Queensland Council for Civil Liberties Discussion Paper on Dangerous Offenders and Sex Offender Notification Legislation

The purpose of this paper is to summarise the Council's position in relation to legislation for the detention of dangerous offenders, and in particular sex offenders, and sex offender notification or registration laws which have the effect of requiring sex offenders to be registered and the fact that they are living in a particular community advised to members of that community.

Dangerous Offenders Legislation

1. Problems with the term "dangerousness"

The concept of dangerousness has a number of problems associated with it that appear not to have been resolved in any jurisdiction. Reviewing American and Canadian literature *Toews*[1] concluded that no definition, standardisation or prediction of dangerousness exists. According to *Mestrovic & Cook*[2] scholars agree that definitions of dangerousness in the law are circular, legalistic and dependent on subjective interpretation. *Diamond*[3] describes the legal use of "dangerousness" as a reification of an action into an attribute, a philosophical error. There appears to be no consensus as to what constitutes dangerousness to provide a sound reference point when that term is applied in legal settings. Experience in other jurisdictions show that definitions of dangerousness are not readily formulated.

2. Dangerousness and future behaviour

Speaking of the two "core characteristics" of dangerousness *Steadman*[4] said:

> "The first is that as a prediction dangerousness is an estimation of the potential that a person will do something that is defined as dangerous. As such dangerousness is a perception of the evaluator and not a characteristic constant or otherwise of the evaluatee. Second, dangerousness is by its nature a prediction. It means that because of certain characteristics or behaviour a person is seen to have a high probability of performing certain acts in the future. Thus the essence of dangerousness is that it is a perception and a prediction."

3. The prediction of dangerousness

With respect to the prediction of dangerousness Steadman (1980) commented that:

---

[1] Toews Et Al *Committment of the Mentally Ill – Current Issues* Canadian Journal of Psychiatry 1980, 25, 612

[2] S.G. Mestrovic & J A *Cook The Dangerousness Standard – what is it and how is it used* International Journal of Law & Psychiatry 1986, 8, 443-469

[3] Diamond *The Psychiatric Prediction of Dangerousness* University of Pennsylvania Law Review 1974, 439

[4] H J Steadman *The Right Not to be a False Positive, Problems in the Application of the Dangerousness Standard* Psychiatric Quarterly 1980 52(2), 84-99

> "No where in the research literature is there any documentation that clinicians can predict dangerous behaviour beyond the level of chance. Although there continue to be assertions of the validity of clinical judgments that assure the listeners of accurate predictions and efficacious treatments to deter violence there exists no empirical documentation…there is not a single piece of empirical evidence that accurate predictions under any circumstances are made by clinicians." (page 96)

Ennis & Litwack[5] (1974) stated:

> "Whatever may be said of the reliability and validity of psychiatric judgments in general there is literally no evidence that psychiatrists reliably and accurately predict dangerous behaviour. To the contrary such predictions are wrong more often then they are right."

Stone (1975)[6] stated:

> "The law asks the psychiatrist to prognosticate dangerous behaviour. That is absurd because it is a rare event and a capacity for such prognostication is absent".

The American Psychiatric Association in their task force report on violence[7] also comments that predictions of violence are "predictions of rare or infrequent events." They state that criteria that would identify 50% of parole violators would have to be so stringent "that 8 of the 9 persons retained in prison…would not have committed offences if released."

The taskforce concluded that neither psychiatrists nor anyone else have readily demonstrated an ability to predict future violence or dangerousness.

The conclusions set out above are based on substantial research. Steadman (1980)[8] reviewed a number of studies of dangerous offenders including two concerned with institutionalized patients (Steadman and Co Cozza and Thornberry and Jacoby 1974). In the former study 967 maximum security mental hospital patients detained because of their mental illness and dangerousness were released following a Court directive. Only 20% were assaultive during the ensuing four years. The second study followed 439 patients discharged under similar circumstances, 14% of whom offended over four years.

Kozol, Boucher & Garofalo (1972)[9] reported on the dangerousness of a population consisting mostly of sex offenders. Of the 226 accepted for treatment, staff

---

[5] Ennis, B.J & Litwack T.R. *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom* California Law Review 1974 52, 693-752

[6] Stone A.A. *Mental Health & Law a System in Transition Centre for Studies of Crime and Delinquency*, NIMH Washington DC 1975

[7] *Clinical Aspects of the Violent Individual* Report of the Task Force of the American Psychiatric Association Washington DC 1974

[8] Op Cit reviewed a number of studies of dangerous offenders including two concerned with institutionalized patients (Steadman & Co Cozza, and Thornberry and Jacoby, 1974).

[9] Kozoil A.L, Boucher R. J & Garofalo, R. F. *The Diagnosis and Treatment of Dangerousness*. Crime and Delinquency 1972 18, 371-392.

subsequently discharged 82 with a recidivism rate of 6.1%. 49 patients were released by Court Order, against the advice of medical staff, with a subsequent recidivism rate of 34.7%. Clinical judgment to retain the 49 high risk individuals was wrong in 69% of cases. A decision to release all of the dangerous offenders would have been 65% correct.

Even the strongest claims in support of the reliability of psychiatric models to predict future dangerousness claim a success rate of only 70-80%. This means we are facing the possibility of detaining a significant number of people who should not be detained.

4. Implications for Legislation

The widely accepted difficulties associated with the concept of dangerousness obviously have implications for the formulation of legislation. Some standard body of knowledge concerned with dangerousness and what have traditionally been termed "dangerous offenders" is now available to legislators. It was not to those who drafted legislation in the past. For example Section 18 of the *Criminal Code Amendment Act* 1945 provides for the detention of individuals deemed to be incapable of controlling their sexual instincts. The Queensland State Parliament passed legislation, not without some dissent, that required predictive skills of mental health practitioners which had not been evidenced. The parliamentary debate did not initially address this issue in great detail but did reflect the belief by some members that expertise would develop through research and practice.

This has not eventuated. The dangerousness of sex offenders still cannot be reliably predicted. This was demonstrated in a recent report to the Criminology Research Council[10]. The authors summarized the current state of the research on pages 12-14. The paper refers to a review of the evidence in 2000 which found that there were still a significant number of false positives.

The paper refers to the attempt to apply what are known as "actuarial" approaches under which offenders are categorized into certain groups and the risk of them re-offending calculated on this basis. These methodologies whilst apparently having a higher level of accuracy they still have significant difficulties, including the fact that individuals are assessed by reference to whether or not they fall within a certain group, so that an individual's particular characteristics are ignored.

With this in mind it might be asked what is the purpose of "dangerous offender" laws. Do they serve to achieve:

a. Retribution;
b. Deterrence;
c. Rehabilitation; or
d. The protection of society.

[10] *Preventative Detention for "Dangerous" Offenders in Australia: A critical analysis and proposals for policy development* by Professor Bernadette McSherry & Ors, November 2006.

Two of these possible objectives, rehabilitation and the protection of society relate to future behaviour. However, there remains no rational way of deciding when to release a prisoner with these in mind. The decision of when to release remains a guess whether it is done at the time of initial sentencing or later. Age is the only relevant factor, as individuals become less capable of being harmful as they age but it can be taken into account at the time of sentencing.

It remains the case that indeterminate sentences do not solve the problem of how long to detain a prisoner for before deciding that he or she is safe. Nothing happens during the period of detention that has any predictive power. All pertinent information is available at the time of sentencing. If the purpose of the law was to provide for individuals identified as "dangerous" to be detained it can only be a sham. It only encourages so called experts to prognostications that are beyond their or anyone else's expertise. Similarly it will encourage the legal profession, at least those not conversant with the scientific reality, to hold onto the view that dangerousness is an entity about which rational decisions can be made.

If legislation is to provide for long term or permanent detention, it could so without reference direct or implied to dangerousness and as a result take account of the scientific knowledge that dangerousness cannot be predicted, and can avoid erroneous assumptions. [11]

We are now going to incarcerate people for not what they have done but for what they may do. This means that even if there is some level of predictability shown, the real risk is that a percentage of people will be detained that shouldn't be.

Despite the social cost of both alcohol and motor cars to the community, which is far more predictive and measurable than the future conduct of an individual, we do not ban these products. Why should a person's liberty have a lesser premium placed on it.

5. Detention and the Criminal Law

The traditional civil libertarian model for punishment is the just deserts approach in which it is said that the punishment should fit the crime. This is usually advocated for due process reasons. If the fundamental criterion is that the punishment should fit the crime then this facilitates equal treatment before the law and restricts the ability of this state to impose arbitrary punishments for purely political or other purposes.

In the *Veen v R* 23 ALR 281 Justice Murphy of the High Court considered a sentence in which the Judge had increased the penalty because there was the risk that when released the offender would recommit the offence. He noted that the evidence is that the predictions of psychiatrists in this area notoriously over predict dangerousness – see page 309 of the Judgment where various reviews of the evidence are cited.

Murphy noted that traditionally the Courts have imposed maximum or near maximum sentences to protect the community not against people who are considered to be

[11] To this point this paper follows substantially a paper prepared by executive member and psychologist Geoffrey Grantham in 1991.

insane or of diminished responsibility but against those who are considered responsible for their reactions but whose dispositions, aggressive or otherwise have made them a danger to society. He noted there is a distortion of the criminal law to sentence people to longer terms because they are sick or have diminished responsibility. It is inconsistent with the aims of the criminal law. A sentence is a once and for all decision not the progressive examination assessment and if possible treatment which are appropriate to prevent detention.

New legislation like the *Dangerous Prisoners (Sexual Offenders) Act 2003* creates the anomalous situation where the standard of proof required to *continue* the detention of an offender is less than the standard of proof required to detain them in the first place. At the very least the Court should have to be satisfied beyond reasonable doubt the prisoner is likely to reoffend in order to continue imprisonment.

If people are to be locked up by the community it should be on the basis of what they have done rather than what they might do. This follows from basic principles. It is possible to establish to a satisfactory standard what they have actually done whereas it is not possible to establish to a satisfactory standard what they might do. This involves the obvious risk of a miscarriage.

6. Notification

The Council accepts that it is a fundamental human right of all persons particularly children to be protected from sexual assault

One of the issues which arises parallel with the question of detaining allegedly dangerous offenders is that of what is known as Megan's Law in the United States which provide for community access to details of the name and address of sex offenders.

The Council rejects such legislation.

The first point to be made, is that the purpose of laws which prohibit the publication of the names of sex offenders is not to protect the sex offender, but to protect the victim.

The first person likely to be harmed by the publication of the names of sex offenders other victims who may well be identified. It is impossible for those who wish to release these names to say that they cannot prevent him victim being identified. They can only say that if they are God and are omniscient that is, they know all possible connections between the victim and other people.

Notification laws will not protect children. They are at best ineffective and at worst create a false sense of security which may actually expose children to risk. In addition there is the danger of vigilantism that risks harming innocent bystanders. These propositions are supported by a number of reports.

The United Kingdom's National Society for the Prevention of Cruelty to Children published a review of these laws in November 2006 which found that there is currently no empirical evidence that community notification has had a positive impact

on offender recidivism rates. Furthermore they found there is no evidence that community notification has resulted in fewer assaults by strangers on children.

If recent evidence which suggests that recidivism rates amongst sex offenders are in fact low is correct, then community notification legislation has the potential to be seriously dysfunctional.

The report noted there is currently little monitoring of the question of the vigilantism but noted that the incidences are likely to be under-reported or not recorded.

The report was particularly concerned that given the fact that most sex offenders are known to or related to their victims (only 5% being strangers according to this report), there is a real prospect that this type of legislation will create a false sense of security. In addition it cited some evidence that the legislation may in fact increase the levels of fear and distrust in the community.

The report noted that governments have great difficulty in locating housing for those who are subject to notification. This increased the prospect of offenders being located together with the very serious risk that they would network increasing the risks to children.

The review noted the well established fact that access to housing, employment and stable social relationships were fundamental to reducing the risk of re-offending. However, community notification increases in fact the prospect of the offenders being ostracized, harassed and relocated significantly reducing the chances of this successful rehabilitation.

It also increases the prospect the offenders will go into hiding which must surely be a most undesirable outcome.

The views of the United Kingdom's National Society for the Prevention of Cruelty to Children are reinforced by American research recently summarized in a report by the *American Justice Policy Institute: Registering Harm*.

That paper reinforces the proposition that sex offender registries create a false sense of security because most perpetrators of sex offences are known to their victims or their families. It further notes that the research in America supports the proposition that placing sex offenders on registries and restricting their movements does not deter inappropriate behaviour and can actually increase crime.

The paper says that there have been numerous reports of vigilantism against people on the sex offender registry including harassment, threats and even murders. The report says 47% of those on a register who were surveyed stated that they had been harassed, 28% had received telephone calls and 16% had been assaulted.

By stigmatizing offenders and cutting them off from the community the effect of the legislation is to undermine rehabilitation.

Human Rights Watch in its report *No Easy Answers: Sex Offenders Laws in the US* [12] summarized the position as follows:

> The evidence is overwhelming, as detailed that these laws cause great harm to the people subject to them. On the other hand, proponents of these laws are not able to point to convincing evidence of public safety gains from them…
>
> sex offender laws are predicated on the widespread assumption that most people convicted of sex offenses will continue to commit such crimes if given the opportunity. Some politicians cite recidivism rates for sex offenders that are as high as 80-90 percent. In fact, most (three out of four) former sex offenders do not reoffend and most sex crimes are not committed by former offenders….
>
> Registrants and their families have been hounded from their homes, had rocks thrown through their home windows, and faeces left on their front doorsteps. They have been assaulted, stabbed, and had their homes burned by neighbours or strangers who discovered their status as a previously convicted sex offender. At least four registrants have been targeted and killed (two in 2006 and two in 2005) by strangers who found their names and addresses through online registries. Other registrants have been driven to suicide, including a teenager who was required to register after he had exposed himself to girls on their way to gym class. Violence directed at registrants has injured others. The children of sex offenders have been harassed by their peers at school, and wives and girlfriends of offenders have been ostracized from social networks and at their jobs. (pages 4-7)

To the argument that wouldn't you want to know if there is a dangerous sex offender in your neighbourhood the Council says that this is not the right basis for making policy. Should people be entitled to know that the person moving in next to them has been convicted of stealing or driving without due care and attention on the basis that they might be a risk of repeating those offences? Some people would want to know the HIV status of a doctor or dentist even though the risk to patients from a HIV infected doctor is miniscule and notification would result in significant harm. The same principle applies in the case of sex offenders: where the evidence is that notification is not going to reduce the risk of offending and it may result in harm to the offender and their family there is no justification for a right to know. This is particularly so if has been suggested the proposal is based on a false view of the rate at which sex offenders reoffend in comparison with other types of offenders.

7. Recidivism

There is a stark contrast between the view of the general public that all child sex offenders are compulsive recidivists and can't be rehabilitated and the conclusion of the criminology community that sex offenders have lower rates of Recidivisom than other types of offenders.[13]

---

[12] September 2007

[13] *McSherry & Ors Supra*

This topic is reviewed in a recent paper by the Australian Institute of Criminology[14] whose review of the evidence indicates that the fact depends on the type of offence and that those who target male victims outside their family have a higher rate of re-offending in the long term than other types of offenders.

A common criticism of the criminologists' point of view is that it is based on conviction rates. The evidence used by Ms Richards[15] is based on arrest rates.

Consideration might have been given to alternative measures of supervision. For example, compulsory notification combined with a cause of action in privacy for breach of privacy. Issues of the burden of applications might have been addressed by procedural and other changes.

However the Justice Policy Institute Paper referred to previously quotes a US Bureau of Justice statistics study also based simply on re-arrest rates which shows that sex offenders are less likely to be re-arrested than people who are convicted of other offences.

Michael Cope
President

[14] Misperceptions about Child Sex Offenders by Kelly Richards
[15] Ibid