

Preventive detention of sex offenders: A comparative law perspective

Cynthia Calkins Mercado, Ph.D., M.L.S.
John Jay College of Criminal Justice (New York)

Recibido: 21/09/06 Aceptado: 01/10/06

Resumen

En décadas recientes, la justicia penal y la legislación de salud mental en todo el mundo ha buscado manejar y prevenir el problema de se reiterada violencia sexual. Tal vez algunas de las medidas más restrictivas han sido aquellas dirigidas a la detención de aquellos abusadores sexuales que se supone son de un riesgo elevado de reincidencia. Este documento examina la Legislación del Depredador Sexual Violento (SVP) considerada constitucional por la Corte Suprema de los Estados Unidos en *Kansas contra Hendricks* (1997), y compara este plan de compromiso civil post sentencia con los estatutos de la detención preventiva dirigidos a, o en otros casos aplicados a, los abusadores sexuales en varias de las naciones de la Commonwealth. Este documento examina, precisamente, a los *delincuentes peligrosos (abusadores sexuales)* de Australia *Acto (2003)*, el cual fue ratificado por la Fiscalía General (QLD) contra. Fardon (2004) y el cual, al igual que la legislación SVP en Los Estados Unidos, permite la detención preventiva post sentencia de los delincuentes sexuales que se consideren de alto riesgo de reincidencia sexual. Más aun, este documento revisa la legislación canadiense sobre *Delincuentes Peligrosos* que permite la detención indeterminada de delincuentes condenados, así como la designación inglesa de Peligrosos y Severos Desórdenes de Personalidad (DSPD) que autoriza transferir a sitios seguros a

Address correspondence to: cmercado@jjay.cuny.edu

Dr. Cynthia Calkins Mercado. Department of Psychology. John Jay College of Criminal Justice. The City University of New York. 445 West 59th Street. New York, NY 10019-1199.

quienes se supone representan un alto riesgo de hacer daño a otros. Una breve discusión de estas ideas alternativas, concluye el documento.

Palabras claves: prevencion, abuso sexual

Abstract

In recent decades, criminal justice and mental health legislation across the globe has sought to manage and prevent the problem of repeat sexual violence. Perhaps some of the most restrictive measures have been those aimed at the preventive detention of those sex offenders thought to pose an elevated risk of re-offense. This paper examines Sexually Violent Predator (SVP) legislation, deemed constitutional by the U.S. Supreme Court in *Kansas v. Hendricks* (1997), and compares this post-sentence civil commitment scheme with preventive detention statutes targeted at, or otherwise applicable to, sexual offenders in several of the Commonwealth nations. Specifically, this paper examines the Australian *Dangerous Prisoners (Sexual Offenders) Act* (2003), which was upheld in *Attorney-General (QLD) v. Fardon* (2004) and which, similar to SVP legislation in the U.S., allows for the post-sentence preventive detention of sex offenders deemed to be at high risk of serious sexual recidivism. Moreover, this paper reviews the *Dangerous Offender* legislation in Canada, which allows for indeterminate detention of offenders at sentencing, as well as the *Dangerous and Severe Personality Disorder* (DSPD) designation in England, which authorizes transfer to secure commitment facilities those offenders thought to pose a serious risk of harm to others. A brief discussion of these alternative schemes concludes the paper.

Keywords: preventive, sex offenders

Despite the actual nature of sexual offenses and the relatively low recidivism rate of sexual offenders (see e.g., Hanson and Morton-Bourgon (2004), who report a recidivism rate of 13.7% based on their meta-analysis), legislative bodies here and abroad have been under increasing pressure to enact strict policy to manage the risk posed by those known to have committed acts of sexual violence. Indeed, the degree of public concern surrounding sexual offenses has resulted in varied and sometimes drastic solutions to manage the problem of repeat sexual violence. Such legislation has included, for example, enhanced sentencing schemes (including longer sentences and electronic monitoring programs), residence restrictions, long-term supervision orders, community registration statutes, and

community notification laws. Arguably, however, the most aggressive legislative efforts toward the prevention of repeat sexual predation have been measures aimed at the preventive detention of a certain subclass of dangerous sexual offenders.

This paper will provide an overview of preventive detention legislation applicable to sex offender populations in several jurisdictions around the world. Specifically, the *Sexually Violent Predator (SVP)* legislation in the United States is contrasted with *Dangerous Offender* legislation in Canada, the *Dangerous and Severe Personality Disorder* (DSPD) designation in the United Kingdom, and the *Dangerous Prisoners (Sexual Offenders) Act* in Australia, which was recently found to be constitutional by the Australian High Court. It is hoped that the

comparative policy perspective undertaken in this paper will enhance our understanding of the differential merits among these policy initiatives, allowing for more informed decision making in the evolution of sex offender policy.

United States

In the United States, 16¹ states currently have some form of Sexually Violent Predator (SVP) legislation that allows for the post-sentence indefinite commitment of «dangerous» sexual offenders. Following the abduction, rape and sexual mutilation of a young boy by a recidivistic sex offender who had vocalized his intent to torture children upon his release, the State of Washington responded to public outcry for greater protection from sexual predators by enacting the *Community Protection Act of 1990* (Fitch y Hammen, 2003; Lieb, 2003). This Act, which required sex offenders to register with authorities upon release from prison, also created a new civil commitment scheme that allowed for the preventive detention of a subclass of dangerous sex offenders who would likely be ineligible for commitment under existing ordinary civil commitment procedures.

Washington's SVP statute, which has served as the model for other state SVP legislation, defines a sexually violent predator as «a person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence.²» In 1995, the State of Kansas enacted legislation modeled after the Washington statute. Kansas sought to use its legislation for the first time on Leroy Hendricks,

a recidivistic pedophile who had served ten years of his five to twenty-year sentence and who was scheduled to be released to a halfway house.³ In *Kansas v. Hendricks* (117 S. Ct. 2072, 1997) the U.S. Supreme Court upheld the constitutionality of Kansas' SVP statute, rejecting Hendricks' claims that the statute violated constitutional provisions against double jeopardy and *ex post facto* lawmaking. Indeed, because these laws were found to be civil (rather than criminal) in nature, the Court reasoned that these additional constitutional protections were not required. Although the United States Supreme Court has historically allowed indefinite commitment in lieu of sentencing for individuals with a mental disorder deemed not responsible for their criminal acts, this newer legislation is more atypical and perhaps problematic in its application at the end of a prison term. Indeed, Morse (2004) notes the difficulties in conflating desert and disease under this model, i.e., in treating sex offenders as both «mad» and «bad» in the alternative criminal justice and civil commitment systems.

As of December 2004, a projected total of 3,493 offenders were detained or committed in the United States under SVP statutes (Lieb & Gookin, 2005). Typically, the burden is on the offender to demonstrate that his risk level has sufficiently changed so as to justify release. To date, however, only a small percentage of those committed have been discharged or released. For example, as of February 2006 in the State of Washington there were 229 sex offenders at the Special Commitment Center, 6 at a secure community transition facility, and another 6 being supervised in the community (Drake y Barnoski, 2006). Similarly, Minnesota, which had committed a total of 235 offenders by the end of 2004, had released only one individual (with that offender later having his release

¹ Arizona, California, District of Columbia, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, North Dakota, New Jersey, South Carolina, Virginia, Washington, and Wisconsin

² Wash Laws §71.09.030 (1990)

³ In re 379, 2003Hendricks, 912 P.2d 129 (Kan. 1996)

revoked) (Lieb y Gookin, 2005). Janus and Walbeck (2000) note the economical impact of these programs, addressing concern in the allocation of considerable economic resources to a relative few serious sexual offenders. Indeed, Lieb and Gookin (2005) report annual costs per patient ranging from \$12,680 (South Carolina) to \$109,000 (Minnesota), with total annual program costs ranging from \$1.2 (South Carolina) to \$45.5 (California) million. Janus and Walbeck (2000) further raise the issue of whether such resources might be used more efficiently to enhance treatment services for a broader population in correctional or community settings.

Australia

Queensland's *Dangerous Prisoners (Sexual Offenders) Act*⁴ authorizes the continued detention (or supervised release) of a subclass of incarcerated sexual offenders for the stated purposes of (1) community protection and (2) the provision of continued care and treatment necessary to facilitate an offender's rehabilitation. Similar to United States' SVP legislation, detention under the Queensland Act is indefinite in nature and applied at the expiration of a prison sentence. Unlike the US legislative schemes, though, the Queensland legislation is part of criminal law, not civil commitment.

The State of Queensland first applied its act to Robert John Fardon, an offender with a history of recidivistic sexual violence. Indeed, in 1988, after having served eight years for indecently dealing with a girl under the age of 14 and rape, Fardon was released from prison.⁵ Twenty days later, he committed further offenses of rape, sodomy, and assault.⁶ Sentenced to another 14 years imprisonment, Fardon's sentence expired

just after the Queensland Act was enacted in 2003. Fardon was considered to be of particular concern given his failure «to participate in or to participate to completion in a course or courses of therapy which address his 'inner world' and give him risk minimization strategies whether related to his violent sexual offending or alcohol and drug relapse prevention.»⁷

In *Fardon v. Attorney-General for the State of Queensland* (HCA 46, 2004), the High Court of Australia, upon review of the constitutional validity of Queensland's *Dangerous Prisoners (Sexual Offenders) Act* (2003) found the Act «not beyond the legislative power of the State of Queensland⁸,» so long as there is an «unacceptable risk⁹» of a future serious sexual offense. The Queensland statute specifically mentions that the court may order a psychiatric evaluation of risk of re-offense if an incarcerated offender is believed to be a danger to the community. Such «risk assessment order» must indicate both an assessment of risk that the incarcerated sexual offender will commit another serious sexual offense if released from custody and if released from custody without a supervision order being made.¹⁰

In Australia, prisoners are not involuntarily detained under mental health legislation. Rather, they are detained at the end of their sentence under criminal law provisions. The main implication of this distinction is that in the United States vast resources have been put into the building and operation of mental health units for SVP's. By contrast, in Australia, prisoners are detained at the end of their criminal sentences and then held within the prison system following a successful application under the *Dangerous Prisoners (Sexual Offenders) Act*. Moreover, it is worth noting that the attorneys general of other

⁴ Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)

⁵ Attorney-General v. Fardon, QSC 379, 2003

⁶ Ibid

⁷ Id, 25

⁸ Fardon v. Attorney-General for the State of Queensland, HCA 46 at 44, 2004

⁹ Ibid, 3

¹⁰ Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)

Australian states, including Victoria and New South Wales, for example, intervened to the High Court on behalf of Queensland. Although Queensland remains the only state to have enacted such policy, this support suggests that other states may follow the lead in proclaiming such post-sentence preventive detention legislation.

Canada

In Canada, dangerous offender legislation permits the indeterminate sentencing of persons deemed to be *Dangerous Offenders*. At the time of sentencing, the Crown (prosecution) may petition to evaluate the offender to determine whether that individual qualifies as a «dangerous offender» or «long-term offender» (Heilbrun, Ogloff, y Picarello, 1999). While the «long-term offender» designation permits a long-term community supervision order, the «dangerous offender» label requires that high risk offenders receive indeterminate, rather than fixed, prison sentences. Under the Criminal Code of Canada (1985)¹¹, offenders with a conviction for a serious personal injury offense and who evidence of continuing threat to the safety or physical or mental well-being of others can be subject to *Dangerous Offender* provisions. The determination of risk is based on evidence establishing a pattern of repetitive or persistently aggressive behavior by the offender or evidence establishing behavior of such brutal nature as to force the conclusion that the offender is unlikely to be inhibited by normal standards of behavioral restraint. Alternatively, the *Dangerous Offender* designation may be applied to an offender who, by nature of his sexual behavior or prior convictions, has evidenced a failure to control sexual impulses (and thus evidences a likelihood of causing harm to others through failure to control such sexual impulses). *Dangerous*

Offender legislation, which has been in existence since 1977, was amended in 1996 to expand the window of opportunity for its application and to increase the minimum parole eligibility period from three to seven years (Petrunik, 2002).

Thus, while there are no specific statutes providing for the post-sentence civil commitment of sex offenders, such legislation may be applied to high risk sex offenders. Indeed, the Criminal Code of Canada enumerates sex offenses that qualify as personal injury offenses, including, for example, sexual assault and aggravated sexual assault.¹² In fact, the majority of those determined to be *Dangerous Offenders* (85-90%) have been convicted of a sex crime (Petrunik, 1994; Weinrath, 2004). Unlike SVP legislation in the United States, *Dangerous Offender* legislation is applied at the point of sentencing. Thus, if the offender is declared to be a dangerous offender, the offender is sentenced to incarceration for an indeterminate period and is held within the criminal justice system. As yet, the criminal justice system has no authority to keep someone detained past the expiration of a prison sentence. It is worth mentioning that *Dangerous Offender* legislation was not found to violate provisions against unfair deprivations of liberty, arbitrary detention, or cruel and unusual punishment in *R. v Lyons* (1987)¹³ (Petrunik, 1994).

Despite rising public concern over sex offenders following several highly publicized sex crimes, Canada has generally been more conservative in enacting sex offender specific policy, though indications suggest that this more cautious approach may be changing (Petrunik, 2002). Indeed, the 1996 amendments to the Criminal Code indicate some willingness to expand this legislation. While there are no recent signs to suggest that Canada would enact post-sentence commitment similar to that which has been enacted in Australia or the United States, it

¹¹ Canada Criminal Code, §753 (1) and §753 (2)

¹² Canada Criminal Code §752

¹³ *R. v Lyons* (1987) 37 c.c.c. (3d) (s.c.c.)

is worth noting that recommendations following the death of Christopher Stephenson in 1988 by the known sex offender Joseph Fredericks, had called for legislation to be created which provided for the continued detention of sex offenders past the expiration of their prison sentences (Petrunik, 1994).

England

In 1999, the UK Home Office and the Department of Health outlined a proposal for detaining and treating a minority of mentally disordered offenders who are thought to pose a serious risk of harm to themselves or others. This new legal framework provides for admission to high security hospitals and prisons for those offenders deemed to have *Dangerous and Severe Personality Disorder (DSPD)*. DSPD has been conceptualized as having personality disorder and a «more likely than not» propensity to re-offend. Indeed, those meeting criteria for DSPD will have evidenced high risk behavior, as measured by validated actuarial risk assessments (e.g., Violence Risk Appraisal Guide (VRAG) (Quinsey, Harris, Rice, y Cormier, 1998), Static-99 (Hanson y Thornton, 2000), Psychopathy Checklist-Revised (PCL-R; Hare, 2003) (Perkins y Bishop, 2003). The DSPD label may be applied to generally violent offenders as well as individuals evidencing a severe personality disorder (defined as a PCL-R score of 30 or above or a PCL-R score of 25-29 plus at least one DSM-IV personality disorder diagnosis other than Antisocial Personality Disorder or evidence of having two or more DSM-IV personality disorders) (Perkins y Bishop, 2003). Prisoners or those already detained under mental health legislation are anticipated to comprise the majority of referrals for DSPD detainment (DSPD Programme, Department of Health Home Office, HM Prison Service, 2005).

Individuals who exhibit high risk sex offending behavior are also eligible for DSPD commitment. While it has been suggested that the DSPD legislation will be applied to many sex offenders, there is as yet a published estimate

of the number of sex offenders currently detained under this new mental health legislation. Early reports indicate an expected 300 or more hospital beds to be available (DSPD, 2005) to manage and treat individuals whose risk of serious violence is linked to personality disorder. However, until DSPD programming is fully operational, it will remain to be seen the extent to which this designation will serve as a preventive commitment scheme for sex offender populations.

Conclusion

In response to highly publicized, and often sensationalized, media reports of sex crimes, policymakers across the globe have enacted statutory mechanisms that facilitate the incapacitation of serious sexual offenders, including preventive detention and indeterminate custodial sentences. While the goal of maximizing public safety must be balanced against individual liberty interests, jurisdictions have responded to this rising concern with varied policy initiatives, some more specific in their application to sex offenders and others more broad in the application to generally violent or personality disordered offenders as well as sex offenders.

While the aforementioned statutes in the United States, Canada, Australia, and the United Kingdom vary in their language and operation, all are designed with the goal of increasing public safety through the identification and incapacitation of dangerous sexual offenders. It is worth noting that the legislation in the United States and Australia, which perhaps is the most far-reaching in permitting the post-sentence detention of dangerous sex offenders, has been upheld by the Supreme, or High, Courts in both nations. Although Queensland was the first, and still the only Australian state to enact legislation to detain sexual offenders in custody following the completion of their sentence, the support of other states, who intervened in *Fardon*, suggests that they may eventually enact similar legislation. Similarly, a growing number of states in the U.S.

have attempted to enact SVP legislation, thus suggesting a similar pattern of increasing support.

The Canadian *Dangerous Offender* designation, is perhaps more conservative in its application at the point of sentencing. Similar to dangerous or habitual offender statutes and «repeat sex offender» statutes common to the United States and a number of other nations, the Canadian *Dangerous Offender legislation*, although perhaps varying in scope and application, allows for harsher punishment at sentencing (Heilbrun et al., 1999). As noted, Canadian legislation does not permit incapacitation of sex offenders past the point of sentence expiration. Indeed, the indeterminate sentence is currently the toughest sentence available. As mentioned, less is known about the extent to which the U.K.'s *Dangerous and Severe Personality Disorder* (DSPD) label will be targeted toward sex offender populations. Whether the DSPD label will be applied disproportionately to sex offender populations remains to be seen.

These statutory schemes further vary with regard to the whether the acts are part of criminal law or civil commitment. As noted, in Australia Dangerous Prisoners (*Sexual Offenders*) are detained after sentencing in the prison system, while in the United States *Sexually Violent Predators* are civilly committed. In Canada, indeterminate sentencing schemes are, of course, part of the criminal justice system. Under the new legal framework in the United Kingdom, the DSPD label could be applied to those leaving prisons or hospitals; i.e., allowing the indefinite commitment of people with DSPD in criminal and civil proceedings (Buchanan y Leese, 2001). Such distinction between civil and criminal applications not only distinguishes incapacitation in terms of its goals, i.e., rehabilitation versus punishment, but also may have more system-wide implications with regard to service system costs and disparate functioning of these unique service models.

Although evolution of policy in the area of sexual offender identification and incapacitation

ensues, it is noteworthy that less attention has been paid to the issues of rehabilitation and community reintegration. As mentioned, only a small minority of those offenders held under SVP statutes in the United States have been released. With the continued evolution of policy in the sexual offender arena, it is hopeful that that United States will draw on the experiences and knowledge of other nations to inform policy with regard to treatment and community re-entry for this population.

References

- Buchanan, A. y Leese, M. (2001). Detention of people with dangerous severe personality disorders: A systematic review. *Lancet*, 358, 1955-1959.
- Drake, E. y Barnoski, R. (2006). *Sex offenders in Washington State: Key findings and trends*. Olympia: Washington State Institute for Public Policy, Document No. 06-03-1201.
- DSPD Programme, Department of Health Home Office, HM Prison Service (2005). *Dangerous and Severe Personality Disorder (DSPD) high secure services for men: Planning and delivery guide*. Available online at: <http://www.dspdprogramme.gov.uk>
- Fitch, W. L. y Hammen, D. A. (2003). The new generation of sex offender commitment laws: Which states have them and how do they work? In B. J. Winick & J. Q. LaFond (Eds.), *Protecting society from sexually dangerous offenders: Law, justice, and therapy* (pp. 27-39). Washington, DC: American Psychological Association.
- Hanson, R. K. y Morton-Bourgon, K. (2004). *Predictors of sexual recidivism: An updated meta-analysis*. (User Report 2004-02). Ottawa: Public Safety and Emergency Preparedness Canada.
- Hanson, R. K. y Thornton, D. (2000). Improving risk assessment for sex offenders: A

- comparison of three actuarial scales. *Law and Human Behavior*, 24, 119-136.
- Hare, R. D. (2003). *The Psychopathy Checklist-Revised, Second Edition*. Toronto, ON: Multi-Health Systems.
- Heilbrun, K., Ogloff, J.R.P. y Picarello, K. (1999). Dangerous offender statutes in the United States and Canada: Implications for risk assessment. *International Journal of Law and Psychiatry*, 22, 393-415.
- Janus, E.S. y Walbeck, N.H. (2000). Sex offender commitments in Minnesota: A descriptive study of second generation commitments. *Behavioral Sciences and the Law*, 18, 343-374.
- Kansas v. Hendricks* (1997), 117 S.Ct. 2072.
- Lieb, R. (2003). State policy perspectives on sexual predator laws. In B. J. Winick y J. Q. LaFond (Eds.), *Protecting society from sexually dangerous offenders: Law, justice, and therapy* (pp. 41-59). Washington, DC: American Psychological Association.
- Lieb, R. y Gookin, K. (2005). *Involuntary commitment of Sexually Violent Predators: Comparing state laws*. Olympia: Washington State Institute for Public Policy, Document No. 05-03-1101.
- Morse, S. J. (2004). Preventive confinement of dangerous offenders. *Journal of Law, Medicine, and Ethics*, 56-70.
- Perkins, D. y Bishop, D. (2003). Dangerous and Severe Personality Disorder and its relationship to sexual offending. In A. Lord y L. Rayment (Eds.), *Issues in Forensic Psychology* (pp. 24-40).
- Petrunik, M.G. (2002). Managing unacceptable risk: Sex offenders, community response, and social policy in the United States and Canada. *International Journal of Offender Therapy and Comparative Criminology*, 46, 483-511.
- Petrunik, M.G. (1994). Models of dangerousness: A cross jurisdictional review of dangerousness legislation and practice. Ottawa: Programs Branch, Ministry of the Solicitor General.
- Quinsey, V. L., Harris, G. T., Rice, M. E., y Cormier, C. A. (1998). *Violent offenders: Appraising and managing risk*. Washington, DC: American Psychological Association.
- Wash. Laws §71.09.030 (1990).
- Weinrath, M. (2004). Dangerous offender FAQ. Available online at http://www.cbc.ca/news/viewpoint/vp_weinrath/