



NSW Ombudsman

Our reference: RR/206P02

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Jerrold,

Dear Mr Cripps

Thank you for your letter of 10 May 2011 inviting a submission to the Sentencing Council's consultation on the sentencing of serious violent offenders.

I note the consultation specifies serious violent offenders as being offenders who pose a significant high risk of violent re-offending following release from prison. Having reviewed the consultation paper, and specifically the Issues and Questions for Consultation, I provide some comments for the council's consideration in the attached document.

Please do not hesitate to contact me, or Jennifer Agius, Manager of Corrections and Compliance, on 9286 1067 in relation to this consultation.

Yours sincerely

B. Barbour

Bruce Barbour
Ombudsman

22/6/11

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SENTENCING COUNCIL – CONSULTATION ON SENTENCING OF SERIOUS VIOLENT OFFENDERS – JUNE 2011

Assessment

The identification of offenders in NSW who could meet the criteria for requiring treatment, indeterminate sentence or extended detention and/or supervision raises the first issue. Recently published literature raises questions about the reliability of some of the current predictors of risk. The clinical assessment format is considered to be inexact (Hayes & Green 1997 in Kebbell & Evans 2009) and subject to a range of biases associated with the assessor – including a strong desire to ensure a safe decision is made, and in some instances as a way of ensuring offenders receive appropriate interventions in custody (Ross 2011). Actuarial assessment is considered somewhat more reliable (Kebbell and Evans 2009) but there are clear indications a form of ‘structured decision making’ or ‘structured professional judgement’ (Ogloff 2011) encompassing both clinical judgement and actuarial risk factors provides a more comprehensive and accurate form of assessment.

Victoria has attempted to address concerns about the validity of predictors of the risk of reoffending by consulting with Dr Steven Ross of the University of Melbourne to design a specific assessment instrument for use in a correctional setting. In designing the instrument, Dr Ross undertook a work study of correctional staff administering existing assessments and found they had a strong bias to the over-classification of risk. The resulting instrument – the Victorian Intervention Screening Assessment Instrument - provides guidance to correctional staff to consistently make appropriate predictions. It could be expected a similar purpose-designed instrument in NSW may remove some of the concerns held about the current predictors of risk.

It is acknowledged the prediction of risk of re-offending provides challenges for correctional administrators and the removal of any areas of bias would lend greater confidence in any subsequent decisions made about offenders identified for intervention or any other matters relating to their ongoing management.

Part 3 of the Report of the Statutory Review of the Crimes (Serious Sex Offences) Act 2006 (‘Part 3’) provided the results of an audit of current NSW offenders who would potentially meet the criteria for high-risk serious violent offender. While certain variables considered appear to be valid, certain biases may also have been inherent – albeit underlying – in the selection of offenders identified. While the report makes reference to four selection criteria generally related to the definition of a serious offender contained in the Crimes (Administration of Sentences) Act, in each category stipulated there is provision for offenders to be so classified at the discretion of the Commissioner of Corrective Services – without the need for reasons to be given for giving any inmate this designation.

For the purpose of the audit discussed in Part 3, an initial group of 750 offenders were identified using the criteria referred to above, primarily being designated as a SORC offender. The originally identified offenders were then further filtered according to their risk of violent reoffending as determined by Corrective Services NSW. The eventual list of identified offenders therefore was devised with all of the attendant concerns outlined above about risk prediction tools and inherent bias. It is likely any action taken to conduct such identification in future for any of the purposes canvassed in the consultation report would also contain such potential flaws.

I note also the current literature references the use of the Psychopathy Checklist Revised (PCL-R) as being the most successful tool (Kebbell and Evans 2009 6), and I am aware this is currently among the tools used by Corrective Services NSW. Dr Robert Hare, who devised the PCL-R cautions about the harm which can arise if it is used incorrectly, or used by people who are unfamiliar with the clinical and empirical literature related to psychopathy.

If a decision is made to extend the detention in custody, or further periods of supervision in the community of offenders identified as being at risk of violent re-offending, then consideration should also be given to the development of a risk identification tool specific to the NSW correctional system to assist in best practice decision making about risk.

Inmates identified in the NSW Audit

As noted above, 750 inmates were initially identified as meeting the Terms of Reference for the audit. The Part 3 report notes, however, that once additional filters were applied to the group, the eventual number of inmates under consideration was effectively 14. It is reported that of the 14, there were two identified as having an intellectual disability, four inmates had mental health illnesses and one was due to enter into a guardianship order on release. These figures cause concern because after applying all filters considered relevant, half of the identified inmates would fall within a group generally defined as vulnerable, and for whom no current adapted violent offending programs exist in NSW.

It is also noted that the Australian Institute of Criminology reported in 2007 that nearly half (47%) of all sentenced prisoners are in custody for crimes of violence (Heseltine, Sarre, Day 2011, 5). As such half of the inmates within the system would require assessment to determine their risk of violent reoffending if there are changes made to sentencing or the extension of detention for such offenders. This provides significant resource issues for the correctional system when the need for specialist staff to conduct such assessments is considered.

Requiring program participation

There is already an expectation of program participation by inmates in the NSW correctional system, especially for sex offenders and violent offenders. Program participation will usually be one of the determining factors for the granting of parole by the State Parole Authority. It is also a factor used internally by CSNSW to guide an inmate's progress through the correctional system including reduction in classification and security rating.

This is where an area of complaint to this office arises – the provision of reports to parole authorities, and the recording of 'case notes' by correctional staff in relation to inmates. Reports prepared by correctional and parole officers can be very difficult for the inmate to challenge (Prenzler 2009 145) or to provide any context to the decision maker about non-participation in programs. When such reports and case notes are used as a part of the overall assessment of an inmate's risk, it is possible that some of the information is wrong, or has been included for improper purposes, or in bad faith. Certainly such allegations are made to this office, and on occasion have been substantiated in the complainant's favour.

There is mixed evidence as to the effectiveness of program participation, including that it can only be stated with certainty that programs reduce reconviction not reoffending (Prenzler 2009 131). We are also aware that for many years sex offenders who denied their offences or guilt were considered not suitable for treatment. Leaving aside ethical considerations about treating someone for a condition they deny having, this has changed and deniers now participate in programs in NSW. Effectively there is no longer any real possibility for an incarcerated high

risk sexual offender to acquire their release without participation in a treatment program. It is known, however, that at least one offender, identified as high risk (a long time denier who was required to attend treatment, and who was placed on an extended supervision order when released at the end of their sentence) has subsequently been returned to custody for reoffending.

The recently released AIC Trends and Issues in Crime and Criminal Justice paper (Heseltine et al 2011 p5) notes specifically the 'paucity of published research on the efficacy of violent offender programs both in Australia and internationally'. They further state the urgent need for this gap to be addressed. Considering the purpose of the Council's consultation the urgency is somewhat increased.

Programs and existing problems

The AIC paper referred to above (No 412, May 2011) is entitled *Prison-based correctional rehabilitation: An overview of intensive interventions for moderate to high-risk offenders*. The authors have reviewed the programs offered in Australian correctional settings, noting "...strong evidence of an ongoing commitment by correctional administrators to the development and delivery of custodial based offender rehabilitation programs.." (p2). While they make the earlier comment about the lack of published research on violent offender programs specifically, they however refer to "the robust body of evidence demonstrating that rehabilitative efforts are generally successful in reducing recidivism (see Andrews & Bonta 2010)."

The view of the authors of the AIC paper about the commitment to the development and provision of programs is not necessarily disputed. However, we frequently deal with complains about inmates in relation to several related areas:

- Delays in being assessed for treatment programs, sometimes affecting their ability to participate prior to their Earliest Possible Release Date and thereby affecting their consideration for parole
- Delays in gaining access to programs for which they have been assessed. For several years this was a chronic issue with the CUBIT program due to it being a 'closed' program which could not be entered by new starters once the intake had commenced the program. This has since been changed and has made some difference to the waiting lists.
- Problems with CSNSW recruiting and retaining sufficient staff to provide programs regularly and consistently.
- 'Lock downs' and 'Lock ins' affecting the ability of inmates to attend programs when they are scheduled to run and therapeutic staff are available. This is an ongoing problem for all levels of programs provided in the correctional system.
- Correctional centres which advise they provide access to a suite of programs do not always have them available for inmates due to staffing or other administrative problems – though this is less likely with the higher level intervention programs such as CUBIT and VOTP.

As it becomes increasingly the case that inmates must attend programs to ensure their release not only to parole, but for some offenders at the end of their sentences, an increased availability and regularity of program provision must be ensured by the correctional system rather than it being left to the administrative vagaries of individual centres.

Post-prison options

Apart from extending the detention of offenders in custody who do not participate in programs some options suggested include extending supervision for offenders in the community beyond the end date of their sentence, as is now available for sex offenders. Suggestions for violent offenders include court ordered high level supervision combined with residence in a community based facility. Potentially it may also include a multi-agency overall co-ordination in a similar manner to the current Child Protection Watch Teams. While this option may assist offenders in their resettlement, and provide a level assurance to the community, it is also resource intensive and the current system with sex offenders should be properly evaluated before a decision is made to move to a similar system with high-risk violent offenders.

I note particularly the Home Office Briefing note released in April 2011 reporting on a review of the work of Public Protection Panels who are charged with similar responsibilities flags concerns about lack of consistency, resourcing issues and overall monitoring and accountability.

Effects of extended sentences

Finally it must be noted in any community discussion about proposals for indeterminate or extended detention of offenders there are recognised negative effects of ongoing imprisonment – psychological and physical - and the prospects of institutionalisation making eventual resettlement in the community difficult. Lack of community reintegration, including possible institutionalisation, is also a high risk trigger for reoffending.

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