



OFFICE OF THE
PUBLIC ADVOCATE

Submission to the Sentencing Advisory Council

High-Risk Offenders: Post-Sentence Supervision and Detention

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The Public Advocate in Victoria is appointed by the Governor in Council pursuant to the Guardianship and Administration Act 1986 (Vic). The Office of the Public Advocate (OPA) represents the interests of people with a disability, aiming to promote their rights and dignity and to strengthen their position in society. It is a statutory office, independent of government and government services, and can highlight situations in which people with disabilities are exploited, neglected or abused.

OPA's response to the discussion and options paper of the Sentencing Advisory Council regarding "High-Risk Offenders: Post-Sentence Supervision and Detention" is as follows: -

1 Should Victoria introduce a post-sentence scheme that would allow for the continuing detention of offenders who have reached the end of their custodial sentence but who are considered to pose a continued and serious danger to the community?

1.1 On the basis of the information provided in the Discussion and Options Paper entitled "High-Risk Offenders: Post-Sentence Supervision and Detention", OPA does not support a post-sentence scheme for the continuing detention of offenders who have reached the end of their custodial sentence.

1.2 OPA's reservations about the introduction of such a scheme are as follows -

1.2.1 Hanson and Bussiere (1998) identified 11 risk factors of the types of sexual offenders who have a risk of recidivism. However, the only consensus from researchers regards two broad factors – deviant sexual interests and an antisocial behaviour/lifestyle instability. Further, there is research that it is very difficult to predict whether a particular individual will re-offend. The Discussion and Options Paper notes that judgments made about individuals by mental health professionals are only slightly more accurate in their prediction of recidivism than chance. Actuarial tools of prediction perform only 'moderately well'. Further, actuarial studies evaluate classes of people, but they do not analyse whether a particular individual will be one of the class who re-offends or who does not.

1.2.2 Another concern is that the observation in the Discussion and Options Paper that "sex offenders and violent offenders are generalists in their offending, not specialists". This means it is more difficult to predict that a particular sex offender will commit offences like the ones that led to his or her incarceration.

1.2.3 Finally, the scheme may act as an impediment to people's rehabilitation. Where offenders fear that what they say may lead to their detention indefinitely it is likely that they will not reveal what they are truly thinking. The phenomenon is not unlike that seen in the mental health jurisdiction where involuntary patients mask their real thoughts from their treating

physicians for fear that if the physician knew these things then they would not be released from detention under the *Mental Health Act 1986*.

1.2.4 Accordingly OPA considers that

- there is a serious risk that people will be wrongly detained under a continuing detention regime and
- the scheme will deter people from wholeheartedly engaging in rehabilitation.

1.3 OPA is of the view that it is possible that a significant proportion of those detained under such a scheme will be people who have a disability; be it a personality disorder, intellectual disability, mental illness or acquired brain injury.

1.3.1 In December 2006 the United Nations passed the *International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*. Whilst this Convention has not been ratified by the Australian Government, the Government was involved in the development of the Convention. The Convention is not part of the *Charter of Human Rights and Responsibilities Act 2006* of the Victorian Government. Nonetheless, it would be short-sighted not to consider the impact of this Convention on the discussion of post-sentence detention. Article 13 of the Convention states –

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:
 - (a) Enjoy the right to liberty and security of person;
 - (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.
2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation

1.3.2 In the light of the research challenging the accuracy of predictions of re-offending behaviour OPA is concerned that detention would be arbitrary. Where the person has a disability, it could be argued that such arbitrary detention would be in breach of this Convention.

1.4 OPA considers that the Victorian community has other legislated options that may ensure the protection of the community, including –

- Indefinite sentences under the *Sentencing Act 1991*;
- Parole under the *Corrections Act 1986*;
- The *Sex Offenders Registration Act 2005*; and
- The *Serious Sex Offenders Monitoring Act 2005*.

1.4.1 There are also rehabilitative options available for people who have a disability which may include restrictions on their liberty. For example, the *Intellectually Disabled Persons' Services Act 1986* includes provisions for restraint and seclusion. This Act will end on 1 July 2007 when the *Disability Act 2006* comes into operation. Part 8 of the *Disability Act 2006* deals with compulsory treatment. Part 8 only applies to people who have an intellectual disability. However, when the *Disability Act 2006* was introduced, the Minister for Community Services stated –

Compulsory treatment

There are a small number of people with an intellectual disability who are subject to compulsory treatment. The bill seeks to provide better regulation for these people by providing for transparent and accountable criminal and civil orders.

At this time these provisions relate only to people with an intellectual disability. This is because the provisions seek to regulate what is already occurring. It has been suggested that the provisions should be extended to people with an acquired brain injury.

Currently, there is little evidence regarding the involvement of people with an acquired brain injury in the criminal justice system and whether there are appropriate treatment models available. It is premature for people with an acquired brain injury to be subject to compulsory treatment in the absence of this evidence. An undertaking has been made to the Public Advocate to commence research into this matter prior to any future inclusion of people with an acquired brain injury under these type of provisions.¹

1.4.2 At the time of writing this submission, the Public Advocate has not been advised of the outcome of the research being undertaken. The Public Advocate is aware of preliminary research that indicates that people who have an acquired brain injury² are significantly over-represented in the prison system.

1.4.3 OPA has sought an extension of Part 8 to cover not just intellectual disability but cognitive disabilities because, in the past, guardianship under the *Guardianship and Administration Act 1986* has been used to detain people in rehabilitative settings which also removed them from the community (such an extension would be consistent with the recommendations of the Law Reform Commission in its report *People with Intellectual Disabilities at Risk: A Legal*

¹ Hansard Legislative Assembly, 1 March 2006, Second Reading Speech at p 418

² An acquired brain injury may result from alcohol and drug abuse as well as head trauma which may explain its prevalence.

Framework for Compulsory Care). Under the *Guardianship and Administration Act 1986* an individual may seek a review of the appointment of a guardian, but they cannot seek a review of a guardian's decision, even a decision to detain someone in a facility. OPA considers that the use of civil detention must be transparent, accountable and reviewable and so argued for such a system in the *Disability Act 2006*.

- 1.4.4 The introduction of the *Disability Act 2006* provisions will provide a mechanism for ongoing compulsory treatment of people who have finished their sentence. To introduce a further mechanism under the criminal law is therefore unnecessary.
- 1.4.5 People may also be detained under the *Mental Health Act 1986* where they meet all the criteria set out in section 8(1) of that Act. Section 8(1)(c) includes "the protection of members of the public".
- 1.5 In conclusion, OPA considers that there are many options available to the Victorian Community to rehabilitate people who have a high risk of re-offending. The legal and human rights at risk in a detention scheme are of the highest and most valued order and their removal could only be justified if there were solid grounds. The fallibility of predictions as to who will be an offender does not counter-balance the removal of these rights. Further, the introduction of punitive scheme may be counter-productive to the identification and rehabilitation of possible offenders and inadvertently lead to a less safe community.