The National Legal Eagle

Volume 9
Issue 2 *Spring 2003*

Article 3

2003

No sex offenders, please- We're Queenslanders

David Field
Bond University, David_Field@bond.edu.au

No sex offenders, please – we're Queenslanders

Associate Professor David Field
School of Law Bond University

Introduction

Queensland is not famed for its legal innovations. Nor has it, historically, blazed the trail in sentencing policies and concepts. However, the recently – enacted *Dangerous Prisoners (Sexual Offenders) Act, 2003 (Qld)* has proved to be the exception. Not only is it a "first" for Australia, but it has raised the bar considerably in the "Get serious about sex offenders" competition between State and territory governments

Its declared purpose, according to the explanatory notes which accompanied the Bill through State Parliament, is to provide "... a mechanism whereby prisoners who, if released, pose an unacceptable risk of committing a further offence of a sexual nature, may be detained when it is appropriate to do so for the protection of the community".

It passed through State Parliament in three days, having met with no opposition, and it did not even receive the normal attention of Parliament's Scrutiny of Legislation Committee (which might otherwise have raised concerns related to civil liberties, certainty in sentencing and the independence of the judiciary), because there were already individuals awaiting release at the end of their sentences to whom the Government wished to apply these new provisions.

First Application

Although the Queensland Attorney-General insisted, during Parliamentary debate, that the new legislation was "not directed at any prisoner or particular offender", it claimed its first potential "hit" precisely 21 days after it came into force, when a prisoner in Townsville, on the very last day of his 14 year sentence for rape and other sexual crimes, was ordered to be further detained pending a full hearing into his suitability for extended detention under the provisions of the Act.

However, defence counsel in that matter has indicated that at the final hearing, it will be argued that the new legislation is "unconstitutional", in that it seeks to detain a person beyond his original sentence date without his having committed any new offence.

It was emphasised during Parliamentary debate that although some $1million has been spent during the current financial year on sex offender programs, "Regrettably, there are some sex offenders who cannot be treated or who choose not to participate in treatment and who represent an ongoing threat to the community". It is these offenders who will be the target of the new detention powers contained within the Act.

Under pre-existing Queensland law, a court might impose an "indefinite sentence", at the time of the original sentencing of any violent offender considered to be a serious danger to the community. Other legislation makes provision for the indeterminate sentencing of a serving prisoner who is deemed incapable of controlling his sexual instincts, on the assumption that he may be cured by continued treatment in prison.

There was, however, nothing in the pre-existing law which permitted a court to detain indefinitely, shortly before his original fixed sentence expired, an offender who is not "certifiably" mentally ill, but who it is believed either cannot, even with treatment, or simply will not, control his sexual urges so as to pose no threat to the community.

Purpose of Act

The new Act seeks to fill this gap, but it has already met with predictable criticism from those who feel that too high a price is being paid (in terms of individual rights and "certainty in sentencing") in return for a regime with no guarantee of success, either in preventing further offending, or accurately identifying those who pose a risk.

The new Act provides the procedural framework for an application to the Supreme Court, by the Attorney-General, for an order that a person who is currently serving a term of imprisonment for a "serious sexual offence" (defined as an offence of a sexual nature which either involved violence – actual or threatened – or was committed on a child), and who is completing the final 6 months of his sentence, be either detained for a minimum of a further year (a **"continuing detention order"**), or released only under supervision (a **"supervision order"**).

Mindful of the risk of sexual offenders moving abroad or interstate in order to conceal their identity, the Act applies even to those prisoners whose previous offence was committed somewhere *outside* Queensland, and/or who could pose a continued threat to the community *anywhere.*

This means that within a relatively short time-frame, the provisions of the Act may well be applied in Queensland for the benefit of a local community in, say, Sydney or Coffs Harbour. It will also deter serving prisoners who satisfy the tests from applying for inter-state transfer to Queensland, where they will become subject to the indefinite detention provisions of the Act, regardless of where their offence was committed.

How the Attorney- General May Apply

The application by the Attorney-General will be in two parts. The first (described as the "preliminary hearing") requires that the Supreme Court judge to whom the application is made be "satisfied" that 'there are reasonable grounds for believing the prisoner is a serious danger to the community' if one of the two orders is not made. Once this "threshold" test has been satisfied, the judge may order that the prisoner be assessed by two psychiatrists (a **"risk assessment order"**), and, if there is any risk that the prisoner will be released prior to the final hearing of the application, may

make an **"interim detention order"** for his continued detention pending the hearing.

In practice, it is likely that at the final hearing, a great deal of reliance will be placed on the reports of the two court-appointed psychiatrists, who will be asked to assess the level of risk that the prisoner will commit another "serious sexual offence" if either released, or released unsupervised.

For those with some experience of the prison regime, it is a little alarming to note that these psychiatrists may in turn make use of any other "relevant report" on the prisoner, and that those compiling these secondary reports will be absolved of any duty of confidentiality. In practice, when assessing sex offenders, considerable reliance is placed on the prisoner's reported "attitude", both towards his offending and the rehabilitation programs available to him, and the door is clearly open for biased reporting from within the prison towards those who have failed what might be termed "the attitude test", for reasons which do not necessarily make them a risk to the community.

Armed with these psychiatric reports, the judge at the final hearing of the application must be "satisfied" that the prisoner will be a "serious danger to the community' if either a **"continuing detention order"** or a **"supervision order"** is not made in respect of him. The prisoner will be deemed a "serious danger to the community" if there is an "unacceptable risk" that he will commit a further "serious sexual offence" if released at all, or without supervision.

If the judge is so satisfied, then he may make one of two orders. The **"continuing detention order"** has the effect that the prisoner remains in jail for a minimum of one year after the expiry of his current sentence. Thereafter, the order is automatically reviewed every 12 months, or may be reviewed on application by the prisoner himself, if he can demonstrate that there are "exceptional circumstances" which relate to him. These are not defined in the Act.

Each review process requires two more psychiatric reports, and without such reports being favourable, it is in theory possible for the prisoner to spend the rest of his natural life in prison. The Act specifically states that in the case of all such applications and reviews, "the paramount consideration is to be the need to ensure adequate protection of the community". It is difficult to escape the conclusion that once a prisoner has been indefinitely detained by this process, the burden of proof will effectively be on him to get himself released.

In addition, when deciding whether or not to grant either of these new orders, the judge is required to take into account a whole host of other factors, among which are the prisoner's previous criminal history, his previous "pattern of offending behaviour", his efforts to rehabilitate, and his degree of co-operation in the preparation of reports. Once again, there is a distinct risk that the prisoner will be "foredoomed" by displaying what might be regarded as a "bad attitude".

The alternative **"supervision order"**, which may be for any length of time which the judge deems appropriate, operates in very much the same way as a probation order, and contains the usual standard conditions in relation to regular reporting (in this case to a Corrective Services Officer), notifying the supervisor of any change of name, address or employment, remaining in Queensland unless given permission to leave, and not committing any further "offence of a sexual nature" (not defined).

Such an order may also contain any other conditions which the judge deems "appropriate", and the examples listed in the Act itself are orders that the released prisoner not knowingly reside with another convicted sex offender, or within a certain distance of a school. The order may be subsequently amended on application by either the prisoner or the authorities, and may be revoked at any time if a judge is "satisfied on a balance of probabilities" that the released prisoner is merely likely to breach it at some time in the future.

It is difficult enough for a prisoner released after a lengthy sentence to re-establish a normal life, and it is likely that a depressing number of those released under a supervision order will be "back behind bars" in a relatively short time.

Civil Libertarian Protest

As already indicated, the initial protests against the new Act have come from civil libertarians, and those who are concerned by the speed with which legislation of this kind can be rushed through Parliament with relative lack of consultation, even within Parliament's own committee system. All the orders which may be made under the Act may be appealed to the Queensland Court of Appeal; from there, they may travel to the High Court, where the major constitutional challenge is likely to be staged, sooner or later.

Until that time, the general public response, on balance, is likely to be a vague feeling of increased security. Within the public service, there will inevitably be concerns regarding the funding of these new initiatives, and the distinct possibility of increased workloads for key staff within the new regime.

Conclusion

The 13% or so of Queensland's prison population who are sex offenders are not likely to be comforted by the Police Minister's assurance during the Parliamentary debate that the new Act will only affect ". . . . a dozen or so very, very serious offenders, most of whom have been in prison for a long time".

And, it may perhaps be added, seem destined to be so for a good deal longer.

Discussion Points

Do you think it is a transgression of a prisoner's human rights to be kept in jail beyond the prescribed jail sentence on the basis of the principles in this legislation?

Is a citizen entitled to expect a sex offender is not to be released until they have indicated they are reformed?