# Fact Sheet

**#21**

*in a series of fact sheets that examine questions frequently asked about the criminal justice system*

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# The Law and High-Risk Offenders

The risk posed by offenders who appear to be dangerous is understandably a concern to everyone in the community. Certain high profile cases involving either the release of or re-offending by an offender deemed as high-risk and the concentrated and sensationalist media attention surrounding such cases often leaves the impression that the law which could be used to restrain these offenders either does not exist or is not tough enough. It is not surprising, therefore, that there are repeated calls for parliament to take action - usually in the form of creating more laws - to ensure that the public is protected from such individuals.

What are the laws governing high-risk offenders? How and when can these measures be applied? How frequently are they used and in what circumstances? What evidence is there as to their effectiveness? This Fact Sheet will present basic information as to the nature and application of the legislation currently available and propose the need for solutions beyond just creating more laws.

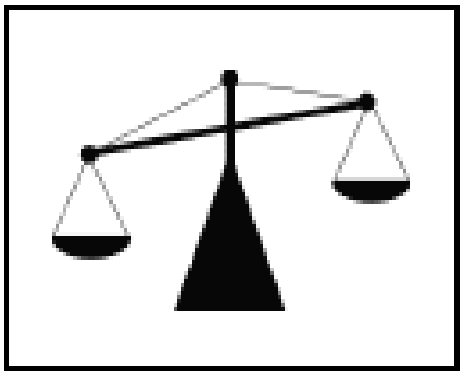
The Fact Sheet excludes information pertaining to the law relating to mentally disordered offenders found to be unfit to stand trial or not criminally responsible. While relevant to this question, it demands its own discussion and will be the subject of a future Fact Sheet.

**Dangerous Offender and Long-Term Offender Provisions**

Like all measures described herein, the Dangerous Offender and Long-Term Offender provisions of the *Criminal Code* subject individuals to punishments by way of loss of or restrictions on their liberty not for what they have done but on the basis of what they might do in the future. These measures, however, are the most severe and carry with them the harshest punishments.

***Dangerous Offender***

Part XXIV of the *Criminal Code* permits the Crown to apply to the court to have a person who has been convicted of a serious personal injury offence (the meaning of which is defined in the law) declared a Dangerous Offender (DO). Under amendments to these provisions in 1997, a person found to be a DO must be given an indefinite sentence, meaning that the offender can be held in prison for life unless the National Parole Board can be convinced that he no longer poses an undue risk to the community. Even if granted release, a person serving an indefinite sentence will be under supervision for the remainder of his life and always subject to re-incarceration for breaches of conditions of release.



The Crown must make the application after the conviction for the serious personal injury offence(s) and before sentencing. An application may be made after sentencing but no later than six months after imposition and only when relevant evidence was not reasonably available at the time of imposition of sentence.

A DO hearing is held with a judge (no jury) who considers evidence relevant to the application, such as victim impact statements, court transcripts, evidence of character and, in particular, assessments of mental health and psychological functioning. For a finding of DO, the Crown must prove that the offender poses a serious threat to the safety of others by virtue of:

a) a pattern of unrestrained behaviour that is likely to cause danger or, a pattern of aggressive behaviour with indifference to the consequences of this behaviour or, the behaviour is of such a brute nature that ordinary standards of

restraint will not control it; or,
b) conduct in sexual matters that demonstrates failure to control sexual impulses.

There are three possible outcomes:
1) if the offender meets the criteria and is found to be unlikely to benefit from treatment and therefore the only way to manage the risk is through an indefinite sentence, he will be declared a Dangerous Offender and given an indefinite sentence;
2) if the person is not found to be a DO, the judge may find the person to be a Long- Term Offender - LTO (see next section) and sentence accordingly, or can order a separate hearing for that purpose;
3) if found to be neither a DO or a LTO, the offender will be given the sentence for the serious personal offence(s) of which he was convicted.

Because of legislative amendments in 1997, those found to be a DO will serve more time before they are first eligible for full parole. The first opportunity for a full parole application was lengthened from three years to seven years at that time.

The data on Dangerous Offenders show the dire consequences of the designation in terms of the possibility of release (see box this page). A significant number die in custody. Few are released on parole.

Data and research identifies concerns with respect to how the legislation is applied. Some research suggests that factors other than risk determine whether a DO application is made, such as community sentiment or local sensitivity to a particular offender, or the inclinations of a particular Crown attorney (Webster and Dickens 1983). Factors other than risk, such as the attractiveness of the offender, can affect whether the application is successful (Esses and Webster 1988). The fact that the vast majority - over 80% - are sex offenders (Trevethan, Crutcher and Moore 2002) suggests the import of these findings. Further, there is great debate in the literature about the assumption that the prediction of violence can be achieved with any degree of accuracy, recognizing that any prediction methods produce false positives (those who are identified as dangerous who do not subsequently behave violently).

**Dangerous Offenders**
(as of 26/09/04)

- 410 designated since 1978
  (Ontario: 162; B.C.: 110;
  Alta: 32; Sask.: 29, Que.: 28;
  N.S. and Nfld : 14; Man.: 10;
  N.B. and NWT: 5; Yukon: 1)
- 1978 to 1992: average 9 designations a year
  1993 to 2003: average 25 a year
- 331 "active"( those deceased are "inactive")
- 314 incarcerated
- 17 released
  (1 deported, 16 under supervision on parole)

*Source: Public Safety and Emergency Preparedness Canada*

The data show variation in both time and place in the use of the DO legislation (see box this page). By far, the greatest users of the DO legislation have been Ontario and B.C. - two-thirds of the designations have come from these two provinces. In contrast, only 7% of the total designated are from Quebec. Also, the number designated has increased dramatically in the past decade.

### *Long-Term Offender*

First introduced by way of amendment to the *Criminal Code* in 1997, this measure was designed as a mechanism for managing some offenders, primarily sex offenders, who, while deemed to be a high risk for re-offending, do not meet the criteria for DO designation and there is evidence that the risk could be effectively controlled in the community under supervision after a sentence of incarceration. A finding of Long-Term Offender (LTO) permits the judge to impose a period of supervision not exceeding 10 years following the completion of the sentence for the offence(s) of which the individual has just been convicted.

The process can take place in either of two ways: a stand-alone application and hearing, or a decision made by the judge to find the person a LTO in a DO hearing. A LTO hearing is similar to the DO hearing described above - by judge alone with relevant evidence presented, such as victim impact statements, court transcripts, evidence of character and, in particular, assessments of mental health and psychological functioning.

For a finding of LTO, the court must be satisfied that there is a substantial risk of re-offending by virtue of:
a) a pattern of repetitive behaviour showing a likelihood of causing death or injury or severe psychological damage to others; or,
b) conduct in any sexual matters showing a likelihood to cause injury, pain or evil to others through similar offences.

The court must be satisfied that there is a reasonable possibility of eventual control of that risk in the community.

Once declared a LTO, the person first must serve the full sentence of imprisonment, including any period of conditional release, and then start their Long-Term Supervision Order (LTSO). The person is supervised by a parole officer of the Correctional Services Canada and subject not only to the standard conditions but also to specialized conditions and close supervision. A breach of conditions has very serious consequences - a sentence of up to 10 years imprisonment could be imposed for refusal or failure to comply with the order.

The data on Long-Term Offenders (see box page 3) show significant growth in the use of this measure by the courts. There are now on average over 40 successful LTO applications across Canada per year and this number is expected to grow. Most of the supervision orders - 70% - are for ten years, the maximum period allowed under the law. While most of the orders are against sexual offenders (about 90%) as originally intended when the

legislation was drafted, successful orders have also been gained against those convicted of arson, domestic assault and impaired driving.

At this point, there does not appear to be any research available as to the effectiveness of this measure. There is growing concern about the nature and extent of the resources required to supervise some of these individuals in the community, particularly those with significant mental health problems.

**Detention Provisions of the *Corrections and Conditional Release Act (CCRA)***

Typically, federal offenders are released at two-thirds of their sentence under supervision until the end of their sentence as a means of meeting the objectives of reintegration. However, the *CCRA* was amended in 1987 to permit the National Parole Board (NPB) to order offenders, who they believe to be likely to commit an offence causing death or serious harm, a sex offence involving a child or a serious drug offence before the expiration of their sentence, detained until the very end of the sentence. At the end of their sentence, these individuals are released without the benefit of supervision. The short-term nature of this proposed solution to the release of high-risk offenders and the absence of community supervision with those who would appear to need it the most have been the major criticisms of this measure. Further, it has precipitated the need for other measures (i.e., 810's and community notification - described in following sections).

This measure is used with some frequency and the vast majority of those who are referred for detention review are detained. From 1991-92 to 2003-04, there have been 3,733 detention orders (an average of 287 per year). Over 90% of those that have been referred to NPB for detention review are detained. Early research (Grant 1997) suggested that the decision to refer for detention and to detain may be based more on the nature of the offence (sex offenders are more likely to be referred and detained) than the risk of violent re-offending. There is no research that demonstrates its effectiveness as a crime control mechanism.

**Long-Term Offenders**
(as of 19/09/04)

- 279 Long-Term Supervision Orders (LTSO) imposed since provisions enacted on August 1, 1997
- 95 imposed during initial 47 month period; 184 imposed during latter period (approximately 40 months)
- 196 for the maximum 10 year LTSO period)
- 271 in federal custody (6 deceased, 1 completed LTSO, 1 order removed on appeal)
- 175 incarcerated
- 96 on supervision in the community (18 on conditional release related to their sentence)

*Source: Public Safety and Emergency Preparedness Canada*

**Judicial Restraint Orders ("810's")**

Among the amendments made to the *Criminal Code* in 1997 was the addition of Section 810.2 that permits courts to issue recognizance orders for individuals who present a danger of committing a "serious personal injury" offence (the meaning of which is defined in the *Criminal Code* under the dangerous offender provision). Essentially, these orders function as peace bonds similar to those used in domestic violence cases.

The applicant (usually the police) must establish a reasonable likelihood that the offender will commit a serious offence of a violent or sexual nature. Individuals who fear for their safety may also make application. The burden of proof is not as high as for a dangerous offender application.

The judge, once satisfied that the risk is real, may require the offender to enter into a recognizance with conditions for up to one year. The conditions are geared generally to restricting movement, i.e. staying away from playgrounds, and usually include reporting to a probation officer and/or the police. The order is renewable for additional periods of up to one year.

Here again, the penalty for non-compliance is significant - up to two years in prison.

This measure is increasingly being used with those individuals who have been detained until the end of their sentence and are being released from prison without supervision. If the offender's destination is known prior to release, the police service in that area may connect with the individual in prison, inform him of their intent to seek an 810.2 order upon his release and attempt to design with him a set of conditions relevant to his risk and need areas with appropriate community resources available. However, factors such as lack of expertise and unavailability of resources often can impact the manner in which this process is implemented, limiting its potential effectiveness.

It is difficult to comment more on the use of this measure due to the lack of research either relevant to outcome (effectiveness) or even of a descriptive nature (quantitative, best practices) of 810.2 orders in Canada.

**Sex Offender Registry Laws**

Ontario's sex offender registry has been in force since April 2001. Under the law establishing the registry, any Ontario resident convicted of a criteria offence defined in the legislation (very broad range from relatively minor, such as exposure, to the most serious offence in this category, aggravated sexual assault) on or after the day the law came into force or serving a sentence on that day must register. This also includes those who are found not criminally responsible, those given an absolute or conditional discharge and young offenders given an adult sentence.

Registration means reporting to the

police within 15 days of any of the following: the relevant court decision, release from prison, change of address, becoming a resident of Ontario or prior to ceasing to be a resident - and annually thereafter. They must provide the required information (name, date of birth current address, current photograph and sexual offence). Registered individuals would be required to report for 10 years for a less serious offence and life for those more serious or if convicted of more than one of any listed offence. The penalty for non-compliance is up to two years less a day imprisonment and a fine of $25,000. At this point, access to the registry is limited to criminal justice officials. There has been no evaluation of the Ontario registry to determine its effectiveness as either a criminal investigation tool or in reducing re-offending.

As of December 15, 2004, there is also a national sex offender registry law in force. It is substantially the same as the Ontario scheme, with some exceptions, most prominently the requirement for a court order to place an individual on the registry (not automatically applied as in Ontario) and an appeal process. Despite the existence of a federal law and a national database maintained by the RCMP and all of the costs associated with maintaining information for a separate provincial registry, the Ontario registry is also being retained.

Sex offender registries have been the subject of much criticism, most notably for providing only illusions of public safety and for focussing time, effort and resources away from those measures which research has shown can reduce re-offending (see Fact Sheet #16).

**Community Notification**

Federal prison officials are required by the *CCRA* to notify the police of the release of an offender deemed to be high risk. Sometimes this can result in "community notification" - typically a media release by the police containing basic information about a particular offender, including a photograph - which is permitted by the provincial legislation, the *Police Services Act*. This Act, as amended by the 1997 Ontario *Community Safety Act*, empowers local police chiefs to publicly disclose information about offenders considered to be a significant risk to the community.

The 1997 law also amended the *Ministry of Correctional Services Act* to similarly permit community notification by provincial correctional officials.

This practice has been criticized primarily for creating an environment in which high-risk offenders are put at greater risk for re-offending and for undermining treatment (see Fact Sheet #10 and #16). Here again, outcome evaluation is virtually non-existent and what has been done (only in the U.S.) shows community notification does not reduce re-offending.

**What's needed: More real solutions, not more laws**

We currently do have laws that allow us to detain, contain and label, even publicly identify, offenders who are deemed to be high risk of committing serious offences. However, we must recognize that these are responses to our fears rather than real solutions.

Rather than simply continuing on this punitive course, we need to be asking for the evidence of the effectiveness of the measures we now have in place. Further, we should be looking in other directions, such as:

- available and accessible treatment resources in correctional facilities and in the community even beyond the end of the sentence;
- a commitment to the value of gradual release, to evidence-based programs and services which reduce the risk, and to targeting the resources at those who are higher risk;
- the political will to support these commitments; and,
- use of mental health legislation, mental health facilities and resources, rather than criminal justice measures, in those rare cases when the offender is extremely disturbed and unsafe to be released.

***Effective, just and humane responses to crime and its causes***

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