

**Assessing the Risk of Australian Indigenous Sexual Offenders Reoffending: A
Systematic Review**

DRAFT

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DRAFT

Abstract

The assessment of offenders' risk of reoffending, particularly sexual reoffending, is a core activity of forensic mental health practitioners. The purpose of these assessments is to reduce the risk of harm to the public, but they are controversial and become more contentious when Australian practitioners who want to undertake such assessments in an ethically responsible way must use reliable validated instruments, disclose the limitations of their assessment methods, instruments and data to judicial decision-makers and must understand how decision-makers might use their reports. The purpose of this systematic literature review was to explore the practices of Australian practitioners and courts in respect of the assessment of Australian Indigenous male sexual offenders' risk of reoffending. We could not identify an instrument that has been developed for the assessment of this population group. Australian courts differ in whether they admit and give weight to practitioners' evidence and opinions based on data obtained with non-validated instruments. We could only identify three possible predictor variables with enough quantitative support to justify including them in an instrument that could be used to assess Indigenous sexual offenders. There is a need for research regarding the validity of the instruments practitioners use.

Keywords: assessment, detention, indigenous, preventative, risk, sexual, reoffending

Assessing the Risk of Australian Indigenous Sexual Offenders Reoffending: A Systematic Review

The assessment of the risk of reoffending in general, and sexual reoffending in particular, is a core activity of forensic mental health practitioners (practitioners; Allan, Dawson, & Allan, 2006). Practitioners use the data they collect to develop intervention plans and prepare reports for judicial decision-makers who must sentence offenders or consider applications for the detention of offenders after they have served their sentence in anticipation that they might commit further offences (preventative detention orders)². The ultimate purpose of these activities is to reduce the risk that the relevant offenders will harm vulnerable members of the public (Allan, 2016). Preventative detention orders are, however, controversial because they could lead to the restriction of people's basic right of liberty (see e.g., Keyzer & McSherry, 2015; McSherry, 2014; McSherry, Keyzer, & Freiberg, 2006).

The enabling statutes in most jurisdictions specifically require judges to take the reports of practitioners into account when they consider preventative detention applications (see, e.g., section 17 of the Dangerous Sexual Offenders Act [WA], 2006). This expectation accords with mental health professions and disciplines, and practitioners' social responsibility to use their scientific knowledge and abilities to contribute to the protection of society (see, e.g., Allan, 2016). Australian practitioners, however, do not have access to risk assessment instruments that have been developed and validated for Australian populations and therefore

² Authors often used different terms for this practice (e.g., anticipatory containment, Brookbanks, 2002) and courts usually use terminology used in the legislation they apply when they refer to these orders (see, e.g., Crimes [High Risk Offenders] Act [NSW], 2006; Criminal Law [High Risk Offenders] Act [SA], 2015; Dangerous Prisoners (Sexual Offenders) Act [Qld], 2003; Dangerous Sexual Offenders Act [WA], 2006; Serious Sex Offenders Act [NT], 2013; Serious Sex Offenders Act [Vic], 2009).

use instruments that were developed for North American and European populations (Allan et al., 2006).

Practitioners' use of non-validated instruments to assess Indigenous³ Australians is particularly problematic because people from this population group are significantly over-represented in the criminal justice system (Australian Bureau of Statistics, 2017b; Freckelton, 2013). Australian Bureau of Statistics (2017a) data show that whilst Indigenous Australians account for approximately 2% of the general population, they make up 27% of the total prisoner population. Indigenous people are also more likely to be reconvicted (76% compared to 49%, Australian Bureau of Statistics, 2017b) particularly for sexual offences (Smallbone & Rallings, 2013; Spiranovic, 2012). Doyle, Ogloff and Thomas (2011b) further found that 14% of the offenders subject to preventative detention orders in New South Wales, WA and Victoria were Indigenous.

Scholars have been writing about the role of ethnicity in the assessment of offenders for many years (see, e.g., Amenta, Guy, & Edens, 2003; Holsinger, Lowenkamp, & Latessa, 2003, 2006; Långström, 2004; Rettenberger, Rice, Harris, & Eher, 2017). There has specifically been an ongoing debate regarding the use of risk assessment instruments developed in North America to assess Indigenous people since the beginning of this decade (see, e.g., the papers reviewed by Allan et al., 2006) to the present (see, e.g., Gutierrez, Maaik-Helmus, & Hanson, 2016; Gutierrez, Wilson, Rugge, & Bonta, 2013; Hart, 2016; Olver, 2016; Stockdale, Olver, & Wong, 2010; Wilson & Gutierrez, 2014; Wormith, Hogg, & Guzzo, 2015). The few Australian authors who write about this topic are mostly sceptical

³ We use the term Indigenous instead of Australians of Aboriginal or Torres Strait Islander decent merely for the sake of brevity, but we appreciate that Indigenous Australians come from different communities and do not represent a homogenous group.

about the propriety of using non-validated instruments to assess Indigenous Australian offenders (see, e.g., Allan et al., 2006; Shepherd, 2016; Shepherd, Adams, McEntyre, & Walker, 2014; Shepherd & Lewis-Fernandez, 2016; Shepherd, Luebbers, Ferguson, Ogloff, & Dolan, 2014; Shepherd, Singh, & Fullam, 2015).

Judges in countries with Indigenous populations such as New Zealand (see e.g., *R v Peta*, 2007) and Canada (see, e.g., *Ewert v Canada*, 2015) are aware of the debate regarding the instruments practitioners use when they assess Indigenous offenders' risk of reoffending. The court in *Ewert v Canada* (2015) used the human rights principles embodied in the Canadian Charter of Rights and Freedoms in the Canadian Constitution Act (1982) to restrain psychologists from using five risk assessment instruments to assess Canadian Aboriginal offenders until Corrections Canada confirmed the reliability of these instruments in identifying these offenders' risk of reoffending. The order required Corrections Canada to stop using the Psychopathy Checklist – Revised (PCL-R; Hare, 1991); Violence Risk Appraisal Guide (VRAG; Quinsey, Harris, Rice, & Cormier, 1998); Sexual Offender Risk Appraisal Guide (SORAG; Quinsey, Harris, Rice, & Comier, 2006); Static 99 (Hanson & Thornton, 1999; Harris, Phenix, Hanson, & Thornton, 2003; Helmus, Hanson, & Thornton, 2009) and the Violence Risk Scale - Sex Offender (VRS-SO; Wong, Olver, Nicholaichuk, & Gordon, 2006; Wong, Olver, Nicholaichuk, & Gordon, 2003). The Federal Court of Appeals overturned this decision in *Canada v Ewert* (2016), but the case highlights some Canadian judges' discomfort regarding the use of non-validated risk assessment instruments to assess Indigenous people.

Australian researchers have examined the law and practice of preventative detention in Australia looking at aspects such as the local legislation and case law and the views of professionals who work in the area regarding the strengths and weaknesses of these orders (Keyzer & McSherry, 2015); the psycholegal aspects of such legislation (Doyle & Ogloff,

2009); the characteristics of offenders subject to such orders (Doyle et al., 2011b); and practitioners' assessment reports (Doyle, Ogloff, & Thomas, 2011a) in these matters. These studies did not, however, examine what assessment methods and instruments practitioners use to assess Indigenous sexual offenders' risk of reoffending and whether they have the information they require to ensure that they do these assessments in accordance with their professions' ethical principles.

Authors (see, e.g., Allan, 2013, 2015, 2017, In press; Allan & Grisso, 2014) argue that the veracity (accurate and transparent) and procedural justice (fair) ethical principles require practitioners to use reliable data collection methods. The care principle further obliges practitioners to take reasonable steps to prevent reasonably foreseeable harm and they must therefore provide information to courts regarding the limitations of their methods and data. Practitioners therefore must understand what parts of their evidence and opinions courts might admit and give weight to and how they will decide this. The distributive justice principle furthermore requires professions to develop methods that serve the interests of all people. Researchers therefore have an ethical obligation to try to develop instruments that are specific enough to minimise the unnecessary detention and expensive treatment of desisters and sensitive enough to protect Indigenous reoffenders' potential victims who will most likely be Indigenous women and children (see Australian Bureau of Statistics, 2017c; Cussen & Bryant, 2015). They might, however, find developing such instruments for Indigenous offenders difficult given the relatively small size and heterogeneous nature of the Indigenous population (see, e.g., Tindale, 1974). The possibility exists, however, that researchers have already identified predictor variables with enough quantitative support to justify their use in assessment instruments.

The aims of this systematic literature review that we undertook as part of a broader study were to identify:

- (a) Assessment instruments that were specifically developed to assess Australian male Indigenous sexual offenders' risk of reoffending.
- (b) The assessment instruments practitioners currently use to assess Australian Indigenous sexual offenders' risk of reoffending and their practices when they present their evidence.
- (c) Research that indicates the validity of instruments practitioners use in the assessment of Australian Indigenous sexual offenders' risk of reoffending.
- (d) Courts' approach towards practitioners' evidence and opinions regarding Australian Indigenous sexual offenders' risk of reoffending.
- (e) Predictor variables with enough quantitative support to justify including them in assessment instruments that can be used to assess Australian Indigenous sexual offenders' risk of reoffending.

Method

The first and second authors commenced the review by doing two broad searches. We first used the terms “Dangerous Sexual Offenders Act, Serious Sex Offenders Act, Serious Sex Offenders (Detention and Supervision) Act, Dangerous Prisoners (Sexual Offenders) Act, and Crimes (High Risk Offenders) Act” with “Aboriginal” or “Indigenous” to identify articles and decisions on Lexis Nexis where authors or judges referred to practitioners' use of risk assessment instruments to assess Indigenous sexual offenders' risk of reoffending. We also identified further articles, cases and legislation of interest whilst reading the material we identified during the initial search. We further searched in peer reviewed journals from January 1970 until December 2016 using the EBSCOhost databases (PsycINFO and PsycARTICLES). The following search filters were used across all

EBSCOhost databases: (i) English language publication, (ii) published in a peer-reviewed journal, (iii) quantitative study⁴ and (iv) Indigenous offenders. The first and second authors used the following Boolean search phrase sequences: (sexual offend* AND risk) OR (Sexual offend* and reoffend*) OR (Indigenous and sexual offend*) OR (Aboriginal and sexual offend*). The second author expanded the search to identify the instruments practitioners' currently use and potential Indigenous specific risk variables⁵ by asking co-authors and other people who work in the field to identify articles, court decisions, reports, studies and unpublished papers that might be useful to identify these instruments. She examined the reference lists of selected papers, read Burner-Fernie (2015) and Hovane's (2015) doctoral theses, and several government reports on Indigenous offending that were available on Australian government websites to collect information. She also searched for scholarly literature meeting the inclusion criteria that addressed specific risk assessment instruments (e.g., the Static-99).

Findings

We did not identify any validated assessment instruments specifically developed to assess Australian Indigenous sexual offenders' risk of reoffending. We did, however, find data regarding aims (b) to (e) that we report under separate headings below.

⁴ We searched for quantitative research only as our purpose was to identify variables that could be used in a risk assessment instrument with little or no further quantitative research.

⁵ We used Cooke and Michie's (2014) definition of risk variables, i.e., any behaviour, personality trait, or circumstances of the offender that may contribute to an increased probability of recidivism.

Assessment Instruments Practitioners Currently use

Applicants generally called practitioners to testify regarding Indigenous sexual offenders' risk of reoffending as required by the enabling statutes (see, e.g., Crimes [High Risk Offenders] Act [NSW], 2006; Dangerous Prisoners (Sexual Offenders) Act [Qld], 2003; Serious Sex Offenders Act [NT], 2013; Serious Sex Offenders Act [Vic], 2009). The respondent in *Attorney-General of the Northern Territory v JD* (2017) was one of the rare respondents who called an expert witness.

Practitioners used information from different sources when they assessed sexual offenders' risk of reoffending (see, e.g. *Director of Public Prosecutions [WA] v Griffiths*, 2015). These sources included their own interviews (see, e.g., *Attorney-General of the Northern Territory v JD* [2], 2016), judges' sentencing remarks in previous cases (see, e.g., *Director of Public Prosecutions [WA] v Woods*, 2008) and official documents and reports (see, e.g., *Attorney-General of the Northern Territory v JD* [2], 2016). Most practitioners used risk assessment instruments and we list those they mentioned in Table 1.

Table 1 about here

Practitioners generally distinguished between the data they obtained by using clinical assessments, actuarial instruments and structured professional judgment instruments⁶ (see, e.g., *Director of Public Prosecutions [WA] v Ugle* [2], 2014). They also explained that actuarial instruments use historical material and therefore fail to take into account dynamic factors (see, e.g., *Director of Public Prosecutions [WA] v Griffiths*, 2015). They also pointed out that:

⁶ Structured professional judgment instruments provide structured decision-making guidelines based on actuarial static variables whilst they simultaneously give assessors professional flexibility to consider unique characteristics of offenders.

The recidivism estimates provided by the STATIC-99 are group estimates based on reconvictions and were derived from groups of individuals with these characteristics. As such, these estimates do not directly correspond to the recidivism risk of an individual offender. The offender's risk may be higher or lower than the probabilities estimated in the STATIC-99 depending on other risk factors not measured by this instrument (*Director of Public Prosecutions [WA] v Woods*, 2008, ¶ 22).

The respondent's expert witness in *Attorney-General of the Northern Territory v JD* [3] (2017) was blunt about practitioners' limited ability to predict future behaviour and pointed out the weaknesses of clinical interviews and actuarial and structured instruments. He concluded:

Hence any assessment of the likelihood of re-offending by an indigenous person would rely on a clinical assessment, with the items in the available instruments acting as an aide memoir. With regards the criteria set down in section 6 of the Serious Sex Offenders Act, it is not possible to predict with any certainty whether a person who has committed previous sexual offences will go on to commit another sexual offence, let alone a serious sex offence (¶ 27).

We read only one case (i.e., *Attorney-General of the Northern Territory v JD* [2], 2016) where it was not clear whether the practitioners disclosed the limitation of the instruments they used when the respondent is an Indigenous person. Practitioners generally provide information about these limitations (see, e.g., *Director of Public Prosecutions [WA] v Allen*, 2009; *Director of Public Prosecutions [WA] v Corbett*, 2012; *Director of Public Prosecutions [WA] v Narkle*, 2010; *Director of Public Prosecutions [WA] v Pindan*, 2013; *State of New South Wales v Hippett* [1], 2016) with one of the applicant's witnesses in *Director of Public Prosecutions (WA) v Griffiths* (2015) for example testifying that the Static 99R:

[H]ad been developed in other countries and cultures and should only be applied to indigenous people with caution ... [and that] ... it is possible that risk factors for Australian indigenous people may differ to those on whom the instrument has been validated (¶ 48, and also see *Attorney-General of the Northern Territory v JD* [3], 2017).

Practitioners generally appear to minimise the importance of risk assessment instruments in their assessments with one testifying that they “were essentially ‘screening devices’ to be used as checks [¶ 92] ... upon her assessment of risk” (*Director of Public Prosecutions [WA] v Mangolamara*, 2007, ¶ 99). Judges’ remarks indicated that other experts use a combination of instruments.

[T]he best practice in Australia, which he used, was to make both a structured clinical judgment and an actuarial risk assessment, and then see whether the results 'cohere', which he said they did in the case of the respondent (*Attorney-General of the Northern Territory v JD* [2], 2016, ¶ 124).

Practitioners further say they combine the data they generated by using risk assessment instruments with information from other sources to form their opinions (see, e.g., *Attorney-General of Queensland v Jacob*, 2015; *Director of Public Prosecutions [WA] v Griffiths*, 2015; *Director of Public Prosecutions [WA] v Ugle* [2], 2014; *Western Australia v West*, 2013).

Validity of Assessment Instruments Currently used

We located only two published articles (Allan et al., 2006; Smallbone & Rallings, 2013) and Spiranovic’s (2012) unpublished study that met our inclusion criteria for this specific research question. The research of Allan and his colleagues (Allan & Dawson,

2002, 2004; Allan et al., 2006) is notable because it is the only published attempt to develop a unique risk assessment instrument aimed at identifying adult male Indigenous sexual offenders' risk of reoffending sexually. The researchers used the file data of a large sample ($n = 1,838$) of male Indigenous sexual and/or violent offenders from WA to perform an initial predictor study, followed by a model building study and cross-validation study. An important finding in the initial stages of the research was that Indigenous sexual recidivists form a distinct and unique group and it was not feasible to identify predictors for a joint sexual and violent group. The researchers noted differences between violent sexual offenders and non-violent sexual offenders even within the sexual offender group, but owing to the small sample size predictors could not be investigated for each of these groups.

The results of a discriminant function analysis revealed the predictors that best distinguished sexual recidivist offenders from non-recidivist sexual offenders were poor coping skills, unfeasible release plans and unrealistic long term goals, the so-called 3-Predictor model. The classification accuracy of the model was high as it classified 93.6% of the 109 offenders in the validation phase of the research correctly. The Area Under the Curve (AUC)⁷ value was similarly high at .97 (95% confidence interval was .94 to 1.00), although Allan and Dawson (2002) point out that the sample size for sexual re-offenders was small ($n = 39$) and accordingly suggest this result should be interpreted with caution. Allan et al. (2007) excluded sexual offenders they used in the development of the 3-Predictor model

⁷ Fischer et al. (2003) pointed out that the perfect instrument yields an area under the curve of 1.0 and proposed that as a general rule instruments with an area under the curve of greater than 0.9 has high accuracy, whilst 0.7 – 0.9 indicated moderate accuracy, 0.5–0.7 low accuracy, and 0.5 a chance result.

when they compared it to other risk assessment instruments (RRASOR, VOTPRAS⁸) practitioners use and found it outperformed each of them (see Table 2).

Table 2 about here

Spiranovic (2012) aimed to develop Australian norms for the Static-99 and Static-99-R using data collected from WA sexual offenders who were considered eligible for a Sexual Offender Treatment Programme (SOTP). These offenders were followed up for violent and sexual recidivism (see Table 2 for the AUC values for sexual recidivism). Spiranovic's results show that both the Static-99 and Static-99-R demonstrated moderate to low levels of predictive validity for sexual recidivism and violent recidivism for non-Indigenous WA sexual offenders and low levels of predictive validity for violent recidivism for Indigenous WA sexual offenders. These instruments were, however, unable to validly predict sexual recidivism in Indigenous WA sexual offenders. The absolute risk estimates for sexual recidivism based on Static-99 and Static-99-R scores for non-Indigenous WA sexual offenders were higher than the estimates for routine samples used in the development and validation of the Static-99 and Static-99-R, but were comparable to the estimates for the high risk or need samples. Australian Indigenous sexual offenders, compared to the original Canadian and United Kingdom samples, tended to score in the low to moderate or high range and were under-represented in the low range on both instruments. Indigenous sexual offenders also displayed a different offending profile compared to their non-Indigenous counterparts as they had a greater number of offences

⁸ Allan et al. (2006) included the Violent Offender Treatment Program Risk Assessment Scale (VOTP; Ward & Dockerill, 1999), to exclude the possibility that it might be useful in predicting risk of sexual reoffending (personal communication, Burner-Fernie, 30 March 2017). We could find no evidence that practitioners ever used this instrument to assess sexual offenders' risk of reoffending sexually.

involving children or non-contact sexual offences (Spiranovic, 2012). Indigenous sexual offenders furthermore displayed a profile more representative of a criminal or antisocial lifestyle in comparison to non-Indigenous sexual offenders who displayed more offences related to sexual deviance. The author concluded that the Static-99 and Static-99-R, with their emphasis on sexual deviance, might therefore not capture the risk factors for sexual reoffending for Indigenous offenders. She, however, pointed out that this conclusion should be interpreted with caution given the low number of Indigenous offenders and wide varying confidence intervals for AUC estimates.

Smallbone and Rallings (2013) recruited participants from each State and Territory in Australia who had served a period of incarceration for a sexual offence. Indigenous offenders scored significantly higher than their non-Indigenous counterparts on the Static-99 and the Static-99-R and were over-represented in the higher risk categories and under-represented in the lower risk categories. Table 2 shows that the short-term prediction accuracy of the Static-99-R was low and Static-99 moderate for Indigenous sexual offenders. The Smallbone and Rallings paper, however, does not reveal that the Static-99's false positive rate for cut-off scores of 1 to 6 ranged from 94.4% to 83.1% because the editor and reviewers instructed the authors not to report them (see Allan, 2015).

Courts' Approach towards Practitioners' Evidence and Opinions

Most of the relevant decisions we identified were from Western Australia, Queensland and the Northern Territory that have relatively large non-urban Indigenous populations (see Australian Bureau of Statistics, 2007). South Australia also has a notable non-urban Indigenous population but the Criminal Law [High Risk Offenders] Act (2015)

only commenced on 25 January 2016 and therefore no relevant decisions were handed down when we undertook this review.

Approach to practitioners' reports.

Courts in most jurisdictions must consider practitioners' reports (see, e.g., *Director of Public Prosecution [WA] v GTR*, 2008, for a discussion of the legislation in WA) but they still make the ultimate decision regarding the risk respondents pose.

Although there is no doubt, ..., that a court must have regard to the psychiatrists' reports (and must bear in mind that the authors have an area of expertise not shared by the court), the reports are only a part of the materials that must be considered and the weight to be accorded to them will depend upon their cogency and reliability, when considered in the light of the whole of the evidence. The responsibility for deciding whether or not the offender is a serious danger to the community as defined and, if so, what order should be made is that of the judge alone (*Director of Public Prosecution [WA] v GTR*, 2008, per Steyler P and Buss JA, ¶ 62).

Courts follow leading cases on expert testimony (e.g., *Makita (Au) Pty Ltd v Sprowles*, 2001; *Pownall v Conlan Management Pty Ltd*, 1995) but with consideration of the relevant provisions in the enabling statute (*Director of Public Prosecutions [WA] v Mangolamara*, 2007). They are aware of the debate in cases such as *Fardon v Attorney-General for the State of Queensland* (2004) regarding whether preventative legislation should be characterised as punitive rather than protective. In *Director of Public Prosecutions [WA] v Mangolamara* (2007) Justice Hasluck pointed out that in the *Fardon*-case:

All of the judgments reflect an awareness that substantial questions of civil liberty arise in regard to legislation of this kind. An order akin to an indefinite sentence arguably goes beyond punishing the offender to an extent proportionate to the crime of which the offender has been committed. There is a risk that a measure designed to ensure the better protection of society could become an instrument to weaken the basic principle of individual liberty (¶ 51).

Judges therefore believe that when they consider the admissibility and weight of practitioners' evidence and opinions they:

[M]ust be satisfied by acceptable and cogent evidence to a high degree of probability (but not beyond reasonable doubt) that there is "an unacceptable risk" of the commission of a serious sexual offence unless the offender is subjected to a continuing detention order or a supervision order (*Western Australia v Latimer*, 2006, ¶13).

Several judges (see, e.g., *Attorney-General for the State of Queensland v Watt*, 2012) referred with approval to the well-known dictum from *Makita (Au) Pty Ltd v Sprowles* (2001) regarding the admissibility of experts' opinions:

[I]t must be agreed or demonstrated that there is a field of 'specialised knowledge'; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be 'wholly or substantially based on the witness' expert knowledge'; so far as the opinion is based on facts 'observed' by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on 'assumed' or 'accepted' facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a

proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must show how the field of 'specialised knowledge' in which the witness is expert by reason of 'training, study or experience', and on which the opinion is 'wholly or substantially based', applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the Court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight (¶ 85).

Courts in making ultimate decisions will consider the opinion of a practitioner:

... who is suitably qualified ... provided the opinion is based on a sound body of specialised knowledge. However, ..., the Court must be satisfied that the facts on which the opinion is based are proved by admissible evidence (*Director of Public Prosecutions [WA] v Mangolamara*, 2007, ¶ 146).

The judge in *Director of Public Prosecutions [WA] v Woods* (2008) explained that courts in preventative detention cases consider practitioners to be suitably qualified if their qualifications meets the requirements of the relevant enabling legislation, but want more information to help them determine what weight to give to such practitioners' evidence.

The court hearing an application under the Act is, however, entitled and obliged to consider the skill and experience of the particular psychiatrists (including in relation to predicting recidivism) who have examined the person in question and prepared reports ... [T]he court must have regard to the reports in deciding whether to find that the person is a serious danger to the community, but the court's consideration of the

skill and expertise of the particular psychiatrists, and the cogency and credibility of their reports and evidence, may affect the weight to be accorded to their views (Director of Public Prosecutions [WA] v Woods, 2008, ¶ 39).

We did not identify a case where the court found practitioners unsuitable but they did question the cogency and reliability of practitioners' evidence and opinions on several grounds (see, e.g., Director of Public Prosecution [WA] v GTR, 2007). A major issue was the requirement that expert witnesses should provide evidence about the basis of their opinions and how they formed them. Courts require that:

[I]nformation such as research data and methods underlying assessment tools must ... be proven in evidence in order for weight to be given to the opinions derived from those assessment tools (Director of Public Prosecutions [WA] v Woods, 2008, ¶44).

They further require practitioners to explain their reasoning or the method of computation they used (Director of Public Prosecutions [WA] v Mangolamara, 2007).

[The practitioner] did state the respondent's score on the PCL-R without indicating how he had arrived at that score. It seems to me that I should be cautious in placing any weight on that risk assessment arrived at from the PCL-R in the absence of either the document from which the instrument derives or .. the practitioner's ... workings in order to arrive at that assessment (Director of Public Prosecutions [WA] v Woods, 2007, ¶84).

Concerns about risk assessment in general.

Judges further took into account the limitations of risk assessments.

[Practitioners] have very limited ability to predict the future behaviour of any individual, because the science of behaviour prediction is weak. This weakness is

because the base rates of serious adverse events are low, and those events are not so much due to the effect of enduring traits as they are the result of circumstances which arise and which are difficult or impossible to predict (Attorney-General of the Northern Territory v JD [3], 2017, ¶26).

They therefore believe practitioners' ability to assess the risk of reoffending is imperfect irrespective of whether they use clinical assessments (see, e.g., Attorney-General of the Northern Territory v JD [3], 2017; Director of Public Prosecutions [WA] v West, 2013); professional structured judgment methods (see, e.g., Director of Public Prosecutions [WA] v Mangolamara, 2007) or actuarial instruments (see, e.g., Director of Public Prosecutions [WA] v Samson, 2014).

There has been a growth in risk assessment calculators purporting to be tools with which specialists, psychiatrists and psychologists can make more accurate predictions of risk. ... The efficacy of some of these tools remains controversial... (Director of Public Prosecutions [WA] v Samson, 2014¶ 51).

Courts therefore initially concluded that the practitioners' reports in this case were not sufficiently cogent and that:

[L]ittle weight should be given to those parts of the reports concerning the assessment tools. In my view the evidence in question does not conform to long-established rules concerning expert evidence. The research data and methods underlying the assessment tools are assumed to be correct but this has not been established by the evidence. It has not been made clear to me whether the context for which the categories of assessment reflected in the relevant texts or manuals were devised is that of treatment and intervention or that of sentencing. [The practitioner] acknowledged under cross-examination that the assessment tools are directed not to the commission

of serious sexual offences but to sexual re-offending of any kind. She acknowledged also that the database used for the mathematical model upon which Static-99 was based related to untreated English and Canadian sex offenders released back into the community on an unsupervised basis (*Director of Public Prosecutions [WA] v Mangolamara*, 2007, ¶ 165).

Risks assessment in preventative detention applications.

The decision in *Director of Public Prosecution [WA] v GTR* (2007) demonstrates that courts do not necessarily totally reject assessment tools but question their use in the context of preventative detention applications.

60 [The] ... RSVP may have a valid use for risk management but may be an imperfect tool for risk assessment as required under the DSO Act.

.....

111 The qualifications and limitations on the use of predictive models in the evidence speak for themselves. These limitations are supported by the published literature to which I have referred. ... I cannot attribute significant weight to the expert psychiatric opinions as to risk. I accept that the use of one or more predictive models, with or without a clinical interview and appraisal, may be helpful in determining a counselling regime or a management strategy for an offender. In such cases there has already been a determination of guilt and a sentence has been imposed. Little prediction is required by the sentencing judge. Within that context there is usefulness in the models to aid the offender's rehabilitation, to customise a course of treatment or therapy, and to plan for the offender's release to the community.

112 However, an application under the DSO Act requires more intense scrutiny.

The respondent's liberty may be removed or curtailed because of a prediction which a judge is required to make as to future offending. For that reason, the DSO Act requires acceptable and cogent evidence to a high degree.

Risks assessment of Indigenous sexual offenders.

Judges were specifically concerned about the use of risk assessment instruments to predict Indigenous sexual offenders' risk of reoffending.

I note in particular the caution raised in the reports of the psychiatrists ... that the risk assessment instruments may not be valid for Australian indigenous communities (¶ 26, *Attorney-General of Queensland v Jacob*, 2015).

They were particularly concerned when these offenders came from remote communities.

... Moreover, having regard to the admissions made under cross-examination that the tools were not devised for and do not necessarily take account of the social circumstances of indigenous Australians in remote communities, I harbour grave reservations as to whether a person of the respondent's background can be easily fitted within the categories of appraisal presently allowed for by the assessment tools (¶166, *Director of Public Prosecutions [WA] v Mangolamara*, 2007).

One reason for their caution is that they know that Indigenous offenders are over-represented in the criminal justice system and amongst the applications for preventative detention (*Director of Public Prosecution [WA] v GTR*, 2007).

An extract from the DPP database of all DSO applications filed at the Supreme Court, up to and including 28 November 2007, indicates that of 15 applications so far filed, seven relate to indigenous respondents. Five of those indigenous respondents,

including the respondent, are from remote indigenous communities. In other words, although the indigenous population of the state is 3%, the indigenous population represented in DSO applications is 46.6% with 33.3% being remote indigenous Australians (¶ 2; and also see *Director of Public Prosecutions [WA] v Mangolamara*, 2007).

Some judges are therefore adamant that:

For present purposes however, ... [the Static-99] ... is not a valid test for Indigenous males of the same cohort as the respondent. Until validated, its use, if any, must be limited to members of the cohort on which it was developed.

There is simply no evidence to suggest whether the Static 99 result has any efficacy whatsoever in relation to Australian Aboriginal men (*Director of Public Prosecutions [WA] v Samson*, 2014¶ 51).

Judges in especially WA therefore initially refused to give weight to practitioners' evidence based on risk assessments, especially when they used actuarial instruments (see, e.g., *Director of Public Prosecutions [WA] v Moolarvie*, 2008), and particularly the Static 99 (see, e.g., *Director of Public Prosecutions [WA] v Woods*, 2008).

A broader approach.

Two appeal decisions handed down in WA (i.e., *Director of Public Prosecution [WA] v GTR*, 2008; *Director of Public Prosecutions [WA] v Woods*, 2008), however, signalled that courts should not “globally discard the predictive models insofar as they might be applied to any case” (*Director of Public Prosecution [WA] v GTR*, 2008, ¶162). Judges now accept that the shortcomings of instruments can be overcome.

[C]riticisms of the use of actuarial instruments and of clinical judgment as means of assessing the risk of future serious sexual offending does not, in my judgment, discredit or detract from the use of a combination of the two kinds of assessment methods involved in 'structured professional judgment' (Attorney-General of the Northern Territory v JD [3], 2017, ¶ 32).

Judges therefore take it into account that practitioners acknowledged the limitations of the instruments they used and took steps to overcome those weaknesses.

[The practitioners] ... accepted that there were limitations in the use of the various risk assessment instruments that they had employed. However, it was clear that they were conscious of those limitations when undertaking their assessments. Further, their conclusions were based on a multi-factorial approach (Director of Public Prosecutions [WA] v West, 2013, ¶ 64).

The decision in Director of Public Prosecutions [WA] v Moolarvie (2008) demonstrated the comprehensive approach judges expect practitioners to use .:

59 ... I agree that an expert opinion based upon the results of the 'Static-99' alone would have very little weight. However an opinion based upon those results combined with the clinical assessments required by the '3-Predictor model' may well have a sounder footing. The RSVP on the other hand is a relatively sophisticated instrument which is carefully structured and seems to address all conceivable risk factors that may be relevant to the assessment required by s 38. I also consider that the requirement for the RSVP to develop a comprehensive risk management plan must necessarily aid a clinical assessment of the overall risk. Accordingly, I have come to the view that a clinical assessment which is partially based upon the correct application of the RSVP will have added weight.

...

68 Having carefully considered the reasons given by each psychiatrist for his assessment, I am satisfied that their opinions are soundly based. In this regard, each assessment is based primarily upon a clinical and not an actuarial foundation, and appears to have been reached in a structured, methodical and professional way. In my view, the use by each psychiatrist of the 'Static-99' tool does not detract from the reliability of his assessment. I also consider that each assessment is consistent with the inferences which inevitably arise from my primary factual findings. Accordingly I have no hesitation in accepting both assessments and giving them full weight (Director of Public Prosecutions [WA] v Moolarvie, 2008).

Courts further examine practitioners' evidence and opinions critically when they consider their admissibility and weight and the mere fact that an instrument is based on data obtained from Indigenous offenders is therefore not enough.

I ... note that the evidence in the present case indicates that the '3-Predictor model' was developed specifically for use with indigenous sexual offenders. Nevertheless that instrument has the shortcoming that it was designed to predict reoffending of a general sexual nature rather than violent sexual reoffending (Director of Public Prosecutions [WA] v Moolarvie, 2008, ¶ 55).

Judges also look at the consistency of practitioners' evidence and opinions with other information such as the sentencing remarks of the judge who imposed the custodial sentence (Director of Public Prosecution [WA] v GTR, 2008; TSL v Secretary to the Department of Justice, 2006).

Courts still consider the need for evidence regarding the studies and research data that underlie non-actuarial instruments, but in some cases take a pragmatic approach.

81 ... [The practitioner] ... also used the three predictor model which examines three factors that a Western Australian study has suggested can be used to predict whether indigenous male sexual offenders would re-offend violently and sexually respectively. The three factors are unrealistic long term goals, unfeasible release plans and poor coping skills prior to release. ... In my opinion, it is commonsense that these three factors will influence the risk of re-offending in a similar way to the way in which an offender has offended in the past. I do not consider that in order to place weight on ... [the practitioner's] ... assessment of those three factors, it is necessary for the study or its research data to be tendered in evidence. ...

82 [The practitioner] also used the Risk for Sexual Violence Protocol (RSVP). ... Again, it seems to me, that commonsense dictates that these 22 factors are relevant to an assessment of the respondent's risk of committing a serious sexual offence in the future. I do not consider that in order to place weight upon [his] assessment of those 22 factors, it is necessary for the study to be in evidence (Director of Public Prosecutions [WA] v Woods, 2007).

Courts point out that the practitioner's "report is only part of the material to which the judge will have regard in deciding whether he or she is satisfied that the offender is likely to re-offend" (¶ 40, TSL v Secretary to the Department of Justice, 2006). Courts, in assessing the risk that respondents might reoffend, have taken other factors into account, such as cognitive impairments or low level intellect (see, e.g., Director of Public Prosecutions [WA] v Pindan [2], 2012), or brain damage that might lead to significant deficits in memory and executive functioning affecting judgment and insight (see, e.g., Attorney-General of the Northern Territory v JD [3], 2017). Judges furthermore considered respondents' criminal history (see, e.g., State of New South Wales v Hippett [1], 2016) and history of general and domestic violence (see, e.g., Attorney-General of Queensland v Jacob, 2015) from childhood to the

present (see, e.g., *Attorney-General of the Northern Territory v JD* [3], 2017), including respondents' attendance of rehabilitation programs (see, e.g., *State of New South Wales v Hippett* [1], 2016). They have also considered evidence that respondents suffer from severe anti-social personality disorders (see, e.g., *Attorney-General of the Northern Territory v JD* [3], 2017) and abuse substance disorders (see, e.g., *Attorney-General of Queensland v Jacob*, 2015).

Courts therefore currently take a holistic approach in considering the risk that offenders pose taking into account the whole of practitioners' testimony (i.e., based on their use of risk instruments and other assessment methods) in combination with information from other sources (*Director of Public Prosecutions [WA] v Griffiths*, 2015). This approach allows them to place:

[C]onsiderable weight on the evidence of ... [the practitioners whose] ... reports and evidence ... were supported by and were consistent with the other assessments in exhibit 1 [...] and the circumstances of Mr West's offending to the extent that has been identified in the reasons (*Western Australia v West*, 2013, ¶76).

Predictor Variables that Could be Considered

Our review of the quantitative published literature identified no variable other than those reported by Allan and colleagues (Allan & Dawson, 2002, 2004; Allan et al., 2006) with strong enough support to justify inclusion in an instrument to assess the risk of Indigenous sexual recidivism. These authors found that poor coping skills, defined as maladaptive coping strategies (e.g., alcohol use), was a significant factor in distinguishing Indigenous Australian sexual recidivists from non-recidivists. They also found that unfeasible release plans (e.g., returning to their home community where the victim resides or

where drug and alcohol use are prevalent) and unrealistic long term goals (e.g., doing work that they did not have qualifications for) were strongly associated with recidivism among WA Indigenous male sexual reoffenders. The researchers pointed out that Indigenous offenders who do not return to their communities upon completion of their sentences might have to make substantial changes in their lives. Those who return to their communities often find themselves unemployed in environments where substance use is rife and/or where there is no work or no work they qualify for (see, also, Keyzer & McSherry, 2013, 2015).

The three dynamic predictors identified are strongly indicative of socio-economic factors external to the offenders, suggesting that Indigenous sexual offending and recidivism might be a function of offenders' circumstances. Allan et al. (2006) point out that it was unclear from their data how exactly practitioners had determined coping skills, unfeasible release plans and unrealistic long term goals and that further research and training was required before the 3-Predictor model could be used by practitioners. The researchers have to date not had an opportunity to replicate the results of this study or deal with its limitations (Burner-Fernie, 2015). Practitioners' use of the 3-Predictor model despite these limitations, however, confirms that they need an instrument to assess Indigenous sexual offenders' risk of recidivism.

Discussion

The purpose of this study was to expand on the work of other Australian researchers regarding the practice of preventative detention (such as Doyle & Ogloff, 2009; Doyle et al., 2011a, 2011b; Keyzer & McSherry, 2013, 2015). We reviewed the literature and case law to identify information that could assist practitioners to practice in an ethically responsible manner when they assess Indigenous sexual offenders' risk of reoffending sexually.

We could not find scientifically credible assessment instruments specifically developed to assess Australian Indigenous sexual offenders' risk of reoffending. The preventative detention legislation, however, indicates that society expects practitioners to help it protect potential victims who in the case of Indigenous offenders are most likely to be Indigenous women and children (see Australian Bureau of Statistics, 2017c; Cussen & Bryant, 2015). Professions and practitioners' social responsibility therefore arguably obligate them to assess Indigenous sexual offenders' risk of reoffending as expert witnesses and when they determine which offenders should undertake sex offender programs. They should, however, do this by using the most appropriate assessment methods and instrument they are competent to use, or a combination of such instruments whose strengths supplement each other. We found that practitioners use several instruments to assess Australian Indigenous sexual offenders' risk of reoffending. The 3-Predictor model is the only instrument they use that was developed in Australia and its developers specifically indicated its limitations when used to predict offenders' risk of sexual reoffending (Allan & Dawson, 2004; Allan et al., 2006; Dawson & Allan, 2002). Several of the instruments practitioners use (e.g., the Static-99) were furthermore developed to predict relative rather than absolute risk of reoffending (Helmus, Thornton, Hanson, & Babchishin, 2011).

We found that practitioners disclose the limitations of their instruments and data in their reports and testimony to allow courts to decide the admissibility and weight of their evidence and opinions as their ethical principles require from them (see Allan, 2015, 2017, In press; Allan & Grisso, 2014). They are, however, hampered by a lack of research they can refer to. We identified only two published studies (Allan et al., 2006; Smallbone & Rallings, 2013) and one unpublished study (Spiranovic, 2012) that specifically examined the scientific credibility of the assessment instruments practitioners use to assess Indigenous sexual offenders. The findings of these studies suggest that practitioners should preferably avoid

using some of the popular instruments such as the PRASOR, VOTPRAS (Allan et al., 2006) and Static-99 and Static-99R (Spiranovic, 2012). Smallbone and Rallings' (2013) finding regarding the Static-99 (AUC of .76) indicates that it might be appropriate for assessing Australian Indigenous sexual offenders, but as we pointed out above the reported data do not provide a full picture due to no fault of the authors.

Our review further indicates that courts are generally very cautious of practitioners' reports and testimony and were initially reluctant, and sometimes refused, to put weight on practitioners' evidence and opinions based on data they collected using clinical assessments, structured judgment assessments and actuarial instruments. Courts now appear to take a holistic and pragmatic approach and are more willing to give weight to practitioners' opinions provided that they meet certain requirements. They want to see that practitioners appreciated the limitations of the assessment methods and instruments and therefore used a combination of instruments that compliments each other in a manner that overcome those limitations. They further examine the consistency of the information that practitioners collected from different sources and compare their finding with other available information, such as offenders' mental health and offending histories. Judges, however, remain cautious when practitioners use non-validated instruments to assess Indigenous sexual offenders and they in particular single out the Static-99 for criticism.

The development of a culturally specific instrument to assess Indigenous sexual offenders' absolute risk of reoffending might, however, not be possible soon. Authors frequently mentioned variables that might predict sexual reoffending by Indigenous sexual offenders but these were seldom based on quantitative data (see, e.g., Homel, Lincoln, & Herd, 1999; Jones, Masters, Griffiths, & Moulday, 2002) and hence these studies were not included in this review. Predictors of sexual offending or child abuse (Coorey, 2001; Gathercole, Lykins, & Dunstan, 2016), or general (Weatherburn, Snowball, & Hunter, 2008)

or violent reoffending (Memmott, Stacy, Chambers, & Keys, 2001) that have a quantitative basis might be of use. Allan et al. (2006) and Spiranovic's (2012) findings regarding the differences between sexual and violent offenders, however, suggest that predictors of Indigenous general and violent offending, and even reoffending, might not predict Indigenous offenders' risk of sexual reoffending. The variables that form part of the 3-Predictor model (coping skills, unfeasible release plans and unrealistic long term goals) had the best quantitative support and notably made intuitive sense to some judges (see, e.g., Director of Public Prosecutions [WA] v Woods, 2007).

Researchers developing risk assessment instruments for Indigenous offenders might therefore find it useful to note that these three predictors and Spiranovic's (2012) finding that Indigenous sexual offenders' offending appears closer related to a criminal or antisocial lifestyle than sexual deviance suggest that their risk of recidivism might be the product of a combination of individual-level and community-level factors. They should therefore consider the work of ecologists regarding the role of person-environment interactions in the prediction of reoffending (see, e.g., Gottfredson & Taylor, 1985) and the more recent work of psychologists developing so-called 4th generation risk models that focus on the impact of community-level factors on an individual's risk of recidivism (see, e.g., Byrne & Pattavina, 2017).

We recognise that our search might have failed to identify relevant cases, studies and instruments that practitioners use and that the list of potential variables we identified might not be exhaustive. Many would consider our focus on quantitative research overly narrow, but our purpose was to identify variables that could be used in a risk assessment instrument with little or no further quantitative research. We also did not undertake a legal analysis of judges' arguments and decisions because that was beyond the ambit of the paper, but we did identify several themes that are relevant for the purpose of this paper.

Our conclusion is that for the foreseeable future practitioners will have to continue using non-validated instruments. They must, however, disclose the limitations of their assessments to give courts an opportunity to decide whether to admit and/or give weight to their evidence and opinions. Our findings together highlight the professions' social and distributive justice responsibilities to generate research that support practitioners who assess Australian Indigenous sexual offenders' risk of reoffending. Researchers must therefore continue investigating and reporting the reliability of instruments that practitioners use. Reviewers and editors should further allow, even encourage, authors to report information about the specificity and sensitivity of these instruments that will discourage practitioners from using them in a manner that is not legally and ethically defensible.

DRAFT

Tables

Table 1

Instruments used to Assess Australian Indigenous Sexual Offenders' Risk of Reoffending

Historical Clinical Risk Management - 20 (HCR – 20; Douglas et al., 2014)

Juvenile Sex Offender Assessment Protocol-II (J-SOAP-II; Prentky & Righthand, 2003)

Level of Service Need Inventory - Revised (LSI-R; Andrews & Bonta, 1995)

Psychopathy Checklist-Revised (PCL-R; Hare, 1991)

Sexual Violence Risk – 20 (SVR-20; Boer, Hart, Kropp, & Webster, 1997)

Risk for Sexual Violence Protocol (RSVP; Hart et al., 2003)

Static-99 and its variations (Hanson & Thornton, 1999; Harris et al., 2003; Helmus et al., 2009)

Stable (Hanson, Maaik-Helmus, & Harris, 2015)

Three-predictor model (Allan et al., 2006)

Vermont Assessment of Sex Offender Risk (VASOR; McGrath & Hoke, 2002)

Violence Risk Appraisal Guide (VRAG; Quinsey et al., 1998).

Table 2

AUC Values for Australian Indigenous and Non-Indigenous Sexual Recidivist Offenders

Researchers	Sample	RRASOR	Static-99	Static-99-R	VOTPRAS	3 Predictor Model
Allan et al. (2006) ^a	Combined <i>n</i> = 226					.84
	Indigenous <i>n</i> = 347	.65			.48	
	Non-Indigenous <i>n</i> = 191	.74	.78 ^b		.53	
Spiranovic (2012)	Indigenous					
	5 year <i>n</i> = 162		.57	.58		
	10 year <i>n</i> = 85		.52	.51		
	Non-Indigenous					
5 year <i>n</i> = 660		.70	.71			
10 year <i>n</i> = 472		.67	.67			
Smallbone and Rallings (2013) ^c	Indigenous <i>n</i> = 67		.76	.61		
	Non-Indigenous <i>n</i> = 320		.82	.79		

Note. ^aMean follow-up period of 9 years 3 month. ^bAUC values are based on any sexual or sexually violent recidivism, except here where it is based on non-violent sexual recidivism only for a sample of 144.

^cFollow-up period of 15-53 months (mean of 29 months).

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