Brief to the Standing Committee on Justice and Human Rights

House of Commons

Review of the Detention Provisions of the Corrections and Conditional Release Act

Submitted by
The John Howard Society of Canada

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1. Executive Summary

Canadian research, including that which has been conducted or sponsored by the Correctional Service of Canada, shows that public policy which interferes with an appropriate system of gradual release will likely result in a larger number of people being victims of crime.

The detention provisions of the CCRA have not had the effect that was intended when they were adopted. Members of Parliament sought and received assurances that the legislation would not be overused, that they would target only the most dangerous, and that these measures would lead to enhanced public safety.

Experience since the use of detention began runs counter to the assurances given. The provisions have been used at a rate that is 400% to 500% higher than the rate estimated. Research studies have shown that those who are detained are not more likely to re-offend than those not detained.

Unintended consequences of the provisions include the increasingly frequent practice of publicly identifying those who were detained after their eventual release. The consequence of public identification is to drive underground those who already face serious reintegration problems. They are deprived of any community and family support that they might still have, employment becomes exceedingly very difficult to find and their level of fear and anxiety becomes extreme. All of these factors work against successful reintegration.

There appears to be no evidence that the interference with gradual release through the detention provisions can be justified in terms of public safety. It should be abolished, but if it is maintained, it should be used only for those who are unable or unwilling to participate in gradual release programs.

2. The Role of Law in Addressing the Issue of Dangerous Offenders

Criminal law attempts to protect the public from the criminal acts of individuals through denunciation, separation, deterrence, punishment and rehabilitation. The law also protects the public from the authority and power of the state by articulating the requirements of due process. The *Criminal Code* contains measures which allow for the punishment of those who violate the law as well as the provisions that ensure a fair trial. The legislation attempts to balance the collective need to impose rules on individuals through the authority of the state while ensuring that the authority is not abused.

The worst crimes in history have been perpetrated by governments on their own citizens through the use of state force that was not moderated by respect for due process and fair treatment. Many people immigrate to Canada - not because of the need to escape from the threat of criminals but to escape from the threat of their governments. The fact that citizens have the protections of due process and constitutional safeguards make law enforcement less efficient. At the same time, these measures protect us from the misuse of authority by the state that would inevitably occur otherwise. Both the public and legislators must be ever-vigilante to ensure that one form of victimization, by the criminal, is not simply replaced by the more serious victimization, by the state.

One of the key principles of fundamental justice, and one on which our criminal justice system is founded, is the presumption of innocence. People cannot be punished without the application of the law and the burden is in on the state to show that a person is guilty of a crime. Due process ensures that the determination of guilt and the application of punishment takes place in a principled environment which is open to the public and operates in accordance with the law.

The preventive detention of individuals in prison, not for punishment for past deeds but solely for public protection, is problematic for a justice system that holds as one of its key principles the presumption of innocence. How can one be guilty of an offence that has not yet occurred?

Where preventive detention legislation exists, such as the dangerous offender provisions or the mental health provisions, it usually places a substantial and heavy onus on the state to show that the person is likely to commit a very violent offence in the near future[1]. Like these other forms of detention, detention to warrant expiry is imposed for public protection rather than punitive purposes.

One should expect that the matter of detention would be exercised with great caution and that the state would assume a heavy burden of proof to justify detention both in the general and the specific situations. The provisions need to be justified as well as the application of the provisions in each case in which it is used. The application of procedures for case reviews does not replace the need to justify the provisions generally.

It should be expected that the detention provisions would be subject to periodic review to determine whether they have achieved the goal of better public protection without unacceptable levels of intrusion into an individual's liberty. It is for these very important reasons that the detention provisions in the *Corrections and Conditional Release Act* were made subject to automatic review by the Justice and Human Rights Committee of the House of Commons. While the John Howard Society of Canada was very sceptical about the likelihood of these provisions achieving their goals, we were very supportive of the provision to have the *Act* reviewed by the House Committee and welcome the opportunity to contribute to this review.

[1] For a more complete review of models intended to identify and hold those considered dangerous, please see Dangerous Offender Legislation Around the World: Directions for Canada, JHS Alberta, 1995

3. Background to the Detention Provisions

The detention provisions, which allow the National Parole Board to detain to warrant expiry those individuals whom it considers to be particularly dangerous and likely to "kill or cause serious harm before the expiration of the sentence", were introduced in 1987 after the courts found that the similar practice of "gating" by the National Parole Board was illegal. Literature accompanying the introduction of Bill C-67 identified as its purpose the protection of the public from violent crime through the increased period of detention in prison of those considered to be of particularly high risk. The first official announcement that the government was considering such a policy came in a press release from the Solicitor General of Canada on October 26, 1984 which states in part:

Mr. McKay [then Solicitor General] instructed the Deputy Solicitor General to conduct a short term review of the mandatory supervision program with a view to retaining longer in the penitentiary, all those who might be considered dangerous on release.

In his appearance before the Senate Committee reviewing Bill C-67 and C-68 on May 8, 1986, Solicitor General Perrin Beatty stated:

Those who will be referred to the Board for a detention hearing are those few extreme cases that present so many characteristics associated with violent conduct that it would be irresponsible to release them before it is absolutely necessary or until those characteristics have changed.

In considering the introduction of detention provisions it was considered plausible that some public protection could be achieved by detaining people to warrant expiry while, at the same time, it was also recognized that opportunities to reduce the risk of re-offending through gradual release were also being lost. In addition, there was some concern expressed about the inherent unfairness of taking away remission that had been earned.

Relevant fundamental principles of sentencing contained within the *Criminal Code* include...

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

718.2 The court that imposes the sentence shall also take into consideration the following principles:

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances;

All politicians and officials of the day gave repeated assurances that the provisions would be used rarely. They would be used only on those for whom violent activity seemed virtually certain. There was considerable confidence expressed that the ability of the National Parole Board and corrections officials to accurately identify the few who had extreme potential for violence. In his testimony to the Senate Committee on Legal and Constitutional Affairs, the Commissioner of the Correctional Service of Canada of the day, Real LeBlanc, stated:

...in many cases we can assess, through our own resources and the use of expertise in this area such as psychiatry, what the likely behaviour of the inmate is going to be on release.

He also testified:

We are also estimating that there will be a very small number of inmates who will be impacted by this provision. We consider that as few as 100 out of the population of over 11,000 will be effected.

In correspondence to the John Howard Society, the Solicitor General, Perrin Beatty stated:

It is expected that detention will not be ordered in more than 100 cases a year out of the 3,000 MS releases that take place in the same period and another 100 inmates may receive a compulsory residence order.

4. Key Questions to Consider

In considering the purposes of the legislation and the reassurances of the government of the day as to how the detention provisions would be used, and considering the concerns that were raised at the time that the legislation was introduced, four important questions arise which should be the basis for the current review of the detention provisions. These questions are as follows:

a) What has been the pattern of use with detention?

b) Have the correct people been identified for detention?

c) Could significantly better results be achieved through amendments to the *Act* or in practices relating to detention?

d) Have the benefits of detention been seriously undermined by the costs of the provisions?

i. What has been the pattern of use with detention?

The use of detention has far exceeded that which was anticipated by the government at the time that Bill C-67 was passed. Officials estimated that the detention provisions would be used in about 100 cases per year and, presumably, government members who supported the Bill did so with the expectation that these estimates were accurate. The fact that the anticipated infrequent use of the provisions was stressed so often in the Committee and Senate hearings suggests that the government of the day, while feeling that the measures might be necessary, also felt that there were potentially serious problems associated with them and sought reassurance that they would be used rarely.

What was overlooked was that with public and media attention focussed on failures rather than successes of released offenders, all of the pressure on officials would be in one direction - to err on the side of detention. Perhaps it is not surprising, therefore, that both the number of cases referred to the National Parole Board for review and the percentage of those referred who were detained (*Figures 1 and 2*) increased dramatically over the ensuing years.

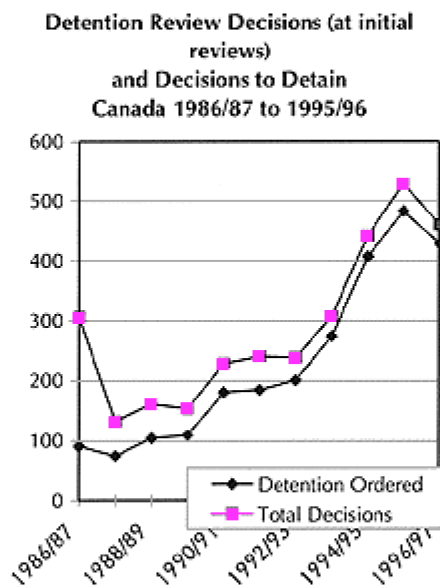

Figure 1

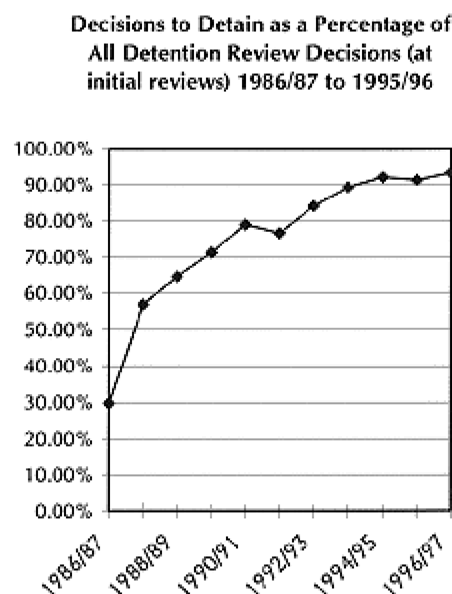

Figure 2

While the rate of detention was relatively stable for the first three years of use, it has subsequently shot up dramatically and is currently about *five times the number which was originally predicted by officials and accepted by the government of the day.* The rate of detention increased from 4.2% of those otherwise entitled to release to a high of 10.7 in 1995[2]. In addition, the reliance on other options which were available such as “one chance supervision” and the residency requirements have been used less and less frequently in favour of full detention. Indeed, detention, as a percentage of all decisions that were referred has increased from 29.74% in 1986/87 to 91.3% in 1995/96[3].

[2] Report of the CCRA Working Group, *Towards a just peaceful and safe society: The Corrections and Conditional Release Act five years later*, Consolidated Report, Solicitor General Of Canada, p.86

[3] Report of the CCRA Working Group, *ibid,* p. 89

Since the amendments to the *CCRA* made in 1995, the number of detention cases has declined about 20% due to the new authority of the Board to attach a residency requirement to regular Statutory Release. The number of residency orders has been numerous and in 1996/97 they reached 845 cases[4] - over 16% of those released on Statutory Release.

To put these rates into perspective, one should consider that the annual offence rate of those released on Statutory Release or Full Parole is about 12%. A detention rate of 10% and a residency rate of 16% seems excessive. *Approximately twice the number of people are detained or given a residency requirement on the basis of being particularly high risk cases than the total number of offenders who commit any crime whatsoever while under supervision.*

ii. Have the correct people been identified for detention?

It would be a mistake to assume that the sharp increase in the number of people detained reflected evidence that officials had been accurately identifying those who would go on to commit serious offences. Indeed, the growth in the detention rate seems to have been in spite of evidence that those selected for detention do not, as a group, represent the highest risk. Research conducted by the Correctional Service of Canada[5] shows that those who have been detained are less likely to commit criminal offenses than those who were released on their Statutory Release date or, for that matter, were released on Full Parole. Given the expectations that the releasing authorities could accurately identify those who "were likely to kill or cause harm before the expiration of their sentences", and since the average period of detention has been slightly over 400 days, one should have expected that many would commit serious violent offences within one year of their eventual release. In fact, evidence now demonstrates that of those who were detained only 16%, as compared to 18 percent for those on full parole, committed any crime within a two-year period. In other words, *those selected as the highest risk returned to prison for a new offence less frequently than those selected as the lowest risk!* Without evidence to suggest that the last portion of the sentence served under the detention provisions were incredibly rehabilitative, we must conclude that the detention decisions of the National Parole Board were wrong in at least 85% of the cases. Research by the Ministry of the Solicitor General of Canada concludes:

> Comparison of recidivism for SR and detention using a two year follow-up period indicates that the recidivism rate for the SR group was 37% compared to 17% for offenders who were detained to warrant expiry and then released. In terms of violent re-offending (Schedule 1, murder), detained offenders had a recidivism rate of 16%, while SR group had a rate of 19%[4].

[4] Report of the CCRA Working Group, *ibid,* p. 85.

[5] Brian A. Grant, *Inmates referred for detention (1989-90 to 1993-94): A comparative analysis*. Ottawa: Correctional Service of Canada, July, 1996 No. R-45.

[6] Ministry of the Solicitor General, *CCRA 5 Year Review: Statutory Release and Detention Provisions*, February 1998, p. 47

In other words, the Parole Board has selected for detention those who are less likely to commit violent offences, and much less likely to commit property offences that the Statutory Release group. It is odd that measures promulgated with the intention of identifying the particularly dangerous for detention have, instead, detained the particularly honest.

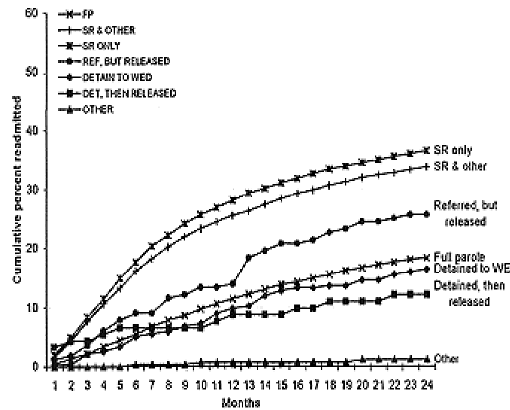

Figure 5-4: Cumulative readmissions by time to new offence for release groups.

We should be concerned about the fact that the detention practices appear to have spun out of control so quickly. The results suggest that factors other than risk of violent re-offending dominate the decision-making process.

iii. Could significantly better results be achieved through amendments to the *Act* or in practices relating to detention?

With or without the detention provisions there are today just as many dangerous offenders being released as was the case in 1987. The delay in releases for those detained has averaged about 410 days. This means that after the first “cohort” served their 410 days, the actual number of releases each year is the same as was the case without the provisions being in place. Our 410 days of “public protection” have long passed. The overall risk to the community would have been the same even if predictions of violent recidivism where accurate. The same number are being released but they are released into much more difficult circumstances for both the offender and the community and without the additional safeguard of support and supervision.

It is unreasonable, in our view, to expect that changes to practice or legislation could generate positive results. The National Parole Board and Correctional Service of Canada has certainly had adequate time since 1987 to evaluate its results and adjust its performance. There has been no evidence of a substantial shift in policy or practice which has the potential to substantially address the serious errors of over-prediction.

The errors in the detention decisions are not ones of degree that could be improved through “adjustments” in policy or practice but are errors of huge magnitude that have produced the opposite outcome to that which was intended when Parliament passed the legislation.

The detention provisions undermine, in practice, the relevant fundamental principles of sentencing contained within the *Criminal Code*(see inset). The fundamental principles of sentencing mean little if they are contradicted by correctional legislation, policy or practice.

The research papers of the Correctional Service of Canada raise serious doubts about the potential efficacy of policies of detention based on prediction of violence.

Research has shown, however, that predicting violent behaviour is an extremely difficult task. Violent crime generally shows low base rates, making prediction particularly challenging[7].

iv. Have the benefits of detention been seriously undermined by the costs of the provisions?

The major benefit of detaining to warrant expiry those who are considered to be high risk must be balanced against the increased risk of releasing individuals without any process of gradual release or supervision. Correctional processes that exist in Canada are premised on the notion that the goal of achieving reintegration into the community as a law-abiding citizen is best achieved through the process of gradual release. The transition from the total control of a prison to free society is very dramatic and unsettling. On release, most prisoners feel that they can be easily identified by the public as being an ex-offender and that they have little likelihood of ever being accepted. They are terrified often by simple acts such as taking public transportation or ordering a meal in a restaurant. They are frequently lacking in community resources and support, have no idea where to look for employment or housing and, generally, face substantial problems of poverty and loneliness. Not surprisingly, some individuals look to their old acquaintances from prison for support after release. People who have had their release delayed are inevitably angry, resentful and, most of all, distrustful towards correctional officials.

When we detain a person, we not only give up the opportunity to supervise and assist them after release, we also discourage the person from making concrete, rational plans for their release. They are sometimes unwilling to participate in any further treatment, if available, while in prison and fear involving themselves in prerelease counselling. The possibility of public identification makes the process of planning release with one's case management officer a potentially dangerous activity. Pre-release planning will simply identify the area in which the warnings will be issued. Avoidance of prerelease counselling precludes the possibility of referral to even voluntary programs of treatment and assistance after release in the community.

Often the people detained are those who have been involved in special programming which is designed to link to community follow up after release. The intervening period of detention interrupts or terminates the treatment and the follow-up links to community are lost. Many of the benefits derived from prison programs is lost prior to release.

[7] Ministry of the Solicitor General, *CCRA 5 Year Review: Statutory Release and Detention Provisions*, February 1998, p. 45

Given the evidence[8] that many of the treatment programs for serious sex offenders can have a substantial impact in reducing future criminality, initiatives which disrupt and discourage a person from continuing with their treatment, have to be viewed with alarm. All reason suggests that such disruptive measures will translate directly into increased numbers of victims in the community. The tragedy is not just for the individual victim of the crime but also for the offender himself who might otherwise have been successful. There are no winners with detention.

It has now become common to see public "warnings" about "dangerous" unsupervised offenders being issued by police and reported extensively by the media. The warnings identify the individual and often identify his address. Public disclosure is, at least partially, a result of the detention provisions in the Corrections and Conditional Release Act and yet was completely unanticipated at the time the legislation was passed.

When the National Parole Board detains an individual as being "likely to kill or cause serious harm before the expiration of the sentence", it is not surprising that police are alarmed to learn that the destination of the person will be to their community. Police have to take the assessment at face value. They recognize that the individual who carries such a serious label is being released without control, supervision, or expectation to participate in any treatment. Police face not just a criminal justice problem but also a political problem. They must seem to be doing something.

If there was little reason to believe that detention contributed to public protection, there is even less reason to believe that public notification does either. Taking individuals who are already at such disadvantage, placing them in a position where they are being hounded from one community to the next, to live the life of a fugitive, and placing them in circumstances where employment, housing, community support, and treatment are essentially impossible to obtain, cannot contribute to public safety. It is only in the sense that one might take some personal precautions (although it is unclear what those precautions might be) or achieve some short-term local public protection by driving the person into another community, that the illusion of public protection can be maintained. If one is safer by having driven an offender from this community to some other community, then surely that benefit is countermined by the fact that some other individual may be living as a fugitive in ones own community.

Forcing serious offenders to participate in a rough game of musical chairs is unlikely to reduce the risk that they present. The initiative to warn the public of a risk, while simultaneously abandoning serious correctional intervention strategies, amounts to little more than the government abandoning its responsibility.

[8] For examples of treatment programs demonstrating positive results please see:
Gordon, A. and Nicholaichuk, T. Applying the risk principle to sex offender treatment, *Forum on Correctional Research*, Correctional Service of Canada, Vol. 8, No. 6, May 1996, p.30.
Barbaree, H., Seto, M. and Maric, A. Effective sex offender treatment: The Warkworth Sexual Behaviour Clinic, *Forum on Correctional Research*, Correctional Service of Canada, Vol 8, No. 3, 1996 p.13
Gordon, A. and Porporino, A. Managing the Treatment of Sex Offenders: A Canadian Perspective, *Research and Statistics Branch*, Correctional Service of Canada, No. B-05, 1991

5. Conclusion

In our submission to the Justice and Legal Affairs Committee in 1987, we noted that the National Parole Board already has authority to return to imprisonment those under supervision who have committed technical breaches of their supervision or are posing a risk to re-offend. We also noted that the National Parole Board uses that revocation authority on a regular basis. The rate of revocation for technical violations has increased substantially over the ensuing years. Our concern at the time was that the use of this power suggested that the National Parole Board would not be reluctant to use the powers of detention. As it has turned out, our concern was both predictive of the experience that has occurred and remains at least as valid today as it was then.

Our original submission was critical of the Bill because it would:

a) delay, at best, rather than prevent criminal activity,

b) destroy the usefulness of remission as a motivating factor for prisoners,

c) add considerably to the bitterness and distrust which prisoners felt towards officials,

d) remove or destroy the post release assistance and supervision which was available under statutory release,

e) likely be overused and result in the detention of individuals unnecessarily,

f) add substantially to the costs of our prison system by contributing to other major problems faced by prisons relating to overcrowding, and

g) diminish the credibility of the National Parole Board and the Correctional Service of Canada as it is blamed not only for crimes committed by those released under supervision but also for those they failed to detain.

All of our concerns are as valid today as when our submission was made in 1987. In addition to that, we now have a very serious problem with public disclosure and the negative impact this has had on the availability of voluntary aftercare assistance for serious offenders.

6. Recommendation

Given that gradual release is the best way of reducing risk, the fact that a person poses a serious risk is not a rationale to refuse gradual release. If any individuals are to be detained to warrant expiry, they should only be those who are *demonstrably unable or unwilling* to abide by the conditions of supervision. Further, public disclosure should be prohibited in circumstances where a person is lawfully released and complying with the terms of his/her supervision.

7. The John Howard Society of Canada

In making this submission, the John Howard Society of Canada is speaking on behalf of the 55 John Howard Societies in communities across Canada. It has a membership of about 20,000 and, as such, is the largest voluntary criminal justice organization in Canada.

Mission

Effective, just and humane responses to the causes and consequences of crime

Description

The John Howard Society of Canada is an organization of provincial and territorial Societies comprised of and governed by people whose goal is to understand and respond to problems of crime and the criminal justice system. They are fiscally responsible for the continuance of the work and service of the National Office.

Methods

In furtherance of its Mission, the Society:

- works with people who have come into conflict with the law,
- reviews, evaluates and advocates for changes in the criminal justice process,
- engages in public education on matters relating to criminal law and its application, and
- promotes crime prevention through community and social development activities.

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