RESPONSE TO HIGH RISK OFFENDER PROPOSALS

JOHN HOWARD SOCIETY OF ALBERTA

1997

Submission

to the

House of Commons

Standing Committee on Justice and Legal Affairs

Regarding

Bill C-55

An Act to amend the Criminal Code (high-risk offenders),
the Corrections and Conditional Release Act,
the Criminal Records Act, the Prisons and Reformatories Act
and the Department of the Solicitor General Act

Submitted by:
John Howard Society of Canada

in conjunction with
John Howard Society of Alberta
and
John Howard Society of Ontario

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Executive Summary

The John Howard Society is concerned about the risks posed to the community by offenders who appear to dangerous. We believe that society has the right to protect itself from harm and should take reasonable and carefully designed steps to do so. We feel, however, that the highly intrusive measures proposed in Bill C-5 not achieve long-term community safety.

The John Howard Society believes that the Long-Term Offender and Judicial Restraint provisions are a resp but not a solution to the problems created by the practice of detaining a growing number of offenders, particu sex offenders, to Warrant Expiry, the lack of treatment and other support services in the community beyond Warrant Expiry and the practice of public notification of the release of offenders. The Long-Term Offender a Judicial Restraint provisions merely extend legal control beyond the end of sentence and do not address the barriers to the successful reintegration of offenders. The Long-Term Offender and Judicial Restraint propos coupled with changes to the Dangerous Offender provisions proposed in Bill C-55, suggest the need for a comprehensive review of how we identify and treat offenders who are believed to pose a significant threat to community safety. Such a review must take place in the context of a more general review of sentencing in Canada.

The John Howard Society has consistently argued for the development of a principled and rational system of sentencing and we support the recommendations of the Canadian Sentencing Commission. The *Purpose a Principles of Sentencing* introduced in Bill C-41 was a promising step. However, the provisions relating to high-risk offenders proposed in Bill C-55 violate many of the sentencing principles enacted in Bill C-41. Whil low-risk offender provisions in Bill C-55 observe the sentencing principles enacted in Bill C-41, we feel that th government could take further steps to reduce the use of incarceration. We believe that more fundamental changes to integrate sentencing and release policy are required to effect substantial reductions in the prison population and to reduce our over-reliance on incarceration. The John Howard Society believes that greater restraint in the use of incarceration can best be achieved by adopting the recommendations of the Canadian Sentencing Commission and by establishing a permanent sentencing commission to develop and revise sentencing guidelines and ensure their consistent application.

Summary of Recommendations

(1) The current system of indeterminate sentencing should be replaced by the exceptional sentence as recommended by the Canadian Sentencing Commission.

(2) In those situations where a person is extremely disturbed and unsafe to be released, the person shou be detained under mental health legislation and be transferred to a mental health facility.

(3) If the current system for Dangerous Offenders is maintained, the discretion of the court to apply fixed sentences should be retained.

(4) If the current system for Dangerous Offenders is maintained, the provisions with respect to required psychiatric testimony should be retained.

(5) Should the new sentencing category, the Long-Term Offender, be enacted, the provisions should be amended to require that a *pattern* of sexual offending be established.

(6) Should the new Judicial Restraint provision be enacted, the provision should be amended to remove electronic monitoring as a condition of the recognizance.

(7) As an alternative to the Long-Term Offender and the Judicial Restraint amendments, the following measures should be enacted:

i) the repeal of the detention provisions of the *CCRA*,
ii) prohibition of public notification of the release of offenders
iii) gradual release as an integral, statutory part of every sentence,
iv) focussing community supervision and treatment resources on those with the greatest need and who pose the greatest risk,
v) available, specialized, professionally operated and well funded community treatment and residential facilities, and
vi) payment for treatment services (i.e. relapse prevention) beyond warrant expiry.

(8) A permanent sentencing commission should be established to develop and revise sentencing guidelines in accordance with the recommendations of the Canadian Sentencing Commission.

Introduction

The John Howard Society of Canada has prepared this submission in conjunction with the John Howard Soc of Alberta and the John Howard Society of Ontario to express our views about those matters relating to provi proposed in Bill C-55 that are of particular interest to the Society.

The positions articulated in this submission evolved from positions of the Society developed over the years v respect to sentencing, corrections and conditional release. We also were guided by the literature and resea relevant to the management of risk and strategies which have proven effective in reducing re-offending, by th available data and by our experience gained from the Society's lengthy history of working with offenders in pr and in the community.

The John Howard Society has maintained that decisions with respect to sentencing and release must be bas on principles which are clearly articulated, understood and consistently applied. The Society's views with res to sentencing and release as we have presented them in other submissions to government, including the Standing Committee on Justice and Legal Affairs, are based on four general observations:

1. The present use of incarceration is excessive and should be reduced.
2. There should be a sustained effort to reduce the length of terms of incarceration.
3. Sentencing policies and correctional practice should be built on the principles of gradual release.
4. Sustained effort should be made to improve the quality, variety and extent of programs whose goal is to enhance opportunities for rehabilitation and successful reintegration into society of those serving sentences in institutions and in the community.

High-Risk Offenders

The John Howard Society is concerned about the risk that is posed to the community by offenders that appe be dangerous. Any person living in the community who cares about their own safety and that of their family shares the same concern. We hear, on a regular basis, about sensational cases where individuals who hav committed an offence appear, on examining their past, to have factors in place which would have predicted t offence. It is not surprising, therefore, that there are repeated calls for parliament to take action to ensure tha public is protected from such individuals. When faced with the prospect of certain violence and no credible alternative to detention exists, then indefinite detention becomes the logical choice.

The notion of indefinite detention has been part of the criminal justice and mental health picture in Canada fo many generations. There are currently a number of measures in place that can hold people indefinitely or fo limited periods of time on the basis of perceived risk. We have many offences within the *Criminal Code* that have life imprisonment as the maximum penalty. Currently in excess of 2,000 people are serving life senten Over 1,000 individuals charged with an offence but found to be unfit to stand trial or not criminally responsible detained within the mental health system through the *Criminal Code* provisions relating to mental disorder. Provincial mental health legislation also permits detention through civil commitment of those determined to b danger to themselves or to others. In addition, we have the dangerous offender provisions under which there 163 individuals being detained in Canada.

Within the criminal justice system there are a plethora of points at which decisions are made to detain or rel the person on the basis of perceived risk. The refusal of bail will result in a person being detained who would otherwise be released. Decisions to deny gradual release ranging from temporary absence to parole can re in longer periods of detention if the person is perceived to be a risk. People in the federal system can be det for the period of their statutory remission if they are perceived to be a risk. Finally, judges routinely and consistently sentence people to longer periods of time if the person presents a risk of committing future crim than would otherwise be given on the basis of the offence alone. In total, literally thousands of people are detained today in custody because someone thought the individual was dangerous.

In spite of the various options to hold dangerous people, offences still take place and with each offence we a whether measures could have been put in place that would have prevented the offence. Inquiries into major crimes almost inevitably find factors that might have predicted the particular offence. The problem is that, in examining specific cases, we tend to overlook the fact that there are many other individuals who have simila patterns in their backgrounds who did not go on to become violent offenders or to repeat past offences.

The real issue is not whether the laws can be expanded to include more people, but whether they can be expanded without also including a large number of individuals who would not have gone on to commit violent offences if they had been released. Much of the discussion that surrounds Bill C-55 seems to *assume* that prediction of violence can be achieved with accuracy. Often those who are most critical of criminal justice o for errors in recognizing a dangerous person seem to have unquestioning confidence that the same systen

not make mistakes when it detains people. They assume that the criminal justice system *has the ability and the will* to differentiate between truly dangerous offenders and others who are strange, scary or unpopular.

In his testimony to this Committee, Chief Brian Ford, on behalf of the Canadian Association of Chiefs of Police, stated:

> *Those involved in the administration of justice have also been frustrated with the onerous procedural requirements they had to meet before someone could be declared a dangerous offender and sentenced to an indefinite term of imprisonment.*

Mechanisms that detain people indefinitely for what we think they *might* do *should* be rigorous and there *should* be substantial onus placed on those who administer the criminal justice system to demonstrate the necessity for the person to be detained. The convenience of criminal justice officials must be viewed as being subordinate to ensuring that the detention provisions are applied fairly, objectively and with utmost restraint. It is expressly because we are *applying the most substantial punishment* available in our *Criminal Code* for behavior that *might* occur that the application of such authority must be tightly controlled. As we relax those laws and reduce the burden on officials to prove their case we are simply ensuring that more and more individuals will be detained indefinitely when such action was not necessary. We look to our legislators to keep in mind the potential tyranny that can be created through legislation that was originally intended to address certain future violent behavior.

Current Dangerous Offender Provisions

Under the present law, the Crown may make application to find a person to be a Dangerous Offender if he/she is convicted of a "serious personal injury offence", as defined under Section 752, but not yet sentenced. In order for the person convicted of a serious personal injury offence within the definition to be declared a Dangerous Offender, the Crown must further prove that:

a) "the offender constitutes a threat to the life, safety or physical/mental well-being of other persons" by virtue of:
   i) a pattern of repetitive behaviour showing a failure to restrain behaviour and a likelihood of causing death/injury/psychological damage through future unrestrained behaviour,
   ii) a pattern of persistent aggressive behaviour with indifference to the consequences of this behaviour, or
   iii) behaviour, associated with the current offence, that is of such a brutal nature that ordinary standards of restraint will not control it, or

b) the current offence shows the failure to control sexual impulses and the likelihood of causing "injury, pain or other evil" to others through failure in the future to control sexual impulses.

The onus of proof is on the Crown and the burden of proof is beyond a reasonable doubt. The application is heard by judge alone. The required evidence is evidence from two psychiatrists, one nominated by the Crown and one by the defendant. The court may hear

Without an experimental study using control groups, it is not possible to determine whether an assessment o risk is accurate. We have no way of knowing, for instance, how many of those who have been declared

Dangerous Offenders might have been dealt with safely in other ways. The only reassurance we have that t provisions have not been misused is by virtue of the fact that they have not been used frequently.

What we do know is that in every other forum of risk-based decision-making officials grossly overpredict the that is present. The following indicators of overprediction should cause us to be very modest about our abilit devise *and implement* systems that accurately identify and detain only those who would be violent.

- Of the 188 persons found to be a Dangerous Offender since 1977, 86 have come from Ontario, 47 from British Columbia and, in contrast, one from Quebec. Factors other than risk clearly influence the process and the outcome.
- Research by Webster and Dickens into the inconsistent use of detention legislation suggests that community sentiment or local sensitivity to a particular offender, or the inclination of a particular Crown Attorney may determine if an application is made.[1]
- Findings in studies by Esses and Webster suggest that less attractive offenders are more likely to be designated as Dangerous Offenders.[2]
- An analysis of the use of the pre-1977 Habitual Offenders provisions shows that there was marked regional disparity in the use of the legislation with British Columbia having by far the largest number of cases, excessive use of the

Proposed Changes to Current Dangerous Offender Provisions

Through Bill C-55, the government is proposing to change the Dangerous Offender provisions in the following ways:

1) reduction of the number of psychiatrists required to testify at the hearing from two to one;
2) allowance for application after imposition of a sentence for an offence, up to six months after if notice is given at the time of sentence and provided that relevant information was not available at the time of sentence;
3) the addition of an alternative disposition, a finding of Long-Term Offender, should the person not to be found to be a Dangerous Offender;
4) removal of judge's discretion to impose a determinate sentence if the person is found to be a Dangerous Offender; and
5) an increase in the period of parole ineligibility from three to seven years for those found to be a Dangerous

[1] C. Webster and B. Dickens, *Deciding dangerousness: Policy alternatives for dangerous offenders*, Toronto: University of Toronto, Centre for Criminology, 1983.

[2] V. M. Esses and C. D. Webster, "Physical attractiveness, dangerousness and the Criminal Code", *Journal of Applied Social Psychology*, 18 (12), 1988.

provision particularly with respect to "nuisance" cases and improper use of the stipulated release procedures.[3] A judicial review of all habitual criminals resulted in 71 of the 93 being granted a full pardon. At the time of the hearings which concluded in 1984, 12 of the 71 were still in prison (i.e., they had been denied parole) and were released immediately.

- A study of the Dangerous Sexual Offender legislation found that there were substantial discrepancies between provinces in the application of Dangerous Sexual Offender proceedings. Again, British Columbia accounted for the largest number. The authors found that approximately one-third of the 109 Dangerous Sexual Offenders *"*had behaved offensively but were not dangerous*"*.[4]

- When the provisions for detention during the period of statutory remission were introduced (1987), the evidence given at the Commons and Senate committees by the then Commissioner of Correctional Service of Canada and the Chair of the National Parole Board was that detention would be used in about 50 cases per year. The data now show that the number of detentions on initial review reached 483 in 1995/96 - *almost ten times the level that was considered necessary when the Bill was passed into law!*

- A recent study done by the Correctional Service of Canada, *Inmates referred for detention 1989-90 to 1993-94: A comparative analysis,* found that offenders who are detained are not those offenders who pose the greatest threat to community safety. For example, the researchers found that:

  > *The data suggest that offenders who are released at their statutory release date, including those that were referred but not detained, are more likely to be readmitted than those who are detained to the end of their sentence. It also appears that those who are not detained are more likely to reoffend within two years of their release and are equally likely to reoffend with a violent offence (another scheduled offence) than those who are detained.* [5]

These findings, and an examination of the additional costs caused by detention (which was estimated in the study to be over $1 million per year), led the researchers to conclude that:

> W*hile the protection of society must remain a prime consideration, there is evidence to suggest that the*

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[3] M. Jackson, "Sentences that never end: The report of the Habitual Criminal study", Vancouver: unpublished report, 1982.

[4] C. Greenland, "Dangerous Sexual Offender legislation in Canada 1948-1977: An experiment that failed", *Canadian Journal of Criminology*, 26(1), 1984, page 10.

[5] Brian A. Grant, *Inmates Referred for Detention (1989-90 to 1993-94): A comparative analysis*, Ottawa: Correctional Service of Canada, July 1996, page 55.

increased incarceration costs of detention may not be achieving much benefit".[6]

- Many offenders who have been assessed by parole authorities as a presenting a risk of re-offending do not commit new offences on release. Of all applications for full parole where a decision is made, approximately 66% result in a denial of full parole. Yet, a follow-up study of all offenders released on statutory release (not granted parole) during a ten year period showed that 17% had committed a new offence.

Sentencing Policy and Dangerous Offenders

The John Howard Society believes that any review of the Dangerous Offender provisions must take place in context of a more general review of sentencing in Canada. The Society has consistently argued for the development of a principled and rational system of sentencing and supports the recommendations of the Canadian Sentencing Commission. We believe that it is time to revisit the recommendations of the Sentenc Commission, move towards a principled system of sentencing based on proportionality and revise our laws respect to Dangerous Offenders accordingly.

The problems of the Dangerous Offender provisions within a principled system of sentencing guidelines hav been well articulated in the report of the Canadian Sentencing Commission. We support the recommendatio the Canadian Sentencing Commission with respect to the repeal of the Dangerous Offender provisions in th context of the following statement made by the Commission:

> *The Commission has already decided that among the principles of sentencing, priority would be assigned to proportionality. Proportionality implies that the focus of sentencing should be blameworthiness of the conduct rather than the character of the offender, or worse, predictions about his future behaviour. Consequently, no special sanction should be triggered only or primarily by reference to the offender's character and propensities.*[7]

The Commission recommended that the current system of indeterminate sentencing be replaced by a proce called the "exceptional sentence" which allows for the enhancement of the sentence for the most serious occurrences. The exceptional sentence can mean up to 18 years of incarceration.

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[6] *Ibid*., page 57.

[7] Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian approach*, Ottawa: Ministry of Supply and Services, 1987, page 212.

Recommendation:
The current system of indeterminate sentencing should be replaced by the exceptional sentence as recommended by the Canadian Sentencing Commission.

The John Howard Society does not reject the idea of preventive detention entirely. In the very rare situation v a person's mental health makes the person uncontrollable in any gradual release program, we propose that t person should not be handled in a correctional environment. Instead, they should be placed in a mental heal facility. The person should undergo extensive assessment and, if found too unsafe to be released, detained under a civil commitment and, at that point, transferred out of the correctional facility to a mental health facilit

We do not recommend civil commitment because the mental health field has an unblemished track record. make this recommendation because we feel that it is essential that prisons not become institutions that have deal with extremely disturbed persons who require indefinite detention. We also feel that the mental health fi has demonstrated reluctance to use the powers of civil commitment. This reluctance would help to ensure t the awesome powers of civil commitment were only used in the most exceptional circumstances.

Recommendation:
In those situations where the offender is extremely disturbed and unsafe to be released, the person should be detained under mental health legislation and be transferred to a mental health facility.

Definite Terms for Designated Dangerous Offenders

One of the new provisions of Bill C-55 would require that any person found to be a Dangerous Offender be sentenced to indefinite detention. Any possibility of a fixed term has been removed. Although the courts have used the fixed term option rarely over the years, no attempt has been made, that we are aware of, to determi why the courts decided in those particular cases that a fixed term was appropriate. In effect, Bill C-55 sets t equivalent of a life sentence as the *mandatory minimum* penalty to be applied to people on the basis of behavior that *might* occur. It seems strange to us that the most onerous penalty available under Canadian criminal law will be applied, *without discretion,* to all cases. The result may be that some individuals who would otherwise have been found to be a Dangerous Offender will not be found as such because of the reluctance of the court to apply the mandatory minimum. In other cases people will be sentenced to an indet term when unusual circumstances related to the case indicate that a fixed term is appropriate.

The Society objects to the indefinite term as a mandatory minimum. While it is quite appropriate to have sentencing guidelines that determine a normative sentence and require justifications from the court to vary outside of a specified range, mandatory minimum penalties inevitably distort the justice system in unpredicta ways.

Recommendation:
If the current system for Dangerous Offenders is maintained, the discretion of the court to apply fixed term sentences should be retained.

Psychiatric Testimony

A 1983 study of the files in Dangerous Offender applications in Ontario found that one psychiatrist appeared for the Crown in 56% of the cases.[8] At least in these cases, the court was *required* to hear additional evidence. Given the severity of the sanction, the fact that the finding depends in large part on psychiatric evidence and the substantial variability of the evidence given by different psychiatrists, no decision should be restricted to the evidence of only one psychiatrist.

Recommendation:
If the current system for Dangerous Offenders is maintained, the provisions with respect to required psychiatric testimony should be retained.

[8] C. Webster, B. Dickens and S. Addario, *Constructing Dangerousness: Scientific, legal and policy implications*, Toronto: University of Toronto, Centre for Criminology, 1985, page 44.

Long-Term Offender

After many years of consultation and discussion and with the advice of many criminal justice experts, the federal government finally passed sentencing legislation last year which included the *Purpose and Principles of Sentencing*. It was hoped and expected that a statement, once enshrined in legislation, would act as a guide to legislators when considering legislation. It is surprising to us that shortly after this legislation was passed, Bill C-55 was drafted which has within it provisions which appear to violate many of the principles contained within the sentencing legislation.

Long Term Offender Provisions

Bill C-55 will result in a new sentencing category, Long-Term Offender, being added to the *Criminal Code*. The target of these provisions is "*sex offenders who are less violent and less brutal than those designated as Dangerous Offenders but are found to pose a considerable risk of re-offending*" (promotional brochure from the Department of Justice). The application procedure is similar to the process for the Dangerous Offender, including the timing of the application. If found to be a Long-Term Offender, the person would be subject to up to 10 years of community supervision (long-term supervision) to be served after completion of the sentence for the offence for which the person was convicted.

The *Purpose and Principles of Sentencing,* contains notions of fundamental justice as well as a recognition that the state should be modest in the use of imprisonment. The principles of proportionality, fairness, and restraint are clearly violated in the Long-Term Offender provisions of the Bill. The promotional material accompanying the release of the Bill state explicitly that the Long-Term Offender provisions would apply *in addition to the "appropriate" sentence* which would be given for the offence. The penalty which follows the "appropriate" penalty is by definition inappropriate and, therefore, *excessive*. The fact is that the additional period of supervision *is a sentence*. It restricts a person's freedom in what could be a very onerous manner. It is punitive. We question how the courts would deal with such a provision. We think that the proposals to add the supervision sentence to the original sentence is improper.

The Society does not object to significant periods of community supervision for those who have a pattern of s offending. We realize and believe very much that extended relapse prevention programs are crucial to a per gaining control over his behaviour. As we recommended with respect Dangerous Offender provisions, we b that the adoption of the recommendations of the Canadian Sentencing Commission, particularly those relatir the exceptional sentence, would permit extensive periods of community supervision without offending the principles of sentencing.

The Long-Term Offender provisions would have been less objectionable if the criteria used to determine which offenders are eligible for designation as Long-Term Offenders were tightened. Presently, offenders convicted of at least one of a list of sexual offences ranging from exposure to a young person under 14 years of age to aggravated sexual assault could be subject to the long-term offender designation. We are greatly concerned that the provisions allow for the possibility that an offender convicted of one sexual offence (i.e., exposure to a young person under 14 years of age) could be designated as a Long-Term Offender. At the very least, a pattern of sexual offending should be established for the Long-Term Offender designation to be used.

Recommendation:
Should the new sentencing category, the Long-Term Offender, be enacted, the provisions should be amended to require that a <u>pattern</u> of sexual offending be established.

Detention to Warrant Expiry and Public Notification

In many cases, detention to Warrant Expiry Date creates barriers to reintegration. It is virtually impossible for those released at Warrant Expiry Date to get access to treatment that would be available through or funded by CSC for those under supervision. The John Howard Society has had contact with released sex offenders who want relapse prevention treatment but such services are not funded by provincial medical plans and these individuals cannot afford the fees.

When the release has resulted in public notification, the individual faces special problems such as accommodation, employment, access to and willingness to use support services. In these cases, the stresses of returning to life in the

Purpose and Principles of Sentencing

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
(a) to denounce unlawful conduct;
(b) to deter the offender and other persons from committing offences;
(c) to separate offenders from society, where necessary;
(d) to assist in rehabilitating offenders;
(e) to provide reparations for harm done to victims or to the community; and
(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:
(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence...
(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

community after a period of incarceration are made even greater. In those instances where the pressure fro some community members has been intense and relentless, individuals have been forced to move from a community where they have some supports to a community where they have none. All of these conditions increase the risk of re-offending. In *Encouraging the Reintegration of Offenders*, the Correctional Services of Canada acknowledged that the factors necessary for an offender's successful reintegration into the comm include family or community support, employable skills, continued psychological or psychiatric intervention w needed and relapse prevention programs for sex offenders and offenders with substance abuse problems.[9]

Measures such as detention and public notification are largely premised on the belief that sex offenders will always re-offend. Challenging this belief is a recent review of the research completed by Department of the Solicitor General of Canada which drew information from 98 different follow-up studies of sex offenders. The overall sexual recidivism rate was 13%. The authors of the research review stated that:

> *Not all sex offenders are high risk. In fact, most sex offenders are never convicted of another sexual crime.*[10]

We should be taking steps to decrease the likelihood of re-offending by sex offenders, not creating illusions o public safety through measures such as detention and public notification which create conditions that actuall increase the likelihood that sex offenders will re-offend.

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[9] Correctional Service of Canada, *Encouraging the Reintegration of Offenders*, Ottawa: Correctional Service of Canada.

[10] R. K. Hanson and M.T. Bussiere, "Sex offender risk predictors: A summary of the research result *Forum on Corrections Research*, 8(2), May 1996, page 10.

Judicial Restraint

Electronic monitoring is house arrest. Electronic monitoring as it currently exists does not track a person. It does not tell authorities where a person has been but only tells authorities whether the person is at home. As such, it is incarceration. The use of incarceration without the commission of an offence, or even a criminal record, is excessive and should not be permitted. It is very different, in our view, for the court to order the person not to go into certain places such as school yards, or to an ex-partner's residence than to detain a person, whether in his home or in a prison. It is extremely dangerous to put in place legislation that will allow for any person to be detained where a court can be convinced that the person constitutes a threat. This is of particular concern to us when in many of the circumstances in which such a motion would arise, community feeling might be highly charged.

Judicial Restraint Provisions

The judicial restraint provisions propose in Bill C-55 would allow a provincial court judge to order an individual to enter into a recognizance to keep the peace and be of good behaviour where there are reasonable grounds to believe that the person will commit a serious personal injury offence. The judicial restraint provision differs from the present *Criminal Code* provisions under "Sureties to Keep the Peace" in that the provincial Attorney General lays the information and the potential offence must be within the meaning of a "serious personal offence" as defined in Section 752 (Dangerous Offenders). The judicial restraint provision also allows for the application of reporting and monitoring conditions, including electronic monitoring.

We share the concerns expressed by many that the provision is a violation of the Charter in that it is so broad that it could be applied to a person who has never even been charged or convicted of a criminal offence and that it allows for the use of highly intrusive monitoring conditions. The Minister of Justice has acknowledged these concerns and has asked the Standing Committee to examine ways to narrow the provision's application. Among the suggestions made by the Minister of Justice are to limit the application to the following:

i) previously convicted persons,
ii) persons with a history of violent behaviour where prior convictions would be relevant but not determinative, or
iii) applying a pattern as in Section 518 of the Criminal Code and developing a list of factors to be taken into consideration.

The John Howard Society believes that the use of electronic monitoring should not be allowed under the judicial restraint provisions.

Recommendation:
Should the new Judicial Restraint provision be enacted, the provision should be amended to remove electronic monitoring as a condition of the recognizance.

Some peace bonds have been issued in conjunction with public notification that a serious offender has been released from prison. In such a highly publicized and politically charged environment it will be very difficult fo judge to reject the application. At the same time that we are creating situations where the court requires the

person to remain at a specific location, public notification makes it impossible for the person to remain. The person is either forced to be subjected to enormous public hostility and potential threat of violence or to violat conditions of his bond in order to hide. Surely that is an intolerable circumstance for the person to survive in is, therefore, a consequence of the legislation which must be seen to be counterproductive and should be avoided.

The judicial restraint provisions were designed in part to deal with the public's concerns relating to those offenders (particularly sex offenders) who have been released with no supervision as a result of being detained to warrant expiry. The failure of detention and the problems of access to treatment in the community have not been addressed in Bill C-55.

Recommendation:
As an alternative to the Long-Term Offender and the Judicial Restraint amendments, the following measures should be enacted:

- ***i) the repeal of the detention provisions of the CCRA,***
- ***ii) prohibition of public notification of release of offenders,***
- ***iii) gradual release as an integral, statutory part of every sentence,***
- ***iv) focussing community supervision and treatment resources on those with the greatest need and who pose the greatest risk,***
- ***v) available, specialized, professionally operated and well funded community treatment and residential facilities, and***
- ***vi) payment for treatment services (i.e. relapse prevention) beyond warrant expiry.***

Low-Risk Offenders

The John Howard Society shares the government's concern with respect to the over-reliance on incarceratio Canada and the increasing populations in federal prisons in this country. In our every day work with prisoner see the negative effects of needless incarceration and overcrowding. We believe that, if we listen to the less from other countries with lower rates of incarceration, "a country can substantially reduce the level of incarce *where there is a will to do so* [emphasis added]".[11] While we applaud the words and the intent of the government, we see little in terms of concrete action contained within Bill C-55 to bring about reduced levels incarceration.

In contrast with the numerous and very specific measures targeting high-risk offenders, measures that will r in more people serving longer periods of time in prison, the only measure in Bill C-55 which has the theoretic potential to limit incarceration levels slightly is the reduction of day parole eligibility for first-time, non-violent offenders from six months before the full parole eligibility date to one-sixth of sentence. While the John Howa Society supports the provision as it will permit the earlier conditional release of some individuals who should be in prison, we should recognize that the effect of reducing the period of day parole ineligibility on the prison population will be negligible.

Assuming that the day parole eligibility provisions work as hoped, the impact on federal levels of incarceratio be minimal simply because the eligibility restrictions ensure that they will apply to a relatively small proportion the inmate population and affect only a small amount of time to be served in incarceration. Only 12% of the current federal inmate population is eligible for accelerated parole review. Non-violent, first-time penitentiary offenders do not usually receive long sentences. The amount of time saved though the earlier eligibility for a person serving a typical three year sentence would be nothing at all! For a person serving six years (an unu long sentence for a first-time, non-violent offender) the potential saving of time in prison would be six months The average sentence length for all new admissions (excluding life sentences) including those sentenced fo violent offences in 1994/95 was 44 months.

One cannot assume, however, that the day parole eligibility provisions will work as hoped given the informati presented in the most recent report of the Auditor General. In an analysis of all of the approximately 1800 offenders admitted during 1995/96 with a sentence of three years and less, the office of the Auditor General f that casework preparation delays and over-prescription of programs would result in virtually none of these offenders having completed the requirements until three months *after* becoming eligible for day parole.[12]

To achieve any substantial reduction in prison populations within the present structure requires first an examination of the causes. The federal prison population has increased steadily and significantly in the past years. Factors contributing to this growth include:

1) More people are being sentenced to a federal term. Warrant of Committal admissions increased 6% from 1990/91 to 1995/96;

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[11] Report for the Federal/Provincial/Territorial Ministers Responsible for Justice, *Corrections Population Growth*, Ottawa, 1996, page 3.

[12] Report of the Auditor General, Chapter 30, November 1996

2) Total admissions increased by 20% from 1990/91 to 1995/96, largely driven by increases in those being returned to prison for a revocation of parole or statutory release. In 1995/96, 65% these revocations involved no new offence. Revocations with no new offence accounted for 2 of all admissions to federal penitentiaries in 1995/96 compared with 20.5% in 1990/91;
3) There is a growing accumulation of "lifers" in the system, due to the 1976 changes to the parc eligibility for those convicted of first and second degree murder;
4) More people are being detained to the end of their sentence. As we have stated earlier in this document, substantially more people are being referred for detention and substantially more c those being referred are being detained; and
5) Fewer people are being granted parole. From 1991/92 to 1994/95, the numbers of day parole and full paroles granted by the National Parole Board dropped significantly - by 39% for day parole and 18% for full parole. Further, escorted temporary absences decreased by 18% and unescorted temporary absences by 54%.

The will to substantially reduce prison populations will only be evident when the above factors are addressed either by legislation or by changes to the policies and practices of the Correctional Service of Canada and th National Parole Board. Prisoners must be prepared for release, must be released in a timely fashion and m have access to needed programs and services once they are released. Gradual release must be valued. Gradual release should be a part of every sentence and grounded in the research on "what works" to reduce offending. Risk assessment tools should be used to identify how best to *manage* the risk in the community, as it is now which is to *deny* access to gradual release. Legislators must resist the temptation to offer the "c fix" to every sensational crime.

The John Howard Society believes that more fundamental changes to integrate sentencing and release polic required to effect substantial reductions in the prison populations and to reduce our over-reliance on incarceration. We agree that an important step was taken through the passage of Bill C-41 with respect to articulating principles of sentencing aimed at restraining the use of incarceration. The statement of the Purp and Principles of Sentencing , however, should be seen as only the *first* step. We do not believe that restrai the use of incarceration will be achieved just by including it in a statement of the purpose and principles of sentencing or even by giving judges more sentencing options, such as the "conditional sentence" which we h argued may result in increasing incarceration.

The John Howard Society has consistently advocated for the establishment of sentencing guidelines to give substance to the principles now articulated in law - principles which we support. Within a system of sentenc guidelines, it would be possible to create a penalty structure that not only would set out the length of sentenc imprisonment based on the principles of proportionality, equivalence and restraint but also and more importa would define certain offences as ordinarily non-imprisonable. The Society believes that greater restraint in th use of incarceration can be achieved best by adopting the recommendations of the Canadian Sentencing Commission and by establishing a permanent sentencing commission to develop and revise guidelines and ensure their consistent application.

Recommendation:
A permanent sentencing commission should be established to develop and revise sentencing guidelines in accordance with the recommendations of the Canadian Sentencing Commission.