

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79 (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ.

observed, at the "higher end" of gravity. But that does not mean that the sentencing judge was not entitled to conclude that indefinite imprisonment was warranted. The nature of the previous offences (sexual offences all involving children), their number, and the social worker's report, containing as it did admissions by the appellant and his failure to respond to treatment, were sufficient foundation for the exercise of a discretion to impose indefinite imprisonment. In exercising that discretion, his Honour fell into no legal error.

130 Nor do I regard the fact that the Court of Criminal Appeal chose to reduce the nominal sentence imposed by the primary judge from 5 years to 3 years as meaning that everything that the trial judge did was infected by his error in imposing an excessive sentence. It does not follow, in my opinion, that because the Court of Criminal Appeal imposed a substituted sentence it was bound to alter (by eliminating) the sentence of indefinite imprisonment. The proceedings in the Court of Criminal Appeal in regard to the sentences were different. A convicted person must apply for leave to appeal against a finite term of imprisonment[80]; by contrast, he or she has an appeal as of right against an indefinite sentence[81]. This difference serves to show that the proceedings are separate, although, no doubt, the demonstration of error in relation to the former at least enlarges the possibility of error in relation to the latter. It does, however, no more than that in this case, in which I am satisfied that both the primary judge and the Court of Criminal Appeal carefully addressed the different statutory principles governing the indefinite sentencing regime.

131 Some point was sought to be made regarding the primary judge's reference to a "declaration". Nothing, in my opinion, turns on that. His Honour said:

> "I am finding some difficulty with this sentencing exercise simply because, I think, of the lack of clear parameters for a declaration under section 98 but at the end of the day I am persuaded to the balance of probabilities that such declaration ought to be made and I am going to make such a declaration that there will be a term of imprisonment of 5 years. It will date from 1 December. There will be no eligibility for parole.
>
> There will be 3 months on each of the other counts to be served concurrently but upon what is before me and upon this constant history of sex offending against younger females since 1991, on the evidence of the reports, on the evidence of the fact that previous detention has not operated to dissuade this offender I do come to the conclusion that he will

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80 *Criminal Code*, s 688(1a)(b).

81 *Criminal Code*, s 688(1a)(a).

> be a danger to part of society because of a clear risk that he will commit other indictable offences. So therefore I am making that declaration of indefinite imprisonment."

His Honour clearly had in mind the provisions of s 98 and the requirement that he decide whether he should make an order or not. I would take his Honour, by using the word "declaration", as saying no more than that he was declaring, or stating, or holding that there should be a sentence of indefinite imprisonment and ordering accordingly.

132 In my view, nothing turns on the fact that the primary judge and the majority in the Court of Criminal Appeal failed to identify the exact indictable offences which the appellant might well commit upon release. It is evident from the references of the trial judge to the appellant's "constant history of sex offending against younger females" and "the evidence of the reports" that his Honour found that the appellant would commit further indictable offences generally of the kind of which he had previously been convicted. This was of central importance to his Honour's decision that the appellant would be a danger to a part of society. Reference by Murray J in the Court of Criminal Appeal to "offences of a sexual kind against … children" also identified the kinds of offences which the appellant was likely to commit in the future. In the circumstances, these descriptions were sufficient. The range of the appellant's sexual misconduct was an extensive one, from voyeuristic and offensively exhibitionist behaviour towards young children to paedophilia involving penetration, committed, significantly, when he was on parole. The fact that it was easy to predict that the appellant would re-offend sexually, but not perhaps in which of the many ways he had already done so, made absolute precision of prediction impossible. The lack of greater specificity is thus not a valid foundation for criticism.

133 The appellant contended that the provisions of the Act authorising the imposition of indefinite imprisonment were invalid because they conferred powers on Western Australian courts that were incompatible with the role of those courts under the Constitution. The appellant relied on *Kable v Director of Public Prosecutions (NSW)*[82] for this argument, urging that features of the Western Australian indefinite sentencing regime were repugnant to, and incompatible with, the exercise of federal judicial power.

134 My conclusion on the primary arguments advanced by the appellant is a minority opinion. The other members of the Court found it unnecessary to deal with the constitutional argument. Nothing that I might say about it therefore could affect the outcome of the appeal. In those circumstances, I do not propose

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82 (1996) 189 CLR 51.

to make any comment about it except to say that, on the arguments presented, I would doubt that the continued detention of persistent and dangerous offenders and the protection of the society of a State are other than matters exclusively for the legislatures of the States to determine.