

Mandatory prison sentences – offering paramedics a placebo rather than protection

By Michael Eburn and Ruth Townsend

In response to increasing incidents of injury to paramedics caused by bystanders or patients, there has been a call for mandatory prison sentences for those convicted of assaulting paramedics and emergency service workers generally. Governments, particularly the state government in Victoria have responded promising that people will be sent to gaol (The Hon. Daniel Andrews MP, Premier, 'Laws To Be Fixed So Jail Means Jail For Emergency Worker Attacks', 22 May 2018¹). The call was particularly vocal after the Victorian County Court ordered two women to serve community correction orders rather than gaol time after pleading guilty to a particularly vicious assault in 2016 that has left the paramedic victim still unable to work (*DPP v Warren and Underwood* [2018] VCC 689²).

The claim is that sending offenders to gaol will protect emergency workers from future violence. It is argued here, however, that the promise of mandatory sentence is simply delivering a placebo (that is "A ... procedure prescribed for the psychological benefit to the patient rather than for any physiological effect" or "A measure designed merely to humour or placate someone"³) rather than effective or meaningful protection. Mandatory sentencing won't protect paramedics from future violence because 1) most people who commit an offence against a paramedic will not be doing a cost/benefit analysis, so the risk of imprisonment is not likely to be at the forefront of their mind and 2) sending people to gaol after the event necessarily shows that the desire for protection hasn't worked. Arguing that mandatory sentencing is 'protection' is like arguing the ambulance at the bottom of the cliff is protection against falling. The sentence (or the ambulance) is only relevant when it is clear the desired protection has failed. To protect paramedics the community needs to address offending before it happens.

In this paper we explore point 1 in some more detail. There are, for the sake of the argument, two potential offenders. The patient, and someone who is not a patient.

The patient

Paramedics provide an emergency health service so it follows that the patient is someone who at least might be in need of emergency health care. They may be suffering from any number of illnesses or injuries that impact upon their capacity to form rational decisions and/or control their actions. For example, on 3 May 2018 it was reported (Kristen Tsiamis, 'Parramatta assault: Paramedics forced to hold man down after attack' *news.com.au*, March 3, 2018⁴) that:

ALMOST a dozen paramedics and police were forced to hold down an assault victim in Parramatta after he became aggressive and tried to bite them.

The 28-year-old was found unconscious on the footpath outside the Rose and Crown Hotel in Parramatta about 11.15pm last night.

Police were told the man had been hit in the head by an unknown person.

¹ <https://www.premier.vic.gov.au/laws-to-be-fixed-so-jail-means-jail-for-emergency-worker-attacks/>

² <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCC/2018/689.html>

³ *Oxford English Dictionary* (Online) <https://en.oxforddictionaries.com/definition/placebo>

⁴ <https://www.news.com.au/national/nsw-act/parramatta-assault-paramedics-forced-to-hold-man-down-after-attack/news-story/7c72958fcdfab55862e8de88b542ac17>

The man became aggressive when he regained consciousness and began swearing before attempting to hit and bite officers and paramedics outside the hotel on Victoria Rd.

Seven police officers and at least four paramedics were required to hold him down as they administered what appeared to be a sedative through his foot.

He was taken to Westmead Hospital in a serious condition.

One might infer that having been rendered unconscious after a blow to the head, which left him in a serious condition, this person did not understand that he was assaulting paramedics and police. One might think it likely he had no idea what was happening and may have no understanding of the event at all. If that's correct if he did 'hit and bite officers' he would not be guilty of any offence. The type of mandatory sentencing laws proposed by the Victorian Premier wouldn't apply to him but if he gets charged, it may take many months to have that issue resolved.

Whilst there are reports of 'assaults' on paramedics, it is unclear how many of them are actual 'assaults' that is an intentional application of force by a person who is conscious and competent at the time. Whilst paramedics may be subject to violence (such as that described in Tsiamis' article) that is not the same as being 'assaulted'.

In another incident ('Man Apologises For Brutal Attack On Paramedic', *The Project*, 17 May 2018⁵) a man who was unconscious and frothing at the mouth struck the paramedic who was treating him. Even if we assume that this action did constitute an assault, the potential of a jail sentence was at the forefront of his mind or will be in the next case. Sending him to gaol may satisfy the need for retribution, but it won't do anything to stop the next assault because the next person who is that intoxicated also won't consider what the likely impact of his or her actions are. But people who are so intoxicated that they are 'unconscious and frothing at the mouth' are the very people who paramedics will be called to assist.

There may be some patients who do, deliberately apply force. People are allowed to refuse treatment. To treat someone without consent is itself an assault and a person may use reasonable force to resist that assault. In *Bonde v Morrison* ([2015] TASM 2 (2 October 2015)⁶) Mr Morrison was not guilty of assaulting a police officer who attempted to restrain him even though the defendant 'looked at him and struck him twice to the face with his left fist ... and said 'How do you like that cunt?' The magistrate said:

The defendant had been making it clear to health professionals from the time he was first seen by the ambulance officers at Lloyds that he did not want their treatment. He had agreed to go to the hospital in the ambulance later that night but had otherwise steadfastly and continuously refused treatment. I reiterate that I am satisfied that when he first entered the hospital, he was calm, but reacted when he saw staff approach him to inject him with a needle. There is no doubt that he expressed aggressively and loudly that he did not want the injection. He was then facing a situation in which he was being forcibly restrained and injected with a drug without his consent and without information as to the identify the drug. There is no evidence that he was provided with any information as to the purpose, nature or risks of the injection. In any event, he was entitled to refuse treatment. The injection into his body of an unknown drug was a gross violation of his personal security and integrity and,

⁵ <https://tenplay.com.au/news/melbourne/2018/5/17/man-apologises-for-brutal-attack-on-paramedic>

⁶ <https://emergencylaw.files.wordpress.com/2015/10/bonde-v-morrison.pdf>

viewed objectively, justified the use of commensurate force in self-defence. The fact that several persons were attempting to restrain him for the purpose of leaving him vulnerable to the injection increased the level of force that would be considered reasonable in the circumstances. He had managed to get his left arm free but his other arm was being held by Sgt Norton. In those circumstances, I cannot be satisfied that it was not reasonable for him to attack the police officer, by punching him with his left hand in an attempt to free himself. Whilst it is arguable that the comment which followed was not necessary, in the circumstances described above, I am not satisfied that such comment was unreasonable in the sense that it was incidental to the use of reasonable force in self-defence.

We will return to that issue and the decision in *Bonde v Morrison* when discussing the possible implications of these law reforms for paramedics.

Apart from using force in self-defence, we may have some sympathy for a potential defendant. On 24 May 2018, following a tragic suicide by a NSW paramedic, the ABC reported on drug use within NSW Ambulance (Hagar Cohen and David Lewis '*Saving our lives while losing their own – the rise of narcotics use among paramedics*' ABC News (Online) 24 May 2018⁷). The report says:

Paramedics in Australia have the second highest rate of suicide of any emergency services workers, including police, firefighters, and prison guards.

It is no secret many steal and misuse addictive drugs, including fentanyl, to treat conditions like post-traumatic stress disorder...

NSW Ambulance Commissioner Dominic Morgan says he takes full responsibility for the fact that fentanyl tampering still occurs.

"It's terribly inappropriate and concerning to me that [patients] were administered saline because that would have meant that they had in fact had inadequate pain relief," he said.

Mr Jenkins' daughter, Kim, says she believes that NSW Ambulance needs to focus on the mental health of long-serving paramedics like her dad as a priority.

"They go into a job that is stressful and they have that long term trauma," Kim Jenkins said.

"They are not supported and they are around these very potent dangerous drugs — it's a complete recipe for disaster."

Paramedics are exposed to traumas that most of us can barely imagine and that compounds over time. It is no surprise that they self-medicate particularly if they do not feel they are supported by their service. Many will leave the service that was essential to their self-identity. Some, like Mr Jenkins, will take or attempt to take their own lives. Whether it's suicide, drug overdose or some other condition many may require assistance from their former (or current) colleagues. What is the correct outcome for a former paramedic, suffering PTSD, who becomes distressed to realise he or she is being loaded into an ambulance and strikes out hitting colleagues who he has worked with? A commentator writing on Michael Eburn's blog, *Australian Emergency Law*, said:

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<http://www.abc.net.au/news/2018-05-24/the-rise-of-narcotics-use-among-paramedics/9788134>

Cases like this are very difficult because people (yes, I'm making an assumption) might be sympathetic to victims but are not sympathetic to criminals. However in many cases (like this one) the two are the same.

So to draw a parallel, it's easy to feel sympathy for a war veteran (or an emergency service worker!) with PTSD but that sympathy and understanding evaporates when this PTSD manifests as domestic violence or alcoholism (or alternatively, there's total denial because it's so hard to reconcile the two)...

It's easy to make a black-and-white judgment call reading news stories about perceived lenient sentencing because we 'the public' see only the criminal, not the whole person.

If paramedic's actions were intentional and not reasonable force in self-defence then that is an assault; but is prison the appropriate response? Paramedics may be more willing to sympathise with the offender who they see as 'one of their own'.

People other than patients

Bystanders may also assault paramedics. An offender who sees that a paramedic is rendering care to someone the offender has just beaten up may see that the paramedic is on the 'wrong' side and so attack him or her. For that offender gaol may be an appropriate sentence.

But there may be others. Imagine an intellectually disabled adult who sees paramedics treating his mother. He may not know what is going on. He may fear that paramedics will take his mother and he does not know what will happen to him so he tries to fend them off. That is not 'self-defence' nor defence of others (because he's not at risk and he's acting to protect his interest, not hers) but would prison be appropriate? If he believed that the paramedics were harming or intending to harm his mother, an attack on them may be justified as 'self-defence' even if the belief is mistaken.

In another news story broadcast on Channel 10's 'the Project' ('Medic Attacks', 22 May 2018⁸) a paramedic reported attending a scene and being warned that it was a 'trap'. She and her partner retreated to the ambulance pending arrival of police whilst the person threatened them. He was 'never charged'. We don't why he was never charged as there's no interview with police or the Director of Public Prosecutions on that point. But he wasn't charged. And mandatory sentences won't apply if people aren't charged and convicted. And like patients a non-patient may be mentally ill or otherwise affected such that they are not actually guilty of the offences that might otherwise be alleged.

Mandatory sentencing does not remove discretion

Even with mandatory sentencing discretion remains. The first discretion lies with the paramedic who decides whether or not to complain to police or assist with their inquiries. The paramedic assaulted by their PTSD affected colleague may choose not to report the matter. The paramedic struck by the intellectually disabled young man terrified at what's happening to his mum may 'understand' and not report it.

Second there is discretion vested in police. They don't have to charge everyone. They have to consider the evidence and whether there are reasonable grounds to suspect that an offence has occurred and whether there are reasonable prospects for success. Considering the person's state of

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<https://tenplay.com.au/channel-ten/the-project/extra/season-9/medic-attacks>

health they may determine that they could not succeed. The resources of the State should not be directed against a person unless there are reasonable prospects of success. Police also have the option of what to charge a person with. They may choose to charge a person with a lesser offence if that does not carry the mandatory penalty if they and/or the victim think that is appropriate in the circumstances.

And then the matter ends up with the Director of Public Prosecutions. The *Policy of the Director of Public Prosecutions for Victoria*⁹ (accessed 25 May 2018) says (p 1):

The decision whether to prosecute is the most important decision in the prosecution process. It can profoundly affect people's lives.

A prosecution may only proceed if:

- there is a reasonable prospect of a conviction; and
- a prosecution is in the public interest.

When considering the public interest the DPP will consider, amongst other things (pp. 2-3):

- the culpability of the offender
- the offender's antecedents and background
- the age, physical health, mental health or special infirmity of the offender
- whether the offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the offender has done so.

In making the decision to prosecute, the DPP will consider many factors that a judge may consider in sentence if a prosecution is successful. The discretion remains but rather than being decided in open court it would be made in the offices of the DPP. One may not like the judge's decision in *DPP v Warren and Underwood* but at least the judge's reasons are published and open for comment and criticism.

The effect on paramedics

Mandatory gaol sentences will have adverse impacts upon paramedics. First more cases, where the inevitable outcome is gaol, will be defended. A person can expect a discount on sentence for an early plea of guilty but if the outcome will be gaol either way, there may be little to be gained. Further a person is more likely to receive legal aid if 'a conviction is likely to result in a term of immediate imprisonment' which is the intended outcome of these reforms (see Victoria Legal Aid, *VLA Handbook for Lawyers*, Guideline 1.1 – 'not guilty' plea in the Magistrates' Court (11 March 2016)¹⁰).

If cases are defended they will take longer and paramedics will be required to attend court and give evidence. Where the defence is that the offender's actions were not willed (in legal speak that the offender was an 'automaton') there will no doubt be competing experts to discuss the impact of the

⁹ <http://www.opp.vic.gov.au/getattachment/b5d48af4-3bef-4650-84fa-6b9befc776e0/DPP-Policy.aspx>

¹⁰ <http://handbook.vla.vic.gov.au/handbook/3-criminal-law-guidelines/guideline-11-not-guilty-plea-in-magistrates-court>

patient's illness or injuries on their capacity to form the intention to strike the paramedic. Where the defence is that the person was mentally ill such that they did not know the nature and consequence of their action, then that too will tie up expert evidence. The patient who honestly believed the paramedics were aliens trying to abduct him or her is entitled to defend themselves and they don't know that the 'nature' of their act was attacking paramedics.

Where the claim is self-defence (as in of *Bonde v Morrison* [2015] TASC (2 October 2015) discussed above) the conduct of the paramedics will be subject to close scrutiny. People have a right to refuse treatment and that raises complex decision making for paramedics when trying to decide whether the refusal is competent and binding, or not. Whilst various statutory and other legal principles may mean a paramedic is not liable for taking action, they won't stop a patient, facing gaol, arguing that they had refused treatment and were therefore entitled to resist the paramedics. No doubt minute details of what was said and done will be gone through to see if there is reason to find that the patient had indeed refused treatment or that the paramedic's actions support the patient's claim that he or she had some fear. Even if that fear is unreasonable when seen objectively, given what was happening to them they may be able to show they had a fear and their response to that fear was reasonable in the circumstances as they understood them.

For the paramedic the job is just 'another day at the office'. For the patient it's the worst day of their life or at least not a good day and whether it's due to drugs, the injuries or simply fear of what's happening to them they may be acting out of very basic 'fight or flight' responses. When 'flight' isn't an option fight may be. When they recover they may be able to see the irrationality of their response but they have to be judged at the time. The point of law is to punish the offender's criminality so if the offender's response was a reasonable response to the world as he or she perceived it at the time that will be a defence.

This will require examination of what the paramedics said and did (and see, for example the sort of examination that did take place in *Bonde v Morrison*). How did the paramedic's approach a distressed person? As training progresses what steps did they take to de-escalate the situation (see Drew, Peter; Tippett, Vivienne and Devenish, Scott, 'Effectiveness of mitigation interventions on occupational violence against emergency service workers: a mixed methods systematic review protocol' *JBIR Database of Systematic Reviews and Implementation Reports*: May 2018 - Volume 16 - Issue 5 - p 1081–1086¹¹);).

Paramedics may be concerned when it comes to treating people that refuse consent or the like, that their conduct will be subject to scrutiny. That can be expected with any prosecution but if more cases are going to be defended, that is likely to increase.

The most trusted profession

Paramedics are constantly rated as one of, if not, the most trusted professions. That trust may be eroded if people fear that if they call the paramedics for their unconscious friend or family member, then that person may end up in gaol if they become agitated or violent.

What's the problem with gaol sentences?

The answer is nothing per se. For some people and some crimes they're necessary. The problem with mandatory sentences is that they often lead to injustice. They lead to injustice as they assume that all offending actions are of the same seriousness and more importantly, criminality. A person

¹¹ doi: 10.11124/JBIRIR-2017-003412

who rings triple zero to bring an ambulance to his or her location so that they can assault the paramedics and steal their drug box is very different from the patient suffering PTSD who is traumatised by the prospect of being loaded into an ambulance. But with mandatory gaol sentences the starting point of the response to their offending is the same. Judges need the discretion to impose gaol terms but there are alternatives and they are there because experience has shown that they can be more effective at preventing future offending.

For some offences the threat of gaol makes sense. Consider the evidence coming out of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*. If bank employees and executives see that they can make money out of fraudulent activity and the risk and consequences of getting caught are low, then they may act illegally. Making it clear that they cannot profit by that conduct by raising the cost may act as a deterrent.

Paramedics work in a different world. The very people who need paramedic assistance are those suffering a mental health crisis, the effects of intoxication or brain injury. Those who are in distress, or in crisis are not likely to make rational decisions. Tony Walker, Ambulance Victoria CEO is quoted as saying "It's illogical to me that someone would want to hurt someone who is out there to help them in a time of their crisis. It's just ridiculous".¹² Potential prison sentences may impact upon those making logical decisions, but they won't have any effect on those who are not in control of their actions, don't know what is happening. They are not acting on the basis of logic and mandating that everyone serve a jail term regardless of the particulars of the case is unjust and won't affect the next person's decision making.

It will also be unjust because the mandatory sentences don't apply to other workers. Assume a person with a mental illness or drug dependency is frustrated as their Centrelink payment has been delayed and they take that out on a Centrelink employee. The Centrelink employee is entitled to a safe workplace too – why is there a mandatory sentence for the person who assaults the paramedic but not the Centrelink employee, the council officer or anyone else? If mandatory sentences are believed to be an effective deterrent or protection the justice argument will be why do they get protection and not others? The end point of that is mandatory life sentences for all offences.

Finally, gaol is not an effective crime prevention measure. In their report into Mandatory Sentencing (2008) the Victorian Sentencing Advisory Council said (p. 20; emphasis added) "it is unclear how accurate a mandatory sentencing regime is in targeting potential recidivists. At the same time, there is much evidence that suggests that imprisonment itself **increases** the likelihood of recidivism".¹³ Tania Wolff writing in the journal of the Law Institute of Victoria says:

Our prison population, perhaps contrary to public perception, is predominantly made up of the poor and disadvantaged. Add to that the addicted, the mentally ill and the cognitively impaired. Prison is not a rehabilitative environment and with recidivism rates at 43 per cent, almost half return to prison inside two years...The notion that the unwell, addicted and impaired will stop committing crimes without rehabilitation and therapeutic programs to deal with the underlying causes of offending is fanciful.¹⁴

¹² <https://twitter.com/theprojecttv/status/998856135191937024?lang=en>

¹³ Sentencing Advisory Council, *Sentencing Matters: Mandatory Sentencing* (Government of Victoria, 2008).

¹⁴ Tania Wolff, 'Why mandatory sentencing fails', *Law Institute Journal*, 1 February 2018

With respect to the defendants in *DPP v Warren and Underwood*, both were first offenders and as far as can be seen, neither have offended again since these offences. It's hard to see what a gaol sentence would have achieved that has not been achieved by the outcome of the court's decisions. Further if paramedics want to be protected from future offending, the evidence is that sending people like Ms Warren and Ms Underwood to gaol, rather than addressing the cause of their offending, is likely to increase not decrease the risk of future offending.

Governments don't believe in mandatory sentencing

It is clear governments don't believe in mandatory sentencing despite the rhetoric. Before the decision in *DPP v Warren and Underwood* paramedics had been told that there was a mandatory six-month gaol term; so how could a judge avoid that sentence? The answer is that the sentence wasn't mandatory. The legislation had allowed a judge to impose a lesser sentence if 'special circumstances' warranted that sentence. Both the first magistrate and then the judge on appeal had found that special circumstances did apply. And those special circumstances were not, as suggested in some commentary, that the offenders were affected by drugs or alcohol at the time. They related to their level of intellectual development and maturity that was impacted upon their own experiences as children including extensive histories of being sexually abused. One of the reasons that sexual assault of children is seen as one of the worst crimes possible (if not the worst) is because of the devastating and long-term impact it has on the victims of those offences. If we believe that then a court should consider what impact being subject to sexual abuse by family members and raped before the age of 15 has on particular offenders. We can't ask everyone to respond to these events (or developing PTSD from their service in the armed or emergency services) in an 'acceptable' way. The consequence of being damaged may be that a person can't behave as we hope they will.

New Zealand has also moved to introduce mandatory sentencing but it, too, isn't mandatory. Under the proposed law set out in the *Protection for First Responders and Prison Officers Bill* (NZ) a court would be required impose a minimum sentence of 6 months imprisonment on any person convicted of the new offence of 'Injuring first responder or prison officer with intent'. The judge need not, however, impose that sentence if in the judge's opinion, 'a sentence of imprisonment would be manifestly unjust'.

Governments can promise mandatory sentences but leave the details, including exceptions, to the judge because they know, as the examples in Victoria and New Zealand show, the details are not reported; just the headline 'mandatory sentence'. But governments also know that all cases are different and have to be judged on their own facts, and only judges not legislators can do that.

So what's to be done?

Stephen Odgers, barrister said ('I am that girl', *ABC Four Corners*, 7 May 2018¹⁵):

The criminal law is a blunt and brutal method of social education. Yes, we want to educate our community to engage and to behave in a civilised way, but you shouldn't rely on the criminal law as the key mechanism for doing that.

Let us attempt an analogy. A person is obese and smokes. They are at risk of coronary disease. They have a coronary occlusion and an ambulance is called. Paramedics attend, apply their high level of skills to keep the patient alive and reduce the potential damage. The patient is transported to hospital and surgeons perform a bypass and the patient is discharged home with no adverse

¹⁵ <http://www.abc.net.au/4corners/i-am-that-girl/9736126>

consequences. The acute response has been effective. But the patient is still at risk of coronary disease. The removal of that blockage has no effect on these arteries and the fat in their circulatory system. If they have another occlusion they can't blame the paramedics or the surgeons for not having dealt with the blockage that had not yet occurred and could not be identified. What is required to avoid the second occlusion is to do the hard work on the body. Changing lifestyle and habits and that requires support. Simply telling a person to get fit and quit smoking won't work.

The analogy (if it's not obvious) is that the occlusion is like the paramedic assault. You can remove the offender but it has no impact on the risk to the next paramedic. What needs to be done is the hard work on the body of the community. Fund education, mental health services, drug rehabilitation etc. Don't demean people who, for whatever reason, can't work in the current community. Make Newstart liveable. And before people argue that we are suggesting spending money on offenders, not victims, we are suggesting taking those steps, so people don't become offenders. People who have committed offences (like Ms Warren and Ms Underwood) may receive support to change their lifestyle including close monitoring, but society would be safer if that support was offered before people committed crimes.

And if people think paramedics are 'not supported and they are around these very potent dangerous drugs...' what about women who were subjected to multiple sexual assaults before the age of 15 and were removed to state care (and the state is not a good parent)?

The problem is that sort of work is expensive, slow and unpopular in today's rhetoric. Politicians can win many more votes with the 'tough on crime' rhetoric rather than saying 'not everyone can pull themselves up by their bootstraps – and everyone deserves support even if we don't actually like them very much and even if they resist, and will fail, and may need the threat (but not necessarily the actuality of gaol) to turn their lives around'.

What's more governments recognise that long term programs are more likely to reduce violence than acting after the violence has occurred (Minister for Aboriginal Affairs, Minister for the Prevention of Family Violence, Minister for Women, 'Stopping Violence Before It Starts In Gippsland', 25 May 2018¹⁶).

Conclusion

Our argument is *NOT* that gaol terms for people who assault paramedics are not, and will not, be called for. Neither are we arguing that it is ok to intentionally assault paramedics. It's not; and that's why it's illegal, as it should be.

Fundamentally our argument is that *mandatory* gaol terms will not decrease the risk of, or actual event of occupational violence directed toward paramedics and they may have adverse effects for paramedics. If we're right we predict no significant downturn in violence due to the sort of changes proposed in Victoria, but we do predict more cases will be defended, more paramedics will have to give evidence in court and the conduct of the paramedics will be subject to closer scrutiny. Community trust in paramedicine may be diminished. These potential costs are achieved for the benefit of making paramedics think the government has done something for them; but it hasn't, it's only done something for itself. By offering mandatory sentencing the government is offering a placebo, a remedy 'to humour or placate' those calling for something to be done. No-one will hold the government to account when the policy fails to produce results, but the government can hope to

¹⁶ <https://www.premier.vic.gov.au/stopping-violence-before-it-starts-in-gippsland/>

ride a vote winning wave. The only winner from introducing mandatory sentences is the electoral appeal of the government. It's a placebo – a procedure prescribed for the psychological benefit but that won't address the cause of offending or reduce the risk of future offending.

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