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Workshop B4: Dangerous and Persistent Offenders: Preventative Detention

Scottish experience: The Order for Lifelong Restriction¹

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Serious violent and sexual offending is, of course, not a new thing. What has changed in recent decades is society's expectation of action in response to such offending and indeed in anticipation of offending.

Where a serious violent or sexual crime is committed, blame is often cast on a system which may be said to have been aware of the danger posed by the perpetrator, but which did nothing about it. The public expects us to manage the known risks posed by violent offenders and do so effectively.

Today I would like to offer as a case study the development of Scottish practice over the last two years in light of recent legislative change, designed to ensure that we are now better placed to identify, assess and, I would suggest, ultimately deal with, the most dangerous criminals in our society. I will be examining these procedures essentially from the perspective of the public prosecutor.

Background

Following recommendations of two reviews led by senior Scottish judges, the Expert Panel on Sex Offending, led by Lady Cosgrove², and the Committee on Serious Violent and Sexual Offenders, chaired by Lord Maclean³ which drew heavily on experience in other jurisdictions, including Canada, in 2003 the Scottish Parliament passed the Criminal Justice (Scotland) Act 2003 ("the 2003 Act")⁴ which introduced new provisions for the sentencing and treatment of serious violent and sexual offenders who may present a continuing danger to the public. These provisions were only fully implemented in June 2006.

The 2003 Act created a new sentence for the supreme criminal court, the High Court of Justiciary (as a trial court), the Order for Lifelong Restriction (OLR), established the Risk Management Authority (RMA) and set out procedures for risk assessment, leading up to the making of an OLR. It also sets out requirements for the preparation, implementation and updating of Risk Management Plans for offenders who are the subject of OLRs.

As a form of life sentence, an Order for Lifelong Restriction can only be imposed by the High Court. It differs from a life sentence or a long determinate sentence, in particular because of

¹ This paper is based on a paper delivered to the annual conference of the Risk Management Authority (in Scotland) in June 2008

² Reducing the Risk - Improving the response to sex offending, June 2001

<http://www.scotland.gov.uk/Publications/2001/06/9284/File-1>

³ June 2000 SE/2000/68 <http://www.scotland.gov.uk/maclean/docs/svso-00.asp>

⁴ http://www.opsi.gov.uk/legislation/scotland/acts2003/asp_20030007_en_1

the crucial element of risk assessment which is undertaken prior to sentence being passed, but also because of the degree of supervision it allows after release. It is an option for dealing with violent, life-endangering and sexual offenders, and those who, in the informed opinion of the court, show a propensity to commit such offences.

The risk criteria in the 2003 Act justifying the making of an OLR are

*“that the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large.”*⁵

Persistence can, therefore, be an aspect of assessment of dangerousness.

The OLR represents a clear departure from the previous position, where the court was limited to considering the offence at hand in the context of previous convictions and limited background reports. There was no real facility to consider an offender’s proclivity towards certain types of offending behaviour. An individual may have displayed an increasingly worrying pattern of behaviour, but as a rule the courts were powerless to impose any kind of lifelong restriction as a means of addressing the identified risk posed by the perpetrator when released. The only limited exceptions were cases where the offence which was the subject of conviction justified a discretionary life sentence.

OLRs are an innovative and evolved addition to sentencing provisions. An application for a Risk Assessment Order, or RAO, which is the first step towards an OLR, can include details of previous convictions, previous acquittals, allegations made to police which were not reported to the public prosecutor and even intelligence information:

*“The assessor may, in preparing the risk assessment report, take into account not only any previous conviction of the convicted person but also any allegation that the person has engaged in criminal behaviour (whether or not that behaviour resulted in prosecution and acquittal)”*⁶

The Risk Management Authority

The Risk Management Authority (RMA) is a Non-Departmental Public Body established under the 2003 Act. Its purpose is to ensure the effective assessment, management and minimisation of risk of serious violent and sexual offenders. It serves as a national centre for expert advice on offender risk assessment and management. It serves the important function of accrediting assessors who prepare reports for the High Court when it is considering making an OLR; and it also approves Risk Management Plans (RMP) submitted by lead authorities - which are Scottish Ministers, while a prisoner is in custody, hospital managers, in appropriate cases and local authorities, when an offender is at liberty in the community.

⁵ Section 210E of the Criminal Procedure (Scotland) Act 1995, as inserted by Section 1 of the 2003 Act

⁶ Section 210C(1) of the Criminal Procedure (Scotland) Act 1995, as inserted by Section 1 of the 2003 Act

RMPs must be prepared within 9 months of the date of sentence and set out the measures to be taken for the minimisation of risk, and how these measures are to be co-ordinated.

The RMA's objectives also include compiling and keeping under review information on the provision of risk assessment and minimisation services in Scotland and research and development, as well as promoting effective practice in offender risk assessment and minimisation and delivering a comprehensive training programme to assist in the delivery of best practice throughout Scotland.

The role of the public prosecutor

The Crown has a key role in providing information which will enable OLRs to be considered by the Court. A tiered approach is adopted when identifying relevant and appropriate supporting information

This means, for example, that where the offender's previous convictions are sufficient to support an application for a RAO, information on previous acquittals will not be relied upon.

As prosecutors, we consider that it is right that this provision is used responsibly, with caution and only when necessary. Information relied upon as part of the risk assessment process may ultimately be tested in court and, for this reason, non-conviction information is relied upon only where it is vital to demonstrating the risk posed by the offender. Defence counsel have a duty to test information put before the court which could affect the accused. Reliance on untested, non-conviction, information brings into prospect the examination of those allegations in court with the potential for victims having to give evidence where they have reported allegations - perhaps some years before - and where these allegations may not have resulted in a conviction, or even a prosecution; and where victims might reasonably have considered the matter to be long since closed.

The Crown therefore strives to balance its responsibility to provide information which could protect the public with its duty to protect vulnerable witnesses, and all of the time while acting in the public interest and in the interests of justice.

In cases where non-conviction information is used, it can provide the court with information which is critical to protecting the public, and which would not have been available in the past, recognising that indicators of risk should not be disregarded simply because they did not result in prosecution or conviction.

Only when the offender's risk to public safety has been minimised to an acceptable level, and the independent Parole Board considers that he is otherwise suitable for release, will he enter the non-custodial part of his sentence (I use the male gender to describe such offenders, because the vast majority will be male). This means that, for the remainder of his life, he will be subject to risk assessment and must abide by conditions which are designed to minimise his risk to the public. If the level of risk rises to an unacceptable level, or he breaches the conditions of his release, he may be returned to custody. In this respect, OLR provisions are hugely innovative and differ significantly from life sentence conditions, since a life sentence in Scotland offers no element of ongoing risk assessment after release on licence and no facility to return the offender to prison simply because it is judged that he poses an unacceptable risk to others.

Process by which individuals are identified for OLR request

The role of the prosecutor in the risk assessment process is a new one. Traditionally in Scotland, prosecutors have had a very limited role following conviction and sentencing was a matter entirely for the court. OLR legislation has, therefore, seen the role of the prosecutor in sentencing evolve, recognising that the danger posed by dangerous violent and sexual offenders demands that known risk is identified and brought to the attention of the court.

As it is a sentence available only in the High Court, where a relatively small cases are indicted by the Crown, it is essential that prosecutors bear in mind, from the outset, whether an OLR is likely to be considered.

Since the introduction of the OLR provisions in 2006, the police have performed a crucial role in identifying offenders who should be considered for risk assessment in the event of conviction. The police are ideally placed to know offenders in a way which prosecutors cannot; the development of increasingly sophisticated intelligence systems and the development by the police of an experience in identifying risk means they are best placed to identify cases suitable for risk assessment orders. However, prosecutors also know that their knowledge of a particular offender is always developing and must be alert to the emerging indicators of risk - and not only those which have manifested themselves in the offender's past. And it is for that reason that the role of the prosecutor in identifying cases appropriate for the consideration of an OLR is equally important - a role which I hope prosecutors are growing into as they become increasingly experienced.

Where the Crown decides that a Risk Assessment Order should be sought in the event of conviction, the local prosecutor, the Procurator Fiscal, will work with the Senior Investigating Police Officer to determine what information should be included in support of the application.

The Crown will tender the RAO application to the court at conviction stage. The legislation stipulates that the accused must be notified in advance if an RAO will be applied for, and notice of this is usually served on him with the indictment. The rigorous procedures put in place by the legislation, the RMA's Standards and Guidelines and the Crown's own policy all seek to ensure that the process is carried out with consistency and integrity.

If the court grants the Crown's request for an RAO, or makes an order of its own volition, the Clerk of Court will identify and instruct an appropriate accredited assessor from the list provided by the Risk Management Authority and the case will be adjourned for a period of initially up to ninety days for the appointed assessor to complete the Risk Assessment Report. The risk assessment process should be carried out strictly in accordance with guidelines set out by the RMA.

Effective information sharing is at the heart of ensuring that the court has all the relevant facts at its disposal in deciding whether to impose an OLR. So far, the Prosecution Service and the Risk Management Authority have worked commendably well together in making this happen. Risk Assessment Orders are relatively new, and, as prosecutors, we are keen to build on the already excellent relationship we have with the RMA to ensure that we provide to those tasked with assessing risk the information that is essential to constructing a picture of the risk an offender poses to society. But in doing this we also have a duty to protect the details of vulnerable witnesses, and we must always balance our various responsibilities to

ensure that we are acting in the public interest. We are dedicated to helping develop the procedures by which we share information and to ensuring that we assist assessors constructively in the compiling of their reports.

The framework we have put in place seeks to ensure that the process of risk assessment is fair and thorough and that it is based on reliable information, while providing enough of an insight into the accused's offending behaviour for the court to obtain a true picture of the risk he poses to public safety, and to give consideration to minimising this risk for the remainder of his life.

As we continue to deal with potential OLR cases, we are constantly learning from them and seeking to work with the RMA to enhance the procedures through which information is shared.

Outcomes

In the two years since OLRs became an available sentencing option, Risk Assessment Orders have been requested in some 18 cases. While the assessments are still pending in a number of these cases, six of the eight cases in which the court has had the opportunity to consider a Risk Assessment Report have resulted in an Order for Lifelong Restriction being imposed.

The Crown should only request an RAO where the relevant statutory criteria for an OLR are met and the modest results so far show that in the majority of cases where an RAO has been requested, the court has concluded that an OLR is appropriate.

Experience to date shows that the OLR has been regarded as an important addition to the available sentencing options for High Court Judges.

A significant number of those who had an OLR imposed on them following a violent offence have also had a history of sexual offending behaviour, and *vice versa*, demonstrating the worth of the OLR and the common link between violent and sexual crime

I would like to reflect briefly on the circumstances of a couple of individual cases which illustrate the merit of OLR provisions, in that their outcomes would have differed significantly if OLR legislation had not been in place.

On 5 July 2006, less than a month after OLR provisions came into force, an Inverness man, Colin Ross, brutally attacked an American teacher, Marty Layman-Mendonca, while she walked the Great Glen Way on a visit to Scotland. She was beaten with an iron bar and a boulder, robbed, and left for dead. The attack left her in a coma, with little prospect of recovery. Northern Constabulary arrested Colin Ross and he eventually pled guilty to attempting to murder Ms Layman-Mendonca. While Ross was awaiting sentence, his victim sadly died in hospital.

The circumstances of the offence were both distressing and disturbing – Ross had planned to attack someone that day and had lain in wait for his victim. Marty Layman-Mendonca had the terrible misfortune of being in the wrong place at the wrong time.

In the absence of an OLR option, the court in this case could have opted to impose either a discretionary life sentence or a determinate sentence. Ross had two significant previous

convictions – one for a very worrying breach of the peace and the other for an assault on a tourist. If the court had imposed a discretionary life sentence, this may have been appealable on the basis that his previous convictions were not sufficiently analogous. But, in any event, when he was eventually deemed suitable for release by the parole board, he could only have been recalled to prison for breaching the terms of his licence or committing another offence. If he had been given a determinate sentence, he would have been entitled to some form of early release, and on expiry of his licence, there would have been no facility to recall him to prison.

The value of the OLR is manifestly demonstrated by the actual outcome of this case. In 2006, Colin Ross became the first person in Scotland to be the subject of an OLR. He was ordered by the judge to spend a minimum of 20 years in prison, and following this period, if he is ever deemed suitable for release, he will be subject to a Risk Management Plan for the remainder of his life. This means that if his risk to the public is deemed to have risen to an unacceptable level or he breaches the conditions of his release, he may be recalled to custody.

A further point worth noting is that police were so concerned by Colin Ross's behaviour that six days before his ultimately fatal attack on Marty Layman-Mendonca, they obtained a Sexual Offences Protection Order against him – a civil court order which was designed to prevent him from approaching women or wearing a balaclava. This was highly significant, as it served to identify Ross as a risk to the public, even though he had no previous convictions for sexual offences. What happened six days later illustrated how the police had correctly identified the risk he posed and had taken action to mitigate it, but it also demonstrated the limitations of the options available to them. If Colin Ross is ever released under the terms of the OLR, there will be a provision to return him to prison if his behaviour gives significant cause for concern.

A second case which illustrates the significance of the OLR is that of Darren Cornelius, the latest person in Scotland to have been given an OLR, following his conviction for an unprovoked knife attack on a complete stranger which left his victim severely injured and permanently disfigured. It emerged that Cornelius had been tried at the age of 15 for sex attacks against two girls, but the case against him had collapsed due to insufficient evidence.

Under normal criminal procedure a court in Scotland cannot consider information about previous acquittals, but the OLR provisions allow information such as this to be included in the risk assessment report. The information that the court is able to consider prior to imposing an OLR is significantly different from the information available to it in handing down any other sentence. While the court would undoubtedly have treated Cornelius's case with utmost severity given the very serious nature of the offence, under normal sentencing procedure it would have been limited to considering Cornelius's analogous previous convictions, and would not have been able to take into account the full extent of his alleged offending background – thus the true risk of his further offending would not have been reflected.

Conclusion

As we strive to meet the legitimate expectation of the public that we will address identified risk appropriately and proportionately, we must continue to look critically at how we use the powers we have been given. We should not assume that the approach we have developed cannot be improved upon. Neither must we lose sight of the fact that, however we

assess and manage the threats posed by dangerous individuals, we could not have prevented some of the horrific offences of the recent past.

The OLR was not designed to - and cannot - eradicate the risk of violent offending altogether, but we have worked with criminal justice partners to provide a response to those individuals who display a pattern of or propensity towards certain types of serious offending behaviour, so that they can be effectively monitored and managed to minimise their risk to society at large.

Over the past two years, the police, the prosecution service and the RMA have enjoyed a constructive relationship and have worked together to help protect the public from the risks posed by serious violent and sexual offenders.

Recent experience shows the OLR to be an appropriate sentencing option. But I also hope that the provisions have begun to provide reassurance to the public, who rightly expect to be protected from the conduct of dangerous individuals.

As professionals we have made a great deal of progress over the past few years. The creation of the RMA and the profile it has established for itself and maintained in recent years are considerable achievements. The risk assessment orders carried out by its accredited assessors have been thorough and have had the effect of informing and, I hope, appropriately influencing, judicial decisions. The police and the Crown Office and Procurator Fiscal Service have adapted well to the welcome change in culture by which better information sharing is now the norm, and it seems that judges have been quick to utilise this new sentencing option.

Clearly the task is not complete – I cannot imagine at such an early stage in the history of the OLR that there is not more we can achieve; and I am sure we can continue to learn from experience and practice in other jurisdictions.

Given that OLRs have only been available as a sentencing option for two years, all those who have been subject to an OLR are still within the custodial element of their sentences, and will only be released when and if it is deemed that the risk that they pose to the public is at an acceptable level. The next phase of the process will be to see how Risk Management Plans work in practice as and when the first offenders subject to OLRs are released from prison. The expectation that their risk will be managed effectively is high, and rightly so.

However, I believe that, with an ever improving understanding of the concept of risk, continually developing resources to help assess and manage risk and a working environment which trains its professionals in the latest risk management techniques, there is a sound framework within which those who are subject to OLRs can be monitored and managed within the community, in the event of their eventual release.

While attacks involving extreme violence on strangers are rare, it has been amply demonstrated that anyone can become the victim of a violent offender. The work of risk assessment and management of violent criminals is therefore crucial to making society safer.