PROBLEMS WITH THE CIVIL COMMITMENT OF SEX OFFENDERS

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Summary

Schemes to detain sex offenders after the expiry of their sentences have been enacted in most states of Australia, and on 1 July 2013 came into force in the Northern Territory. This paper will look at the background to this form of legislation, briefly review the laws that exist around Australia and describe the New South Wales experience. The paper will then look at some definitions of types of sexual offender, examine problems with the so called treatment of sex offenders, define risk and examine shortcomings of risk assessment in general. The paper will conclude with some suggestions for a rational approach to the use of what are very expensive and potentially unjust preventative detention schemes.

Introduction

The origins of preventative detention schemes can be traced to the rising concern about crime and the "law and order auctions" that were a feature of state politics in the 1990s. Around the same time a number of studies were published demonstrating the prevalence and harm caused by abuse of children, in particular, sexual abuse. There were some conspicuous cases of sentencing that changing community standards came to see as inadequate. There was also

publicity surrounding serial sexual abusers, especially among the ranks of the clergy, which left the impression in the public mind of a category of compulsive and predatory child sex offenders.

The first attempt at preventative detention legislation enacted in New South Wales was in response to an inmate who had made threats, rather than because of any fear of further sexual offenders. That law was struck down by the High Court because it was directed at the one person. In any case, the period of detention that was envisaged by the law was short, which raised the question of what to do once the order expired. Furthermore, to the author's knowledge that individual has not committed an offence in the fifteen years since his release.

The next attempt at preventative detention legislation, the *Dangerous Prisoners (Sex Offenders) Act 2003* (Qld) was allowed by the High Court with a vote of 6 to 1. Not surprisingly the dissenting opinion came from Justice Kirby, who noted that 'experts in law, psychology and criminology have long recognized the unreliability of predictions of criminal dangerousness'.

The growth in the fields of forensic psychiatric and psychology have been accompanied by a growing interest in providing counselling and other treatment to people who have committed sex offenders in order to reduce their propensity to reoffend. The sex offender treatment industry has emerged on a background of increasing sentences for people convicted of sexual offences, and also a high rate of recidivism for most categories of offender, consistent with a general lack of success of corrective services around Australia in one of their main functions, which is the rehabilitation of offenders as measured by the reduction in recidivism.

Australian legislation

The *Dangerous Prisoners (Sex Offenders) Act 2003* (Qld) was closely followed by the *Serious Sex Offenders Monitoring Act 2005* (Vic), recently replaced by the *Serious Sex Offenders (Detention and Supervision) Act 2009*, the *Crimes (Serious Sex Offenders) Act 2006* (NSW), the *Dangerous Sexual Offenders Act 2006* (WA) and most recently the *Serious Sex Offenders Act 2013* (NT).

All these schemes require some kind of psychiatric or psychological input in both identifying offenders to be placed under the schemes and in providing evidence that the offenders are indeed at risk of committing further sexual offences. However, the standard of proof required by the courts has not been the usual criminal standard of "beyond reasonable doubt", which has until the introduction of these laws been the basis for imposing a term of imprisonment. The level of risk required has also been debated and defined in the legislation. For example, in Queensland the level was described as "substantial risk".

The New South Wales experience

The New South Wales scheme varies from several other schemes in being a hybrid of civil and criminal provisions. It purports to impose civil commitment, but uses the criminal sanction of continued detention in prison, in what is claimed is not a form of punishment. The applications for the orders have sometimes arisen because sex offenders were not released on parole and served their full term, in part because they have not completed or been eligible for the custody based sex offender treatment programs.

The notifications are made by psychologists employed by the Department of Corrective Services, in reports that are often very detailed, but ultimately fall to the simple screening test for sexual offender recidivism, Static 99, to determine if

a sex offender is at high risk of committing further offences. The legislation then requires that opinions are sought from two psychiatrists as to the probability of re-offending, instructed by the Crown Solicitor. The hearings themselves are reported to be hugely expensive, and in practice everyone gets an order, although one such order was for only three years rather than the maximum of five. The problem of what to do after an order expires has also arisen, as the score on Static 99 can never be reduced once an offender has turned 25.

Definitions of sex offenders

Sex offending is not a psychiatric disorder in itself, although groups of sexual offenders include people with a range of psychiatric disorders and interpersonal deficits that could require specific treatment.

Paedophilia, or sexual behaviours or urges directed at pre-pubescent children, is included in psychiatric classifications systems. The latest issue of the American system, the fifth edition of the Diagnostic and Statistical Manual (DSM V), includes a reference to men who collect mainly child pornography, on the presumption that doing so is evidence of particular sexual attraction to pre-pubescent children. However, an attraction to post-pubescent children is not considered a medical disorder.

There are a small group of fixated paedophiles who have committed repeated sexual assaults against large numbers of children, and display the characteristic behaviour of seeking the company of children and "grooming" them for sexual exploitation, all the while rationalising and minimising their own behaviour. The behaviour of this small sub-group appears to form the basis of legal interventions, whereas the majority of sex offences are opportunistic in nature and often involve family members and acquaintances. The courts and corrective services also have to grapple with a new wave of offenders charged as a result

of their deviant use of the internet and social networks, without actual having any physical contact with another person.

Sex offender treatment

The so-called treatment of sex offenders has become a huge industry, despite common sense telling us that it will not work, and despite the near complete lack of evidence that it reduces recidivism. The sex offender treatment industry has taken on a life of its own, with its own vocabulary and firmly held belief systems that are passed on to new generations of mainly young forensic psychologists.

Sex offender treatment begins with the laudable aims of demanding disclosure of offending, encouraging empathy with the victim, and helping the offender to identify triggers to their offending. However, the model of group based therapy for all types of offenders, taken from the treatment of addictions, assumes that the behaviour of all offenders is a form of addiction. The fact that the relapse prevention model is not especially effective in treating addictions should give pause to those attempting to "treat" deviant sexual behaviour, especially when one considers that counselling has never been shown to change a person's underlying deviant sexual interest. The real challenge for corrective services should be to convince offenders not to break any laws, and in that respect there is some evidence for counselling and supervision after release.

Definition of risk

When describing the risk of further sexual offences, most assessors simply describe the probability of a further offence, without saying whether the offence would be a serious offence, which the preventative detention schemes are designed to prevent. However, risk is properly defined as the probability

multiplied by the total loss arising from an adverse event. Moreover, the unit of risk in insurance or gambling is the loss, rather than the probability, usually measured in terms of cost, which in the forensic setting should be defined as the net harm arising from a further offence.

In sex offender risk assessment, the focus is entirely on probability, which combines the likelihood of more common minor offences, many of which would not attract a term of imprisonment, with rarer serious offences.

Problems with risk assessment

A non-exhaustive list of the problems of risk assessment includes:
There is no proof that routine use of risk assessment has ever reduced harm. In fact there is surprisingly little empirical research on the outcomes of risk assessment in any setting. The risk assessment tools have been derived by retrospective examinations of characteristics of populations of offenders and tested against other populations, but there has been very little research of the outcome of classifying sex offenders and applying interventions to the high risk groups based on that classification.

There are unacceptably high rates of both false positive and false negative classifications. False positives matter, because they are the individuals who would be detained at great expense and unfairness but would not go on to commit an offence. The false negatives are those who are not detained but then commit an offence, and who would miss out on the intervention if it were of any value.

Risk assessment is less useful in attempting to predict rare events. The base rates of the serious offences that the schemes hope to prevent are thankfully very low, which makes the use of preventative detention for that purpose

completely impractical. For example, we would have to detain 30,000 patients with schizophrenia for a year to prevent one homicide of a stranger, but would would still miss the two thirds of those offences that are committed by patients who are not yet known to mental health services.

Risk assessment is generally unable to consider the varying levels of harm, as most of the studies on which risk assessment instruments such as Static 99 have been based do not separate serious and less serious offences, or even the different types of sex offences.

Risk assessment is also unable to consider varying types of harm, although Static 99 is equally good at estimating the probability of both sexual and non-sexual offending. This problem arises in mental health settings, in which some of the risk factors for suicide and for violence go in opposite directions.

One of the reasons risk assessment does not work is that it makes incorrect assumptions about human behaviour. It is assumed that offenders have fixed traits that are always present and convey a constant risk for offending. In practice, human behaviour is very much a product of a person's circumstances and fluctuations in their mental state, especially with drugs and alcohol.

One of the main problems with preventative detention schemes, and the whole risk assessment industry, is that it sets up the unrealistic expectation that all harm can be prevented. One of the more glaring examples would have to be the attempt to treat dangerous personality disorder in the UK. After expenditure of literally hundreds of millions of pounds, the scheme has been found to have no effect.

This leads to the problem of misallocation of resources on the basis of risk assessment. The diversion of money to interventions for high risk offenders

inevitably leads to reduced interventions for those considered to be at low risk. By any measure, the mistreatment of children is a major public health problem. An example of a better way to allocate resources might be in the parenting skills of prisoners, who have lots of children but on the whole have very little idea about how to care for them or how to break the cycle of offending.

Finally, participation in risk assessment is an unethical activity for a number of reasons. You rarely see any acknowledgement of the vested interests of people who promote and participate in these schemes, which include fees, royalties and career opportunities. Assessments are usually performed to the person's detriment without their participation or informed consent, despite some evidence that the subjects of risk assessment are better at identifying their own risk then their assessors. Moreover, the way in which the evidence is presented to courts and the way the conclusions of reports are interpreted by courts presents the real ethical problem of misleading and misused pseudo-scientific evidence.

A rational scheme

Given the lack of demonstrated efficacy for custodial based counselling, and our inability to identify which offender will go on to commit an offence, let alone a serious offence, what then might a rational scheme look like?

The first recommendation would be to reserve supervision orders of this kind for recidivist offenders, because the overall rate of re-offending for sexual offenders is on the whole lower than for other categories of offender, and most offenders only serve the one prison sentence. Offenders who have re-offended while on parole supervision should be given particular consideration.

The issue of long term supervision should be raised at sentencing, to be included with the fair sentence for the offence, as it seems that sex offenders are now much less likely to be granted parole.

It should be incumbent on the various departments of corrective services, as the informant in these applications, to keep a comprehensive register of cases and transparent records on the progress of sexual offenders, and to develop a more sophisticated assessment of strengths, weaknesses and individual treatment needs than is currently generally the case.

The main recommendation would be the assumption that orders would initially be made in the form of conditional release to the community, given the high rate of false positive assessments of offenders who will not go on to commit another offence for the duration of the order, just like the original subject of preventative detention legislation in New South Wales.