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Response to Sentencing Serious Violent Offenders Consultation Paper

Introduction

In general, psychiatrists do not have much to contribute to the question of the sentencing of serious violent offenders. However, the opinion of a psychiatrist might be of some assistance in the minority of cases in which the offenders have a major mental illness, brain injury or intellectual disability, or have a condition about which there is a body of research about the prognosis of a psychiatric condition.

Risk assessment

With regards assessment of risk of future violence, there are currently no methods that can predict the future violent conduct of an individual with sufficient accuracy to make a fair decision based on the results of that assessment. The problems of risk assessment include the high number of false positive and false negative assessments, the lack of any empirical proof that acting on the results of risk assessment has actually prevented violence anywhere, the inability of risk assessment instruments to assess the extent of any harm that might occur, and the inability of current instruments to consider all the forms of harm that might occur or when they might occur. An examination of the histories of a group of serious violent offenders in the Violent Offenders Treatment Program (VOTP) would demonstrate that violent behaviour is usually the result of a coincidence between tendencies and circumstances, and was usually committed for some purpose that might not appear again.

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The section on risk assessment in section 2 of the consultation paper is completely misleading and incorrect. The positive predictive value of harmful events such as future violence depends on the base rate of those events. Serious violence is rare, even among populations with an increased propensity for violence. In the case of rare events such as homicides committed by people with schizophrenia, as many as 10,000 patients would have to be detained for a year to prevent one death. [1]

In answer to the consultation questions

1. My observations while providing a clinic at the Metropolitan Special Purpose Centre (MSPC) at Long Bay, which was attended by prisoners participating in the VOTP, was that the serious violent offenders in the VOTP were a very mixed group with a range of personal and social deficits and a wide range of circumstances in their past offending. In many cases the people referred to the VOTP had only committed the one serious offence.
2. The common characteristic of a group identified for special attention by a serious violent offenders program would be a history of repeated and irrational violent behaviour, rather than violence for an obvious gain such as obtaining money for drugs or gaining acceptance in a violent peer group.
3. The best method of assessing the risk of reoffending would be to examine the circumstances of each individual case, and the viability of their plans after release, similar to the assessment performed in parole hearings.
4. “Actuarial” methods are of little value in predicting an individual’s future behaviour or their response to correctional programs and counselling over time. All they show is whether the person has similar characteristics to groups of similar offenders, not whether that person will commit another violent offence.

5. Actuarial methods are too inaccurate to be of any use in a fair and just preventative detention scheme.[2]
6. Serious violent offenders with complex needs should perhaps be identified on an individual basis by an assessment unit within the Department of Corrective Services, taking into account all available data. That unit could assist in classification, rehabilitation streaming and parole preparation.
7. Any treatment program should be based on the presence of some form of psychiatric disorder that is amenable to treatment, and clear evidence of efficacy of the program (evidence of this kind is not available for most sex offenders, or for that matter, for the current sex offender treatment programs)
8. I do not have the expertise to comment on the potential use of the Habitual Criminals Act for serious violent offenders. However, the unhelpful effect of blanket sentencing, such as “three strikes” type legislation is well known, and the habitual offender provisions have created an underclass of unlicensed drivers with greatly diminished prospects for employment and normal family life.
9. The creation of a special category of life time parole might provide the framework for long term supervision of people whose mental condition was strongly associated with acts of violence and for whom indefinite continued treatment might reduce the likelihood of a further offence.
10. Any preventative detention regime for violent offenders should avoid the pseudo-scientific, hypocritical and self-defeating aspects of the scheme for preventative detention of dangerous sex offenders.[3] The dangerous sex offender legislation assumes those offenders have medical conditions and addictions, rather than a pattern (and in some cases a single episode) of bad behaviour. The detention in a prison for involuntary treatment under supposedly civil commitment, and the creation of conditions under which it becomes almost impossible then to release those detained under the orders because they have not changed in any way, should be avoided. I

suggest extending parole for failing to adhere to a rehabilitation program and for poor prospects for living a law-abiding way of life.

11. There is obviously scope for the Parole Authority to supervise serious violent offenders, because there is some capacity to supervise the conditions in which such offenders live in the community, which is one of the main determinants of violent conduct.
12. One possible reform of the probation and parole service would be to divide it into a therapeutic and supervision streams. The therapeutic stream could consider inmate requirements such as suitable accommodation, occupation, social circumstances and evidence-based psychological treatments, and the supervision arm could consider adherence to conditions such as residence, association, attendance at programs and abstinence from drugs.
13. The VOTP should only be expanded if there is evidence that the program can reduce future violence for a significant proportion of participants. Otherwise it would be another waste of resources. From my observation, some of the inmates referred to the VOTP had only the one incident of very severe violent behaviour in particular circumstances, and did not have evidence of a pattern of violent conduct. The notion that group therapy can somehow change attitudes and create empathy in this category of offender deserves scientific investigation. Despite many claims to the contrary, there is no proof that the current sex offender counselling programs make any difference to rates of recidivism.
14. It is difficult to understand the rationale for personal restriction orders over and above the conditions that can be imposed by a parole order. Perhaps people who have been violent towards an elderly citizen will be prevented from living within 500 metres of a nursing home.
15. Preventative detention of Forensic Patients found not guilty due to mental illness is entirely rational, because the original offence was directly linked to the effects of a mental illness that is usually lifelong and recurrent, and indefinite detention is a guarantee of adequate treatment. Once treated,

those patients are usually allowed conditional release, during which treatment is monitored. By contrast, the dangerous severe personality disorder programs in the UK are vastly expensive and have not provided any proof of efficacy, let alone cost-effectiveness. Resources on this scale should go to prevention, rather than detention.[4]

16. My personal view (not that of the Forensic Section of the Royal Australian and New Zealand College of Psychiatrists, which represents the interests of psychiatrists) is that psychiatry, psychology and behavioural science have little to offer in a system for the assessment of preventative detention for violent offenders and the opinion of psychiatrists regarding the probability of future behaviour has almost no scientific basis and should not be incorporated in any legislation. Psychiatric opinion might be sought in individual cases in which there is a pattern of manifestly irrational conduct due to diagnosed or underlying mental illness or brain dysfunction.
17. If preventative detention were to be adopted, I would recommend it be in the form of extended parole for people who have not adequately prepared themselves for life in the community during their head sentence. The provisions would include a presumption for parole after the original sentence was served, because future conduct cannot be predicted in a reliable way. It is worth noting that Gregory Kable has been very quiet since his release, despite the concern that he was a danger to the community at the time of his release.
18. If such a scheme were to be adopted in NSW, I would recommend avoiding the incorporation of pseudo-medical diagnoses, such as psychopathic disorder or severe personality disorder, and only consider the individual's established pattern of behaviour. The Sentencing Council should be wary of the very strong vested interests and the fervent but unscientific belief systems of many of the medical proponents of these classifications systems and risk assessment instruments.

19. The task of setting a sentence to reflect the offence before the court and future protection of the community is a difficult one. The issue of future dangerousness based on past offending can be considered at the time of sentencing. The natural history of violence in people with psychotic illness is for the violence to recur unless there is continued treatment, and long term supervision of those patients is recommended. My view is that substantial impairment is usually an unsatisfactory verdict for someone with a schizophrenic illness whose offence appeared to be linked to manifestations of that illness, and a better outcome for the community would be long term parole with orders similar to those for Forensic Patients.
20. Extending parole would appear to be a rational way of dealing with repeat violent offenders who have not prepared themselves for parole within the term of imprisonment imposed for the original offence. From experience, some of these offenders end up in an obstinate pattern of conflict with the correctional authorities and make a bloody-minded decision to serve out their sentence in order to be free of parole. There is often an inability to compromise and find a pathway to lower security and rehabilitation programs in face of constant uncooperative behaviour.
21. Serious violent offenders with psychiatric disorder require long term care. About 10% of both homicides and non-lethal serious assaults are committed by people with psychotic illness, who make up about 0.5% of the wider community. Those offenders carry a long term risk of further offending during exacerbations of illness and should have long term supervision. Many of the prisoners in the High Risk Management Unit (HRMU) over the last few years have had under-treated psychotic illness and the irrational and the self-defeating conduct of prisoners who are repeatedly violent while in gaol is often because of underlying treatable mental illness. The system for supervising Forensic Patients is associated with a low rate of recidivism and serves the community very well. However, the interface between prison and the community for other

mentally ill violent offenders is not well managed and might benefit from some kind of transfer to a similar system of mental health supervision or treatment, starting with transfer to the prison hospital and the supervision of the Mental Health Review Tribunal.

22. The idea of an indeterminate sentence for a young person who has committed a serious offence seems arbitrary and disproportionate, when a similar offender might receive a finite sentence in another court. However, the protection of the community through longer or indefinite parole would seem more acceptable, especially if there was a presumption in favour of parole after a term was served.

In summary, I would strongly oppose (and recommend that psychiatrists refuse to participate in) any system that relied on psychiatric opinion about future behaviour, because of the scientific limitations of the prediction of future behaviour. Based on the experience of dangerous sex offender legislation around Australia, preventative detention schemes end up creating a rod for the back of corrective services, because there is little we can do to change the offenders who fall under these schemes and hence the conditions in which we are happy to release these prisoners are difficult to fulfil.

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