Submission to the
Legal Affairs and Community Safety Committee

Criminal Law (Two Strikes Child Sex Offenders) Amendment Bill 2012

Bravehearts inc.
Educate Empower Protect
Our Kids

27th June 2012

About the Authors

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Bravehearts Submission

As Australia's leading child protection advocate, Bravehearts congratulates the Queensland Government on amendments to the criminal code that include a 'Two Strike' approach to sentencing of dangerous sex offenders. It is encouraging that the State Government has taken such a proactive step towards protecting Queensland's children.

We offer our complete support for the Bill's objectives to:

1. Amend the *Penalties and Sentences Act 1992* to insert a new mandatory sentencing regime of life imprisonment for certain repeat child sex offenders; and
2. Amend the *Corrective Services Act 2006* to prescribe a minimum non-parole period of 20 years imprisonment for an offender sentenced to mandatory life imprisonment under the new repeat child sex offender sentencing regime in the *Penalties and Sentences Act 1992*.

We also support the application of the Bill to apply to:

- an adult offender is convicted of a relevant serious child sex offence (as defined in the Bill);
- such offence is committed after the commencement of the Bill;
- the offender has a prior conviction as an adult for a relevant serious child sex offence (it does not matter whether the first offence was committed, or the offender was convicted of the first offence, before or after the commencement of the Bill); and
- the second offence is committed after the conviction of the first offence.

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. It has always been Bravehearts position that if people are a known danger to our children, it is the duty of those responsible for public safety to protect the community from those offenders.

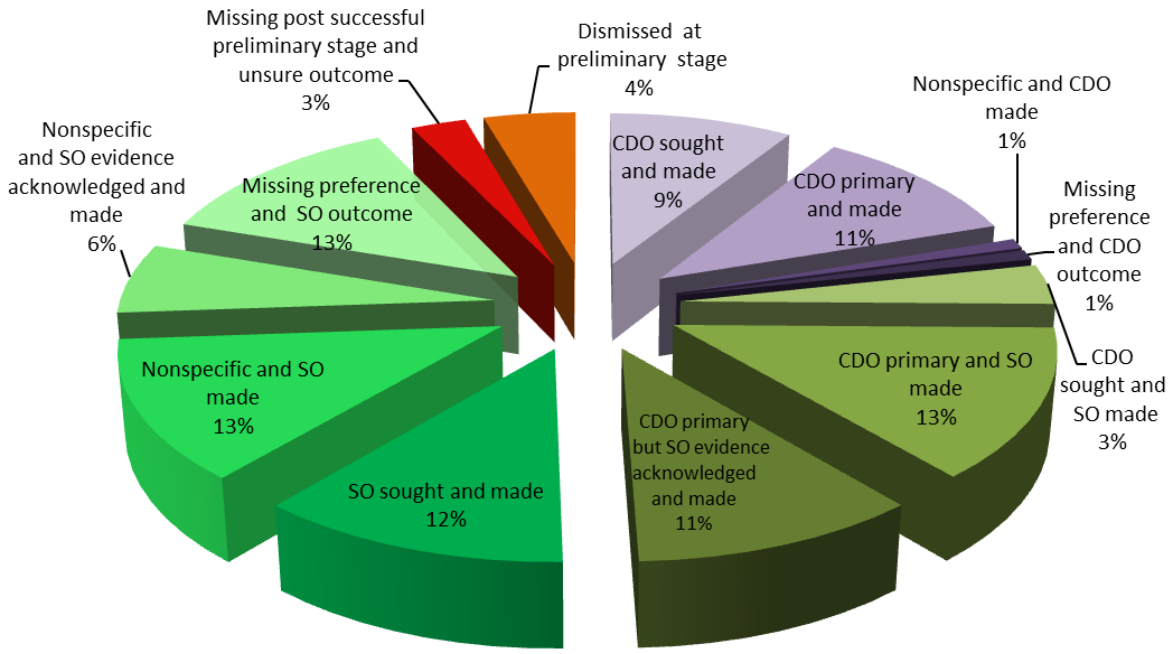
It is clear to us that community fears of child sex offenders are real. Just as real is the incredible amount of damage and harm that is caused by child sex offenders on those they prey upon. As a community we need to find ways in which to manage sex offenders and respond to those that are clearly a serious risk. Nothing is as strong an indicator of a high-risk offender as persistent offending. 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. This responsibility is consistent with our obligations under Article 19 of the United National Convention on the Rights of the Child:

> 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.

Bravehearts has been consistent in lobbying for a two strikes approach to dangerous sex offenders since 2008, releasing our position paper, "Two Strikes and They're Out: Mandatory Sentencing for Child Sex Offenders" (2009) (attached).

The release of this policy by Bravehearts was in response to our continued frustration with the 'watering down' of the *Dangerous Prisoners (Sexual Offenders) Act 2003* by the courts. It was clear that judges were continuing to release known, dangerous sex offenders into the community, irrespective of assessments of risk to children.

A recent review (the paper is currently being finalised and can be made available), conducted by Bond University and Bravehearts, of 111 applications under the *Dangerous Prisoners (Sexual Offenders) Act 2003* found that the Attorney-General applied for a continued detention order in 47% of matters, with more than half of these application being rejected resulting in high risk offenders being released on supervision orders (see figure below):



Please Note: Order preference was determined by the initial wording used in the application and consistency in this preference (or lack of preference) mentioned throughout the transcript/s. Only three reports displayed an inconsistency in this respect, and the preference with the most frequency and cogency as per the counsels verbalisations was used for this analysis. In terms of the above categories, this includes what orders were 1) ***sought*** *by the applicant (via explicit, sole, reference to an Order type), 2)* ***primary*** *-where a preference was stated for an order, with a secondary alternative acknowledged (e.g. "or in the alternative", "or, alternatively", "or else, that if", ".Alternatively", ".In the alternative", "or; alternatively"), and 3)* ***nonspecific****- where no preference was expressed (e.g. "either", "or", "division 3 order"- and no other specific order preference mentioned throughout the transcript). In each of the sought and primary stages, it was noted where counsel for the Attorney General accepted that despite their initial argument (and possibly continued) order preference, the evidence supported a different outcome (this is expressed by the term '****evidence acknowledged'*** *in the above figure.*

Moreover, it was found that in approximately **90% of cases** (where the information was available), ***at least one*** **of the two risk assessors/psychiatrists classed the offender under consideration as "high" or "very high" risk** if they were to be released immediately or at the end of their current sentence and not be subject to a supervision order under the DPSOA. Bravehearts believes that if an offender is considered of 'high' or 'very high' risk of reoffending, a supervision order is a grossly inadequate measure for responding to that risk.

Certainly, our research has shown that of the 97 offenders on a supervision order, 36% contravened their supervision order in some way. These offences include:

- Sexual assault, consisting of masturbation in public place and subsequent conviction of this offence via plea of guilty,
- Rape for which the offender was acquitted via way of appeal,

- Indecent treatment of a child under 16 via way of taking photographs. This includes two separate offenders having undertaken these acts (3 acts each) while together, with the outcome for at least one offender having been a conviction.
- A further indecent treatment offence resulted in a not guilty verdict while the outcome for an additional indecent dealing offence is unknown.
- A contravention based on a verbal threat to rape also occurred, however the outcome of this offence is unknown,
- The outcome of an offence involving the offender "placing his hands" on a child in a public place for which the child "broke free" also constituted a contravention, the offence outcome of which is unknown,
- The outcome of an offence involving harassing and "sexually obscene" phone calls in relation to multiple people (both QCS staff and strangers) are unknown.
- One further contravention involved an offender serving a Supervision Order having committed a further offence where a child stated they were "tickled" inappropriately by the offender

As outlined in our attached "Two Strikes and They're Out" position paper, while Bravehearts respects that the concerns around multiple strikes legislation are legitimate in relation to the general introduction of laws, it is our position that child sex offences need to be considered with the utmost gravity. The reality is that child sex offending is a compulsive, addictive behaviour that damages victims for life. High risk offenders pose a continued danger to our communities as such we believe that a specific, targeted multiple strike legislation is an appropriate and justified response to these habitual/persistent child sex offenders.

Summary

We again congratulate the Government on the *Criminal Law (Two Strike Child Sex Offenders) Amendment Bill 2012*. We believe with the introduction of this Bill our State is making huge steps forward to ensuring the protection of our children from known, dangerous child sex offenders.

Please contact us (07 5552 3000 or research@bravehearts.org.au) if further information or clarification is required in relation to this submission.

Warm Regards

Hetty Johnston
Founder & Executive Director

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Research and Policy Manager

Position Paper

Two Strikes and They're Out! Mandatory sentencing and child sex offenders

2009

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Abstract

As a community we value the rule of law, the presumption of innocence and principles such as that punishment should only follow a finding of guilt. But we are also concerned about the need to protect ourselves and others from the risk of future harm – particularly from those whom we know to be, or believe to be, dangerous. At no time are these concerns brought more sharply into focus than when convicted child sex offenders reach the end of their sentence and are due to resume their lives back in the community.

The preponderance of opinion is that paedophilia is as much a part of one's orientation as anything else. At this point in time, paedophilia is seen as a disorder that should be treated. As we delve deeper into this issue, it seems that it is instead part of one's orientation. It can't be treated and so if one has this orientation, it is not a question of IF they will re-offend but WHEN they will re-offend.

Child sexual assault is the secret crime, the silent crime, and the crime that is not spoken about. But rarely is it the opportunistic crime. It is pre-meditated and avenues of detection avoidance and escape are thought out. It is also the crime with the lowest confession rate. People will confess to armed robberies, frauds, arson and even murder. But child sex offending is something to which very few will ever admit. This is why these are the most common trials in the District Court.

If people are a danger to the community, it is the duty of those responsible for public safety to keep such people away from the general community. We can find no philosophical argument against this proposal. After all, children are not empowered to look after themselves; if we don't do it, who will?

Even so, given the difficulty in detecting and measuring re-offending, claims that child sex offenders pose a high risk of recidivism are difficult to prove. As such, the rate of recidivism amongst these offenders is the point of much contention. 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 community we need to find ways in which to manage sex offenders and respond to those that are clearly a serious risk. Nothing is as strong an indicator of a high-risk offender as persistent offending. 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.

This Position Paper explores the potential for introducing a 'two strikes' law in the Australian context and specifically its viability as a sentencing option for child sex offenders. It will provide a brief overview of research on these laws, discuss some of the implications of these policies and present Bravehearts' position.

Note: This paper should be read in conjunction with Bravehearts' Position Paper on the "Management and Treatment of Child Sex Offenders".

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Persistent Offending and Child Sex Offenders

While any offender's subsequent re-offending is of public concern, the prevention of child sexual assault is particularly important, given the irrefutable harm that these offences cause child victims and the fear they generate in the community as a result.

There are ongoing reviews of criminal justice responses to how we address sexual offending in our communities. Comparisons between self-report/victimisation surveys and official statistics from the police and the courts clearly show that the number of offenders who come to the attention of the authorities is comparatively low.

The lack of reporting or underreporting of offences is higher in crimes of sexual assault, and in particular sexual offences against children, than general criminal violence and this undoubtedly impacts on official recidivism rates.

What we do know is that only a small percentage of sex offenders are ever charged and convicted. As a result, legislative responses need to ensure that the community is safe from those offenders that we do know about. Statistics illustrate the difficulty in having child sex offenders charged:

- One in five parents who were aware that their child had been sexually abused did not report the abuse. (Smallbone & Wortley, 2000)
- Two studies cited by ICAC (Independent Commission Against Corruption NSW), suggest respectively that only 2% of familial and only 6% of extra-familial child sexual abuse were ever reported to police. (Woods, 1997)
- About half of the victims of child sexual abuse never report the abuse to another person and many do not disclose until they reach adulthood. (Queensland Crime Commission & Queensland Police Service 2000)
- 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)
- Only 1 in 100 (1%) 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 be found guilty. (Weatherburn, 2001)
- 90% of reported sex assaults do not end up in convictions (New South Wales Bureau of Crime Statistics and Research, 2006)
- Only 17% of reported sex assaults end up in court (New South Wales Bureau of Crime Statistics and Research, 2006)
- 56% of defendants in sexual assault cases are found not guilty (New South Wales Bureau of Crime Statistics and Research, 2006)

Although there is a common acceptance that recidivism is the commission of a subsequent offence, there are many operational definitions for this term. Recidivism

can only be measured in terms of known offences. For example, recidivism may be counted as a result of a new arrest or it may be counted as the result of a new conviction. However, reliance on measures of recidivism as reflected through official criminal justice system data obviously omit offences that are not cleared through an arrest or those that are never reported to the police. This distinction is critical in the measurement of recidivism of child sex offenders.

Difficulties in accurately assessing recidivism rates results in the many discrepancies in rates of re-offending among sex offenders reported by research. Results of recent studies have illustrated these discrepancies:

- 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.

It is interesting to note, that in nearly all studies that reported on re-offence type, sex offenders had a higher recidivism rate for violent offences than for sexual re-offences.

In addition to previous convictions, self-report data from convicted sex offenders shows that the number of victims per offender is incredibly high. Smallbone and Wortley's comprehensive study on child sex offenders in Queensland prisons found:

> "169 child sex offenders who admitted having committed at least one sexual offence against a child later disclosed offences concerning 1010 children (748 boys and 262 girls) of which only 393 (38.9%) were reported to have been associated with official convictions." (Smallbone & Wortley, 2001)

Although a number of studies suggest that sex offenders have lower overall recidivism rates than other offenders, they have received considerable attention from the media and public. This is likely due to the seriousness of sexual offending and its impact. While there is debate and discrepancies in the research on recidivism,

certainly any instance of sexual recidivism is cause for concern, researchers and policy makers should not lose sight that child sex offender recidivism is a major concern to the general community. When a child sex offender re-offends, it is not a car that is stolen or a house burgled – it is a life that is changed forever.

A number of criminal justice responses have been utilised over the years in attempts to respond to habitual sex offenders. Recently in Australia, positive steps have been taken to ensure that sex offenders who are assessed as a high risk of re-offending are detained as long as they continue to present a serious risk. This legislation has been introduced in a number of jurisdiction (eg. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Dangerous Sexual Offenders Bill 2005* (WA); *Crimes (Serious Sex Offenders) Act 2006* (NSW); *Criminal Law (Sentencing) (Dangerous Offenders) Amendment Bill 2007* (SA), however, it is acknowledged that there are extreme difficulties in the tools used in assessing risk. Assessment tools are not infallible. In addition, there are concerns around the ways in which these risk assessments are used by the courts. In cases where there are discrepancies between psychiatric or psychological reports (where one or more reports find the offender is an unacceptable risk and recommend not to release, and one or more recommend release) courts tend to err on the side of conditionally releasing the offender.

It is our position that the decision to release must be unanimous. If there are **any** reports or recommendations that an offender is an unacceptable risk and should be continuously detained, the court **must** err on the side of community safety and protection therefore detaining the offender until such time that recommendations to release are unanimous.

One response not yet utilised for habitual sex offenders in Australia is mandatory sentencing in the form of measured mandatory preventative detention legislation (such as that proposed in this paper).

Sentencing Options

It is universally accepted that child sex offenders represent a serious, ongoing and unacceptable risk to all Australian children. It should also be recognised that there are different types of offenders who each represent a different level of risk. As an example, the statistics on recidivism do bear out that extra-familial offenders tend to have higher recidivism rates than intra-familial offenders.

Repeated offending presents a particular set of challenges for courts. Courts in Australia have a fairly wide discretion to determine what sentence an offender should receive. In most cases, repeat offenders are sentenced more severely than first-time offenders. Such sentencing can be linked to the following rationales:

- Just deserts (offending behaviour is more reprehensible, and deserving of greater censure, if it happens persistently)
- Individual deterrence (the repeat offender needs a stronger deterrent)
- Incapacitation (society must be protected from the repeat offender).

Judicial discretion is generally exercised within legislative boundaries that set maximum penalties (however, New South Wales, for example, has recently introduced standard minimum penalties for some offences) and is structured by common law sentencing principles and doctrines. This approach to sentencing is consistent with the rehabilitative goal of our correctional system – it encourages an individualised approach to sentencing as to facilitate the rehabilitation or reform of the individual offender. Having said this, rehabilitation programs for sex offenders are not compulsory and numbers of those participating is often affected by lack of services, lack of time and/or because in order to access treatment an offender must admit to the offence.

Research into sentencing, both in Australia and internationally, demonstrates that the wide discretion judges exercise often produces sentences that are grossly disparate from one another. These discrepancies are even more evident when considering the sentencing of persistent offenders.

Ashworth (1992) neatly identified three approaches to sentencing persistent offenders.

1. The first is simply to ignore an offender's previous record and sentence him or her solely on the current offence(s). It is argued that offenders have already been punished for the previous offence and to take that into account a second time would be to unjustly punish them twice for the same offence. This approach does not consider that the previous offence has any bearing on the current offence and as such should not be considered as a factor in the sentencing process.
2. A second approach defined by Ashworth takes into consideration that the offence may be ‘out of character’ or a result of ‘human frailty’ and puts

forward that a first offence should be treated less harshly than a subsequent offence. This approach would see the first time offender receiving a 'discounted sentence', mitigated by the very fact that it is the first offence. Any subsequent offences would result in harsher sentences. The premise behind this approach is that individuals should 'learn' from previous sentences. Concerns about this approach to sentencing arise when considering serious offences such as child sexual assault.

3. The third approach is the cumulative principle, whereby sentences become progressively more severe with each new offence. This is normally justified on the grounds that society needs to be protected from persistent offenders (incapacitation), and that ever increasing penalties will deter an offender (individual deterrence). These grounds take precedence over the principle that offenders should be sentenced in proportion to the gravity of the current offence(s). This approach is normally associated with extensive use of imprisonment, as repeat offending causes offenders to escalate up the penalty scale.

A Brief Description of Multiple Strikes Law

Multiple strikes laws are a category of statutes initially enacted by state governments in the United States, beginning in the 1990s, to mandate long periods of imprisonment for persons convicted of a felony on three (or more) separate occasions. The term is borrowed from baseball and is generally colloquial in its usage, as such these types of laws are most often known officially as a form of mandatory sentencing.

The underlying philosophy of these laws is that any person who commits more than two felonies can justifiably be considered incorrigible and chronically criminal, and that permanent imprisonment is then mandated for the safety of society.

While the practice of imposing longer prison sentences on repeat offenders than on first-time offenders who commit the same crime is nothing new, such sentences were not compulsory in every single case, and judges had much discretion in what term of incarceration to impose.

Washington was the first US State to introduce a "three strikes and you're out" policy in 1993. The policy was formed from a research project conducted through the *Washington Institute for Policy Studies* who highlighted the need for a review of sentencing practices in relation to violent and career criminals (LaCourse, 1994).

The Institute recommended that any person convicted of a third serious felony offence be sentenced to life imprisonment without the possibility of parole, with the only option for release through the granting of a pardon or clemency.

In 1994, California introduced a "three strikes law", which was the first mandatory sentencing law to gain widespread publicity. The laws were introduced after Richard Davis, a 39year old with a history of 17 arrests, including kidnapping and sexual

assault charges, kidnapped and murdered 12 year old Polly Claas. Similar laws were subsequently adopted in most US jurisdictions. The law requires imprisonment for a minimum term of 25 years after a defendant is convicted of a third serious felony.

Currently at least 23 States in the US have adopted versions of multiple-strikes legislation (Poochigian, 2006) where heavier sentences or in many cases life imprisonment is mandated for second or third offences.

A similar 'multiple strikes' policy was introduced to the UK in 1997. This legislation enacted a mandatory life sentence on a conviction for a second "serious" violent or sexual offence (i.e. a 'two strikes' law), a minimum sentence of seven years for those convicted for a third time of a drug trafficking offence involving a class A drug, and a mandatory minimum sentence of three years for those convicted for the third time of burglary. An amendment by the UK Labour opposition established that mandatory sentences should not be imposed if the judge considered it unjust.

According to figures released by the British government in 2005, just three drug dealers and eight burglars received mandatory sentences in the next seven years because judges thought a longer sentence was unjust in all other drug and burglary cases where the defendant was found guilty.

In 2005 the 'two strikes' law was revised, requiring courts to sentence a criminal who commits a second violent or dangerous offence to an indeterminate life sentence, unless the court is satisfied that the defendant is not considered a danger to the public. While it is still early on in its implementation, this amendment to the *Criminal Justice Act 2003* is expected to result in far more life sentences than the 1997 legislation.

Multiple Strikes in Australia

There have been a number of examples of multiple strikes type legislation in Australia over the past 15 years (Morgan, 2000; Personal Communication, 2006a; Personal Communication, 2006b):

- In 1992 Western Australia introduced the *Crimes (Serious and Repeat Offenders) Act* (enforced until 1994), legislating that a repeat offender convicted of offences of violence would be sentenced to a minimum of 18 months in custody followed by mandatory indeterminate detention. A repeat offender under this legislation was defined as:
    - An individual with three conviction appearances for prescribed violence offences, or
    - An individual with six convictions for other offences.
- A 1996 law followed this earlier legislation, introducing a 'three strikes and you are out' burglary law to Western Australia. Underpinning this legislation was a minimum 12month sentence applied to third and subsequent offences.
- The *Fish Resources Management Amendments Bill 2006* put forward mandatory maximum sentences for individuals convicted of third or

subsequent offences against sections 174(1) and 175(1) of the Act (both in relation to the use of foreign boats for fishing).

- The Northern Territory introduced provisions amending the *Sentencing Act 1995* in relation to property offences, including stealing, robbery, assault with intent to steal, criminal damage, unlawful entry, unlawful use of a motor vehicle, receiving stolen goods and possession of stolen property reasonable suspected of being stolen. This legislation set out that for adults courts must impose:
    - a minimum 14 days imprisonment for a first conviction.
    - a minimum 90 days imprisonment for a second conviction.
    - a minimum 12 months imprisonment for a third conviction.

  For juveniles, courts must impose:
    - a minimum 28 days imprisonment for a second conviction, unless ordered to a diversionary program.
    - a minimum 28 days imprisonment for a third conviction, without the option for diversion from the system.

  The Northern Territory have since repealed their legislation. Many concerns had been raised about the impact of these laws, specifically in respect to juvenile offending and its impact on the Indigenous communities.
- A number of jurisdictions in Australia have mandatory sentencing legislation in place for various offences. For example in the Northern Territory, adults convicted of a violent offence (such as grievous bodily harm) or a sexual offence, must be sentenced to imprisonment (see Sections 78BA and 78BB of the *Sentencing Act*).
- In late 2006, the South Australian government announced a "two strikes and you're out" policy, under the *Criminal Law (Sentencing) Act 1988* (Sect 20B) to allow courts to declare sex offenders as "serious repeat offenders" after two convictions incurring in heftier sentences and longer non-parole periods.

The Effectiveness of Multiple Strikes Laws

Multiple strikes legislation is a community protection model based on incapacitation and deterrence. Under these laws there is no requirement for dangerousness to be established, with the sentence passed simply on the basis of past criminal record and not on criminal character. The application of the legislation has been typically broad, and covers property as well as violent crimes.

The effectiveness of multiple strikes style legislation is a matter of great controversy. While critics claim that these laws are based in a "thirst for retribution and vengeance" (Brown, 2001) and are overly punitive in basis, proponents suggest that there are three main benefits (LaCourse, 1997):

1. Justice Outcome. Justice is served for victims of crime as violent, career criminals are removed from communities.
2. Prevention Outcome. Crimes would ultimately be prevented as persistent offenders are detained.
3. Deterrence Outcome. For fear of incarceration, some persistent offenders may change their behaviours.

Criticisms from the criminological and legal fraternities have been well documented (see Austin, Clarke, Hardyman & Henry 1999; Beres & Griffith, 1998; Brown, 2001; Hinds 2005; Jones, Connelly & Wagner 2001; Morgan, 2000; Pillsbury, 2003). Fears that multiple strikes legislation would see a huge spike in arrests, clogging of the courts and over-packed prisons underlay claims that the push for these laws are based on ill-advised policies, a quick fix solution to a dynamic problem and would result in a huge financial burden for our criminal justice systems.

Many critics feel that multiple strikes legislation is contrary to the principle of proportionality; that is that the sentence should fit the crime committed. Furthermore critics say this law is applied with inconsistency, including what crimes (violent or non-violent) count as strikes, the possibility of parole or no parole, whether the person should be sentenced as a persistent offender and whether they should receive a mandatory sentence.

Criticisms of multiple strikes legislation can be categorised into five main areas, which will be addressed in the following sections:

a) These laws unfairly target vulnerable sectors of our communities, juveniles, Indigenous populations and do not deal with the underlying causes of offending behaviours.
b) Multiple strikes laws violate the basic principle of our criminal justice system, that of proportionality. The punishment should never be disproportionate to the crime. By taking discretion away from the courts, offenders will be unfairly and harshly punished.

c) The laws have not had a significant impact on reducing crime and making our communities safer.
d) Multiple strikes laws have had modest to little effect in deterring offenders.
e) Implementing multiple strike policies will overwhelm an already stretched system, resulting in huge increases in 'traffic' through the criminal justice system, over-filled prisons and subsequent increased financial costs.

Targeting Vulnerable and Minority Groups

One of the major negative consequences of the multiple strikes legislation in the US, has been the impact on juvenile and minority groups. With a focus on a wide range of offending behaviours, the impact on minority groups has been disproportionate. For example:

> "[W]hile comprising only 7% of the population of California, African Americans comprise 37% of two-strike convictions and 44% of three strike convictions" Hinds (2005)

Certainly, the Australian experience bore this out. In the Northern Territory, where the laws have since been repealed, the offences that attracted multiple strikes penalties tended to be minor and property offences, tending to be committed by juveniles, disadvantaged groups and Indigenous juveniles. Brown (2001) talks about the resulting "social exclusion of individuals and communities" resulting from these types of laws.

By advocating for a 'two strikes' law in Australia, Bravehearts is focused on introducing the law solely for child sex offences. The laws are not proposed to include strikes for offences other than offences that are related to sexual crimes against children (including grooming offences).

Proportionality

The argument that the law violates the proportionality rule of our justice system and the notion that the time should fit the crime is a legitimate consideration. One of the major arguments against multiple strikes legislation is that it takes the role of assessing individual offenders and circumstances away from the judges. It is argued that these laws tie the hands of our judges, who have traditionally been responsible for weighing both mitigating and aggravating circumstances before handing down a sentence. By preventing judges from taking individual circumstances into account, an offender may receive a sentence that is far harsher than what is considered to be proportionate to the seriousness of the offence.

In response to this criticism, proponents of multiple strikes laws argue that the sentence is being imposed not solely on the 'latest' offence, but as a result of persistent offending.

It is certainly true that in the US, where multiple strikes laws can encompass a broad range of criminal offences (from rape to minor assaults to property offences), the laws can unfairly target sections of the community or offenders whose crimes do not warrant harsh sentences. Here in Australia we saw examples of these seriously disproportionate sentences in the Northern Territory's 'experiment' with multiple strikes (Senate Legal and Constitutional Reference Committee, 2000):

- A 21 year old Aboriginal man was sentenced to 12 months in prison for the theft of $23 worth of cordial and biscuits from the storeroom of a mine…
- A 24 year old Aboriginal woman was sentenced to 14 days in prison for receiving a stolen $2.50 can of beer…
- A 15 year old girl was detained for 28 days for unlawful possession of a vehicle, after being a passenger in a stolen car.

It is Bravehearts position that a version of these laws, focussed on child sex offenders could be drafted that avoids the problem of proportionality. The focus would be on developing a specific version of multiple strikes legislation aimed at protecting the community from habitual child sex offenders and would not include minor offences or those not related to child sex offending.

Impact on Community Safety

Research over the years has indicated that multiple strikes laws as introduced in the US, do not impact greatly on incidences of violent crime. Studies show that States in US, where multiple strikes laws have been implemented, have not experienced decreases in serious or petty crimes. Reasons suggested for this lack of impact are:

> "(1) that the current sentencing practices already confine a substantial proportion of high-risk offenders, (2) incapacitating offenders at the end of their criminal careers would more than likely not have any type of impact on the overall crime rate, and (3) juveniles were not affected by the three strikes law" (Jones, Connelly & Wagner, 2001).

In fact, research indicates that States that have not adopted these multiple strikes laws, experienced greater decreases in crime than States that have adopted such laws. In California where the laws have been utilised to the greatest degree, results have shown that prior to the laws introduction, rates of crime were declining already and any impact of the laws on the crime rates have been at best small (Jones, Connelly & Wagner, 2001).

One difficulty in judging the impact of multiple strikes laws on the criminal justice system is that there are many factors that impact on crime rates and unless these factors are controlled for in an analysis of effect, it is difficult to determine the true impact of specific sentencing practices on the safety of the community.

Bravehearts proposed introduction of two strikes for child sex offences, is not concerned with having an impact on the criminal justice system in terms of catching high numbers of offenders in a wide net, or even reducing crime in general. The proposal is specifically aimed at ensuring the protection of the community, and in particular children, from known and habitual child sex offenders.

Deterrent Effects

Proponents of multiple strikes legislation claim that having multiple strikes legislation in place will be a deterrent on violent crimes. Critics argue that these laws will probably not have any major impact on violent or interpersonal offences, as most violent crimes are not premeditated. Violent and interpersonal crimes are more likely to be committed in anger, the heat of the moment or under the influence of alcohol or drugs.

In contrast to other violent and interpersonal crimes, child sex offences are more likely to be a result of extensive premeditation and careful grooming. This is specifically true when considering persistent child sex offenders who often focus much of their lives on the pursuit of offending sexually.

Admittedly, there is little that will act as a deterrent with this group of offenders (which is why we need these laws), however, the purpose behind Bravehearts push for a two strikes law is not predominately as a deterrent but as an effective tool for responding to this offending behaviour based on the safety and protection of the community.

Effect on the System

Critics of multiple strikes legislation argue that our courts and prisons are already suffering from serious overcrowding and that these laws will only make a bad situation worse. Faced with a mandatory life sentence, repeat offenders will choose the costly and time-consuming avenue of trial, rather than make a plea bargain.

In the US, where these laws are applied to a broad range of offence categories, concerned opponents argued that these laws would lead to substantial increases in prison populations, resulting in increased costs to house offenders. In addition, they argued that in the future, multiple strikes laws would create an ageing prison population with increased costs to care for them.

The experience in the US has not borne out these results. Analysis of the Californian system shows that in the ten years since its introduction, there has been a steady decrease in three strike convictions since they peaked in 1996 (Otero and LaBahn, 2004).

As outlined by Austin, Clark, Hardyman and Henry (2000) the multiple strikes laws movement was never designed to have any substantial impact on the criminal justice system. The laws were original designed so that in order to be ‘struck out’ an

offender would have to be convicted of two or three serious, but rarely committed crimes. Bravehearts' proposal for the introduction of a two strikes legislation is focused on this original aim; that is a focus on child sex offences.

It has been put forward that the financial burden of implementing a 'two strikes' law is huge. A study in the US concluded that because the intent of the three-strikes law is to lock up repeat offenders longer, most of the extra costs would be incurred in the construction and operation of additional prisons (Brown & Jolivette, 2005). Some police-related costs may be saved in not having to deal so often with such offenders once they are locked up, but greater prison costs would overwhelm such savings.

A two-strikes law would certainly result in an aging prison population, and with it an increase in the costs of caring for older prisoners. However, it must be noted that this analysis is on a system where the offence categories subjected to the law are far broader than that proposed in this paper. Costs of incarcerating two strike child sex offenders must be considered against the costs of this crime to the community, including the costs of supervising offenders in community settings. Queensland Minister for Police and Corrective Services recently stated that costs of incarcerating offenders under the current *Dangerous Prisoners Act* ($160.00 per day) is less that the costs of supervising them in the community ($170.00 per day) (Queensland Parliament transcript, 10th October, 2007).

While Bravehearts respects that the concerns around multiple strikes legislation are legitimate in relation to the general introduction of laws, it is our position that child sex offences need to be considered with the utmost gravity. The reality is that child sex offending is a compulsive, addictive behaviour that damages victims for life.

Bravehearts is advocating for a specific, targeted multiple strike legislation as a response to habitual/persistent child sex offenders. A focus on child sex offences, inclusive of grooming offences, will be proposed.

Our communities are getting increasingly concerned about the sexual assault of children, it is time that our legislation and courts reflected this.

Proposed sentencing for "Two Strikes" legislation

Our proposal is that:

1. The two-strikes legislation be focused on adult offenders only.
2. For any first conviction of a contact child sex offence there be a mandatory term of detention and completion of a mandatory treatment program. See also Bravehearts' position paper "The Management and Treatment of Child Sex Offenders".
3. Any dangerous offender with a previous contact child sexual offence is to receive a mandatory 20 year sentence for any second contact child sexual offence
4. Such legislative reform should include consideration of non-contact offences, which can be as harmful and as serious. This should include discussion around the inclusion of grooming and on-line predation offences in a multiple strike law.

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