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HABITUAL CRIMINALS AND THE INDETERMINATE SENTENCE

I. Introduction

The expression "indeterminate sentence" has led to considerable confusion in comparative criminology because the words have been interpreted differently. Many writers, particularly in the United States of America, distinguish between an indeterminate sentence and an indefinite sentence¹. In the case of the former, there is no limitation on the power of administrative authorities to decide the length of the sentence, whilst in the case of the latter, there is a statutory or judicial maximum or minimum. Other writers distinguish between sentences which are absolutely indeterminate and those which are relatively indeterminate². In recent years, the confusion has been aggravated by a tendency to extend the use of the word "indeterminate" to include sentences imposed in jurisdictions where conditional release by administrative agencies is permitted, although a fixed term has been imposed by statute or by the sentencing court. In this article, the expressions "absolute indeterminacy" and "relative indeterminacy" are used where the extent of administrative power is relevant to the length of the sentence but both expressions imply that no sentence has been fixed either by statute or judicially.

It has been claimed that Alexander Maconochie, with his system of progressive classification in the penal settlement at Norfolk Island was the originator of the whole movement leading to the indeterminate sentence³. Classification was based on the earning of marks and as Maconochie expressed it, the purpose was "to place the prisoner's fate in his own hands, to give him a form of wages, to impose on him a form of pecuniary fine for his prison offences, to make him feel the burden and obligation of his own maintenance and to train him, while yet in bondage, to those habits of prudent accumulation which after discharge would best preserve him from again falling"⁴. Whilst Maconochie's biographer, Sir John Barry, does not dispute this claim, he adds a corollary: Maconochie would have been startled by some of the modern developments, particularly the arbitrary powers

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1. N. Morris: *The Habitual Criminal* (1951) at 21.
2. This distinction corresponds with the distinction otherwise made between "indeterminate" and "indefinite" sentences.
3. United Nations Monograph: *The Indeterminate Sentence* (1954) at 12.
4. Cited by E. Lindsey: "Historical Sketch of the Indeterminate Sentence and Parole System" (1925) 16 *Journal of the American Institute of Criminal Law and Criminology* at 12. A proposal has recently been made for the introduction of a system of "self-determinate sentences" which is similar to Maconochie's concept. See Kathleen J. Smith: *A Cure for Crime* (1965).

entrusted to administrative tribunals such as Adult and Youth Authorities and Parole Boards⁵.

Another influential advocate for the indeterminate sentence was Richard Whately, Archbishop of Dublin. Apparently it is unknown whether Archbishop Whately was familiar with the recommendations made by Maconochie⁶ but their reasons for favouring the sentence seem to have been similar. Both believed firmly in the notion of free will and in the doctrine of moral responsibility.

However, the appeal of the indeterminate sentence was not confined to those who saw it as a vehicle for manipulating the individual's purpose. Paradoxically, it appealed also to the positivists of the early twentieth century who denied the existence of free will. Enrico Ferri caught the mood of the extreme positivists in his "law of criminal saturation" when he said: "Just as in a given volume of water, at a given temperature, we find the solution of a fixed quantity of any chemical substance, not an atom more or less, so in a given social environment, in certain defined physical conditions of the individual, we find the commission of a fixed number of crimes"⁷. Consciousness of personal choice, according to Ferri, is mere subjective illusion and for the absolute determinist, it follows that there can be no such thing as moral responsibility. However, society must protect itself and therefore every individual has legal responsibilities. The extent of the social dangerousness of the individual cannot be ascertained in advance and for this reason, indeterminate sentences are a necessity⁸.

The impact of positivism has by no means been uniform throughout the world. In Anglo-American countries, it has been relatively insignificant. It has been strongest in Italy and South America, where the influence of Ferri was undoubtedly a powerful factor. In France, Germany, Spain and the rest of Europe, the impact has been weaker although there have been increased tendencies to deny the existence of free will, moral responsibility and just retribution, in Denmark and Sweden during the last thirty-five years. These tendencies Mannheim attributes largely to the influence of a prominent Swedish psychiatrist, Olof Kinberg⁹.

II. The English position

In England, positivism in the field of criminology did not meet with much success although Havelock Ellis tried to popularise the works of Lombroso. Certainly there were movements to introduce indeterminacy for habitual criminals and a strong recommendation is to be found in the Report of the

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5. J. V. Barry: "Alexander Maconochie", from H. Mannheim Ed., *Pioneers in Criminology* (1960) at 87.
 6. E. Lindsey: "Historical Sketch of the Indeterminate Sentence" (*Supra* n.4) at 12.
 7. Quoted by H. Mannheim: Introduction to *Pioneers in Criminology* (1960) at 16.
 8. Lombroso considered that the indeterminate sentence was appropriate for all but the irreformable. For them the use of the death penalty "should remain suspended, like the sword of Damocles"; M. E. Wolfgang: "Cesare Lombroso", from H. Mannheim Ed., *Pioneers in Criminology* (1960) at 215.
 9. H. Mannheim: *Pioneers in Criminology* (1960) at 22.

Committee on Prisons in 1894 under the chairmanship of Mr. Herbert Gladstone¹⁰. However, the proposal bore little fruit until 1908 when Gladstone, who was then Home Secretary, introduced the Prevention of Crime Bill which provided that a court should have power, on the finding of a jury, to sentence an habitual criminal to preventive detention. Two provisions of the Bill gave rise to particular controversy. First, it was contended that preventive detainees should not be committed to prison "during His Majesty's pleasure" i.e. without the safeguard of a maximum term, and secondly, there was fierce opposition to the proposal that the measure should be exclusively "dual-track"¹¹. The Home Secretary was prepared to compromise on the first point and instead of the sentence being during His Majesty's pleasure, the court was given authority to sentence a preventive detainee for a maximum of ten years and a minimum of five years. On the second point, however, the Government took a firm stand. The Home Secretary argued that if the judge had the discretion to sentence the offender according to the single *or* the dual-track system it would be impossible that discipline during the actual period of preventive detention could be relaxed. On the contrary, it would have to be levelled up to that of ordinary prisons. Thus the whole system of preventive detention in England rested upon two basic concepts, first, that the sentencing court should set the term to be served, within statutory limits, and secondly, that preventive detention should be served under conditions of greater leniency than other prison sentences¹². Preventive detention continued to be exclusively dual-track until 1949 when the Criminal Justice Act 1948 came into operation.

It appears that in practice, the Prevention of Crime Act 1908 was invoked rarely and by 1932, the Persistent Offenders Committee reported that it had become a dead letter¹³. The Committee's terms of reference were not confined to preventive detainees but extended to all persistent offenders, the hallmark of whom were repeated prison sentences. As a result of its investigations, the Committee reached the conclusion that there was need for some type of sentence between preventive detention and ordinary terms of imprisonment and recommended the innovation of corrective training for certain persistent offenders. It was not until 1948 that this recommendation was implemented by Section 21(1) of the Criminal Justice Act, which provided:—

"Where a person who is not less than twenty-one years of age—

(a) is convicted on indictment of an offence punishable with imprisonment for a term of two years or more; and

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10. N. Morris: *The Habitual Criminal* (1951) at 34.
 11. The expression "dual-track" means that an habitual criminal shall be sentenced first for the actual offence for which the court has convicted him and then to preventive detention, which is a security measure. By contrast, a "single-track" system is one in which the habitual criminal is sentenced immediately to preventive detention in respect of his present offence and as a security measure.
 12. Within the terminology used in this article, preventive detention was neither absolutely nor relatively indeterminate. The only element of indeterminacy existed in the sense that the offender's progression through the stages depended on administrative decision and he did not know whether he would be eligible for release after serving two-thirds or five-sixths of his sentence.
 13. Cited by the Advisory Council on the Treatment of Offenders: *Preventive Detention* (1963) para. 9. See also Report of Home Office Research Unit: *Persistent Criminals* (1963).

- (b) has been convicted on at least two previous occasions since he with such a sentence,

then, if the court is satisfied that it is expedient with a view to his reformation and the prevention of crime that he should receive training of a corrective character for a substantial time, followed by a period of supervision if released before the expiration of his sentence, the court may pass, in lieu of any other sentence, a sentence of corrective training for such term of not less than two nor more than four years as the court may determine."

The Committee's proposals relating to preventive detention were also accepted and Section 21(2) of the Criminal Justice Act 1968 provided:—

"Where a person who is not less than thirty years of age—

- (a) is convicted on indictment of an offence punishable with imprisonment for a term of two years or more; and
- (b) has been convicted on indictment on at least three previous occasions since he attained the age of seventeen of offences punishable on indictment with such a sentence, and was on at least two of those occasions sentenced to Borstal training, imprisonment or corrective training;

then, if the court is satisfied that it is expedient for the protection of the public that he should be detained in custody for a substantial time, followed by a period of supervision if released before the expiration of his sentence, the court may pass in lieu of any other sentence, a sentence of preventive detention for such term of not less than five nor more than fourteen years as the court may determine."

There were certain notable features about these provisions. First, before a court could sentence an offender to corrective training, it had to be satisfied such sentence was expedient "with a view to (the offender's) reformation and the prevention of crime", while in the case of preventive detention, it was only required that the court should be satisfied it was expedient "for the protection of the public." Secondly, the system was changed from being exclusively dual-track to being exclusively single-track. Thirdly, the maximum term for preventive detention was increased from ten years to fourteen years.

The Prison Rules 1949 included thirteen special provisions which were applicable to preventive detainees. There were three stages in which the sentence should be served and progression from one stage to the next was dependent upon good conduct and industry, subject to the qualification that no offender should serve more than two years in the first stage in which ordinary conditions of imprisonment prevailed. In the second stage, concessions were allowed in recognition of the fact that the sentence was a security measure rather than one which was appropriate to the last offence. However, with the passing of time, and the general improvement of conditions within prisons, these concessions became little more than nominal¹⁴.

14. Advisory Council on the Treatment of Offenders: *Preventive Detention* (1963) para. 29.

Progression to the third stage entitled the offender to serve the remainder of his sentence in conditions of modified security and if he had already served two-thirds of it, he was eligible for release on licence. The criterion used by the administrative board in determining whether an offender should be admitted to the third stage was whether there was a reasonable probability he would not return to a criminal life. According to the Advisory Council on the Treatment of Offenders, this gave rise to much subjective speculation¹⁵. In practice, about thirty-three per cent of the preventive detainees did not gain promotion to the third stage, in which case they were not eligible for release on licence until they had served five-sixths of their sentences. From the statistical evidence before the Council it was clear that the great majority of preventive detainees were sentenced for terms of seven or eight years and most of them were nearer the age of forty rather than thirty, following a practice direction given by the Lord Chief Justice¹⁶. Research indicated that most preventive detainees had been convicted of crimes against property and in about thirty-five per cent of the cases in 1956, the value of the property did not exceed £10. Those convicted of crimes involving violence against a person, sexual offences and robbery did not, when added together, account for more than ten per cent of those committed to preventive detention in any one year. Thus it was clear that it was the petty persistent offenders, rather than those convicted of serious crimes who formed the bulk of the preventive detainees¹⁷.

The Council examined carefully the views of those witnesses who favoured retaining preventive detention, among whom were most of those who had experience of sentencing in superior courts, and the Commissioner of Metropolitan Police. The majority of the members of the Prison Service and administrative authorities responsible for promotion of preventive detainees between the stages, were critical of the existing sentence but favoured some form of preventive detention for older offenders.

The Council found that one of the particular difficulties in administration arose from the unduly rigid and largely artificial distinction between preventive detainees and other persistent offenders¹⁸. The infrequent use of the sanction weakened its general deterrent value and with regard to special deterrence, there was found to be no significant difference between those who had served preventive detention and those who had not¹⁹. Further, there was little difference between those who had been released after serving two-thirds of their sentences and those who served five-sixths²⁰. The Council concluded that there was no evidence that the abolition of preventive deten-

15. *Id.*, para. 32.

16. "It must be borne in mind that a prisoner after (preventive detention) is likely to have become institutionalised and his chances of rehabilitation seriously diminished. Such a sentence should in general therefore only be given . . . to those nearing forty years of age or over." Cited by the Advisory Council on the Treatment of Offenders: *Preventive Detention* (1963) para. 15.

17. See also D. J. West: *The Habitual Prisoner* (1963).

18. Report of the Advisory Council on the Treatment of Offenders, para. 61:—"The more the courts are deterred from using (the sentence) the greater the resentment that will be aroused in the few cases where it is used."

19. *Id.*, para. 54.

20. *Id.*, para. 37.

tion would leave society worse protected than it was already and recommended that the existing provisions for it should be repealed. Instead, the Council recommended that courts should be empowered to pass sentences of up to ten years' imprisonment on all persistent offenders convicted of offences punishable with terms of five years or more²¹. Recommendations were also made for more extensive and thorough after-care²².

It was not until the Criminal Justice Act 1967 came into operation that effect was given to the proposals of the Council. Section 37(1) abolishes both preventive detention and corrective training. Instead, under Sub-section(3), courts may impose extended terms of imprisonment of up to five years if the maximum otherwise permitted is less than five years, or up to ten years if the maximum otherwise permitted is more than five years but less than ten years. However, there are stringent pre-requisites which must be satisfied before an extended term may be imposed. First, the offender must have been convicted on indictment of an offence punishable with imprisonment for a term of two years or more. Secondly, the court must be satisfied "by reason of (the offender's) previous conduct and of the likelihood of his committing further offences that it is expedient to protect the public from him for a substantial time"²³. Thirdly, the conditions specified in Section 37(4) must be satisfied, and these are as follows:—

"(4)

- (a) the offence was committed before the expiration of three years from a previous conviction of an offence punishable on indictment with imprisonment for a term of two years or more or from his final release from prison after serving a sentence of imprisonment, corrective training or preventive detention passed on such a conviction; and
- (b) the offender has been convicted on indictment on at least three previous occasions since he attained the age of twenty-one of offences punishable on indictment with imprisonment for a term of two years or more; and
- (c) the total length of the sentences of imprisonment, corrective training or preventive detention to which he was sentenced on those occasions was not less than five years and—
 - (i) on at least one of those occasions a sentence of preventive detention was passed on him; or
 - (ii) on at least two of those occasions a sentence of imprisonment (other than a suspended sentence which has not taken effect) or of corrective training was so passed and of those sentences one was a sentence of imprisonment for a term of three years or more in respect of one offence or two were sentences of imprisonment each for a term of two years or more in respect of one offence."

21. *Id.*, para. 63.

22. *Id.*, para. 75.

23. Criminal Justice Act 1967 s.37(2) (Eng.).

By enacting Section 37, the English Parliament has indicated an intention that extended terms should be used only for recalcitrant offenders who have already served substantial prison sentences rather than for those who have served many short terms. Unlike the Criminal Justice Act 1948, the new Act contains no direct restriction as to the minimum age of the offender but the combined effect of sub-sections 4(b) and 4(c) makes it improbable that an extended sentence will be imposed on anyone under the age of twenty-six²⁴. Perhaps the most notable feature of the new Act is the disappearance of the slight element of indeterminacy which existed under the earlier provisions, in so far as offenders committed to preventive detention did not know whether they would be released after they had served two-thirds or five-sixth of their sentences. The Criminal Justice Act 1967 has also abolished the necessity for offenders to work their way to release through progressive stages.

An obvious question which arises out of the wording of Section 37 is this: what does "extended" mean? In the very recent decision of *D.P.P. v. Ottewell*²⁵, the unfortunate interpretation by the Court of Appeal of the word "extended" has been rejected by the House of Lords. In that case, the trial judge had sentenced the offender to two years' imprisonment on each of two counts of assault occasioning actual bodily harm, such terms to be served consecutively. He had purported to pass the sentence under Section 37(2), although two years' imprisonment was below the maximum term which he could have imposed on each of the two counts. It is clear that the trial judge took this course of action in order that the Secretary of State, on the recommendation of the Parole Board, would be able to ensure the supervision of the offender under Section 60 until the full term of four years had expired. This discretion would not be conferred on the Secretary of State in respect of prisoners serving ordinary sentences. However, the Court of Appeal held that Sub-section (2) could only be invoked if the maximum term for the particular offence had been exceeded. Ashworth, J., delivering the judgment of the Court of Appeal, said: "In the view of this court the object of Sub-section (3) was not to confer an option on the sentencing court either to exceed the authorised maximum or not. The object was to set limits to the extent to which an extended term might exceed the authorised maximum." In taking this view, the Court of Appeal rejected the argument that the expression "extended term" did not necessarily imply that the maximum for the offence had to be exceeded.

On appeal to the House of Lords, Lord Reid, delivering the leading opinion, considered there are three possible interpretations of the word "extended" in Section 37, first, extended beyond the term which the judge would have imposed if Section 37(2) had not been enacted; secondly, extended by virtue of the provisions of Section 37(3) beyond the maximum otherwise authorised by law, and thirdly, extended beyond the normal

24. It appears that an offender of less than 26 could receive an extended sentence if he had, since he was 21, received sentences which were not less than five years, but he had been released on licence.

25. [1968] 3 All E.R. 153, reversing the decision of the Court of Appeal, Criminal Division (sub nom. *R. v. Ottewell* [1968] 2 All E.R. 593). For comment on the decision of the Court of Appeal, see [1968] Crim.L.R. 453.

sentence for that type of crime. The last interpretation, he rejected without hesitation on the ground that there cannot and should not be a "normal" sentence for offences of a particular kind because of the wide scope for variation within the broad categories. He noted that the Court of Appeal had adopted the second possible interpretation on the ground that courts already had power, in the interests of public protection, to sentence an offender to a longer term than they would have imposed otherwise. However, Lord Reid took the view that such power was severely limited²⁶ and he considered that Section 37(2) is designed to remove the limitation and to authorise an extended term "not as a punishment for the last offence nor as additional punishment for previous offences, but for the purpose stated in the section i.e., the protection of the public from the persistent offender for a substantial time." Accordingly, he concluded that the new power essentially is flexible and is not intended to be restricted to cases in which the statutory maximum is exceeded.

III. The Australian position

It appears that New South Wales' Habitual Criminals Act 1905 was the legislative progenitor of similar provisions in each of the other Australian States and New Zealand²⁷. However, since 1905, there have been extensive legislative changes, particularly in New South Wales and Victoria and it is proposed to analyse the provisions of each State individually²⁸. Particular attention is paid to the conditions under which the respective Acts may be invoked and the extent of the authority conferred upon administrative bodies.

1. New South Wales

The present provisions relating to habitual criminals are contained in the Habitual Criminals Act 1957. Unlike the earlier legislation, the 1957 Act does not classify offenders according to the types of offence they have committed; rather it looks to the number and length of previous terms of imprisonment. Under Section 4, an offender of at least twenty-five years may be declared an habitual criminal if he has been convicted on indictment, or summarily of an indictable offence by a stipendiary magistrate, and has served at least two separate previous terms of imprisonment for indictable offences, provided the judge is satisfied it is expedient to detain him in prison for a substantial time, with a view to his reformation or to the prevention of crime. The section may be invoked at the discretion of the

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26. Lord Donovan agreed with Ashworth, J., that judges have always felt entitled to deal with a persistent offender by increasing the sentence which they would have passed if he were not. However, he considered that Section 37 was enacted to enable a judge, in the interests of public protection, to ensure the availability of supervision of the offender after discharge from prison. Therefore he found it incongruous that a sentence exceeding the statutory maximum should have to be passed to procure that effect. It is respectfully submitted that this view is correct.
27. See Habitual Criminals Act 1907 (S.A.); Indeterminate Sentences Act 1908 (Vic.); Criminal Code 1913 (W.A.); Indeterminate Sentences Act 1921 (Tas.); Criminal Code 1899 (as amended) (Qld.); Crimes Act 1908 (N.Z.).
28. A similar task was undertaken by Professor Morris in *The Habitual Criminal* (1951). Even since then, there have been substantial statutory changes and for that reason, a less detailed analysis is attempted here.

sentencing judge, or if the conviction has been summary, upon the discretion of a judge acting on the application of the stipendiary magistrate before whom the offender was convicted. However, before a declaration is made, it is mandatory that a report is obtained from the Adult Probation Service²⁹.

Upon making a declaration the judge must sentence the offender for a term of not less than five nor more than fourteen years³⁰ and release on licence may be authorised after at least two-thirds of the sentence has expired if the State Governor is satisfied that the offender's conduct and attitude merit such release. Apparently there is no restriction as to the minimum term to be served if the Governor determines for other good cause that the offender should be released on licence³¹. In practice, the Governor acts on the recommendation of the Parole Board which consists of a judge, and four other members at least one of whom must be a woman. The New South Wales' system is dual-track, but is subject to the provisions of Section 6(2) of the Habitual Criminals Act 1957 which stipulates that any prison term being served at the time of declaration must be served concurrently with the term imposed in respect of such declaration. In these circumstances, the offender may not be released on licence until the expiration of the term he was serving when the declaration was made.

Release on licence continues for such time and on such conditions as the Governor prescribes, subject to the restriction that the term of the licence cannot continue after the expiration of the term of imprisonment imposed by the judge who made the declaration³². During the currency of the licence, the offender must report to the Adult Probation and Parole Service. If an offender, during the currency of his licence, commits a breach of the terms of it, or a summary offence punishable by imprisonment for more than three months, or an indictable offence, he may be sentenced to a further term of imprisonment of up to fourteen years³³.

Since the 1957 Act came into operation, no separate statistics relating to habitual criminals have been included in the Annual Report of the Comptroller of Prisons. However, it appears that the following declarations have been made during the years 1963-1966³⁴:

1963	.....	.....	21
1964	.....	.....	13
1965	.....	.....	12
1966	.....	.....	11

At the end of 1966, there were eighty offenders in New South Wales' prisons who had been declared habitual criminals, seventy-three of whom had been declared following convictions for crimes against property and seven of whom had been declared after committing crimes against the person. Of the eighty offenders, all but six could have been sentenced to longer

29. Habitual Criminals Act 1957 s.9 (N.S.W.).

30. Habitual Criminals Act 1957 s.6(1) (N.S.W.).

31. Habitual Criminals Act 1957 s.7(1), (2)(a) (N.S.W.).

32. Habitual Criminals Act 1957 s.7(2) (c) (N.S.W.).

33. Habitual Criminals Act 1957 s.8 (N.S.W.).

34. *Per* letter from the N.S.W. Comptroller of Prisons, dated 15th January, 1968.

terms of imprisonment without reference to the Habitual Criminals Act 1957³⁵.

Clearly the New South Wales' legislation was modelled on the English Criminal Justice Act 1948, for the pre-requisites for declaring the habitual criminal are a kind of compromise between those referable to corrective trainees and those referable to preventive detainees. The age restriction in New South Wales is twenty-five, compared with twenty-one for corrective trainees and thirty for preventive detainees. The test of expediency in New South Wales is whether the declaration is required "with a view to (the offender's) reformation or the prevention of crime" which is similar to the test for corrective trainees. Again, the number of previous terms of imprisonment is the same in New South Wales as it was for corrective trainees. On the other hand, the statutory limits within which the judge may sentence an habitual criminal are the same as those for preventive detainees.

2. Victoria

Indeterminate sentencing in the State of Victoria was first possible under the Indeterminate Sentences Act 1908 and until 1958 it was of such wide application that it was difficult to distinguish clearly those provisions which related to habitual criminals³⁶. The relevant provisions are now contained in Section 537 of the Crimes Act 1958 which, like the New South Wales' legislation, bears marked resemblance to the English Criminal Justice Act 1948. In Victoria, the relevant sentence is described as preventive detention and the court must be satisfied it is expedient "for the protection of the public or for any other reason" that the offender be detained in prison for a substantial time. There is an age restriction of twenty-five and the offender must have been convicted by the Supreme Court or any court of general sessions of an offence punishable with imprisonment for a term of two years or more. There must also have been two previous convictions since the offender was seventeen, by the Supreme Court or a court of general sessions for offences punishable with imprisonment for two years or more. The Victorian system is exclusively single-track. There is a statutory maximum of ten years and the sentencing judge is required to fix a minimum term during which parole shall not be granted³⁷. The section may be invoked at the discretion of a judge of the Supreme Court or a court of general sessions. A preventive detainee may be released on parole under Section 538 of the Crimes Act 1958 in the same way as an ordinary prisoner. Parole is available at the discretion of the Parole Board at any time after the expiration of the minimum term fixed by the court. The offender is released under the supervision of a parole officer and the supervision continues until

35. *Id.* One particular criticism was offered by the Comptroller concerning the use of the Act: during 1966, it was estimated that the terms of the Act could have been invoked against at least 250 offenders, yet only 11 declarations were made. Such erratic sentencing was thought to be prejudicial both to the deterrent and reformative purposes of the Act.

36. N. Morris: *Op cit.*, *supra* n.1. at 99. This type of legislation still exists in Tasmania and Western Australia.

37. The requirement that the sentencing judge shall fix a minimum term during which the parole shall not be granted, is, of course, a common feature of the Crimes Act 1958 (Vic.).

the date when the offender would have been released from prison if he had not been granted parole. The Parole Board for male prisoners consists of a judge, the Director-General of Social Welfare and three male civilians. For female prisoners, the constitution of the Board is similar except that there are three female civilians instead of the male civilians. Parole must be cancelled if an offender commits an offence punishable with imprisonment during its currency³⁸. Also, the Board has discretion conferred on it in other cases, to cancel parole under Section 540(1) of the Crimes Act 1958. Presumably this Sub-section is intended to cover cases where there is merely breach of the terms of the parole order or an offence is committed which is not punishable by imprisonment. Upon cancellation of parole, the Board may authorise the apprehension and the return of the offender to prison, where he will serve the unexpired residue of his term of imprisonment, without allowance being made for the period between his release and subsequent return³⁹.

It is understood that Section 537 of the Crimes Act 1958 has only been invoked once since the Act came into operation and it is regarded in Victoria as a dead letter⁴⁰. It seems likely that this situation has arisen because courts are able to impose long terms of imprisonment without recourse to preventive detention.

3. Queensland

Queensland was the last of the Australian States to adopt habitual criminals' legislation, the first provision for it being contained in the Criminal Law Amendment Act 1914, which amended the Criminal Code 1899. A further amendment was made by the Criminal Law Amendment Act 1945. The provisions are complex and are based on the number of prior convictions received for similar offences.

Section 659A of the Criminal Code 1899 provides that the following classes of offenders may be declared habitual criminals:—

- (1) those convicted on indictment of certain offences against morality who have been previously so convicted on indictment on at least *two* occasions for similar offences;
- (2) those convicted on indictment of any one of certain offences relating to the coin, of endangering life or health, of stealing or some like offences, or of serious injuries to property, or of forging or of some similar offences, and who have on *three* previous occasions been convicted on indictment of three previous offences falling within the above widely defined group;
- (3) those twice previously convicted on indictment of offences falling within the group referred to in (2) above and who are convicted summarily of an offence punishable by imprisonment for not less than three months and who have been convicted summarily on *two*

38. Crimes Act 1958 s.540(2) (Vic.).

39. Crimes Act 1958 s.540(3)(4) (Vic.).

40. *Per* letter from the Victorian Director of Prisons, dated 12th January 1968.

- previous occasions at least of offences punishable by imprisonment for not less than three months;
- (4) those convicted of an offence under The Vagrants Acts 1851-1863 who have been previously convicted on at least *four* occasions of any offence mentioned in those Acts;
 - (5) those convicted summarily of an aggravated assault (under Section 344) of a sexual nature, on a child under the age of fourteen years, who have *twice* previously been convicted of such assaults;
 - (6) notwithstanding that wilful exposure of the person in a public place is an offence under The Vagrants Acts referred to in (4) above, any offender so convicted who has *twice* previously been convicted of this offence may be declared an habitual criminal⁴¹.

The Queensland system is exclusively dual-track⁴². Usually the discretion to make a declaration resides in the sentencing court although in the case of courts of petty sessions, the discretion is to refer the case to the Supreme Court, or a judge of it, so that the offender may be "dealt with as an habitual criminal". In one exceptional instance, where the offence is an aggravated assault on a child under fourteen, there is an obligation on courts of petty sessions to refer the offender to the Supreme Court, or a judge of it, to be dealt with as an habitual criminal. The Criminal Code implies that sentences under Section 659A are absolutely indeterminate, but Section 32 (1)(ii) of the Offenders Probation and Parole Act 1959-1968 prohibits release of offenders under that Act unless they have served a minimum of two years. In practice, all releases of habitual criminals are made under the Offenders Probation and Parole Act⁴³ and therefore the sentence can be described as relatively indeterminate, with a fixed minimum but no fixed maximum. The Offenders Probation and Parole Act requires habitual criminals to give notice of a proposed application for release to the Comptroller-General of Prisons who in turn, makes a report to the Parole Board, of which he himself is a member. The other members are a judge, who is the chairman, the Under-Secretary of the Department of Justice, a psychiatrist and a male and female civilian. In practice, all habitual criminals are released on licence, for a term not exceeding two years under the supervision of a parole officer.

There are a number of circumstances in which an habitual criminal who has been released on licence may be recommitted by a court to a reformatory prison under Section 659(H) of the Criminal Code 1899. These can be summarised as follows:—

- (i) if he has failed, without reasonable excuse, to report his address and occupation as required in the licence;
- (ii) if he is charged by a police officer with getting his livelihood by dishonest means and it appears to a court of petty sessions that there

41. This summary of the provisions of Criminal Code 1899 s.659A (1) to (4) (Qld.) is taken from the analysis by N. Morris, *Op. cit. supra* n.1 at 107.

42. Criminal Code 1899 s.659(D) (Qld.).

43. *Per* letter from the Queensland Comptroller of Prisons, dated 6th March 1968. The alternative procedure for release, which has now fallen into obsolescence, is under the Criminal Code 1899 s.659(G) (Qld.).

are reasonable grounds for the belief that he is so getting his livelihood⁴⁴;

- (iii) if on being charged with an indictable or summary offence before a court, he fails to give his correct name and address;
- (iv) on conviction for any offence under the Vagrants Acts 1851-1863, or for any indictable offence, or for any summary offence which is punishable with an imprisonment for not less than three months.

The Offenders Probation and Parole Amendment Act 1968 contains sundry provisions relating to breach of parole.

During the last five years, only two persons have been declared habitual criminals in Queensland. In February 1968, four habitual criminals were still incarcerated. Before the Offenders Probation and Parole Act came into operation most offenders served at least four years after the expiration of their fixed sentences, because there were various stages through which it was unusual to pass in a shorter time⁴⁵.

4. *Tasmania*

The Supreme Court of Tasmania enjoys wide powers of indeterminate sentencing, with or without declaring the offender an habitual criminal. Under section 392 of the Criminal Code Act 1924, the Supreme Court may make a declaration in respect of an offender of at least seventeen who has been convicted of an indictable offence and has been so convicted previously on at least two occasions. Under this section, the sentence is exclusively dual-track and at the expiration of the fixed term, the offender is detained in a reformatory prison⁴⁶. Section 393 empowers the Supreme Court to commit an offender to prison indeterminate in addition to or in lieu of imposing a fixed sentence, without declaring him an habitual criminal. This section may be invoked, (whether or not the offender has been convicted previously of an indictable offence) if the judge thinks fit, having regard to his antecedents, character, associates, age, health or mental condition, the nature of the offence or any special circumstances. Furthermore, courts of petty sessions are empowered under section 6 of the Indeterminate Sentences Act 1921 to refer certain offenders to the Supreme Court to be sentenced indeterminate. The provisions of section 6 are far-reaching. The offender must apparently be seventeen or more. The court of petty sessions must have sentenced him to a term of at least three months' imprisonment in respect of one or more of a variety of summary offences, ranging from vagrancy to loitering, but excluding drunkenness. He must have had at least two previous summary convictions or

44. This subsection appears to reduce the onus of proof to one on the balance of probabilities.

45. *Per* letter from the Queensland Comptroller of Prisons, dated 16th January 1968. As in New South Wales, the administrative authorities express concern at the lack of discernible policy on the part of the courts in making declarations. Of 23 habitual criminals released on parole since the Offenders Probation and Parole Act 1959-1968 came into operation, 14 have failed to honour the terms of parole and only two have been traced and returned to prison.

46. In fact, there is no separate reformatory prison in Tasmania and habitual criminals are detained at Risdon gaol.

convictions on indictment. A judge before whom an offender is brought under section 6 of the Indeterminate Sentences Act 1921 may order that he is detained in a reformatory prison indeterminately, at the expiration of his fixed sentence⁴⁷. Sentences imposed under any of these provisions are absolutely indeterminate.

The State Governor may release an offender sentenced indeterminately if he is of the opinion, after receiving a recommendation from the Indeterminate Sentences Board, that the offender has sufficiently reformed or there is some other good and sufficient reason for his release⁴⁸. The Board consists of the Director of Mental Health and four other members appointed by the Governor⁴⁹. In 1967, the members so appointed were the Solicitor-General, the Controller of Prisons and two private citizens. Offenders are released on licence for two years and in practice, are subject to the supervision of probation officers who must report on their conduct at intervals of not less than three months⁵⁰.

The Governor may revoke a licence on recommendation of the Indeterminate Sentences Board⁵¹, and there appears to be no restriction on the Board's discretion to make such a recommendation. If a licence is revoked, there are legislative provisions for the issue by courts of petty sessions, of warrants for apprehension of the offender and for his recommittal to a reformatory prison⁵². If the offender has been sentenced to a fixed term following the commission of a further offence, his recommission to a reformatory prison is deemed to take place at the expiration of the fixed term.

Although the Tasmanian provisions are capable of wide application, in practice few offenders are sentenced indeterminately. The statistics for the last five years are as follows:—

	1963	1964	1965	1966	1967
Number of offenders sentenced indeterminately	13	13	13	14	6
Proportion of total committals to prison	1 in 64	1 in 73	1 in 65	1 in 64	1 in 146

In February 1968, twenty-three offenders were either serving indeterminate sentences or fixed sentences at the expiration of which indeterminate sentences would commence. The actual term served by offenders committed indeterminately is substantially less in Tasmania than elsewhere, presumably because there is no provision for a minimum term. The Controller states that the average length of sentence served is only nine months⁵³.

47. Criminal Code Act 1924 s.394 (Tas.).

48. Indeterminate Sentences Act., 1921 s.16(1) (Tas.).

49. Indeterminate Sentences Act, 1921 s.21 (Tas.).

50. Indeterminate Sentences Act, 1921 s.16(3) (Tas.).

51. Indeterminate Sentences Act., 1921 s.16(4) (Tas.)

52. Indeterminate Sentences Act 1921 s.17(1)(2) (Tas.).

53. *Per* letter from the Tasmanian Controller of Prisons, dated 20th February 1968. In a later letter, dated 2nd April 1968, the Controller stated that the Indeterminate Sentences Board considers that absolute indeterminacy is subject to valid

5. *Western Australia*

The original provisions relating to habitual criminals contained in the Criminal Code 1913, followed the general pattern of the New South Wales' legislation of 1905⁵⁴. However, substantial amendments were made by the Criminal Code Amendment Act 1918 and the present provisions bear little resemblance to the original. As in Tasmania, the indeterminate sentence is not confined to habitual criminals, and may be imposed by the Supreme Court under either section 661 or 662 of the Criminal Code 1913. Under section 661 the offender must apparently be at least eighteen but section 662 contains no lower age limit⁵⁵. An offender may be sentenced, at the discretion of a judge, under section 661 if he has been convicted of any indictable offence, not punishable by death, and has been previously so convicted on at least two occasions. Under this section, the offender is declared an habitual criminal and the system is exclusively dual-track. Under section 662, the offender is not declared an habitual criminal and indeed, he need have no prior convictions. Here the court may exercise its discretion having regard to the antecedents, character, age, health or mental condition of the offender, the circumstances of the offence or any special circumstances. Under section 662, the system is single or dual-track at the discretion of the sentencing judge. Both sections omit reference to the purpose of the indeterminate sentence, but this is implied by the use of the words "reformatory prison". The Criminal Code also implies that the sentences are absolutely indeterminate but in practice, all releases are made under the Offenders Probation and Parole Act 1963, which requires that a minimum term of two years shall be served by habitual criminals before release⁵⁶. Under section 21 of the Offenders Probation and Parole Act 1963, a Parole Board was established which consists of five members, namely a judge, who is the chairman, the Comptroller General of Prisons and three male or female civilians, depending on the sex of the offender. The Parole Board has discretion under section 41 to authorise the

criticism on the following grounds:—

- "1. It runs counter to widely accepted notions of justice because—
 - (a) It often results in a dual, triple or multiple sentence for the one original offence and
 - (b) The power to punish by imprisonment is transferred from a court of law to an administrative body.
 2. It has a bad psychological effect on the prisoner concerned and on his relatives and makes planning for the future exceedingly difficult.
 3. It creates problems for the prison and probation authorities in implementing a rehabilitation programme, including the finding of accommodation and employment, when the release date for a prisoner cannot be forecast.
 4. It is not accepted by prisoners as fair and comprehensible and consequently creates an atmosphere of bitterness and unrest, this having a harmful effect on the ordinary inmates.
 5. It requires for its efficient operation a proper reformatory prison separate from a common public gaol but the establishment of such a prison seems for the foreseeable future, as for the past, to be beyond the financial resources of the State."
54. The system was dual-track and habitual criminals were defined objectively in terms of their prior offences.
 55. The Criminal Code Amendment Act 1945 (W.A.) deleted the words "apparently of the age of eighteen years or upwards" from section 662.
 56. If an habitual criminal were serving a term of imprisonment before the Offenders Probation and Parole Act 1963 (W.A.) came into operation, the Parole Board was required to fix a minimum term: see Offenders Probation and Parole Act 1963 s.47(1)(2) (W.A.).

release of offenders sentenced indeterminately⁵⁷, on licence not exceeding two years, under the supervision of a parole officer. The parole order must contain a requirement that the offender shall not "frequently consort with reputed criminals or persons of ill-repute".

Parole is automatically cancelled if the offender is sentenced to another term of imprisonment during the parole period and the Board also has a discretion to vary or cancel the parole order⁵⁸. This discretion is free from precedent conditions. Upon cancellation of a parole order, the original commitment to a reformatory prison is again in force.

Statistical records do not distinguish between sentences imposed under section 661 of the Criminal Code 1913 and those imposed under section 662. The total commitments under both sections during the last five years are as follows⁵⁹:—

1962-1963	.....	.....	22
1963-1964	.....	.....	30
1964-1965	.....	.....	15
1965-1966	.....	.....	18
1966-1967	.....	.....	15

From the inception of parole in Western Australia in 1964 until December 1967, one hundred and forty-three parole orders were made in respect of those detained indeterminately and the results were as follows:—

Recommitted to prison for breach	.....	50
Parole completed satisfactorily	.....	55
Parole still current in December 1967	.....	38

However, these figures should be considered in the light of the parole periods which were as follows:—

6 months	.....	.....	10
12 months	.....	.....	13
18 months	.....	.....	3
24 months	.....	.....	117

6. South Australia

The first legislation in South Australia relating to persistent offenders was the Habitual Criminals Act 1870. However, an entirely new approach was adopted in the Habitual Criminal Amendment Act 1907 which was modelled on the New South Wales' legislation of 1905⁶⁰. Fundamentally, the approach of the 1907 Act has been preserved and is incorporated into section 319 of

57. The Criminal Code 1913 s.666 (W.A.) contains an alternative method of release but this section now is never invoked—*per* letter from the Western Australian Comptroller General of Prisons, dated 9th April 1968.

58. Offenders Probation and Parole Act 1963 s.44 (W.A.).

59. *Per* letter from the Western Australian Comptroller General of Prisons, dated 9th April 1968. The Comptroller General considers that the indeterminate sentence can be valuable as a sanction provided there are suitable reformatory prisons to accommodate those upon whom it is imposed.

60. Habitual Criminals Act 1905 (N.S.W.).

the Criminal Law Consolidation Act 1935-1966. This section classifies offences into eight different groups:—

- Class 1: Wounding and allied offences.
- Class 2: Poisoning.
- Class 3: Sexual offences, including rape, defilement, indecent assault and abduction.
- Class 4: Abortion.
- Class 5: Offences of dishonesty, including robbery, extortion, burglary, larceny, embezzlement, false pretences and stealing.
- Class 6: Arson.
- Class 7: Forgery.
- Class 8: Crimes created by Part IV of the Commonwealth Crimes Act 1914.

Where an offender is convicted of an offence included in Classes 1-4 and has been previously so convicted on at least two occasions of an offence in the same class, the judge may, in his discretion, declare him an habitual criminal. If the offence is included in Classes 5-8, the offender must have been previously convicted on at least three prior occasions of offences in the same class. There is no age restriction in section 319. In practice, judges do not exercise their discretion to make declarations unless an application is made by the Crown. The South Australian system is exclusively dual-track and offenders who have been declared habitual criminals must serve their fixed sentences without remissions⁶¹ before the indeterminate sentence begins. Under the Prison Regulations 1959 no petition may be made for release until at least three years have expired from the start of the indeterminate sentence⁶². There is no maximum term. Petitions are required to be handed to the gaoler and thence to the Comptroller, with a statement concerning employment and accommodation available to the offender on release⁶³. The Comptroller then has the discretion to make a recommendation to the Chief Secretary for release.

Under Prison Regulation 395, a Consultative Committee has been established, the function of which is to meet quarterly and to consider individually every habitual criminal. In practice, petitions for release are considered first by the Consultative Committee and if it makes a recommendation to the Comptroller, a discretion resides in the Comptroller to make a similar recommendation to the Chief Secretary. The Consultative Committee consists of a visiting justice (who also has jurisdiction to deal with prison offences), the gaoler, the medical officer and the visiting chaplain to whose denomination the offender belongs. In practice, only two chaplains sit as members of the Consultative Committee, namely the Anglican and Roman Catholic priests.

61. Prison Regulations 1959 Reg. 78(3) (S.A.).

62. Prison Regulations 1959 Reg. 392(1) (S.A.). If the offender has been declared an habitual criminal more than once, no petition may be made for five years from the start of the indeterminate sentence, unless he has been certified by a medical officer to be suffering from a condition of ill-health and is unlikely to recover. If a petition is rejected, new petitions may only be made at annual intervals, subject to a proviso in the event of ill-health.

63. Prison Regulations 1959 Reg. 393 (S.A.).

Habitual criminals are released on licence for three years under section 323 of the Criminal Law Consolidation Act 1935-1966. In practice, they are subject to the supervision of the Adult Probation Service. The State Governor has an absolute discretion to recall an habitual criminal on licence to a place of confinement and to release him on licence again⁶⁴. In practice, recalled habitual criminals are not permitted to petition for release until at least twelve months have expired since the date of recommitment.

The number of committals made under Section 319 of the Criminal Law Consolidation Act 1935-1966 during the last six years are as follows:—

1962	.....	.....	2
1963	.....	.....	2
1964	.....	.....	3
1965	.....	.....	1
1966	.....	.....	0
1967	.....	.....	2

Since 1957, only four habitual criminals have completed their terms on licence satisfactorily and in the case of one of the four, the length of the licence was decreased to two years owing to the offender's incurable illness⁶⁵. In January 1968, seventeen offenders were detained in South Australian prisons who had been declared habitual criminals.

IV. The purpose of the indeterminate sentence: reformatory or preventive?

Broadly, those who advocate the use of absolute indeterminacy fall into three groups. At one extreme, there are those who believe it provides an unparalleled incentive to reform. Members of this school agree with Maconochie that "when a man keeps the key of his own prison he is soon persuaded to fit it to the lock"⁶⁶. This implies, of course, belief that man is a creature endowed with a gift of free will, and belief in the concept of moral responsibility. At the other extreme, there are the determinists who deny the existence of moral responsibility and free will. They argue that man is tossed about in the relentless sea of fate and his behaviour is beyond his own control. Those who exhibit strong anti-social tendencies must be detained indeterminately in the interests of public safety. Between these two extremes, there is a third school the doctrine of which may sound more familiar to contemporary ears. Members of the third school argue like this: man has a certain degree of free will. Also, his behaviour is influenced by internal and external pressures. If the indeterminate sentence can be instrumental in causing an habitual criminal to amend his ways, public interests are served thereby. If he does not reform, at least he is out of circulation during the currency of his sentence and it is assumed that his anti-social tendencies are no stronger when he leaves prison than they were when he went in. It is this assumption which lies at the root

64. Criminal Law Consolidation Act 1935-1966 s.323(2) (S.A.).

65. In fact, the offender died shortly after his licence had expired, *per information* from Senior Probation Officer, on 1st May, 1968.

66. Quoted by N. Morris, *Op. cit.*, *supra* n.1 at 21.

of the controversy between those who favour absolute indeterminacy and those who do not.

During the last twenty years, there are indications of growing disillusionment in the reformatory potential of the indeterminate sentence for habitual criminals. Disillusionment is reflected in legislative changes and to a lesser extent, in judicial decisions. The English legislation never contained more than a slight element of indeterminacy but it is significant that the Criminal Justice Act 1948 provided that the expediency test for corrective training was the offender's chances of "reformation *and* the prevention of crime", whereas for preventive detainees, expediency was considered only in the light of public protection⁶⁷. The 1967 legislation abolishes indeterminacy and contains no reference to the word "reform". The same trend is discernible in Australia. The Criminal Code States, Tasmania, Western Australia and Queensland are all using early legislative models which authorise wide use of the indeterminate sentence and empower the courts to order detention in a "reformatory prison". In South Australia, the original section 323 of the Criminal Law Consolidation Act 1935 authorised the State Governor to release an habitual criminal if he had "sufficiently reformed or for other good cause", until it was repealed by the Criminal Law Consolidation Act Amendment Act 1956. The new section 323 contains no reference to the word "reform".

In New South Wales and Victoria, the two States which have amended their legislation relating to habitual criminals most recently, the reform objective no longer occupies a prominent position. The Victorian Crimes Act 1958 considers expediency in the light of "the protection of the public or for any other reason". The New South Wales' legislation refers to "reformation *or* the prevention of crime"⁶⁸.

In the courts, too, there seems a growing reluctance to express the hope that reformation will be achieved by the use of the indeterminate sentence. For example, in 1923, the Queensland Court of Criminal Appeal indicated a then typical spirit of optimism when it stated that an offender was "likely to profit by treatment of the nature contemplated by the legislature"⁶⁹. However, more recent cases reveal emphasis on public protection, and the hope of reform is rarely referred to⁷⁰. The views of Mansfield S.P.J. in *R. v. W. C. Thomson*

67. Criminal Justice Act 1948 s.21 (Eng.).

68. Habitual Criminals Act 1957, s.4 (N.S.W.).

69. *R. v. Jackson* [1923] St. R. Qd. 276. See also another typical case *R. v. Hamilton* [1913] 13 S.R. (N.S.W.) 651; 30 W.N. (N.S.W.) 190 where a declaration was made in respect of an offender aged 23 and the Court of Criminal Appeal laid strong emphasis on the probability of reformation.

70. Of twenty offenders who were declared habitual criminals in South Australia between 1946 and 1963, only in three cases was a hope of reform expressed by the sentencing judge. Where reform is referred to, it is generally one of a number of objectives, as in *R. v. Ciemcioch* [1963] S.A.S.R. 64. In that case, the Full Court of South Australia still demonstrated some faith in the reformatory potential of the indeterminate sentence for an offender aged eighteen. However, there were unusual circumstances in that at the time of conviction, the accused asked the court to take into account fifty-seven other housebreaking offences with which he had not been charged. In dismissing the appeal, the Full Court said: "the effect of the declaration is to avoid what might otherwise be a crushing penalty while, at the same time, it provides a guarantee that the appellant will not be set free until responsible authorities feel some assurance that he is not likely to resume his career of crime." In confirming the declaration, the Full Court also held that

and *R. S. Thomson*⁷¹ are perhaps typical of the modern approach: "The protection of the public is probably the most important consideration in cases such as this, but there are other matters also which are relevant. The prisoner's age, the period during which the offences were committed, the nature of the offences and the period of time between the offences are all matters which it is necessary to consider. I do not say that there are no other factors, but these I consider to be the most important"⁷².

If, as it seems, there is a growing disillusionment in the reformatory potential of the indeterminate sentence for habitual criminals⁷³, we may well enquire the reason. Undoubtedly there are a number of factors at work, of varying degrees of importance. First, there seems little doubt that for many offenders, anti-social patterns of behaviour are firmly established by the time the first sentence is imposed. *A fortiori*, by the time an offender qualifies for declaration as an habitual criminal, his behaviour is much more difficult to manipulate. It can hardly be claimed that habitual criminals are "good material" for reformation, even under the most favourable circumstances. Secondly, there is a dearth in Australia of reformatory prisons, in spite of the numerous legislative references to such institutions. In practice, offenders sentenced to reformatory prisons are detained in the same gaols as those serving ordinary sentences. Little segregation is possible and bitterness is rife amongst habitual criminals. Eidelberg observed: "When external punishment stimulates defiance it loses its value as a crime preventing method"⁷⁴. If this premise is correct, reformation

convictions by Juvenile Courts for offences which otherwise would have fallen within the necessary classification of Section 319 of the Criminal Law Consolidation Act 1935-1956, were to be considered as prior convictions for the purpose of the Act. In *R. v. Ciemcioch*, the point was not pressed by the appellant that his prior actions had not taken place on previous "occasions" as required by the Section. After considerable controversy, it has now been settled by the High Court that the expression "on at least three previous occasions" in Section 319(b) of the Criminal Law Consolidation Act does not require that there shall have been temporal disconformity in relation to the previous occasions. Convictions on separate counts in one information are convictions on separate "occasions" and this is so notwithstanding that the counts were heard in the one court at the one time; *R. v. White* (1968) 42 A.L.J.R. 10. See also *R. v. Hamilton* (1913) 13 S.R. (N.S.W.) 651; *R. v. Steele* (1910) 29 N.Z.L.R. 1039; *R. v. Crago* (1917) 36 N.Z.L.R. 863; *R. v. Nesbitt* [1946] N.Z.L.R. 505, and dictum of *Dixon J.* (as he then was) in *R. v. Johnstone* (1945) 70 C.L.R. 561. Compare these cases with *R. v. Rogers* [1953] 1 Q.B. 311; *R. v. Rider* [1954] 1 All E.R. 5; *R. v. Perfect* [1957] 2 Q.B. 107, and *R. v. Keitley* [1965] Qd. St. R. 190.

71. Queensland unreported decision, cited by R. F. Carter: *Criminal Law of Queensland* (1958) at 333.
72. The length of time between offences has also been considered relevant in other cases, e.g. *R. v. Tregaskis* [1937] S.A.S.R. 358; *R. v. Stanley* (1920) 14 Cr.App. R. 141, and *R. v. Fahey* [1954] VL.R. 460.
73. During the course of the present study, the writer conducted interviews with thirty-seven people in South Australia who are concerned in various ways with the imposition and administration of indeterminate sentences. Those interviewed comprised six Supreme Court judges, twelve probation officers, twelve prison officers, four members of the Consultative Committee, a Superintendent of Police, a Crown Prosecutor and a prison psychologist. Of these, only eight considered the sentence contained any reformatory element and five of the eight qualified their answers e.g. "reformation only takes place when the offender is motivated". Twelve interviewees opposed the introduction of a maximum term, the remaining twenty-five favoured it.
74. L. Eidelberg: "When is punishment effective?" Symposium, *Journal of the Association for the Psychiatric Treatment of Offenders*, Vol. 3 No. 2, cited by M. Reich: "Therapeutic implications of the Indeterminate Sentence" (1966), 2 *Issues in Criminology* No. 1 at 7.

is an even more remote hope than crime prevention. Thirdly, research indicates that even under the English Criminal Justice Act 1948, where the element of indeterminacy was slight, offenders sentenced under Section 21 tended to lose contact with their families more readily than those serving fixed sentences. Instances were cited to the Advisory Council of wives who had hitherto remained unfaithful, deserting their husbands on being told they were to remain in the second stage⁷⁵. It seems probable that the stronger the element of indeterminacy, the higher are the chances of family disruption. Neither the prisoner nor his relatives can make realistic plans for the future, and uncertainty would appear to threaten marriages, parent-child relationships and the chances of employment⁷⁶. Fourthly, it is undeniable that administrative powers are susceptible to abuse. The extent of the susceptibility will depend, *inter alia* upon (a) the constitution of the administrative authority (b) the nature of its function (c) the right of the offender to appear before members of the board or tribunal and (d) the right to appeal against its decisions. It is conceded that administrative authorities play an indispensable part in determining dates for release but justice should be done and be seen to be done. Jones takes the view that if an offender has valid grounds for complaint that his case is not receiving fair consideration, it will either stimulate aggressiveness in him or he will lapse into a feeling of passive hopelessness⁷⁷. Neither state of mind seems compatible with reformation of character. Fifthly, it is difficult to discern a consistent policy on the part of the courts in imposing indeterminate sentences. This criticism is common amongst prison administrators and inconsistency is thought to aggravate bitterness on the part of habitual criminals. Lastly, there is some evidence that the way in which an offender perceives the indeterminate sentence depends upon his individual psychopathology⁷⁸. Miriam Reich maintains that:

“(Prisoners) do not automatically accept the implication that their own efforts can affect their release date for they impute their own symbolic meaning to the power invested in the Board.

Because the majority of the prison population consists of people who have problems in the area of impulses and relationship to authority, the tendency . . . to have a distorted perception of the system and its administration, is probably present to some extent in all inmates. Furthermore, the very process of incarceration and the prison situation which divests the prisoner of his individuality and self-esteem, tend to elicit or strengthen hostile and negative reactions towards those responsible for the administration of the system . . . Because the inmates come before the Board for a yearly review and evaluation, and therefore nearly all have experiences of a “denial”, their sense of injustice and their anger towards this authority is constantly reinforced.

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75. Report of the Advisory Council on the Treatment of Offenders, *Op. cit.*, *supra* n.14, para. 35.
76. These and other factors have been described by John Martin as being “stakes in the community” which are thought to be of great importance in rehabilitation. See J. Martin, “Sociological aspects of conviction” (1964) *Advancement of Science*.
77. H. Jones: *Crime in a Changing Society* (1965) at 100, and H. Jones: *Crime and the Penal System* (1962) 2nd ed.
78. M. Reich: *Op. cit.*, *supra* n.74 at 25.

The hope which is built up between appearances, followed by denial, places a heavy strain on the inmate's psychic equipment. Thus, this procedure does seem to make the inmate more prone to feelings of resentment and defiance, concerning his sentence, than a fixed term as it necessitates a constant readjustment to disappointment, or a blanket-assumption of injustice and arbitrariness from the beginning. Such an attitude operates in contradiction to the rehabilitative goals of the prison sentence as a crime-preventing method."

Certainly these six factors militate against the reformatory potential of the indeterminate sentence and it appears that absolute indeterminacy may even aggravate rather than reduce anti-social tendencies.

V. The dilemma and a suggested solution

The problem of adjusting the delicate balance between the rights of society and the right of the offender is particularly acute in the case of the habitual criminal. Even if we could be certain that the measures we take would reform the offender, or make a substantial contribution towards his reformation, should we be entitled to deprive him of his freedom until he reforms? Professor Morris has argued persuasively that "power over a criminal's life should not be taken in excess of that which would be taken were his reform not considered as one of our purposes"⁷⁹. To what extent, then, may we deprive an offender of his freedom in the name of crime prevention? Behind this question lies another which is even more fundamental: are the present measures effective as instruments of long-term crime prevention? Are we aggravating future problems in our efforts to solve our present ones? There are indications that indeterminacy, in its absolute form at least, serves neither the purpose of rehabilitation nor the purpose of long term crime prevention. Furthermore, it is unlikely that it acts as a general deterrent in view of the infrequent and inconsistent application of it⁸⁰. If absolute indeterminacy has failed, what other form of sentence is likely to achieve this delicate balance of competing interests⁸¹?

It is submitted that occasionally courts need power to exceed the statutory maximum, for the protection of the public, but generally it will be adequate. It is far more likely that the courts will require assurance, like the trial judge in *D.P.P. v. Ottewell*⁸², that the habitual criminal will receive such intensive

79. N. Morris, "Impediments to Penal Reform" (1966) 33 *University of Chicago Law Review* No. 4, 638. See also N. Morris and C. Howard, "Penal Sanctions and Human Rights" in *Studies in Criminal Law* (1964), 147.

80. Report of Advisory Council on the Treatment of Offenders, *Op. cit.*, *supra* n.13, paras. 54 and 61.

81. For a recent comparative study of sentences passed on habitual criminals see (1967) 13 *McGill Law Journal* No. 4. See also: B. A. Grosman, "The Treatment of Habitual Criminals in Canada". (1966) 9 *Criminal Law Quarterly* No. 1; J. E. Hall Williams, "Sentencing in Transition" in *Criminology in Transition* Edd. Grygier, Jones and Spencer (1965) at 39. For articles favouring the retention of absolute indeterminacy see: Edward C. Kaminski, "Indeterminate Sentencing—Half-Step Toward Science in Law" (1959) 10 *Western Reserve Law Review* at 574 and "Use of Indeterminate Sentence in Crime Prevention and Rehabilitation" (1958) 7 *Duke Law Journal* at 65.

82. *Supra*, at n.25.

supervision, as deemed appropriate by administrative authorities, both preceding and succeeding his release from prison. This, of course, calls for the considerable enlargement of probation and parole services for the provision of compulsory professional training courses for officers and for salaries and opportunities for promotion which will attract suitable recruits.

If these supervisory facilities are available, it is suggested that the following recommendations may offer a practical method of balancing the rights of the offender against the rights of society:—

1. If the offender is:—

- (a) at least twenty-five years of age; and
- (b) he has been convicted by the Supreme Court of an indictable offence which was committed before the expiration of three years from a previous conviction of an offence punishable on indictment with imprisonment for a term of two years or more, or before the expiration of three years from release from prison; and
- (c) he has been convicted on indictment on at least three previous occasions since he attained the age of twenty-one of offences punishable on indictment with imprisonment for a term of two years or more; and
- (d) the total length of sentences of imprisonment to which he was sentenced on these occasions was not less than five years⁸³

the Supreme Court should call for the report of a probation officer and should have the discretion to declare the offender to be an habitual criminal. Whether or not the Supreme Court makes such declaration, the reasons for the decision should be stated.

2. Upon declaring an offender to be an habitual criminal, the Supreme Court should have power to impose a sentence of imprisonment which exceeds the maximum term for the offence of which he has been convicted, by a period of not more than five years⁸⁴.

83. The recommendation embodied in 1(b), (c) and (d) is modelled on Section 37(4)(a), (b) and (c) of the English Criminal Justice Act 1967. It is submitted that these provisions are sound in that they look not only to the previous convictions of the offender but also to their severity, and the length of previous terms of imprisonment served by the offender in recent years. It seems beyond doubt that the community is concerned primarily to protect itself against an offender upon whom existing sanctions have recently failed rather than from an offender who has been convicted on a requisite number of occasions but may have served no previous terms of imprisonment at all as was the case in *R. v. Ciemcioch* (*supra* n.70).

84. This recommendation is put forward in preference to the provisions contained in Section 37(3) of the English Criminal Justice Act 1967. It is submitted that sub-section (3) of the English Act makes an artificial distinction between offences which carry maximum terms of less than five years and offences which carry maximum terms of more than five years but less than ten years. In consequence, an English court may impose, for example, an extended term of up to five years on an offender who has committed an offence with a maximum penalty of four years six months' imprisonment but an extended term of up to ten years on an offender who has committed an offence with a maximum penalty of five years and six months.

3. Upon declaring an offender to be an habitual criminal, the Supreme Court should state the maximum term for which the habitual criminal shall be subject to supervision after release.
4. After the habitual criminal has served at least two thirds of the term of imprisonment, he should be eligible for release from prison, subject to supervision.
5. Throughout the habitual criminal's term of imprisonment, he should be visited regularly by a member of the probation or parole service and where possible, the member of that service should also establish and maintain contact with the habitual criminal's family.
6. An administrative board should be established, consisting of the following people:—
 - (a) a judge or stipendiary magistrate (as chairman);
 - (b) the Comptroller of Prisons;
 - (c) a prison psychologist;
 - (d) the senior probation or parole officer; and
 - (e) two or more private citizens who should be co-opted biennially by the four above-mentioned members of the board⁸⁵.
7. The administrative board (before which the habitual criminal should have the right to appear) should determine:—
 - (a) the date of the habitual criminal's release from prison; and
 - (b) the period of supervision within the maximum period specified by the sentencing court; and
 - (c) the conditions on which the habitual criminal should be released on licence.
8. In determining the matters referred to in (7) above the administrative board should take into account reports from the following:—
 - (a) the trade instructor under whom the habitual criminal has been working in prison; and
 - (b) the member of the probation or parole service who has visited the habitual criminal in prison. Such report should contain information as to possible accommodation and employment and, if possible, the attitudes of the habitual criminal's family and friends towards him.
9. The administrative board should have the discretion to call for any other reports which it considers may assist it to determine the matters referred to in (7) above.
10. If it is sought to cancel the habitual criminal's licence during the period of supervision, the matter should be referred to the Supreme Court.

85. In practice, it might be desirable that the private citizens be representatives of trade unions and/or employers' organisations.

The Supreme Court should have power to:—

- (a) cancel the licence and sentence the habitual criminal for such further term of imprisonment as it thinks fit and to state the maximum term for which the habitual criminal shall be released again on licence;
- (b) to impose such non-custodial sentence as it thinks fit;
- (c) to discharge the habitual criminal without imposing any further sentence on him.