

Mental Health America understands that racism undermines mental health. Therefore, we are committed to anti-racism in all that we do. This means that we pledge to work against individual racism, interpersonal racism, and institutional racism in all their forms.



# Position Statement 55: Confining Sexual Predators In The Mental Health System

CRIMINAL JUSTICE ISSUES

## Policy

At least twenty states [1] and the Federal government [2] have passed various versions of what has come to be called "sexual predator" legislation. These laws provide for indefinite involuntary commitment of people who have committed serious sex offenses to mental health treatment facilities after they complete prison terms. At least 5,000 persons are currently confined under these laws.[3] The impetus for this legislation was the repeal of the indeterminate sentencing laws under which people who had committed serious sex offenses previously were confined in prison until prison officials were satisfied that they were no longer dangerous and the highly publicized accounts of a number of people who, upon release from prison for sex crimes, committed additional heinous crimes, in some cases against children. The United States Supreme Court narrowly approved sexual predator laws in a 1997 decision, *Kansas v. Hendricks*, 521 U.S. 346 (1997).

Mental Health America (MHA) believes that these laws do not constitute sound public policy. They focus on punishment rather than treatment, deal with people who often do not have a treatable mental illness, increase stigma, distort civil commitment, risk the safety of other persons in mental health facilities, divert resources from mental health care and inappropriately burden the mental health system with a criminal justice function for which it is not funded or equipped.

## Background

Sexual crimes, especially against children, are an unspeakable tragedy and among the most horrible forms of violence imaginable. Among the many interests to be served in this complex situation, the protection of children and the prevention of violence are the most important goals. In the case of sexual predators who remain a threat to the community, continued separation from society in the interest of public safety is necessary. However, involuntary commitment of people convicted of sex offenses to mental health treatment facilities after they complete their prison terms is an inappropriate response to this problem.

- **The Mental Health System is for Treatment and Recovery, not Punishment.** The mental health system is not the appropriate place for long-term confinement of sexual predators. Sexual predator statutes usually state that the continued confinement of people convicted of sex offenses in mental health systems is for the safety of the public, not the treatment of the offender. The dissent in the *Hendricks* case agreed with the Kansas Supreme Court that the purpose of the Kansas statute was punishment. Whether the goals of these laws are punishment or public safety or a combination of the two, the mental health system should not be used for these purposes. The mental health system is designed and should be used only for treatment and recovery. Sexual predator laws disrupt the state's ability to provide treatment to people who need it and can benefit from it and undermine the mission and the integrity of the mental health system. If the societal goal of sexual predator laws is incapacitation and incarceration of potentially dangerous offenders, the criminal justice system is the appropriate place to pursue that goal. If current criminal justice statutes do not allow for sufficient periods of incarceration because of the widespread repeal of indeterminate sentencing laws, then those statutes should be changed. This will allow parole boards to assess the rehabilitation and dangerousness of people convicted of sex offenses in the context of other offenders seeking release and prison census concerns, rather than as a mental health issue.
- **Sex Offenders Often Do Not Have a Treatable Mental Illness.** Many sexual predator statutes refer generically to people convicted of sex offenses as having a mental illness. However, these special commitment laws were created in part because the persons who are confined under them do not meet the definition of mental illness used in the ordinary civil commitment laws of any of the fifty states. [4] Indeed, the definition of mental illnesses (or more commonly “mental disorders”) used in sexual predator statutes are completely circular in that they define the disorder as the tendency to commit sex crimes. [5] Finally, to the extent that sex offenders have a mental illness at all, it is not one that can be treated under our current understanding and available evidence.[6] Thus, mental health

professionals have difficulty determining which sex offenders are likely to be dangerous if not committed and what if any treatment should be provided. This means that courts, which must rely on professional expertise, will regularly make mistakes in deciding who should be committed or released, with serious consequences for both the public and the offender. Additionally, many sex offenders are reluctant to participate in treatment because the information which they reveal in treatment is used to prevent their release.

- **People Committed as Sex Offenders are Confined for Lengthy Periods Without Appropriate Review.** Because of the serious nature of their past crimes, the general ineffectiveness of treatment and fears about the consequences of mistaken releases, people convicted of serious sex offenses are destined to spend a long time away from society. Once confined as a sexual predator, it is difficult if not impossible to be released. In *Karsjens v. Jesson*, 2015 U.S.S. Dist. LEXIS 78171 (D. Minn., 2015), a federal court held that the Minnesota scheme for confining sexual predators violated the Due Process Clause because the procedures for determining whether sexual predators remained dangerous were inadequate. The court found that some people had been confined for more than twenty years, and not one person had been unconditionally discharged. While Minnesota appears to have the most serious procedural deficiencies, all states make the release of sexual predators much more onerous than ordinary civil commitment in ways that demonstrate and exacerbate the punitive nature of these commitments.
- **Sexual Predator Legislation Increases Stigma.** Linking mental illness with sexually predatory behavior in the public consciousness and in sexual predator statutes fuels the stigma attached to mental illness and to treatment in the mental health system. People with mental health conditions, their families, and advocates have worked for decades to dispel the notion that people with mental illness are violent or dangerous. By associating sexually violent behavior with mental illness, these statutes threaten gains that have been made in the perception, understanding, acceptance, and non-discriminatory treatment of people with mental health conditions.
- **Sexual Predator Legislation Distorts Civil Commitment.** Sexual predator statutes distort the meaning and practice of civil commitment. Involuntary civil commitment is very controversial among people with mental health conditions and their families, with some people seeing it as inherently illegitimate because of its coercive nature, and others seeing it as an undesirable but sometimes necessary last resort. MHA shares the latter view. See Mental Health America Policy P-36, "Involuntary Treatment." Involuntary civil commitment may be necessary in some cases as a last resort to protect the health and safety of a person with a mental illness or those in contact with him/her. But the basic rationale of involuntary confinement is that people are found to be dangerous to self or others due to mental illness at the time of the commitment, that they receive treatment until they show that they have regained their competency and are recovering, and that they are then released to continue their recovery voluntarily in the community because they no longer present the imminent danger that they did at the time of the commitment. The essence of the rationale for the curtailment of liberty and privacy inherent in civil commitment is that the confinement is time-limited and paired with a course of treatment. None of these essential elements is present in the case of a person convicted of a sex offense committed after serving a prison sentence. Thus, sexual predator commitments are an abuse of civil commitment.
- **Confining Sex Offenders with Persons with Serious Mental Illnesses is Unconscionable.** To detain potentially violent people convicted of sex offenses in mental health facilities

puts other people with mental health conditions in those facilities at risk. Even secure forensic units have a treatment purpose. To use such units for the detention of offenders who do not have a treatable mental health condition is a threat to the safety and viability of the mental health system and a waste of precious treatment resources.

- **Sexual Predator Legislation is Criminal Justice Legislation in Disguise.** Sexual predator laws blur the line between the mental health and criminal justice systems in ways that confuse policy makers, including judges, mislead the public and are unfair even to those who, due to their behavior, may be deserving of long-term incarceration. The criminal justice system is intended to punish only those persons who commit crimes of their own free will. Thus, all but five states provide some form of an insanity defense for those whose crimes are closely related to serious mental illness. And plea bargains can essentially be circumvented by commitment after completion of the stipulated sentence. If a person who has committed a sex offense is in fact not guilty by reason of insanity, it is may be a great disservice to agree to a plea to a lesser criminal offense, since sexual predator laws are likely to result in a longer period of incarceration. Other provisions in the criminal law requiring proof of a specific mental state also contribute to this important protection. Thus, only those persons who choose to commit a sex offense should be convicted and punished for these offenses.[7] The United States Supreme Court has determined that only those sexual predators who are unable to control their sexually violent behavior may be committed under sexual predator laws. *Seling v. Young*, 531 U.S. 250 (2001). Conversely, sexual predator laws are only applied to persons who have already been convicted and served a term of imprisonment, having been found criminally responsible for their sexually violent behavior. It is unfair to first punish someone (find him/her at fault) for a crime and then commit the person because his/her criminal behavior is caused by a mental illness and, therefore, not his/her fault. Given this contradiction, it is not surprising that these laws were upheld by the Supreme Court by only a one-vote margin in *Kansas v. Hendricks*, 521 U.S. 346 (1997). Moreover, the Court remains badly divided over these laws. In *Kansas v. Crane*, 534 U.S. 407 (2002), the Court could not reach a consensus on what evidence was needed to establish that someone could not control him/herself and rejected the Kansas Supreme Court's interpretation of that state's statute. The confusion over whether sex offenders are deserving of punishment as criminals or entitled to treatment due to an illness often carries over to the terms of their incarceration. In some states, sexual predators must be cared for in facilities operated by the state mental health authority in a building which is located inside a prison operated by the state correctional authority.[8] This split of authority further confuses employees, detainees and the public about the purpose of these statutes. The United States Supreme Court has demonstrated its own ambivalence about whether these laws are civil or criminal. In upholding the power of the federal government to enact a sex offender commitment law in *United States v. Comstock*, 560 U.S. 126 (2010), the Court held that the law was justified as part of the power of the federal government under the "necessary and proper" clause of the United States Constitution to criminalize conduct.
- **Sexual Predator Legislation Diverts Already Inadequate Resources from Mental Health to Criminal Justice.** Public mental health systems in most states and localities are financially stressed and in many cases inadequately funded to meet the mental health treatment needs of non-offenders with serious emotional disturbances and serious mental illnesses. Because most people who commit sex offenses do not have a diagnosable mental health condition relating to their offense, it is extremely difficult to determine which persons who have committed sex offenses should be committed, to provide effective treatment for those who are committed and to determine whether, when and under what conditions a committed sex offender should be released. Thus, states have been forced to

spend substantial funds in enforcing these laws. To divert funding to incarceration of sexual predators who will require enormous resources for very long periods of stay diverts scarce resources from mental health systems already experiencing a financial crisis.

## Call To Action

- **Repeal Sexual Predator Commitment Laws that indefinitely confine sex offenders at the end of their prison terms** because: (1) effective treatment is rarely available; (2) commitments commonly result in life-time confinement; (3) procedural protections are usually inadequate; (4) they divert resources from persons with treatable mental health conditions; (5) they increase the stigma associated with mental illnesses; and (6) the underlying, unstated goal-punishment-is more appropriately served through changes to our criminal sentencing laws.
- **Revise Sentencing Laws and Guidelines.** Sex offender laws were created because of the perception that existing determinate sentencing laws did not adequately protect the public. However, if this is true, then states should explore a return to indeterminate sentencing for sex offenses rather than using the mental health system as a dumping ground for criminal offenders who have served their time but are still seen as dangerous.
- **Provide Heightened Procedural Protections for Sex Offender Commitments.** So long as sex offender commitment laws remain, we must insure that the rights of persons confined under these laws are protected. Those rights include rigorous standards and procedures for initial commitments, mandatory periodic reviews, and access to competent, trained lawyers and to independent psychiatric expertise needed to demonstrate recovery. Since the duration, conditions of confinement and stigma which accompany sexual predator commitments are all more onerous than ordinary civil commitments, we must be even more vigilant in assuring that these commitments are truly warranted.<sup>[9]</sup>
- **Begin Treatment in Prison.** To the extent that some people who commit sex offenses have a treatable mental illness, prisons should begin providing treatment for that illness as soon as the offender is incarcerated. Additionally, perhaps even more than persons with other mental health conditions, persons convicted of sex offenses are likely to be victimized in prison. Prisons have a special obligation to protect convicted sex offenders from harm. <sup>[10]</sup> Treatment, including where appropriate involuntary commitment under the ordinary civil commitment standards and procedures, may be continued at the end of any prison sentence.
- **Early Intervention.** States should provide comprehensive diagnostic and treatment services in juvenile corrections systems and all other child-serving systems to identify potential predators early. There is substantial evidence that “sexual predators” quite frequently were themselves victims of sexual violence in childhood or adolescence. It is in everyone’s interest to identify and treat at-risk adolescents before they commit sex offenses.
- **Research.** States should increase research on sexual disorders and treatment options for people who commit sex offenses to more clearly differentiate between those people who are amenable to treatment and those who are not. This will enable a more targeted and

**appropriate mix of incarceration and treatment that will increase the chances of preventing recurrence and will more appropriately use the tools of both the criminal justice system and the mental health system.**

- **Study.** Affiliates and advocates should study the problems of sexual abuse and the criminal justice and mental health response in their states. The effects of laws like sex offender registration and sexual predator legislation need to be documented, and new approaches need to be developed to protect the public, persons within the mental health system and persons convicted of sex offenses alike.

### **Effective Period**

The Mental Health America Board of Directors adopted this policy on December 5, 2015. It will remain in effect for a period of five (5) years and is reviewed as required by the Mental Health America Public Policy Committee

**Expiration:** December 31, 2020

1. Miller, "Sex Offender Civil Commitment: The Treatment Paradox" 98 Cal. L.Rev.2093, 20998 fn.21 (2010)

2. 18 U.S.C. 4248(2016).

3. "Sex Offenders Locked Up on a Hunch," New York Times Editorial (8/15/2015); *See also*, Miller, *supra* at 2098, fn. 25 (4,600 persons confined as sexual predators in 2006).

4. *See Kansas v. Hendricks*

5. *Karsjens v. Jesson*, 2015 U.S. Dist. LEXIS 78171 (D. Minn., June 15, 2015))

6. The *Hendricks* Court rejected the position taken in briefs amicus curiae from both the American Psychiatric Association and the American Psychological Association that the Kansas statute allowed the commitment of persons who were not mentally ill. The majority held that *Hendricks* must be mentally ill solely because he could not control himself.

7. Miller, *supra*.

8. *See*, for example, the Illinois law, 725 ILCS 207/50

9. *See* MHA's Position Statement 22: Involuntary Mental Health Treatment for a discussion of the procedural protections which should be provided to anyone facing involuntary commitment.

<http://www.mentalhealthamerica.net/positions/involuntary-treatment>  
(<http://www.mentalhealthamerica.net/positions/involuntary-treatment>).

10. Everyone in a prison or a jail who has a mental health condition should be afforded decent and humane mental health services. *See* MHA Position Statement 56: Mental Health Treatment in Correctional Facilities.

<http://www.mentalhealthamerica.net/positions/correctional-facility-treatment>