

# Position Statement 55: Confining Sexual Predators in the Mental Health System

## Policy

At least seventeen states have passed various versions of what has come to be called "sexual predator" legislation. These laws provide for indefinite involuntary commitment of sex offenders to mental health treatment facilities after they complete prison terms for serious sex offenses. The impetus for this legislation was the repeal of the indeterminate sentencing laws under which serious sex offenders 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: Mental Health America Concerns

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 prove themselves not to be amenable to treatment and who remain a threat to the community, continued separation from society in the interest of public safety is necessary. However, involuntary commitment of sex offenders to mental health treatment facilities after they complete prison terms for serious sex offenses is an inappropriate response to this problem.

1. **The Mental Health System is for Treatment, 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 sex offenders 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. While public safety is an appropriate societal goal, the purpose of the mental health system is treatment. 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.

2. **Sex Offenders Often Do Not Have a Treatable Mental Illness.** Many sexual predator statutes refer generically to sex offenders as having a mental illness. In fact, many sex offenders do not have a mental illness that can be treated under our current understanding and available evidence. Rather, the sex offenses under which sexual predators are convicted are a manifestation of what the Diagnostic and Statistical Manual of the American Psychiatric Association (DSM-IV) refers to as "Antisocial Personality Disorder," that is not amenable to currently available treatments.<sup>1</sup> 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.
3. **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.
4. **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 the person is found to be dangerous to self or others at the time of the commitment, that he or she receives treatment and 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 sex offender committed after serving a prison sentence. Thus, sexual predator commitments are an abuse of civil commitment.
5. **Confining Sex Offenders with Persons with Serious Mental Illnesses is Unconscionable.** To detain potentially violent sexual offenders in mental health facilities puts other people with mental health conditions in mental health 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.
6. **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. 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.

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. 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*, \_\_ U. S. \_\_, 130 Sup. Ct. 1949 (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.

- 7. 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 sex offenders 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.

## Action Steps

1. **Research.** States should increase research on sexual disorders and sex offenders to more clearly differentiate between those offenders 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.
2. **Revise Sentencing Laws and Guidelines.** States should address statutes and policies regarding sentencing and incarceration of sex offenders. If the new determinate sentences for sex offenders are seen by communities as inadequate, then sentencing guidelines and laws should be revised. The mental health system should not be used as a dumping ground for criminal offenders who have served their time but are still seen as dangerous.
3. **Begin Treatment in Prison.** To the extent that some sex offenders have a treatable mental illness, prisons should begin providing treatment for that illness as soon as the offender is incarcerated. Treatment, including where appropriate involuntary commitment under the ordinary civil commitment standards and procedures, may be continued at the end of any prison sentence.
4. **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 become sexual predators.
5. **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 new initiatives 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 approved this policy on March 5, 2011. It is reviewed as required by the Mental Health America Public Policy Committee.

## Expiration: December 31, 2016

1. 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 the Hendricks must be mentally ill solely because he could not control himself.
2. [See, for example, the Illinois law, 725 ILCS 207/50](#)