

# CRIMES (HIGH RISK OFFENDERS) AMENDMENT BILL 2016

## *Second Reading*

**The Hon. DAVID CLARKE ( 16:27 ):** On behalf of the Hon. John Ajaka: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

### **Leave granted.**

The Government is pleased to introduce the Crimes (High Risk Offenders) Amendment Bill 2016. The bill will amend the Crimes (High Risk Offenders) Act 2006 to clarify how the existing scheme for continued detention and extended supervision applies to offenders serving sentences of imprisonment for violent offences. This bill is another demonstration of the commitment of the Government to protect the safety of our community.

The Act enables the State to apply to the Supreme Court for preventative orders to supervise or detain high risk violent or sex offenders who pose an unacceptable risk of committing a serious violent or serious sexual offence on their release from imprisonment into the community. The primary object of the Act is to ensure the safety and protection of the community. A further object is to encourage high risk violent and sex offenders to undertake rehabilitation. The extended supervision and continuing detention of offenders is to manage a very small cohort of 'high risk' offenders after their sentence ends.

When introduced in 2006, the Act originally only applied to high risk sex offenders. In 2013, this Government recognised the need to extend the regime to high risk violent offenders, who can pose an equally concerning risk to community safety. The Act already covers high risk violent offenders who are serving sentences for imprisonment for offences that involve conduct that causes the death of another person or grievous bodily harm. The person must have intended to cause the death of another person or grievous or actual bodily harm or be reckless as to whether they do so.

The bill will clarify that the Act applies to violent offenders who have been imprisoned for the offences of:

1. wounding with intent to cause grievous bodily harm
2. manslaughter by unlawful and dangerous act, and
3. murder that occurs in the course of committing another serious crime, known as "constructive murder".

The offences have maximum penalties similar to those already clearly covered by the Act. The bill addresses limitations where some very violent crimes, such as shootings and stabbings, are potentially not covered by the Act due to the technical elements of the offence the person was charged with. The Act was intended to cover these types of offending, however a technical limitation in drafting of the Act has recently been identified. In some individual cases, there are no distinguishing features between these offences and the offences currently covered by the Act— the nature of the violent offending of people who have been imprisoned for these offences is sometimes just as serious in nature as that of offenders currently covered by the Act. There is a concern that the present definition of serious violence offence in the Act could apply haphazardly to some criminal offences, but not others of objectively greater seriousness.

The Government is committed to ensuring that the community is protected from the high risk of reoffending posed by such individuals. The amendments will enable offenders who pose an unacceptable risk of committing further violent offences to either be detained for a set period after their sentence ends or be subject to supervision by Corrective Services in the community. This bill does not make every violent offender subject to the Act. These orders continue to be for the ongoing supervision of dangerous offenders who have committed extremely serious offences and who have been assessed by experts and by the Supreme Court as meeting an unacceptable risk threshold. The serious violent offences the subject of this bill are all serious indictable offences— they are offences which are punishable by imprisonment for 25 years or life.

The regime under the Act is used only for a small number of offenders in the most serious cases. Only one Continuing Detention Order and nine Extended Supervision Orders have been made since the provisions were introduced in 2013. The bill is not intended to result in a significant increase in the number of people who are subject to extended supervision or continued detention.

The people who need to be subject to these orders to protect the community are identifiable through a risk assessment process, including consideration by the High Risk Offender Assessment Committee established by this Government in

2014. The committee is chaired by the Commissioner of Corrective Services and comprises representatives which include members of justice, law enforcement and human service agencies.

The Supreme Court ultimately determines whether an order should be made. In assessing whether an extended supervision order or continuing detention order is needed, the person's offence is looked at alongside other factors, including their:

- criminal history
- pattern of offending behaviour
- psychiatric/psychological issues
- institutional behaviour, and
- the offender's attempts to rehabilitate, including through program participation in prison.

Expert evidence, including reports by independent psychiatrists and psychologists who have examined the offender, is provided to the court to inform its decision on the offender's risk of reoffending. When an offender is detained, the offender is regularly reviewed by a clinical committee and referred to programs to address the causes of their offending.

Offenders supervised in the community are subject to conditions imposed by the court, such as regular reporting to Corrective Services NSW, electronic monitoring and participation in treatment and rehabilitation programs. Breaching a supervision order is a criminal offence punishable by five years' imprisonment or a \$55,000 fine or both. These orders are also regularly reviewed by Corrective Services to ensure that the orders are still appropriate.

A broader statutory review of the Crimes (High Risk Offenders) Act is also underway to examine whether the Act is achieving its objectives. In undertaking that review, the Attorney General has asked the Department of Justice to consider, and consult with stakeholders, in relation to options for better managing high risk offenders and whether the factors the Supreme Court is required to consider in making an order for continuing detention or extended supervision align with the Act's objectives. The report is due to be completed by March 2017.

The amendments in this bill are being progressed in advance of that broader statutory review as limitations in the Act pose a real and immediate threat to community safety. The Government thanks the stakeholders who were consulted in the drafting of this bill in New South Wales, including the Bar Association, the Law Society, Legal Aid, the Office of the Director of Public Prosecutions, Police, Public Defenders Office, and the Serious Offenders Review Council. I now turn to the detail of the bill.

Item 1 of the bill would amend the definition of "serious violence offence" in section 5A of the Act. The definition of "serious violence offence" effectively defines who is a "high risk violent offender". It does this in two ways. First, to be considered a high risk violent offender the person must have been sentenced to imprisonment for a serious violence offence. Secondly, the court must be satisfied to a high degree of probability that the offender poses an unacceptable risk of committing a serious violence offence if he or she is not kept under supervision.

Item 1 would clarify that the Act covers some types of murder that occur during the commission of a serious crime, such as during an armed robbery. This is referred to as constructive murder. Other types of murder are already serious violence offences. Constructive murder often involves the offender engaging in violent acts. Courts have consistently held that constructive murder is just as serious as other types of murder.

Item 1 also clarifies that reckless conduct that causes the death of another person also includes a reference to manslaughter caused by an unlawful and dangerous act. The offence of "manslaughter by unlawful and dangerous act" can also involve acts that amount to serious violence. While often this offence occurs as a once-off error of judgement, unfortunately for some offenders the offence forms part of a pattern of recurring violence.

Finally, the bill clarifies that a serious indictable offence that is constituted by a person engaging in conduct that causes grievous bodily harm, includes conduct that wounds another person. The person must still have intended to cause the death of another person or grievous bodily harm. In practice, offenders are sometimes convicted of the offence of wounding when the harm caused was grievous bodily harm. This is because it is easier for the prosecutor to prove the offence of wounding and the same maximum penalty applies. This is creating limitation in the Act whereby people who have engaged in the same criminal conduct, such as shooting or stabbing someone, are either covered or not covered by the Act depending on what offence they were charged with and convicted of.

Currently, an offender who is convicted of attempting to cause grievous bodily harm but who in fact did not harm the victim would be covered by the Act, but an offender who is convicted of actually wounding the victim would not be covered. The bill will address these limitations by clarifying that applications can be made in respect of offenders serving sentences of imprisonment for the offence of wounding with intent to cause grievous bodily harm. It is the offenders who are serving sentences of imprisonment for wounding, but who intended to cause grievous bodily harm, to which it is envisaged the Act would apply in practice.

Item 2 deals with savings and transitional matters. It provides that the amended definition of " serious violence offence " will apply to sentences imposed and offences committed before the amendments commence. This is consistent with the high risk violent and sex offender schemes which also applied to pre-existing offences in this way.

The bill will commence on the date of assent. By clarifying the Act's application, the bill ensures the Act fulfils community expectations of what serious violence offences should be covered. With this bill, the Government is promptly responding to newly identified potential limitations in the Act that pose a real and clear threat to community safety. The Government will not allow the community to be placed at risk.

I commend the bill to the House.

**The Hon. ADAM SEARLE ( 16:27 ):** I lead for the Opposition in debate on the Crimes (High Risk Offenders) Amendment Bill 2016. The Opposition does not oppose the bill. The object of the bill is to amend the principal Act, the Crimes (High Risk Offenders) Act, to include within the continuing detention and extended supervision regime offenders convicted of the indictable offences of constructive murder, which is murder occurring in the course of the commission of another serious offence, manslaughter by unlawful and dangerous act, and wounding with intent to cause death or grievous bodily harm.

Despite the exaggerated claims made by the Government in the other place when introducing this bill, this bill is modest. The bill seeks to clarify and extend the class of violent offenders in relation to whom the State can apply for an extended supervision order or a continuing detention order. In her second reading speech the Attorney General noted that the Act was originally intended to cover the types of offence covered in this bill. The regime was originally established by the Labor Government in the Crimes (Serious Sex Offenders) Act in 2006. As the title suggests, the regime at that stage applied only to serious sex offenders.

In 2013 the Crimes (Serious Sex Offenders) Amendment Bill was adopted by the Parliament to include high-risk violent offenders. This flowed from a referral by then Premier Keneally in 2010 to the NSW Sentencing Council and a subsequent report. The legislation was amended again in 2014 to, among other things, establish the High Risk Offenders Assessment Committee.

The legislation currently allows an application to be made to the Supreme Court in relation to certain categories of convicted offenders for an order to supervise or detain the offender even though their sentence has expired. Orders can be made only by the Supreme Court, as is appropriate, and only if the court is satisfied to a high degree of probability that the offender poses an unacceptable risk of committing a serious offence if not kept under supervision. Unsurprisingly, there are relatively few offenders against whom orders are made. I note that in her second reading speech in the other place the Attorney General acknowledged that since 2013 only one continuing detention order and nine extended supervision orders have been made.

In answer to a supplementary question on notice at budget estimates, the then Attorney General indicated that as at 1 September 2014 there were 35 offenders in New South Wales in the community on an extended supervision order—35 were sex offenders and one was a violent offender. At that stage no-one was subject to a continuing detention order. In mid-2015 a media report indicated that there were 37 persons living on extended supervision orders, which gives a sense of the scale of this regime. The scheme is different from earlier strategies such as habitual offender legislation. Detention is not unlimited and is not imposed at the time of sentence. It is imposed at a later period and is still at variance with traditional common law principles.

Currently, apart from serious sex offenders, the legislation applies to offenders convicted of a serious indictable offence that consists of engaging in conduct that causes the death of another person or grievous bodily harm to another person with the intention of causing, or while being reckless as to causing, the death of another person or grievous or actual bodily harm to another person. It also extends to attempting to commit or conspiring with or inciting another person to commit that kind of offence. This is set out in subsections (1) and (2) of section 5A of the principal Act.

The only substantive part of this bill is to include a new section 5A (2A) to clarify the existing provisions of the Act. New subsection (2A) provides that the conduct referred to in section 5A (1) (a) includes murder committed during or immediately after the commission of a serious crime, manslaughter caused by an unlawful and dangerous act, and conduct that causes the wounding of another person, but only if the conduct was engaged in with the intention of causing the death of another person or their grievous bodily harm. Provision is also made to have application to offences committed before the commencement of the Act and to persons serving a prison term before the Act commences. The Opposition did not oppose the 2013 legislation and this bill will ensure that the 2013 legislation has the effect that was intended at the time. Accordingly, the Opposition does not oppose the bill.