

POSITION PAPER

Balancing Rights: Arguments for the continued detention of dangerous sex offenders



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About Bravehearts

Bravehearts has been actively contributing to the provision of child sexual assault services throughout Australia since 1997. As the first and largest registered charity specifically and holistically dedicated to addressing this issue in Australia, Bravehearts exists to protect Australian children against sexual harm.

Our Mission

To prevent child sexual assault in our society.

Our Vision

To make Australia the safest place in the world to raise a child.

Our Guiding Principles

To, at all times, tenaciously pursue our Mission without fear, favour or compromise and to continually ensure that the best interests, human rights and protection of the child are placed before all other considerations.

Our Guiding Values

To at all times, do all things to serve our Mission with uncompromising integrity, respect, energy and empathy ensuring fairness, justice, and hope for all children and those who protect them.

The 3 Piers to Prevention

The work of Bravehearts is based on *3 Piers to Prevention: Educate, Empower, Protect* - Solid Foundations to Make Australia the safest place in the world to raise a child. The 3 Piers are:

Educate Education for children and young people

Empower Specialist counselling and support

Training for adults, professionals, business and community

Risk Management 'ChildPlace Health & Safety' Services

Community engagement and awareness

Protect Lobbying & Legislative Reform

Research

Abstract

Continuing detention legislation, a form of civil commitment, has been introduced in response to growing community concerns about the release of convicted sex offenders who were considered a continued risk. The legislation enables Courts to order post-sentence preventative detention or supervision of prisoners serving sentences for serious sexual offences who are considered to pose a significant danger to the community upon release from prison.

It has been argued by some that these forms of legislation are a perilous result of community moral panic and politics of fear, however, the problem of dangerousness and unacceptable risk cannot be ignored. While the science of assessing this risk remains questionable, it is imperative that our legislation addresses the, at times, conflicting rights of the community and those of individual offenders.

Legal arguments that continued detention breaches the general principle of sentence proportionality, amounts to cruel and unusual punishment and violates human rights by punishing offenders for crimes not committed, must be balanced against the rights to safety of the community.

In 2003 Queensland was the first State to introduce continuing detention legislation (the *Dangerous Prisoners (Sex Offenders) Act 2003*) to allow for sex offenders, assessed as dangerous, to be held indefinitely, post-sentence, until such time as the offender is considered of low risk. Bravehearts, a national organisation focused on addressing child sexual assault in Australian communities, was instrumental in ensuring that the proposed legislation was adopted.

Although the introduction of this type of legislation has withstood a High Court challenge asserting that it breached the Australian Constitution, debate continues. In March 2010 the United Nations Human Rights Committee made a determination that the continued detention legislation enacted in various Australian jurisdictions, specifically the Queensland and New South Wales Acts, violated the International Covenant on Civil and Political Rights.

This paper will explore the ethical and practical implications of the introduction of continuing detention legislation in Australia from the perspective of a victims' advocacy and support group; this will include consideration of the principles of justice and the rights of the community and a proposed mental health approach in sentencing dangerous and repeat sex offenders.

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Introduction

It is not unusual to incarcerate offenders for terms longer than those which may otherwise be imposed as a 'preventive' measure designed to protect the community. Such forms of imprisonment are generally referred to as 'preventive detention' schemes.

Courts across Australia have always had the capacity, at the time of sentencing, to provide an indefinite term for prisoners if it is considered appropriate (for example, under Section 163 of *Queensland's Penalties and Sentences Act 1992*, Section 23 of *South Australia's Criminal Law (Sentencing) Act 1988* and Section 18 of *Victoria's Sentencing Act 1991*). The difficulty in ordering indeterminate sentence at time of sentencing is that there is little basis to judge risk. Courts cannot take into account whether or not the offender will agree to undertake or even complete a rehabilitation program let alone be provided with an assessment of its effectiveness. The stated reason why this type of sentencing is rarely if ever used is that pre-sentence assessment of risk provides little indication on whether or not the offender is likely to re-offend in a number of years' time after he or she has completed their head sentence.

In 2003, Queensland introduced the *Dangerous Prisoners (Sexual Offenders) Act 2003* (June) allowing the State's Attorney General to apply to the Supreme Court for a continuing detention order to be imposed upon a prisoner. The Queensland law was unique because it authorises the continued incarceration of a sex offender who has served his or her term of imprisonment, but who is judged by a court to represent an ongoing risk to the community if released. In addition, such sentence is imposed, not as part of the sentencing process, but as an administrative civil procedure at the end of a person's sentence.

The main premise of such legislation is that there are a number of offenders who remain a significant risk to the community at the completion of their sentence. Since its introduction in Queensland in 2003, other Australian States have followed with similar legislation as a way of managing dangerous offenders. In 2006 both *Western Australia (Dangerous Sexual Offenders Act 2006)* and *New South Wales (Crimes (Serious Sex Offenders) Act 2006)* introduced versions of the Queensland Act, in 2007, in *Victoria the Serious Sex Offenders (Detention and Supervision) Act 2009* came in force in January 2010 and more recently the Northern Territory introduced the *Serious Sex Offenders Act 2013*.

In addition to discussing the importance of continued detention legislation, this paper proposes a new approach in sentencing dangerous and repeat offenders that take a mental health approach at the time of sentencing. In the Section titled 'Civil Commitment, Mental Health and Sentencing', Bravehearts advocates that our system include a process where once a dangerous or repeat offender has been found guilty, a mental health assessment occurs and offenders who are found to have a mental health disorder are placed in a specialised, sex offender mental health unit for treatment. Offenders without such a diagnosis are sentenced under the current process.

The History of Continued Detention in Australia

The Impetus for Continued Detention in Queensland: Leonard John Fraser

Bravehearts began strenuously lobbying for provisions to continually detain sex offenders who remained an unacceptable risk after a previously convicted sex offender abducted and murdered a nine-year old child.

In 1998 Leonard John Fraser, a repeat child sex offender who, with no mechanism in law to continue his detainment, was reluctantly released despite the obvious ongoing danger he posed to the community. In 2001, he was subsequently convicted of the 1999 abduction and murder of nine year old Keyra Steinhardt. Fraser had a lengthy criminal history spanning more than 30 years across New South Wales and Queensland, with convictions for a series of brutal rapes and attempted rapes before he abducted and murdered Keyra in 1999. Fraser was also found guilty of the murders of Beverley Leggo (37) and Sylvia Benedetti (19) and the manslaughter of Julie Turner (39) between 1998 and 1999.

Fraser's extensive and violent criminal history was considered an indication of his habitually violent tendencies and prompted debate in regard to the criminal justice processes that allow for the release of prisoners where there is a likelihood that the offender is a high risk of re-offending.

In recognition that there are offenders, such as Fraser, who either cannot or will not control their predatory behaviours and urges, Bravehearts advocated for legislation which would focus on protecting children and others who could potentially be victims of known dangerous sex offenders who are judged not to have been rehabilitated and were seen as likely to reoffend. It is our belief that we have a responsibility to protect our children and communities from those offenders who pose a serious and genuine risk. The protection of children from offenders known to be a risk must be our first priority.

In 2003 the Queensland government announced it would introduce new laws to block the release from prison of sex offenders who are assessed as posing a continuing serious danger to the community. The *Dangerous Prisoners (Sexual Offenders) Act 2003* was described by the then Queensland Premier as "a 'community protection test' ... governing the release from prison of violent sex offenders and paedophiles".

The legislation allows for an application to the Supreme Court by the Attorney-General in cases where there is a belief that a convicted sex offender poses a risk of reoffending. The Court assesses the risk and has the power to either impose a continuing detention order or an order requiring strict supervision upon release. In making its decision, the Court takes into consideration the offender's criminal history, evidence indicating the level of risk and other relevant evidence. Where a continuing detention order is imposed, a system of periodic review is established.

Queensland Legislation Tested: Robert John Fardon

In June 2003, three weeks after it was enforced, Robert John Fardon became the first sex offender to be subject to an application by the Queensland Attorney-General under the new legislation.

Fardon had an extensive criminal history extending back to 1965. While some of his offences included petty property and non-violent crimes, in 1967 he was placed on a bond for attempted carnal knowledge of a girl under 10 and in 1980 he was sentenced to imprisonment for indecent dealing with a girl under 14, rape and unlawful dealing. Fardon served 8 years of his sentence before being released on parole on 14th September 1988.

Twenty days after his release, on the 3rd October 1988, Fardon committed further offences of rape, sodomy and assault occasioning bodily harm of an adult female. On the 30th June 1989 he was sentenced to 14 years imprisonment on the first two counts and 3 years imprisonment on the third count, to be served concurrently.

A psychiatrist who had contact with Fardon from 1998, stated prior to his sentence completion date in 2003 that:

“Given the nature of Mr Fardon’s personality structure, including its intrinsic system of values, and the fact of his very prolonged institutional life, it is my opinion that a substantial risk (our emphasis) exists that Mr Fardon will commit further offences, including offences of a sexual nature upon or in relation to a child under the age of 16 years...”

He went on further to state that Fardon’s assurances that he would not re-offend could not be trusted. Fardon had refused or failed to participate in programs while incarcerated and had been expelled from the Sexual Offender’s Treatment Program after completing only a third of the program.

The two psychiatrists assessing Fardon for the indefinite sentencing Appeal, found that he was at risk of re-offending; one noting that:

“... re-offending is catastrophic for victims, families and the community. While the protection of the community is best served by the rehabilitation of offenders, that is not always possible. The difficulty remains that the protection of the community must be weighed against the imprisonment of a person who has completed his or her sentence and so is effectively to be punished by detention for a crime he or she has not committed and may never commit.”

After the dismissal of two challenges to the legislation (Justice Muir ruled that the legislation was constitutionally valid on 9 July 2003 and on 23 September 2003 the Queensland Court of Appeal found that s8 and s13 of the Act were constitutionally valid) the Queensland Attorney General’s application for an indefinite detention order was granted on 6 November 2003.

Fardon lodged an Appeal through the High Court challenging the constitutional grounds of the legislation. The basis of Fardon’s appeal was that the legislation was unconstitutional as it amounted to double punishment, and challenged the validity of the Act, specifically both Section 8 (concerning interim detention orders) and Section 13 (concerning the process of granting continuing detention orders).

On the 1st October 2004 the High Court of Australia upheld that the continued detention of offenders under the Queensland legislation was constitutional. The Court, by a 6-1 majority, held that the Act was valid and dismissed Fardon’s appeal. It held that the *Dangerous Prisoners (Sexual Offenders) Act 2003* did not compromise the integrity of the Court process or conflict with the power conferred on Federal Parliament by the Constitution to invest State Courts with Federal jurisdiction. Reasons for the High Court judgement included that:

- The *Dangerous Prisoners (Sexual Offenders) Act 2003* contained many safeguards of a trial;
- The Act is directed at a class of offenders rather than at one particular person;
- The Supreme Court exercises judicial power in determining whether the release of a sexual offender is an unacceptable risk;

- The Attorney General bore the onus of proving a prisoner is a serious danger to the community;
- If the Supreme Court is satisfied a prisoner is a serious danger it had the discretion to order a continuing detention order or a supervision order;
- Any order under the Act is subject to periodic review;
- The issue of unacceptable risk must be satisfied to a high degree of probability;
- Detailed reasons must be given for any order; and
- There is a right of appeal.

In dissent, Justice Kirby thought the law was invalid. Kirby considered the substance of the law rather than its intention, finding that the Act was evidently a punitive law, offending the principles of double jeopardy and retrospective punishment.

2010 UN Human Rights Committee Determination

On 18 March 2010, a determination was made by the United Nations Office of the High Commissioner for Human Rights in relation to submissions made by Robert John Fardon and Kenneth Davidson Tillman, two offenders detained under continuing detention legislation in Queensland and New South Wales respectively. The United Nations Human Rights Committee found Fardon and Tillman’s continued detention was in violation of Article 9, paragraph 1 of the International Covenant on Civil and Political Rights.

In their communication with the United Nations, both Fardon and Tillman claimed to be victims “of a violation by Australia” of articles 9, paragraph 1 and 14, paragraph 7, of the Covenant (our emphasis):

Article 9, para 1: Everyone has the right to liberty and security of person. No one shall be subjected to *arbitrary arrest or detention*. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law...

Article 14, para 7: No one shall be liable to be tried or *punished again for an offence for which he has already been finally convicted* or acquitted in accordance with the law and penal procedure of each country.

United Nations ‘International Covenant on Civil and Political Rights’

In short, the substantive issues are (1) the arbitrary nature of detention under the Qld and NSW Acts and (2) the concern that continued detention under the Acts constitute double punishment:

- In Tillman’s correspondence, it was argued that “his re-imprisonment pursuant to the CSSOA was imposed by **civil proceedings which failed to apply the procedures required for a criminal trial**. The absence of any **further determination of guilt amounts to double punishment** and also **undermines the essence of the principle that deprivation of liberty must not be arbitrary**.” (our emphasis)
- In Fardon’s correspondence, it was argued that “the DPSOA **imposes double punishment without further determination of criminal guilt**. Despite characterising the purpose of the imprisonment as non-punitive, (Fardon) was subject to the same regime of imprisonment as if he had been convicted of a criminal offence... (and) **that detention, in order to avoid the characterisation of arbitrariness, must be reasonable, necessary and proportionate....**

(Fardon) claims that his detention for an undetermined time period, which had... a punitive character **may not be rationally connected to the objective of facilitating his rehabilitation**. He further maintains that the same legislative end could have been achieved by **less intrusive measures, for example by his detention in a rehabilitative or therapeutic facility rather than a prison**".

In both matters the Committee determined that the State had violated Article 9 (1) of the Covenant, and as a violation had been determined the Committee did not proceed to consider the alleged violation of Article 14 (7).

It should be noted that the finding of the Committee was not unanimous, with two of the 13 members dissenting from the view of the Committee. The dissenting members view was that the "preventative detention was not disproportionate to the legitimate aim of the applicable law and did not, in this or in any other respect, constitute a violation of article 9, paragraph 1, of the Covenant".

In finding that the State had violated Article 9(1), the Committee made the following remarks:

"The question presently before the Committee is whether, in their application to the author, the provisions of the (State Act) under which the author continued to be detained at the conclusion of his... term of imprisonment were arbitrary. The Committee has come to the conclusion that they were arbitrary, and consequently, in violation of Article 9 paragraph 1 of the Covenant, for a number of reasons, each of which would, by itself, constitute a violation. The most significant reasons are the following:

- 1) This purported detention amounted, in substance, to a fresh term of imprisonment which, unlike detention proper, is not permissible in the absence of a conviction for which imprisonment is a sentence prescribed by law.
- 2) Imprisonment is penal in character. It can only be imposed on conviction for an offence in the same proceedings in which the offence is tried... new sentence was the result of fresh proceedings, though nominally characterised as 'civil proceedings', and fall within the prohibition of Article 15 paragraph 1 of the Covenant... The Committee therefore considers that detention pursuant to proceedings incompatible with Article 15 is necessarily arbitrary within the meaning of article 9, paragraph 1, of the covenant.
- 3) This particular procedure (of the Act)... was designed to be civil in character. It did not, therefore, meet the due process guarantees required under Article 14 of the Covenant for a fair trial in which a penal sentence is imposed.
- 4) To avoid arbitrariness, in these circumstances, the State Party should have demonstrated that the author's rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention, particularly as the State Party had a continuing obligation under Article 10 paragraph 3 of the Covenant to adopt meaningful measures for the reformation... (throughout the time) during which he was in prison."

Comments in response to each of these concerns raised by the Committee are addressed below. In addition, these arguments have been addressed in the following section of this paper in more detail.

➤ **Detention under the Acts amounts to a ‘fresh term of imprisonment’**

We would argue this implies that an offender is being ‘re-imprisoned’ (a term that the Committee refers to in its determination). Re-imprisonment suggests the offender has been freed and then re-imprisoned. In fact, the offender has not yet been freed. Both Acts deal with the continued imprisonment of offenders currently serving terms for heinous offences and who have been deemed a continued, unacceptable risk of re-offending. Legal precedent in Australia has already demonstrated that the Attorney-General must apply for and attain a continuing detention order prior to the release of a prisoner, in a timely manner.

It is argued that it is further determination of the offender’s likelihood of re-offending rather than the further determination of guilt that is the primary issue. It is the determination of the success or otherwise of rehabilitation and therefore the impact on community safety. Both Acts provide for the further determination of offender rehabilitation and community safety.

• **Imprisonment is penal in character**

We acknowledge that any ongoing detainment and treatment in a punitive prison environment (or any other environment) could be deemed, or perceived as, ongoing ‘punishment’. However, as stated by the dissenting Committee members, both the Queensland and New South Wales Acts are preventative in nature and cannot be considered disproportionate to the legitimate aim of the legislations.

While it may be argued that continued detainment could take place in a facility outside of a prison or correctional facility, it could equally be argued that detainment in any environment which is imposed at the tail end of a sentence and which continues to take effect past the previously determined release date could be argued as amounting to ‘double punishment’.

It is our position that currently, without other viable options, continued detention in a correctional facility that is secure and where offenders are able to access a range of treatment and re-integrative programs is the best outcome for both community safety and offender rehabilitation. If there was a secure, rehabilitation facility that could be utilised, Bravehearts would support the utilisation of such a facility (see ‘Civil Commitment, Mental Health and Sentencing’), as long as the location is free of children and free of access to children.

Ultimately, we do not consider the length of detainment to be the essential factor in determining the appropriate time for the release of child sex offenders. We believe the risk of re-offending and therefore the safety of children should be the key factor in determining release. Duplicating this service in another facility would create a massive financial impost on society and would not overcome the issue of detainment – only location and environment of detainment.

• **Does not meet due process guarantees**

Detention under the Acts cannot be deemed arbitrary as it can only arise after a thorough and exhaustive legal process which must consider the civil and human rights of convicted child sex offenders against those of the community safety and in particular, those of children and their families. In addition, decisions to continually detain offenders are open for Appeal and orders to detain offenders under the Acts are subject to periodic reviews.

As found by the Australian High Court in response to Fardon’s original appeal, the Court exercises judicial power in determining whether to continually detain an offender, with the onus on the State to prove that an offender is an unacceptable risk of re-offending within a high degree of probability. Procedures required for criminal trial intrinsically include the use of psychiatric reports and previous criminal history to determine sentencing; further the Courts consider extensive evidence including both statements of fact (previous offending behaviour – behaviour reports from Correctional services – reports from the rehabilitation team etc) and statements of opinion (psychiatric reports).

In addition, people are held indefinitely for preventative measures, (some without a determination of guilt through a criminal trial) for a range of concerns of public safety (for example, terrorism offences and civil commitment for mental health issues). This legislation is designed to protect children and the community from serious repeat child sex offenders who have been assessed as posing an ongoing unacceptable community safety risk. In applying this protection, the law applies all the same legally accepted tests applied in the courts daily for use in sentencing and assessment of offender’s risk.

- **Rehabilitation could have been achieved by less intrusive means**

In the case of both Fardon and Tillman, both offenders refused to undergo the rehabilitation program offered to them while incarcerated, the likelihood of these offenders accessing and successfully completing treatment while outside of a correctional facility is highly doubtful.

Prisons are deemed correctional facilities and as such, they provide offender treatment programs to those convicted child sex offenders who need it. Article 10, paragraph 3 of the *International Covenant on Civil and Political Rights* states that correctional facilities are the primary places to provide rehabilitation services. In both Queensland and New South Wales this is the essential aim of both correctional departments, with correctional facilities in both of these States providing a range of rehabilitative and re-integrative programs.

Discussed below in the section titled ‘Civil Commitment, Mental Health and Sentencing’ is an alternative option based on civil commitment laws for sexually violent predators in the United States.

- **Reflections on the UN Determination**

Bravehearts wholeheartedly supports the position of the dissenting Committee members - the primary object of the both the Queensland and New South Wales Acts is not punishment. It is to ensure the safety and protection of the community and to encourage serious sex offenders to undertake rehabilitation. In cases where the offender is assessed as posing an ongoing high risk of re-offending, the court is charged with deciding to uphold the principles of the human rights of the offender against the human rights of children.

Bravehearts holds that in consideration of the UN’s determination, reflection on both the United Nations Convention on the Rights of the Child and the United Declaration of Human Rights is necessary. It is Bravehearts’ position that the current Human Rights Commission finding in

relation to Fardon and Tillman’s matter, is in direct contradiction with the State’s commitment under UN Rights of the Child.

In discussing the rights of offenders in respect to continued detention legislation, it is necessary that the discussion include the rights of the actual victims of crime, the rights of potential victims of crime and the rights of children in the community.

In looking to the *Universal Declaration of Human Rights* (adopted by Australia and the United Nations on 10 December 1948), Article 3 states that: “Everyone has the right to life, liberty and security of person”. Article 16 states that “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”. Continued detention legislation, such as the Queensland *Dangerous Prisoners (Sexual Offenders) Act 2003* and the New South Wales *Crimes (Serious Sex Offenders) Act 2006* challenged by Fardon and Tillman, safeguards the liberty and security of society and in doing so protects the family, inclusive of children from sexual assault and harm which would result from the re-offending of offenders.

The *Convention of the Rights of the Child* (ratified by Australia) highlights the specific protection of children’s rights. Article 3 states that the courts and legislative bodies must act in the best interests of the child:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration”.

Articles 19 and 34 of the Convention protect children from sexual assault:

Article 19:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 34:

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- b) The exploitative use of children in prostitution or other unlawful sexual practices;
- c) The exploitative use of children in pornographic performances and materials.

Bravehearts contends that continued detention laws are a legislative instrument which provide for the protection of children from the sexual assault of re-offenders.

Addendum: Fardon

During the process of revising this paper, it should be noted that on 14 May 2010, Robert Fardon was sentenced to a 10 year term (eligible for parole after 8) for the rape of an intellectually disabled woman in 2008, an offence committed while on an intensive supervision order under the *Dangerous Prisoners (Sexual Offenders) Act 2003*. If the Courts had continually detained Fardon under the Act, noting the findings of the psychiatric evaluations presented to the Court by the State in its application, the rape of this vulnerable woman would have been prevented.

Addendum: United States Supreme Court Ruling

On the 17 May 2010, the United States Supreme Court ruled in relation to a suit brought forward by a number of sex offenders held under the Federal *Adam Walsh Child Protection and Safety Act 2006*. Under this Federal legislation indefinite imprisonment of offenders found to be 'sexually dangerous' is provided for.

The basis of the challenge was the constitutionality of the Federal 'civil commitment' for sex offenders who are nearing the end of their confinement or who are considered too mentally incompetent to stand trial.

Corrections officials and prosecutors determined the men remained a risk for further sexually deviant behavior if freed. The inmates' attorneys maintain the continued imprisonment violates their constitutional right of due process and argue Congress overstepped its power by allowing inmates to be held for certain crimes that normally would fall under the jurisdiction of state courts.

The Supreme Court ruled in the majority (7-2) that "The federal government, as custodian of its prisoners, has the constitutional power to act in order to protect nearby (and other) communities from the danger such prisoners may pose" (Justice Stephen Breyer).

While one of the two dissenting judges, Justice Clarence Thomas stated that the legislation overstepped Federal bounds, Justice Breyer equated the federal civil commitment law to Congress' long-standing authority to provide mental health care to prisoners in its custody, if they might prove dangerous, "whether sexually or otherwise."

Key Debates around Continued Detention

One of the greatest challenges facing our criminal justice system is the at times conflicting goals of ensuring community safety and protection against the rights of individual offenders. When sentencing an offender Courts are asked to determine an appropriate sentence that balances justice, punishment, deterrence and rehabilitation.

In the matter of Fardon, the High Court found that the continued detention of prisoners past the conclusion of their sentence term under *Dangerous Prisoners (Sexual Offenders) Act 2003*, was constitutionally valid as it (a) served a protective purpose, (b) applied rules of evidence and (c) upheld legal safeguards such as the right to review and appeal.

However, the debates around the lawfulness of indefinite sentencing continue. Even in 2010, the United Nations Human Rights Committee found the law breached the international covenant. Opponents to the legislation argue that it breaches basic tenants of Australian and International law and violates the rights of offenders. Debates around continuing detention can be split into four major issues: (1) Impact on the criminal justice system and due process, (2) Violation of human rights, (3) Challenge of predicting risk and (4) Balancing community protection.

Impact on the Criminal Justice System and Due Process

Although the High Court determined that the Queensland legislation was constitutionally valid and did not violate the legal rights to a fair and just system, those opposing indefinite sentencing legislation argue that basic tenants of our justice system are in fact corrupted by such legislation.

It is argued that the principle of due process is compromised as the legislation allows for the continued detention of a person who has already served their sentence without any further crime being committed and without any additional determination of guilt. Specific concerns that continued detention may be ordered without following the processes ordinarily required for a criminal trial and sentencing (such as requirements of evidentiary proof beyond reasonable doubt, rules of evidence and true judicial discretion) are legitimate and must be addressed.

One of the arguments against this form of legislation is that the threshold of evidential proof falls short of the standard criminal courts ‘beyond reasonable doubt’ and gives way to the lesser civil court standard of ‘on the balance of probabilities’. As such it does not reflect the ordinary rules of criminal evidence and in fact requires a Judge to make a decision that is considered ‘non-judicial’ in nature.

To ensure a fair system and protection against the arbitrary imposition of indefinite sentence, the legislation in Queensland sets a high threshold of probability, requiring the court to be satisfied to a “high degree of probability” that an offender presents as a “serious danger to the community”. It is important that the rules of evidence are enforced and that the proof that an offender is likely to reoffend upon release is based on acceptable and cogent evidence and to a high degree of probability. The continued detention of offenders should only occur where there is appropriate expert opinion of risk in line with suitable and accepted criteria. It is crucial that agencies managing high-risk sex

offenders are given the appropriate resources to provide courts with all the information they require to ensure a fair and just process in assessing applications for continued detention.

Some opponents argue that indefinite sentencing legislation removes judicial discretion. In an effort to eliminate this concern, Queensland legislation allows for either the continued detention of a prisoner or release on an extended supervision order. While the Attorney-General's representatives petition the court for one or the other, the ultimate decision lies with the Judge.

It may be argued that despite the provisions in the legislation, true judicial discretion is limited as it would be difficult for a Judge to release a prisoner where reports suggest that the prisoner would be a danger if released. However, such decisions, similar to any others made by a Judge, must be made based on the evidence and information before the Court. If the evidence and the recommendations of the reports provided suggest that an offender is of unacceptable risk and should be further detained, the Judge's responsibility is to make a determination based on that information.

Indefinite sentencing legislation must be transparent with the appropriate checks and balances in place to ensure that all offenders are afforded a just process. In addition to ensuring an offender's access to review and appeal, strong procedural guidelines and safe-guards must be built into any legislation that allows for the indefinite detention of sex offenders.

Some argue that continual detention of offenders assessed as an unacceptable risk would result in great financial cost to the prison system. However, in 2007 the Queensland Minister for Corrective Services, in response to a question from the Opposition, stated that under the *Dangerous Prisoners (Sexual Offenders) Act* it costs more to supervise dangerous sex offenders in the community than it does to keep them in prison. In addition, if cost is considered a factor, a cost-benefit must also take into consideration the costs of reoffending.

We would argue that cost should not be a factor. We need to focus on what will best serve community safety.

This type of legislation provides the community with a real sense of safety and of a system that is focussed on protecting and respecting the community. As it stands there is an increasing feeling that the criminal justice system is out of touch with community expectations and focuses on the offender, ignoring the rights of victims. As a community we need to get serious about responding to sexual offenders and ensuring that where there is a known risk, we protect our communities from these.

Violation Human Rights

Indefinite sentencing legislation may be considered to infringe upon the human rights of offenders and has been labelled as a cruel and unusual punishment. The major issues affecting the basic rights of offenders include: the violation of the principle of proportionality, the question of double punishment, offenders' rights to finality of sentence and opportunities for rehabilitation.

One of the basic principles of sentencing is that an offender should receive a sentence that is proportional to the crime committed and the amount of harm done. The sentencing Judge is charged with determining an appropriate sentence for the offender based on the information before them at the time of sentencing. The principle of proportionality may be considered to have been violated through

continued detention. It is suggested that a person should only be sentenced for the offence they have committed and been found guilty of, not offences that they may commit in the future.

This issue is one that as a community we are grappling with at a larger scale, particularly around terrorism, with debates around the use of preventative detention of suspected terrorists. The use of preventative detention in the area of terrorism differs to the type of legislation we are advocating for. Detention of a suspected terrorist is a challenge to our system as it does not require the commission of an offence – for example see the *Terrorism (Preventative Detention) Act 2005*, Qld – whereas indefinite sentencing provides for the ‘continued’ detention of someone who has committed an offence and who is assessed as at an unacceptable risk of reoffending.

Taking victim and community safety into consideration, the principle of proportionality must remain a key component of our legal system. However, it must also be subject to ‘reasonable’ and ‘justifiable’ exceptions. Where an offender’s criminal history and behaviour is such that a clear, unacceptable level of risk is able to be established, an exception to the notion of proportionality must be considered justified in the interests of community safety.

Another fundamental maxim of our legal system is that a person will not be punished twice for the same crime. Many argue that the continued detention of an offender under indefinite sentencing serves as double punishment as the individual has already been convicted and satisfied the sentence imposed by the court.

In response to this concern, it is important to emphasise that indefinite sentencing legislation is a preventative form of detention. The purpose of legislations, such as the *Dangerous Prisoners (Sexual Offenders) Act 2003*, is not punishment for an offence, but the prevention of future offending and the protection of the community. The purpose of this type of legislation must not be to punish the offender, but must be focussed on assuring, as far as possible, the protection of the community.

In the High Court appeal regarding Fardon’s case, the majority Justices found that this legislation was not punitive in nature and that there are situations where individuals are detained for reasons other than punishment and that it depended on whether incarceration could be considered as reasonably necessary to achieve a non-punitive objective.

It may be considered that continued imprisonment of an offender after completion of a sentence might be seen as punishment for the failure to rehabilitate. It is not given as punishment but rather as a community safety mechanism. It is important that all jurisdictions provide offenders with the opportunity to participate in *effective* rehabilitation programs. It is our position that sex offenders should be required to participate in rehabilitation while in custody and be provided with maximum support upon release to protect against reoffending. The majority of victims are not as concerned with offenders being incarcerated as they are with offenders receiving treatment to stop the likelihood that others would be harmed.

It has been argued that a prisoner should have a legitimate expectation to be released upon the conclusion of their sentence; that is that offenders have a right to ‘finality of sentence’. However, it can be said that offenders sentenced for sexual offences are aware of this legislation and the potential for them to be continually detained under it.

It is important to ask whether the community should have a legitimate right to be protected from an individual who has committed a sexual offence, has made little or no attempt to rehabilitate and who is assessed by experts within the field to be an unacceptable risk of reoffending?

There is a need to ensure that the competing rights and interests of the broader community and that of the offender are balanced appropriately and that continuing detention is used to protect children and the community as a priority. Paramount is that the individual human rights of the offender should not prevent us as a society from questioning the ethics and rationale of releasing people who we know are at an unacceptable risk of reoffending and who pose an unacceptable risk to the human rights of children and the community.

Underlying the arguments around the violation of an offender's basic human rights is the argument that there is a shift from the legal system's focus on ensuring that the **'punishment fits the crime'** to a focus on a **'punishment fitting the offender'**.

Challenge of Predicting Risk

One of the fundamental questions in respect to risk of sex offenders reoffending is: what do we know about the recidivism rate of this category of offenders? Given the difficulty in detecting and measuring re-offending, claims that child sex offenders pose a high or low risk of recidivism are difficult to prove.

- Difficulties in accurately assessing recidivism rates results in the many discrepancies in rates of re-offending among sex offenders reported by research:
- Smallbone and Wortley (2000) found previous convictions for sexual offences amongst incarcerated child sex offenders of:
 - 10.8% for intra-familial offenders
 - 30.5% for extra-familial offenders
 - 41.1% for "mixed-type" offenders
- Greenberg, Da Silva and Loh (2002) reported an overall recidivism rate of 15.5% for sex offenders
- Hanson (2002) found rates of:
 - 8% for intra-familial child sex offenders
 - 20% for extra-familial child sex offenders
 - 17% for rapists
- Hood, Shute, Feilzer and Wilcox (2002) found recidivism rates of:
 - 0% for intra-familial child sex offenders
 - 26.3% for extra-familial child sex offenders
 - 9.5% for non-stranger rapists
 - 5.3% for stranger rapists
- Lievore (2004) found a variance between 2% and 16% in Australian studies on sex offender recidivism.

Recidivism can only be measured in terms of known offences but even more than that, the offence not only needs to be reported, a criminal charge and a conviction must follow before the offender is to be

counted as a Recidivist. What we do know is that only a small percentage of sex offenders are ever charged and convicted.

- Only 1 in 100 sex offenders in a given year ends up convicted of sexual assault. Each year in NSW, about 40,000 women will be sexually assaulted. About 1000 men will be brought to court for sexual assault and about 400 of those men will either plead guilty or get found guilty (Weatherburn, 2001).
- Only about 17% of reported sexual offences result in a conviction, a figure consistent with data from other States and overseas (Crime and Misconduct Commission, 2003).

However, it is clear that community fears of child sex offenders are real. Just as real is the incredible amount of damage and harm that is caused by child sex offenders on those they prey upon. As a result, legislative responses need to ensure that the community is safe from those offenders that we do know about and who present as a continued risk.

The question then turns to the validity of assessing risk. Risk assessment is extremely difficult and it is argued that preventative legislation such as continuing detention deprives individuals of their liberty on the basis of what amounts to an “educated guess” and may in fact lead to the detention of people who are in fact not likely to reoffend.

Accurate risk assessment is crucial in making decisions about a sex offender’s level of risk to the public. However, there is no fool-proof method of assessing offending risk. No single instrument or data source in and of itself should be used to make critical decisions that impact on the safety and protection of the community. This caution is perhaps best understood when those working with offenders are aware of some of the limitations of common data sources and techniques used in the assessment of child sex offenders:

- ***Clinical risk assessment** involves a judgment by a forensic psychologist or psychiatrist concerning the risk a specific offender poses. This type of assessment involves interviews and/or observation of the offender. The assessment usually involves developed tools or checklists. All known information about the offender's personality and behaviour and the details of the crime itself are considered. The risk factors used in clinical assessment are different for each person assessed and can change over time; including various aspects of a person's mental health, personality, behaviour, personal history and social skills. These individual characteristics, taken as a whole, give clinicians a picture of the person in question, and a decision about the potential harm they may pose is then made. However, studies indicate that clinicians often come to different conclusions after assessing the same individual. Such findings question the notion of clinical 'expertise' in dangerousness prediction, suggesting that the assessment process is arbitrary, and that the fate of an offender is dependent on who conducts the assessment.*
- ***Actuarial risk assessment tools** focus primarily on static (unchangeable) factors that influence recidivism. Several studies have found that the static risk factor with the strongest influence on general recidivism (all types of criminal offences) is prior contact with the criminal justice or mental health systems. When an offender is assessed using an actuarial tool, their particular characteristics are inventoried and level of risk is determined by the extent to which the individual possesses various risk factors associated with recidivism. The information considered in the assessment process typically includes the offender's education*

level, employment status, known or suspected mental disabilities, in addition to the individual's criminal history. While these tools generally provide better results than unstructured clinical judgments, the predictive accuracy of these tools is far from perfect.

- **Physiological assessments** can provide an independent and objective means for collecting useful assessment information that is not reliant on an offender's statement. Although there have been questions about its reliability and validity, including the potential for some individuals to use countermeasures to control some the physiological responses that are measured, physiological tools are becoming increasingly valuable in the assessment, treatment and supervision of offenders.

Both actuarial risk assessment tools (such as the SONAR [Sex Offender Needs Assessment Rating] and RRASOR [Rapid Risk Assessment for Sexual Offence Recidivism]) and clinical judgement are commonly used in the Australian context. Combining a range of methods provides the most comprehensive analysis of offender's risk and results in a broad assessment spanning a range of factors from personal traits to environmental contexts.

Assessment of risk is a highly inaccurate science. The most accurate and telling measurement of risk remains the offenders past behaviour. Recidivists by their very own actions demonstrate that they will always pose a high risk. It has been suggested that psychiatrists "get it wrong almost as often as they get it right". Accurate risk assessment is crucial in making decisions about a sex offender's level of risk to the public. However, there is no fool-proof method of assessing offending risk. No single instrument or data source in and of itself should be used to make critical decisions that impact on the safety and protection of the community. The reliability of assessing individual risk is strengthened when a combination of clinical and actuarial measures are used; looking at a combination of static factors based on historical evidence, stable factors based on long-term characteristics and acute factors based on immediate and recent behaviours.

As a community we need to find ways in which to manage sex offenders and respond to those that are clearly a serious risk. In order to keep our communities, and in particular our children, safe and protected from harm, we need to find effective measures to protect our children against those offenders who demonstrate that they are a risk.

Clearly there are some offenders who pose such a danger to the community that they must be kept in prison indefinitely. While Courts currently take into account a range of factors at the sentencing stage, including that of community protection, it is unreasonable to expect a sentencing Judge to be able to make assumptions on when, or even if, an individual, who has committed a sexual offence, will be of 'acceptable' risk to release. If we argue that it is difficult for professionals and clinical experts to assess risk, then how can we expect Judges to make this determination with the limited information available at sentencing?

Balancing Community Protection

Proponents for continuing detention legislation are extremely vocal about the community protection goal of these laws. It is suggested by opponents of this type of legislation that there may in fact be more effective means for protecting the community that are less intrusive on the rights of offenders. While indefinite prison sentences can be justified in terms of the criminal justice goal of

incapacitation to ensure community protection from a known risk, it is argued that current measures including extended supervision orders and multi-agency support are more viable opportunities for providing for the protection of the community from dangerous sex offenders.

However, the statistics on breaches would tend to contradict this. In Queensland, for example, as of May 2010, statistics released by the Department of Corrective Services showed that more than a third of the 685 sex offenders living in the community under strict supervision orders had reoffended over the past two years. Up to 163 sex offenders faced suspension of parole, a warning or a further conviction for offences including rape, attempted murder, molestation and indecent exposure.

Certainly, balancing the rights of individual offenders and community protection is difficult and community protection must also encompass prevention and intervention programs and structures that support offenders to not reoffend upon release.

There is no question that offenders, as individuals, have rights, but the rights of the community to safety and protection from those we know pose an unacceptable risk is surely greater. Philosophical debates around individual versus community rights are across many aspects of our daily life, from the smokers right to smoke in public through to the rights of those detained under mental health orders, to sex offenders who pose an ongoing risk to the community. At some point we, as a community, need to put the best interests of our most vulnerable, our children before the rights of those who have harmed them.

As discussed earlier in this paper, the *Convention of the Rights of the Child* (ratified by Australia) emphasises the overarching need to protect children; with Article 3 stating that the courts and legislative bodies must act in the best interests of the child:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration”.

The fundamental truth is that we will never be able to protect all children from sexual assault despite our collective best efforts. However, we can bring about huge improvements to the current situation by dealing with the realities of the issue and beginning to put the best interests of children and victims first. Indefinite sentencing legislation is not a response for all offenders. The response should be targeted at those who are recidivists and/or those who pose a serious risk to children and the community more broadly. As such, targeting resources towards high risk offenders is surely a useful allocation of the limited correctional resources.

Civil Commitment, Mental Health and Sentencing

A Mental Health Approach

Continued detention in Australian jurisdictions currently sees offenders being detained at the completion of their sentence in the prison system.

In the United States a number of jurisdictions have passed various versions of what has come to be called "sexual predator" legislation (McSherry, 2008). These laws provide for indefinite involuntary commitment of sex offenders to mental health treatment facilities **after they complete prison** terms for serious sex offences. The impetus for this legislation was the repeal of the indeterminate sentencing laws under which serious sex offenders previously were confined in prison until prison officials were satisfied that they were no longer dangerous and the highly publicised accounts of a number of people who, upon release from prison for sex crimes, committed additional heinous crimes, in some cases against children.

In the case of sexual predators who present as a continued threat to the community, continued separation from society in the interest of public safety is necessary. Civil commitment of sex offenders to mental health treatment facilities will provide as an appropriate response to this problem. Arguments in favour of civil commitment laws for sexual offenders include:

- the need for further treatment of offenders so as to reduce the likelihood of reoffending,
- to prevent child sexual offending during the period of continued detainment, and
- that the criminal sentence was inadequate in relation to community protection and expectations (Hayes, Barnett, Sullivan, Nielsens and Large, 2008).

However, critics of civil commitment laws in respect to sexual offenders argue that these laws blur the line between 'bad' and 'mad' (Morse, 2003) and question whether it is appropriate to consider those who commit sexual offences as suffering from a major mental illness. Many in this category receive the psychiatric diagnosis of paedophilia or other paraphilias, however these conditions are considered to be more mental abnormalities that are 'controllable' than mental illnesses that will respond to treatment.

Other critics suggest that this model of responding to sexual offending has a negative effect on treatment outcomes. Winick (2003) argues that for treatment to be effective, treatment programs must be offered as soon as possible after conviction, not at the end of the offender's sentence. Treatment that is delayed is much less likely to be effective.

Coalinga State Hospital: A Californian case study

Coalinga State Hospital opened on September 5, 2005. It is a maximum security civil-commitment facility built to ensure that sexually violent predators stay out of the community. Currently, the hospital houses more than 900 sexually violent predators (Gabrielson, 2011). The sexually violent

predators are men are deemed too a high risk of reoffending to be released and are housed indefinitely at the hospital until they are deemed no longer a danger to the community.

Less than 1% of the 100,000 registered sexual offenders in the state of California fall into the sexually violent predator category (California State Auditor, 2011).

In California all prisoners with sexual assault or pedophilia crimes are flagged and reviewed six months prior to parole (California State Auditor, 2011). To be labeled under the category of sexually violent predator an individual must:

- have at least one identified victim,
- have a serious mental illness, and
- must have established a relationship with a person with the intent to cause victimisation.

Prior to parole, the offender is assessed by two independent evaluators (licensed mental health professionals). If both professionals agree that the offender meets the criteria to be categorised as a sexually violent predator, the offender is sent to Coalinga State Hospital for treatment. If one agrees and the other does not, an additional two evaluators review the prisoner's history. If those final two reach agreement, the prisoner is then civilly committed to the hospital.

Currently, California law allows sexually violent predators to be committed to the hospital indefinitely (under what is termed “Jessica's Law”) as long as they are receiving 'treatment'. Treatment at Coalinga is intensive, and requires admission of guilt, as well as polygraph and phallometric testing. Offenders must successfully complete four stages of treatment before being released and subject to outpatient treatment. The four treatment phases include (sourced from www.dmh.ca.gov/services_and_programs/state_hospitals/coalinga):

1. **Treatment readiness:** facilitates the offender’s transition from prison to the therapeutic environment. Educates offenders on the hospital culture, interpersonal skills, anger management, mental disorders, victim awareness, cognitive distortions and relapse prevention.
2. **Skills acquisition:** focus on personal therapy. Teaches coping strategies, behavioural skills, prosocial thinking and emotional awareness. Requires the offender acknowledges and discusses past sexual offences, expresses a desire to reduce their risk of reoffending, and agrees to participate in required assessment.
3. **Skills application:** assists the offender to integrate the learnings in Phase 2 into their daily lives. Focuses on relapse prevention, coping with cognitive distortions and developing victim awareness. Requires the offender accepts responsibility for past offences, articulates a commitment to ‘abstinence’, understands the trauma resulting from their sexual crimes, is able to correct deviant thoughts, demonstrates an ability to manage sexual urges and impulses, and shows an ability to cope with high risk factors.
4. **Discharge readiness:** develops a detailed Community Safety Plan and involves family members and significant others in the relapse prevention plan. Focuses on relapse prevention, managing cognitive distortions, victim empathy and coping strategies. Treatment teams must determine that offenders can fully describe the negative impact of their sexual offending on their victims, acknowledge and accept past sexual crimes, articulate a commitment to abstinence, correct all cognitive distortions, able to control deviant sexual urges and interests, can describe potential risk

factors and internal warning signs, can cope with risky situations, follow rules and comply with supervision, and displays no inappropriate impulsivity or inappropriate emotions.

Since its inception, only a minimal number of offenders have successfully completed the Coalinga program and have been released to the community.

Civil Commitment: An option for Australia

Currently in Australia, the continued detention of sexual offenders takes the form of a criminal justice model. This model is supported by research that shows that the majority of sex offenders, while having a history of mental health problems, are not clinically mentally ill. Smallbone and Wortley (2000), found that the majority of child sex offenders do not have a diagnosable mental disorder, although many have been treated for depression (23%), drug and alcohol misuse (18%) and anger management issues (13%).

However, for those offenders who ‘do’ have a diagnosable mental illness, Bravehearts believes that civil commitment to a mental health unit dedicated to the treatment of sexually violent offenders is an option that warrants further consideration.

It is our position that a specialised sex offender mental health unit, in line with the Coalinga model, should be established.

While currently the admission of offenders to a mental health facility can occur under correctional policies (where an offender satisfies the requirements for involuntary commitment the mental health legislation) Bravehearts puts forward the following proposal for responding to dangerous and/or repeat offenders:

- The criminal justice proceeds as normal.
- Once a repeat offender or an offender who is designated as a dangerous offender (due to the nature of the offences and/or offending behaviour) has been found guilty, a mental health assessment is ordered.
- As happens under the Coalinga model, the offender should be assessed by two independent psychologists or psychiatrists. If both assessments concur that the offender meets the criteria to be admitted to the sex offender mental health unit, the offender is sent to the unit on an indefinite basis for treatment. If one agrees and the other does not, an additional two psychologists or psychiatrists assess the offender. If those final two reach agreement, the offender is then sent to the specialised unit.
- Where there is no unanimous agreement or if the offender does not meet the criteria for admission to the mental health unit, they are sentenced by the court to a term of imprisonment and as is the current situation subject to risk assessment at the end of their sentence under the DPSOA legislation.

Under Bravehearts proposal, a two strikes policy would apply for repeat sex offenders. Either way, whether the offender is admitted to the specialised sex offender mental health unit or to a correctional facility, offenders must not be released until assessed as having a low risk of re-offending.

Bravehearts' Position

Clearly there are some offenders who pose such a danger to the community that they must be kept in prison indefinitely. Bravehearts argues that this group would comprise of all recidivists and others whose offences were so heinous as to indicate a life-long high risk. It is unreasonable to expect a Judge at the sentencing stage to assess when, or even if, such individuals will be safe for release. Continuing detention legislation allows for offenders to be monitored in terms of their progress while in custody, their responsiveness to treatment and for a full assessment of their level of risk. Bravehearts would prefer mandatory two strikes legislation for recidivists attracting 50 year sentences with the only option for release being to earn it rather than be granted it. This would ensure the resources for rehabilitation are directed toward those who may benefit from such an intervention.

Underpinning all of the arguments against continuing detention is the argument that such legislation violates the individual rights of offenders. There is no question that every human being has fundamental rights, however we need to question whether as a society we consider individual rights above the rights and liberties of the community as a whole? Are our human rights charters necessarily absolute or are they subject to reasonable limitations for the protection and safety of the community as a whole.

The Woods Royal Commission represented the most exhaustive and comprehensive study incorporating research available from around the globe on this subject. It concluded that all sex offenders constitute a real risk to children and that this risk can be lifelong. We need to find appropriate ways to reduce this risk and ensure community safety.

Bravehearts fully supports the continued detention of sexual offenders who pose a continued risk of re-offending. In addition Bravehearts advocates for the establishment of a dedicated mental health unit to provide for the treatment of continually detained offenders who have been assessed with a mental disorder. This option should be additional to current legislation that allows for the continued detainment of offenders in prison. As stated above we propose that for repeat and dangerous offenders:

- The criminal justice proceeds as normal.
- Once a repeat offender or an offender who is designated as a dangerous offender (due to the nature of the offences and/or offending behaviour) has been found guilty, a mental health assessment is ordered.
- As happens under the Coalinga model, the offender should be assessed by two independent psychologists or psychiatrists. If both assessments concur that the offender meets the criteria to be admitted to the sex offender mental health unit, the offender is sent to the unit on an indefinite basis for treatment. If one agrees and the other does not, an additional two psychologists or psychiatrists assess the offender. If those final two reach agreement, the offender is then sent to the specialised unit.
- Where there is no unanimous agreement or if the offender does not meet the criteria for admission to the mental health unit, they are sentenced by the court to a term of imprisonment and as is the current situation subject to risk assessment at the end of their sentence under the DPSOA legislation.

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