

MINUTES
Sex Offense/Offender Task Force
Colorado Commission on Criminal and Juvenile Justice
November 5, 2010 1:30PM-4:30PM
150 East 10th Avenue, Denver

ATTENDEES:

CHAIR

David Kaplan, Private Defense Attorney

TASK FORCE MEMBERS

Michael Anderson, Parole Board

Norma Anderson, Former State Senator

Maureen Cain, Criminal Defense Bar

Peggy Heil, Department of Corrections

Erin Jemison, Colorado Coalition Against Sexual Assault

Dianna Lawyer-Brook, CURE and SOMB

Chris Lobanov-Rostovsky, Division of Criminal Justice

Steve Siegel, Victim Advocacy, Victim organizations and Denver DA's Office

Scot Smith, Colorado Judicial Branch

Ted Tow, Colorado District Attorneys' Council

PUBLIC PARTICIPANTS

Maggie Conboy, Deputy DA, 2nd Judicial District (Denver)

Jeff Geist, Department of Corrections / Sex Offender Management Board (SOMB)

Terri Morrison, Colorado Judicial Branch

Roberta Robinette, Colorado Organization for Victim's Assistance

Mitch Sherman, Advocates for Change

Hailey Wilmer, DA's Office, 2nd Judicial District

Carolyn Turner, Advocates for Change

Annmarie Jensen, Colorado Coalition Against Sexual Assault

STAFF

Kevin Ford, Division of Criminal Justice

Jana Locke, Legislative Liaison, Colorado Dept. of Public Safety

ABSENT MEMBERS

Laurie Kepros, Colorado Criminal Defense Bar

Richard Schneider, Denver PD, SO Registration

Issue/Topic:	Discussion:
<p>Welcome and Introductions David Kaplan</p>	<p>David Kaplan welcomed the group and provided a brief overview of the meeting:</p> <ul style="list-style-type: none"> • There will be updates from each of the Working Groups: Registration and Refinement • The Working Groups will present updates on their recommendation concepts that were shared at the previous Task Force meeting • The items are described as “concepts” because they still may require polishing before they can be considered finalized recommendations • If acceptable to the Task Force, these concepts will be presented at the next meeting of the Commission (Colorado Commission on Criminal and Juvenile Justice) for initial feedback from Commission members <p>David introduced Ted Tow who will describe the recommendation concepts from the Refinement Working Group. Maureen Cain will describe the concepts from the Registration Working Group.</p>

Issue/Topic:	Discussion:
<p>Update: Refinement Working Group Ted Tow, WG Leader</p>	<p>Refinement (Indeterminate/Determinate Sentencing) Working Group Members: Ted Tow (Leader), Peggy Heil, Erin Jemison, Laurie Kepros, and Dianna Lawyer-Brook</p> <p>Speaking from a handout, Ted walked the Task Force through each of several topics discussed by the Working Group (WG). The topics were categorized by the extent to which the WG agreed that a problem existed and the extent to which a viable solution(s) was identified. The categories were:</p> <ul style="list-style-type: none"> A) consensus on problem and the solution B) consensus on problem, but lack of consensus on solution C) consensus on problem, but unsure of the solution, or D) lack of consensus on the existence of the problem and whether a solution was necessary <p><u>Category A: consensus on problem and the solution</u> There were <u>two items</u> in this category:</p> <ol style="list-style-type: none"> 1) Sentencing for Unlawful Sexual Contact and, 2) the period of sentence for a deferred judgment. <p>ITEM 1. Unlawful Sexual <i>Contact</i> with force, threat, or intimidation should be made probation eligible. Currently this crime requires a mandatory prison sentence, while Sexual <i>assault</i> with force, threat, or intimidation is probation eligible. The WG recommends altering statute subsection CRS 18-3-404(3) to make this Unlawful sexual contact crime probation eligible.</p> <p>ITEM 2. A deferred judgment and sentence is presently limited to 4 years for a felony. However, in most cases, 4 years is not long enough to complete sex offender treatment. The WG agreed that for those crimes listed in CRS 16.11.7-102(3) (i.e., offenders requiring treatment) and where appropriate, for good cause, and with the consent of the parties, that the court would have the power to extend the length of deferred judgment for an additional two years.</p>

Issue/Topic:

Update: (cont'd)
Refinement Working Group
Ted Tow, WG Leader

Relatedly, the WG is identifying language to clarify exactly the start of the deferred judgment period, taking into account such things as the plea date, presentence investigations, or offense-specific investigations (The section on deferred sentence of defendant is CRS 18-1.3-102).

Task Force conclusion: PRESENT ITEMS 1 AND 2 TO CCJJ

The Task Force members approved presenting both these items to the CCJJ.

Category B: consensus on problem, but lack of consensus on solution

There were three items in this category:

- 1) indeterminate sentences for “economic” crimes,
- 2) post-release supervision periods for Lifetime (indeterminate sentence) offenders, and
- 3) converting some F4 indeterminate sentences to F4 determinate sentences.

ITEM 1. The current provision allowing a judge to convert a determinate to indeterminate sentence based on a finding of future dangerousness for offenders charged with the so-called “economic” crimes (CRS 18-1.3-1004(4)). All agreed that this provision is unconstitutional based on the Supreme court ruling in *Blakely v. Washington, 542 U.S. 296 (2004)*.

- a. Repeal the unconstitutional subsection (CRS 18-1.3-1004 (4))
- b. Amend the unconstitutional subsection requiring a process whereby the defendant must grant consent for a judge to engage in fact-finding that may result in the conversion of a determinate to an indeterminate sentence.

A problem with the (b) alternative is that this sentence conversion is dependent on a designation as a sexually violent predator (SVP). However, the process of SVP evaluation requires a conviction for specific crimes that do not include the “economic” crimes.

There were several comments offered by Task Force members and meeting guests regarding this problem and potential solutions.

- There was a concern that “fixing” the provision would place plea bargaining practices in statute which was described as not desirable.
- Others expressed concern that the behaviors of these offenders are not that dissimilar in harm from those offenders who commit “contact offenses” and, therefore, should be subject to the same indeterminate sentencing provisions.
- It was observed that the treatment for indeterminate offenders committing contact offenses would not provide the appropriate intervention for offenders committing these non-contact offenses.
- In response, it was stated that the callousness and disregard demonstrated by contact and non-contact offenders is not dissimilar, although the exploitive behaviors may differ.
- Without providing a specific reference, an Australian study is mentioned that indicated that treatment of contact and non-contact sex offenses should differ.

Task Force conclusion: PRESENT ITEM 1 TO CCJJ

The Task Force members approved presenting this concept with both potential solutions to the CCJJ.

Issue/Topic:

Update: (cont'd)
Refinement Working Group
Ted Tow, WG Leader

ITEM 2. The Working Group felt that the post-release supervision periods in the lifetime statute, as it currently exists, is very inflexible. Due to the complexity of the issues surrounding the required supervision periods, a quick solution could not be reached. Some of the issues discussed included:

- The requirements of 10 years (for an F4) or 20 years (for an F2 or F3) do not recognize the actual dynamic nature of treatment needs and treatment progress
- The fixed periods do not provide an incentive that rapid progress could result in a shortened supervision requirement.
- The fixed supervision periods do not reflect actual risk based on the crime committed.
- The time periods could be revised to “5 to life” and “10 to life.” The F4 minimum could be set to 7 instead, but that was felt to be an odd reduction.
- The Work Group was unsure whether designating 5 years as the minimum for an F4 would set an expectation that that is a sufficient period. That may not be long enough for some offenders who would require more years to demonstrate good self-management.
- Rather than revise the time period, the creation of an appeal process was proposed, but more discussion would be required to explore this option.

Task Force conclusion: PRESENT ITEM 2 TO CCJJ

The Task Force members approved presenting this concept to the CCJJ, but that work on this issue will continue.

Item 3. The Working Group explored the possibility of converting 5 indeterminate F4 offenses to determinate F4 offenses. A list of arguments for and arguments against were presented for each of the 5 offenses.

After generating the arguments for and the arguments against, the Working Group remained conflicted and could not come to a decision regarding any of the 5 offenses. The Task Force concurred regarding the sentence conversion, but identified a different issue that underlies the desire for the conversion.

The Task Force members concluded that the real problem is that the Lifetime supervision sentence has evolved from its original intent. The purpose was to create a sentence that would apply an appropriate period of incarceration followed by an extended period of supervision following release. In practice, the period of incarceration has extended beyond what is considered a commensurate period of punishment relative to other crimes. A potential solution would be to devise a sentence that included a determinate period of incarceration followed by the indeterminate period of supervision.

Task Force conclusion: DEFER ITEM 3

Due to the complexities of this proposal, the Task Force will place this item on the list of future problems the Task Force will address.

Category C: consensus there is a problem, but no solution identified

There was one item in this category:

- 1) Position of trust

Item 1. The Working Group explored issues surrounding age matters related to “position of trust,” but had difficulty identifying solutions that did not create

Issue/Topic:

Update: (cont'd)
Refinement Working Group
Ted Tow, WG Leader

other problems.

- Some WG members felt that the definition of position of trust was interpreted too broadly. The statute implies those individuals standing in place of parents and not simply an individual who is older than the victim (for example, a slightly older babysitter or slightly older work supervisor).
- Some WG members felt the definition was too narrow on the aspect of chronology. The definition requires that the perpetrator currently be in a position of trust. It would not apply to a perpetrator who had been in a position of trust previously (for example, former teacher or coach).
- Fixing the possible trust positions was problematic because agreement could not be reached on the boundary of relationship types or the ability to find an easy conceptual demarcation between positions of trust and non-positions of trust.
- Fixing the chronology problem by extending the definition to previous position of trust could result in over-charging the offense when the former position of trust relationship could not be proven as resulting in undue influence on the current circumstance.
- A narrow area of agreement was on the age difference between the alleged perpetrator and alleged victim in position of trust circumstances. The WG proposes adding a 4-year age difference requirement similar to the one in the Sexual Assault on a Child. The “position of trust” charge would require that the victim be younger than 15 or that the perpetrator be 4 years older than victims who are 15, 16, or 17.

Task Force conclusion: PRESENT (the last bullet) of ITEM 1 TO CCJJ

The Task Force will present the final element of this issue regarding the 4-year age difference requirement to the CCJJ.

Category D: lack of consensus that there is a problem

There were three items in this category:

- 1) Adjusting the victim age under the “mistake of age” defense,
- 2) altering the minimum age for Sex Assault on a Child, and
- 3) the large sentencing difference in F4 to F5 Attempted Sex Assault relative to F4 to F5 sentence differences for other attempt crimes.

ITEM 1. The Working Group discussed making an adjustment in the lower bound for the “mistake of age” defense. Currently, the defense exists in circumstances where the victim is between 15 and 17. The proposal is to lower the age to 14. The following were some of the pro and con arguments surrounding this issue:

- A problem with lowering the age is that it would be inconsistent with the 15 year limit on Sex Assault on a Child.
- Fourteen 14 year olds can just as easily appear as a 15 year old.
- Although the cultural norms are pushing 14 year olds to adopt a manner and dress that is older than their years, the cognitive and emotional age of 14 year olds is still developmentally unsophisticated.
- Altering this age limit might confuse appearance with developmental appropriateness.
- Biological maturity is continuing to drop, on average; the average age of menarche is around 12.5 years old.
- Fourteen 14 year olds often attend high school and adopt behaviors consistent with older teenagers.

<p>Issue/Topic:</p> <p>Update: (cont'd) Refinement Working Group Ted Tow, WG Leader</p> <p>Presentation Conclusion</p>	<p><u>Task Force conclusion: PRESENT ITEM 1 TO CCJJ</u> The Task Force members approved presenting this item to the CCJJ.</p> <p>ITEM 2. To maintain consistency with the “mistake of age” item and for the same reasons outlined there, the Working Group proposed altering the lower bound of Sexual Assault on a Child to 14 years of age. The discussion was similar to the above; however, members did not support forwarding this concept for presentation to CCJJ.</p> <p>Task Force conclusion: DO NOT PRESENT ITEM 2 TO CCJJ The Task Force members voted to not present this item to the CCJJ.</p> <p>Item 3. The Working Group described the relatively larger “drop-off” in sentence severity from an indeterminate F4 to a determinate F5 Attempt. The sentence length of an attempted crime is typically shorter by half than for the comparable completed crime. However, the completed F4 sex assault can result in a maximum sentence of life compared to the attempted F5 which can result in a maximum of 3 years. The shortest sentence for a completed F4 is 12 years, still 4 times longer than the maximum of the F5 attempt. The difficulty of this interpretation, and the reason there was no consensus on this issue, is that the indeterminate sentence does not necessarily represent an extended period of incarceration, but an extended period of supervision.</p> <p><u>Task Force conclusion: WITHDRAW ITEM 3; DO NOT PRESENT TO CCJJ</u> The Working Group decided to withdraw this item; therefore there was not vote to present this item to the CCJJ.</p> <p>The Working Group mentioned a final item it had no time to address adequately. The Working Group had an incomplete discussion of the lack of sentencing and treatment options for individuals who perpetrated as a juvenile, but were not charged until they were over 18. The Working Group would like to place this item on the list for future discussion.</p>
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<p>Issue/Topic:</p> <p>Update: Registration Working Group Maureen Cain, WG Leader</p>	<p>Discussion:</p> <p>Registration Working Group Members: Maureen Cain (Leader), Sen. Norma Anderson, Chris Lobanov-Rostovsky, Rick Schneider, and Scot Smith</p> <p>Speaking for the Registration WG, Maureen offered the Task Force several topics discussed by the Working Group (WG) for potential presentation to the Commission. <u>Six items</u> were presented that have been discussed at length by the WG:</p> <ol style="list-style-type: none"> 1) de-registration procedures, 2) registration fee structures, 3) homeless/transient registration, 4) registration cancellation processes, 5) jail registrations, and 6) risk classification and community notification. <p>An additional six items were mentioned as still tentative.</p>
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Issue/Topic:

Update: (cont'd)
Registration Working Group
Maureen Cain, WG Leader

Item 1. De-registration procedures

There are subgroups of sex offenders who are qualified to petition for de-registration. The current system does not notify these qualifying individuals very well resulting in some individuals remaining on the registry when they could move off the registry. Specifically, juveniles at the end of their supervision and adults who are completing a period of deferred judgment would qualify. It would be more efficient if the court appearance that concludes supervision under these circumstances simultaneously addressed de-registration.

The Juvenile Parole Board and DYC (Division of Youth Corrections) would need to collaborate in the process for juveniles. The Judicial branch would need to coordinate the de-registration for adults completing deferred judgment. It was felt that this simultaneous de-registration would not affect Adam Walsh compliance.

Task Force conclusion: PRESENT ITEM 1 TO CCJJ

The Task Force members voted unanimously to present this item to the CCJJ.

Item 2. Registration fee structures

Preliminary research done by the WG has identified problems with the fees assessed to sex offenders when they attempt to register. Registration is required at different frequencies, depending on a sex offender's classification. Some are required to register annually and others up to 4 times per year. The fees assessed can be burdensome and can reduce registration compliance.

The fees are not consistent across counties/jurisdictions and it is reported that high fees have the consequence of pushing offenders into areas where fees are less expensive. Some counties charge nothing for registration and others charge over \$100 for the initial registration. Law enforcement has suggested that a standardized fee would be fairer for all.

The WG is recommending that the registration fee be set for up to \$25.00 for each registration occurrence. For those required to register 4 times a year, this would be a maximum of \$100/year. The fee can be waived by the law enforcement entity for those offenders who cannot afford the fee. The most important thing is that offenders are registered, regardless of the ability to pay. This plan is to be shared with the police chiefs at a meeting on November 8, 2010.

Task Force conclusion: PRESENT ITEM 1 TO CCJJ

The Task Force members voted unanimously to present this item to the CCJJ.

Item 3. Homeless/transient registration

The registration of sex offenders who are homeless or transient is problematic. It is possible for law enforcement to check on individuals who have provided an address and/or place of employment. Homeless/transient offenders, if their registration is accepted at all, are much harder to track.

The WG has brainstormed how registration might work for the homeless or transient offender. Some of the features of a transient registration process could include the following:

- There should be a definition of "transient" in Colorado statute.

Issue/Topic:

Update: (cont'd)
Registration Working Group
Maureen Cain, WG Leader

- After registering, transient offenders would be required to check-in every 30 days. This would reduce the burden on law enforcement to check up on transient offenders who may or may not be found at their “transient address” or location.
- Transient offenders could be issued a “transient card.”
- Because a transient offender is currently only required to register annually (or 4 times a year, depending on classification), the failure to check in every 30 days should not result in charges for a new crime. The failure to check in would not be considered a failure-to-register event. If the offender failed to re-register at their required annual or quarterly date, they would be subject to a failure to register crime.
 - Why 30 days? It seems a reasonable check-in period and there are a few examples around the country of this type of check-in procedure (for example California and Nebraska require a 30-day check-in for transient offenders). This is the period that Denver is currently using effectively.
 - Would officers on the street have the ability to stamp the check-in card? This might save office time and be more effective for transient offenders.
 - Can parole officers be given the authority to stamp check-in cards? This might provide another option for offenders, but the tracking function in law enforcement offices might be impeded. The parole officers would have to report the stamping to local law enforcement.
 - If the STAR system is used, offices could combine the registration functions. However, some local law enforcement offices would prefer the offender make an appearance in person.
 - Would offering the check-in become a temptation for offenders with a residence to register as transient? Some offenders might prefer to withhold their actual address and register as transient. It is felt the extra check-in burden would make this option less attractive to those wishing to use this option who are not transient.

Task Force conclusion: PRESENT ITEM 1 TO CCJJ

The Task Force members voted unanimously to present this item to the CCJJ.

Item 4. Registration cancellation processes

When offenders move between jurisdictions, they are required to register in the new jurisdiction. Some jurisdictions will not accept a new registration unless the “old registration” location has been notified and that registration canceled. The WG felt that there should be a law enforcement procedure where a new registration would be accepted and would trigger a cancellation notification to the old notification location. This would be:

- more efficient,
- bring consistency to the registration cancellation process across counties,
- enhance re-registration compliance of offenders, and
- reduce the bureaucracy for offenders.

A problem with this approach would be the added burden on law enforcement offices to add this cancellation notification process. There is no existing technology that could streamline the process. However, the STAR system could provide the platform to automate the process.

Task Force conclusion: PRESENT ITEM 1 TO CCJJ

The Task Force members voted unanimously to present this item to the CCJJ.

Issue/Topic:

Update: (cont'd)
Registration Working Group
Maureen Cain, WG Leader

Item 5. Jail registrations

It is possible for sex offenders to be confined in jail in one jurisdiction at the time when their registration expires in a different jurisdiction. To avoid being charged with failure to register, the WG felt that jails should register any offender being held for longer than 5 days. The registering jail would then notify law enforcement in the offender's primary jurisdiction that they are being held.

Task Force conclusion: PRESENT ITEM 1 TO CCJJ

The Task Force members voted unanimously to present this item to the CCJJ.

Item 6. Risk classification and community notification

The current registry does not provide a good way to classify offenders according to risk or effective notification processes.

- The only risk categories that currently exist are those with an SVP rating vs. those without this designation.
- Community notification meetings are considered by some law enforcement agencies an inefficient method of notification. In some jurisdictions, members of the public attend, whereas in others, no one attends.
- A risk assessment comprising more categories would be more informative to the public and to law enforcement.
- E-mailing blanket notifications of all sex offenders treats all offenders, regardless of risk, the same. Different methods of notification that would be related to the offender's risk would be more effective and informative.
- Informing the public of any new "graduated" notification system would be important.
- Why should the categories only be driven by risk scores? If the SVP designation is replaced, one could also utilize other indicators such as "priors" and mental illness or psychopathy designations.
- The current size of the registry makes it somewhat meaningless when all offenders, regardless of risk, are included. Would it be possible to list the conviction charge on the registry?
- It would be important to address how modifications to notification would impact Adam Walsh compliance. There are roughly 200,00-300,000 funds at risk due to Adam Walsh non-compliance.
- Some states only post registrants on the internet if they are non-compliant or have failed to register. Notification has been shown in WA and MN to be more effective in recidivism reduction where the notification is proportional to offender risk. WA and MN registries are risk-based rather than offense-based. The Colorado registry is offense-based with the SVP designation overlaid.

Additional concepts under discussion.

The Work Group listed other issues still under discussion, but that are not ready for presentation to the Task Force or the CCJJ:

- **Affirmative defense for failure to register**

An affirmative defense should be crafted in statute to deal with unexpected timing issues. This defense would provide an argument for failure to register when the failure was unavoidable.

- **Mandatory SOISP**

The requirement that SOISP under probation should be changed to an option, giving judges greater sentencing discretion.

<p>Issue/Topic:</p> <p>Update: (cont'd) Registration Working Group Maureen Cain, WG Leader</p>	<ul style="list-style-type: none"> • Eliminate “the stipulation to underlying factual basis” It is possible to require an individual to register as a sex offender even if there is no conviction for a sex offense requiring registration. • Clean up of registration paragraphs in statute There are some inconsistencies in the registration sections in statute that can easily be fixed, for example, timing of registration deadlines and references to registration requirements for those convicted in tribal or territorial courts. • SVP equivalency There should be language inserted that establishes SVP designations for offenders moving from other states to Colorado
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<p>Issue/Topic:</p> <p>Next Steps / Adjourn David Kaplan</p>	<p style="text-align: center;">Discussion:</p> <p>David summarized the goals before the next Sex Offense / Offender Task Force meeting:</p> <ul style="list-style-type: none"> • David, Maureen, and Ted will provide an update to the CCJJ on the initial work and recommendation concepts of the Task Force • The Registration and Refinement Working Groups will meet to finalize recommendations for the next SO TF meeting • We will have an update on the SOMB bill draft at the next Task Force meeting. • The Task Force will vote on the recommendations presented by the two Working Groups • The approved recommendations will be presented for discussion and vote at the December 10, 2010 CCJJ meeting. <p>The direct link to the Sex Offense / Offender Task Force webpage on the CCJJ website is: http://cdpsweb.state.co.us/ccjj/Sex_offender_task_force.htm</p> <p>The meeting adjourned at 4:50pm</p>
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Future Sex Offense/Offender Task Force Meeting Dates:

Date	Location	Time
Wednesday, December 1, 2010	150 E. 10 th Avenue, Denver	1:30-4:30PM
Wednesday, January 5, 2011	150 E. 10 th Avenue, Denver	1:30-4:30PM
Wednesday, February 2, 2011	150 E. 10 th Avenue, Denver	1:30-4:30PM
Wednesday, March 30, 2011	150 E. 10 th Avenue, Denver	1:30-4:30PM
Wednesday, May 4, 2011	150 E. 10 th Avenue, Denver	1:30-4:30PM
Wednesday, June 1, 2011	150 E. 10 th Avenue, Denver	1:30-4:30PM