NSW GOVERNMENT | Justice

Review of the *Crimes (High Risk Offenders) Act 2006* (NSW)

Review Report

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Justice Strategy & Policy

Department of Justice

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Executive Summary

This report seeks to ensure:

- frameworks governing eligibility, making an order, management of an offender and administration of the high risk offender scheme are operating effectively
- NSW's scheme for post sentence supervision and detention appropriately protects the community, and
- the scheme has measures in place that facilitate and emphasise rehabilitation of high risk offenders.

The objects of the *Crimes (High Risk Offenders) Act 2006* (NSW) (**the Act**) remain valid. Amendments to the Act are needed to ensure it adequately addresses the above aims. The Department of Justice (**the Department**) has engaged in a thorough consultation process to obtain the views of stakeholders. These views have informed the report's recommendations. The recommendations in this report will further ensure that the legislative and administrative frameworks supporting the scheme appropriately meet the objectives of community safety and rehabilitation of an offender without substantially broadening the application of the scheme.

CHAPTER 1 — Eligibility

The Act currently has separate provisions for sex and violent offenders that are based on the risk that sex offenders will commit further sex offences only and violent offenders will commit further violent offences only. The complexity of this cohort of high risk offenders results in offenders who commit both sex and violence offences and who do not neatly fit within one of the two statutory categories. The current eligibility requirements do not cater to the small number of generalist offenders such as offenders serving a sentence for a serious sex offence who pose a risk of committing a future violent (rather than sex) offence. To ensure that the scheme appropriately addresses the risk posed by these generalist offenders, we recommend that the strict distinction between sex and violence in the Act be removed. This aligns with recommendations from a similar review conducted in Victoria (the Harper Review) which also recommended combining eligibility across sex and violent offenders and sex and violence offences.

Eligibility of offenders for post-sentence supervision or detention should be determined by conviction and imprisonment for an eligible offence (which may be a serious sex offence[1], offence of a sexual nature[2] when the previous sentence of imprisonment was for a serious sex offence, or serious violence offence[3]) and anticipated risk of committing a future eligible offence (which may be a serious sex offence or serious violence offence) (**Recommendation 1**). It is currently unclear whether offenders who have served community based sentences come within the scheme. Given the scheme is intended to only apply to the most high risk cohort of offenders, the Act should be amended to clarify that a sentence of imprisonment does not include suspended sentences (**Recommendation 2**).

CHAPTER 2 — Making an order

The Department identified a number of issues with the current process for making an order:

[1] See *Crimes (High Risk Offenders Act) 2006* (NSW) s 5
[2] Ibid
[3] See *Crimes (High Risk Offenders Act) 2006* (NSW) s 5A

- offenders who pose an unacceptable risk which cannot be managed on an extended supervision order (**ESO**) are being granted an ESO by the Court under the current test
- offenders cycle between ESOs and being in custody (having breached that ESO) with no change to underlying behaviour
- CSNSW is required to provide detailed information on how an 'unmanageable' offender *might* be supervised in the community, even when CSNSW does not have confidence that the proposed supervision measures will be effective to keep the community safe.

Ensuring the safety and protection of the community is the primary object of the Act. To emphasise and better meet this object, community safety should be clarified as the Court's paramount consideration in determining whether to make an order for an offender's extended supervision or continued detention (**Recommendation 7**).

The current test for making an order has resulted in offenders being given ESOs even where the risk they pose of committing a serious sex or violence offence cannot be managed in the community. This issue has led to offenders being placed on ESOs only to repeatedly breach their orders because they are too high risk to be managed in the community.

The test for making an order should be changed so that rather than considering whether *adequate supervision* would be provided by an ESO, the test for deciding whether to make an ESO or continuing detention order (**CDO**) would be based on unacceptable risk. The threshold test to determine whether to make an order would be the same as the current test — that the offender poses an unacceptable risk if not kept under supervision (either in custody or in the community). The test for deciding whether to make a CDO should be changed so that the Court may impose a CDO if satisfied that the risk of the offender committing a serious sex or violence offence would be unacceptable unless a CDO is imposed. Otherwise the Court could make an ESO (or no order) (**Recommendation 5**).

The reframed test would retain further detention under a CDO as an option of last resort; would result in the same number of offenders being subject to an ESO or CDO (ie would not increase the number of offenders subject to an order); and would result in somewhat more offenders being given a CDO than do currently (to address the small group of offenders who are currently getting ESOs when they are unable to be safely managed in the community and who repeatedly breach the ESO).

Recommendation 6 would clarify that in determining *unacceptable risk* the Court should consider whether the offender would comply with the conditions of an ESO and the available options in custody or in the community to reduce the risk of reoffending over time. The reframed model would better address the underlying factors of reoffending with the aim of reducing the number of offenders who repeatedly cycle between supervision and imprisonment under the scheme.

A 2014 amendment to the Act enabled the NSW Attorney General to make *ex parte* applications for emergency detention orders. While the State is always under Model Litigant obligations in litigation matters, additional safeguards are needed including the immediate

notification of Legal Aid NSW when an emergency detention order application is filed (**Recommendation 8**). The Act should be amended to ensure that a victim's family representative are not precluded from providing a victim impact statement to the Court in situations where the victim of the offence is deceased or incapacitated (**Recommendation 11**).

CHAPTER 3 — Management of an offender

The current practice of determining ESO conditions strikes the appropriate balance between consistency of conditions between offenders and retaining ultimate Court discretion as to which conditions are imposed on an offender. Given the Act already includes a non-exhaustive list of conditions that can be tailored to a particular offender's needs, no further change is required to the current list of ESO conditions available. The current framework governing breach of ESO conditions has elements of a system of graduated sanctions. To the extent that courts impose inconsistent sentences for ESO breach, the Department should ensure there is sufficient training material available (**Recommendation 20**) and ensure that the prosecution has information to inform the court about the seriousness of the breach (**Recommendation 21**).

CHAPTER 4 — Administration of the scheme

A recurrent theme throughout the consultation process was the overrepresentation of Indigenous offenders in the scheme. Since the scheme's commencement, there have been 107 offenders subject to an ESO or CDO of which 27% are Indigenous.[4] While not directly comparable with the general prison population, this is consistent with the high Indigenous representation across the NSW prison system more broadly.[5] We consider that earlier identification and warning of offenders will provide greater opportunity for Indigenous offenders to engage in rehabilitative programs while in custody.

The Department recommends Corrective Services NSW (**CSNSW**) implement practices which identify high risk offenders earlier in their sentence (both within six months of sentencing and three years before the earliest release date) to earmark high risk offenders for targeted rehabilitation programs earlier (**Recommendations 23** and **25**). The aim is to ensure that by the end of an offender's original sentence of imprisonment, fewer offenders will present an unacceptable risk of committing a serious offence and therefore an ESO or CDO will not be necessary. Further, courts and CSNSW should be required to warn *all* eligible offenders at, and immediately after, sentencing of the Act's potential application to them, rather than under the current framework where only violent offenders are warned of the scheme (**Recommendations 24 and 25**). This early notification will provide offenders significant notice and incentive to engage in rehabilitation programs while in prison.

The Department recommends a number of additional measures to improve the process for making an application (**Recommendations 14 and 15**), the use of information and reports obtained to inform the Court's decision (**Recommendation 16**), the timeframes for the Court to consider an order (**Recommendation 18**), and interaction of the scheme with parole proceedings (**Recommendations 9 and 10**) and bail applications (**Recommendation 26**).

[4] As at September 2016.
[5] 33% (12,657) of NSW offenders in the June quarter of 2016.

Recommendations

CHAPTER 1 — Eligibility

1. Eligibility of offenders for post-sentence supervision or detention should be determined by:

   - conviction and imprisonment for an eligible offence (which may be a serious sex offence or serious violence offence)
   - anticipated risk of committing a future eligible offence (which may be a serious sex offence or serious violence offence).

2. The Act should be amended to clarify that *imprisonment* excludes suspended sentences and includes full time custody, Intensive Corrections Orders, and home detention.

CHAPTER 2 — Making an order

3. The Act should be amended to clarify that the scheme applies to offenders serving Commonwealth and/or interstate offences concurrently or consecutively, or partly concurrently and partly consecutively, with a NSW offence.

4. The Act should apply to offenders serving sentences of imprisonment for certain Commonwealth sex offences. The Commonwealth sex offences to be included will be the subject of further consultation.

5. (a) The test for making an order should remain that the offender poses an unacceptable risk of committing a serious sex or violence offence if not kept under supervision. If so satisfied, the Court may make an ESO.

   (b) The test for deciding whether to make a CDO should be changed so that the Court may impose a CDO if satisfied that the risk of the offender committing a serious sex or violence offence would be unacceptable unless a CDO is imposed.

6. The Act should be amended to provide that the Court must consider (as part of the existing non-exhaustive list):

   - whether the offender is likely to comply with the conditions of an ESO, and
   - available options in the community or in custody to reduce the risk of reoffending over time.

   The Act should state that, when considering a CDO, the Court must not consider breach of an order as an effective form of intervention that indicates the risk would be acceptable.

7. The Act should be amended to clarify that community safety is the paramount consideration for the Court in making an ESO or CDO.

8. The Act should be amended to require immediate notification of Legal Aid NSW when an emergency detention application is filed or is likely to be filed.

9. The *Crimes (Administration of Sentences) Act 1999* should be amended to require SPA to take into account that a current ESO/CDO application is on foot in determining whether to grant an offender parole.

10. SPA must not consider whether an ESO/CDO application *may* be made in determining whether to grant an offender parole.

11. The Act should be amended so that the definition of *victim* is a person who is recorded on the Victims Register in respect of the offender. This would enable a broader range of victims (including a family representative where the victim of the crime is deceased) to provide victim impact statements.

12. The Act should be amended to enable victims to provide statements in written form or direct to the Court.

13. To the extent possible, all victims of an offender should be advised when an offender is subject to an ESO/CDO application.

14. Section 25 should be amended to clarify that the Attorney General can order a person to provide financial information to the court to inform its determination.

15. The Act should be amended to enable the Attorney General to be able to request a person in other Australian jurisdictions to provide information in relation to the offender.

16. The Act should be amended to permit the disclosure of reports prepared under sections 7 and 15 to those who are involved in the supervision, treatment or assessment of offenders and should prohibit secondary disclosure.

17. Circumstances in which section 7 and section 15 reports can be used in separate proceedings or for separate purposes should be narrowly defined in the legislation based on the test established in *State of NSW v McCarthy*.

18. The timeframe for applications should be extended from six to nine months before the expiry of an offender's sentence.

19. The Court should be able to defer commencement of orders for up to seven days to allow post order arrangements to be made in circumstances where an interim detention order is not an available option.

CHAPTER 3 — Management of an offender

20. The Department of Justice should work with the Judicial Commission of NSW to ensure sufficient training material is available to inform ESO breach proceedings.

21. The Department of Justice should ensure the prosecution has information to inform sentencing courts about the seriousness of an ESO breach.

22. The Act should be amended to clarify that an alleged breach of an ESO can constitute altered circumstances to enable a CDO application to be made.

CHAPTER 4 — Administration of the scheme

23. CSNSW should notify eligible offenders three years before their earliest possible release date that they may be subject to the scheme.

24. Sentencing courts should be required to warn *all* offenders who have committed an eligible offence about the Act's potential application to them.

25. CSNSW should provide eligible offenders written notification of the potential application of the scheme to offenders within six months of sentencing.

26. In determining bail conditions for an offender subject to an ESO application in parallel proceedings, the court should consider the ESO conditions proposed in the ESO application.

27. Work should commence to explore extension of the NSW scheme to terrorist offenders, including consideration of lessons learned from the implementation of the Commonwealth's High Risk Terrorist Offenders Scheme.

28. Minor and machinery changes to the scheme should be made to ensure the framework is operating effectively. These would:

    - 28A — clarify that an interim detention order is 'current custody' for the purposes of the definition of *supervised sex offender* or *supervised violent offender*

- 28B — clarify the effect of the suspension of an ESO order when an offender is in lawful custody and enable a CDO application while an offender subject to an ESO is on remand, and
- 28C — enable CSNSW to issue a certificate regarding an offender's time in custody.

Review purpose and scope

The Department of Justice has conducted a Statutory Review of the *Crimes (High Risk Offenders) Act 2006* (NSW) (**the Act**) on behalf of the Attorney General of NSW.

The review was initially confined to amendments made to the Act in 2013. Section 32 of the Act requires review of the 2013 amendments to determine whether:

- their policy objectives remain valid, and
- the terms of the Act, as amended, remain appropriate for securing those objectives.

The then Attorney General subsequently broadened the scope of the review to consider, in addition to the 2013 amendments, the Act in its entirety. The aim remains to minimise use of orders to the most high risk offenders who pose a continuing unacceptable risk to community safety.

This paper has been divided into chapters across the four broad headings of eligibility requirements, making an order under the Act, management of an offender under the Act and administration of the scheme. In particular, the paper considers:

- issues and options to improve the eligibility thresholds
- options to improve order requirements (including factors the Supreme Court is required to consider in deciding whether to grant an Extended Supervision Order or Continuing Detention Order)
- issues and options regarding management of offenders (including options for better managing offenders who breach their ESO), and
- administration of the scheme.

Stakeholder consultation

The Department made a general call for submissions on the 2013 amendments in January 2016. A roundtable was then held in February 2016 focusing on the definition of 'serious violence offence.' The then Attorney General subsequently introduced amendments to the Act to clarify how the existing scheme for continued detention and extended supervision applies to offenders serving sentences of imprisonment for violent offences. These amendments commenced on 1 June 2016. Detail of these amendments is at **Attachment A**.

The Department conducted targeted consultation with stakeholders in August and September 2016. This included two roundtables with legal stakeholders and victims' groups and a written submission process with legal stakeholders, victims' groups, transitional service providers, NSW departments and statutory committees.

A third round of external stakeholder consultation was conducted in November 2016. This included a roundtable with legal stakeholders and a wider invitation to make written submissions to legal stakeholders, victims' groups, transitional service providers, NSW departments and statutory committees. This round of consultation enabled the Department

to consult on proposals not previously consulted upon and to ensure that stakeholder views were accurately represented in the report.

A final roundtable was held with stakeholders in January 2017 to seek stakeholder views on the revised test for making an order under the Act.

Stakeholder submissions received as part of all the stakeholder consultation processes are listed at **Attachment B**.

Crimes (High Risk Offenders) Act 2006

The Act's primary object is stated in the Act as being to provide for the extended supervision and continuing detention of high risk sex offenders and high risk violent offenders to ensure community safety and protection. The Act also states that a further object is to encourage high risk sex offenders and high risk violent offenders to undertake rehabilitation.

The Act is intended to cover 'a handful of high-risk, hard-core offenders who have not made any attempt to rehabilitate while in prison. These offenders make up a very small percentage of the prison population, yet their behaviour poses a very real threat to the public.'[6]

The Act enables the State to apply to the Supreme Court for orders to supervise in the community or to detain in prison high risk violent and sex offenders once their original sentence of imprisonment expires where there is an unacceptable risk that the offender will commit further serious violence or sex offences if released from prison without supervision. A more detailed summary of the scheme is at **Attachment A**.

Conclusion

The Department concludes that the objects of the Act remain valid. The terms of the Act are largely appropriate for meeting those objects. However the Department makes a number of recommendations to improve both the Act's operation and the administrative framework supporting the Act. The recommendations will ensure that the frameworks governing eligibility, making an order, management of an offender and administration of the scheme are operating as effectively as possible.

[6] NSW, *Parliamentary Debates,* NSW Legislative Assembly, 29 March 2006, Hon Carl Scully.

1. Eligibility

This Chapter examines the eligibility of offenders for post sentence supervision or detention. In this Chapter, the Department considers:

- whether the strict statutory distinction between sex and violence should be removed
- how the scheme applies to community based sentences
- whether the 2013 amendment to extend the scheme to offences committed as a child is appropriate, and
- whether the scheme should apply to Australian citizens who commit their qualifying offence overseas.

Statutory distinction between sex offenders and violent offenders

The Act creates two categories of high risk offender: 'high risk sex offenders' and 'high risk violent offenders'.[1] The distinction between the two categories of offender runs throughout each aspect of the decision making process under the Act.

In 2013, following a report of the Sentencing Council, NSW became the first Australian jurisdiction to extend its legislative scheme for post sentence detention and supervision to include *high risk violent offenders*. A *violent offender* refers to a person over the age of 18 years who has at any time been sentenced to imprisonment following his or her conviction for a serious violence offence. Offenders who are subject to applications for orders are identified through a risk assessment process, including consideration by the High Risk Offender Assessment Committee established in 2015.[2]

Two types of orders may be made in respect of high risk sex offenders and high risk violent offenders — ESOs and CDOs. The table below shows the number of ESOs and CDOs made in respect of high risk sex offenders and high risk violent offenders.

Orders[3]	**Extended Supervision Order**	**Continuing Detention Order**
High risk violent offenders	14	2
High risk sex offenders	58	2

The Act has separate provisions for sex and violent offenders that are based on the risk that sex offenders will commit further sex offences only and violent offenders will commit further violent offences only (see following table).

[1] There is also a third category of offenders — high risk terrorist offenders. On 1 December 2016 the Commonwealth Parliament passed the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* which creates a national post sentence detention scheme for terrorist offenders. This Commonwealth legislation will operate in parallel to the NSW scheme and has been considered in further detail at Recommendation 27.
[2] *Crimes (High Risk Offenders) Amendment Act 2014*.
[3] The number of orders on foot as at 16 January 2017.

Within scope of the Act	Outside scope of the Act
High risk **sex offenders** posing an unacceptable risk of committing a **serious sex offence**.	High risk **sex offenders** posing an unacceptable risk of committing a future **serious violence offence**.
High risk **violent offenders** posing an unacceptable risk of committing a **serious violence offence**.	High risk **violent offenders** posing an unacceptable risk of committing a future **serious sex offence**.

Strict distinction may create gaps in the scheme

The complexity of this cohort of high risk offenders means that offenders who commit both sex and violence offences do not neatly fit within one of the two statutory categories. Many offenders are generalist offenders who have a history of general offending rather only committing one category of offence. For example, an offender's current sentence of imprisonment could be for a serious sex offence but this forms part of a pattern of violent offending with the future risk being that the offender will commit serious violent offences. The current Act is confined in such a way that these generalist offenders are not currently captured by the scheme.

Removing the legislative distinction between sex and violence would enable the continued supervision or detention of generalist offenders who posed a risk to society of a different category than the crime for which they are originally imprisoned.

Confining post sentence detention to a narrow cohort is important. Nevertheless, it is equally important to ensure that the structure of the Act does not jeopardise community safety through gaps in the scheme.

Distinction between sex offenders and violent offenders in other jurisdictions

Victoria recently reviewed its equivalent Act — the *Serious Sex Offenders (Detention and Supervision) Act* 2009 (the **Victorian Act**) — as part of the Complex Adult Victim Sex Offender Management Review Panel *Advice on the legislative and governance models under the Serious Sex Offenders (Detention and Supervision) Act 2009* (the **Harper Review**). The Review was led by former Supreme Court judge the Honourable David Harper AM. It was commissioned by the Victorian Government following the murder of 17-year-old girl by Sean Christian Price, a generalist offender with a history of both sexual and violent offences. The Harper Review recommended *combining* offence types to protect the community from those presenting the greatest likelihood of causing serious interpersonal harm.[4] The Harper Review noted that their framework's current limitations has resulted in gaps and that it should be irrelevant to categorise offences according to whether they involve sex, or violence, or both.

[4] Complex Adult Victim Sex Offender Management Review Panel, *Advice on the legislative and governance models under the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* (2015) xii
Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016 (VIC).

While the Victorian Government has agreed to all 35 recommendations made by the Harper Review, the amendments passed to date by the Victorian Parliament do not go as far as the recommendations of the Harper Review.[5] The Victorian Act still requires a link between the former offence type (ie sexual offences) and anticipated future offence type (sexual offences).[6] However the Victorian Court can now impose conditions on an ESO aimed at reducing a serious sex offender's risk of committing *violent offences* or engaging in violent conduct.[7]

In NSW similar ESO conditions can be imposed once an order has been made (see further at pages 52-53). However this does not address the core issue of the gaps in the scheme and the fact that it does not address issues posed by high risk generalist offenders. Other jurisdictions including Queensland, Western Australia and the Northern Territory have enacted post sentence detention schemes, however these schemes are confined to serious sex offenders and anticipated risk of future sex offences.

Stakeholder views

The majority of stakeholders supported removing the legislative distinction between sex offences and violence offences. The Public Defenders' Office and Rule of Law Institute noted that this proposal would remove an existing gap in the scheme. The Office of the Director of Public Prosecutions (**DPP**) noted that the proposal would achieve internal consistency between the scheme applying to high risk sex offenders and high risk violent offenders, would close gaps, and address anomalies.

The Bar Association and Legal Aid NSW were concerned that this amendment would extend the scheme to apply beyond the 'handful of high risk, hard core offenders'[8] for whom the legislation was originally intended. Further, it was submitted that there is no evidence of offenders posing an unacceptable risk of committing a future serious violence offence or serious sex offence that have not been caught by the current legislation.

However recent case examples show that offenders often have a 'generalist' history of offending, [9] as do the findings of the Harper Review. A small number of additional cases *do* exist, but informal feedback from stakeholders indicates these matters are never brought before the Court given the current legislative thresholds do not adequately cater to offenders with a history of general offending who pose an unacceptable risk to community safety.

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[5] *Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016* (VIC).
[6] Under the Victorian amendments a Court can only make an ESO or CDO where an offender is an *eligible offender* (that is, has committed a *relevant offence*) and the Court is satisfied that the offender poses an unacceptable risk of committing a further *relevant offence. Relevant offences* are defined in Schedule 1 to the Victorian Act which only lists sexual offences. That is, a *relevant offence* does not include serious violence offences; the legislation still requires a link between the former offence type and anticipated future offence type before the Court can make an ESO or CDO. The only offence 'blurring' occurs at the second stage of the process, where the Victorian Court imposes core and discretionary ESO conditions.
See s 9 and s 35 *Serious Sex Offenders (Detention and Supervision) Act 2009.*
[7] *Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016*, s 15(3), 16(1)(a), 17(1)(j)(ii), 19(1)(a).
[8] Citing NSW Parliamentary debates – NSW Legislative Assembly, 29 March 2006, Carl Scully.
[9] See for example, *State of New South Wales v McLeod* [2016] NSWSC 1052; *State of New South Wales v Mills* [2016] NSWSC 1165

The Law Society of NSW and the Aboriginal Legal Service have raised concerns that removing the legislative distinction will impact on the accuracy of the risk assessment process of future offending. The risk assessment is undertaken according to best practice standards. CSNSW engage in a 'convergent risk assessment' approach whereby a range of risk assessment tools are used including dynamic risk assessment tools or Structured Professional Judgement in conjunction with actuarial tools. Ideally the risk ratings of all of the tools should converge, which gives weight to the initial baseline score provided by the actuarial tools.

Victims Groups including Bravehearts, Enough is Enough, the Blue Knot Foundation, the Homicide Victims' Support Group, the Survivors and Mates Support Network and the Victims of Crime Assistance League supported removing the legislative distinction between sex offences and violence offences in the Act. The Victims of Crime Assistance League noted that often offenders are convicted of violent offences and may manifest sexual perversions in custody, which may not have been identified at the time of sentencing for the original offence. The Homicide Victims Support Group similarly noted that it has seen offenders imprisoned for serious violence offences who had shown signs of sexual deviancy but were not deemed to pose an unacceptable risk of committing further violent offences, and were therefore not eligible for an ESO or CDO, despite later committing serious sex offences.

Conclusion

There are a small number of offenders with histories of serious sexual and violent offending who pose a risk of further offending that are not currently covered by the scheme. This is because the current Act does provide for generalist offenders but instead creates a distinction between sex and violence which runs throughout each aspect of the decision making process under the Act. Under the proposal, generalist offenders would be covered by the Act but would still need to meet the requisite thresholds of having been sentenced and imprisoned for a serious sex offence or serious violence offence and be at risk of committing a future serious sex offence or serious violence offence.

Recommendation 1: Eligibility of offenders for post-sentence supervision or detention should be determined by:

- **conviction and imprisonment for an eligible offence (which may be a serious sex offence or serious violence offence)**
- **anticipated risk of committing a future eligible offence (which may be a serious sex offence or serious violence offence).**

Application of community based sentences to scheme is unclear

It is unclear whether the Supreme Court could make an order in relation to a sex offender where that offender previously received a suspended sentence for a serious sex offence, and then was serving a prison term for a non-serious sex offence (ie an offence 'of a sexual nature'). An application for an ESO may be made only in respect of a *supervised sex*

offender or *supervised violent offender*.[10] To come within these definitions, an offender must:

- **First threshold —** meet the definition of *sex offender* or *violent offender*
    - *sex offender* is defined[11] as a person over the age of 18 years who has at any time been *sentenced to imprisonment* following his or her conviction of a serious sex offence.
    - *violent offender* means a person over the age of 18 years who has at any time been *sentenced to imprisonment* following his or her conviction for a serious violence offence.
- **Second threshold —** be serving a current *sentence of imprisonment* for a particular offence[12] or be subject to an ESO/CDO. In the case of a sex offender, the offence for which they are currently imprisoned may be an offence 'of a sexual nature.'

The Act does not define 'sentenced to imprisonment' for the purposes of the first threshold. As a result, it is unclear whether an offender who has been sentenced to a suspended sentence, home detention or an Intensive Correction Order (**ICO**) for a serious sex offence who is currently imprisoned for an offence of a sexual nature would come within the scope of the Act.

The provisions setting out the second threshold state that a person is taken to be serving a *sentence of imprisonment* 'whether the sentence is being served by way of full-time detention, [an ICO] or home detention and whether the offender is in custody or on parole.'[13] These provisions could be interpreted as suggesting that a sentence of imprisonment does *not* include a suspended sentence for the purposes of the second threshold.

The current ambiguity in the Act means that the Court may be able to make an order in circumstances where an offender had previously received a suspended sentence as a teenager for a serious sex offence, and then was serving a prison term for an offence of a sexual nature (i.e. an offence that is not a serious sex offence) as an adult.

To clarify the first threshold, the Department consulted on three potential changes to the framework:

> **Option 1 —** Explicitly including all forms of sentences of imprisonment at the first threshold: suspended sentences, home detention, ICOs, and full-time detention.[14]
>
> **Option 2 —** Explicitly including home detention, ICOs and full-time detention at the first threshold but excluding suspended sentences. This option would align the first threshold with the existing second threshold without broadening the scheme as far as if suspended sentences were included.

[10] *Crimes (High Risk Offenders Act) 2006* (NSW) s 5I.
[11] *Crimes (High Risk Offenders Act) 2006* (NSW) s 4.
[12] Set out in *Crimes (High Risk Offenders Act) 2006* (NSW) s 5I(2)(a) and s 5J(2)(a).
[13] *Crimes (High Risk Offenders Act) 2006* (NSW) s 5I(3) and s 5J(3).
[14] Some offences are excluded from sentences of home detention or Intensive Correction Orders. This amendment would therefore only apply to the extent that the relevant orders applied to the original offence.

Option 3 — Explicitly excluding home detention, ICOs and suspended sentences at the first threshold and confining the first threshold to sentences of full-time detention. Any offender who was currently serving a sentence of full-time detention for a serious sex or violence offence would still meet both thresholds. However, sex offenders serving the term of imprisonment in the community, would only come within the scheme if they had, some point, been sentenced to full-time detention for a serious sex offence.

A further option was to amend the second threshold, either by amending the Act to:

- confirm that suspended sentences are not included, or
- add suspended sentences to the list of sentences that amount to a current sentence of imprisonment.

Stakeholder views

All stakeholders agreed that the Act should be amended to clarify the definition of *imprisonment*.

Legal stakeholders considered that Option 1 might disproportionately broaden the scheme by creating a low threshold for offenders to come within the Act. For example, if this change was made, an offender would come within the Act if they previously received a suspended sentence as a teenager for a serious sex offence, and then were serving a prison term for another non-serious sex offence as an adult.

Most stakeholders supported confining the definition of *imprisonment* to full-time detention and explicitly *excluding* home detention, ICOs and suspended sentences from the first threshold (i.e. Option 3). The Aboriginal Legal Service noted that breach of a suspended sentence, home detention or an ICO may result in imprisonment (hence those offenders who had breached would meet the full time custody definition of *imprisonment*).[15] Further, it was noted that home detention is not available for many serious violence and serious sexual offences[16] or for an offender who has previously been convicted of murder, attempted murder, manslaughter, sexual assault or sexual offences.[17] In this context, it was submitted that it would be unlikely that offenders who were originally intended to be brought within the ambit of the Act would be sentenced to a home detention order. The Law Society noted that there might be reasons why a suspended sentence or ICO was imposed for an earlier offence (for example, the offender could have been a young person involved in consensual sex). Legal Aid NSW supported Option 3 and further recommended that the Act should make clear that 'full time imprisonment' excludes control orders under the *Children (Criminal Proceedings) Act 1987*.[18] The Rule of Law Institute noted that Option 3 would confine the scheme to offenders who:

- had been assessed by CSNSW as presenting an unacceptable risk; and

[15] *Crimes (Sentencing Procedure Act) 1999* (NSW) s 98(3) (suspended sentences); *Crimes (Administration of Sentences) Act 1999* (NSW) s 167 (home detention orders); *R v Pogson* (2012) 82 NSWLR 60 at [100] (intensive corrections orders)
[16] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 76
[17] *Children (Criminal Proceedings) Act 1987* s 33(g)
[18] The second reading speech to the 2013 amendments noted that offences dealt with in the Children's Court are not qualifying offences, as detention by way of a control order under the *Children (Criminal Proceedings) Act* does not constitute a sentence of imprisonment for the purposes of the Act.

- had been found by a Court to warrant a full-time custodial sentence.

Enough is Enough, the Victims of Crime Assistance League, NSW Police and the Office of General Counsel recommended *including* full-time detention, home detention, ICOs and suspended sentences in the definition.

The DPP recommended including home detention, ICOs and full-time detention but excluding suspended sentences.

Conclusion

The Department considers that Option 2 strikes the appropriate balance in clarifying the Act, aligning the first threshold with the existing limits on the second threshold and ensuring the scheme is not broadened to apply beyond offenders considered by the Court to represent a high risk to the community. If an offender is serving a sentence of imprisonment by way of an ICO or home detention for a serious sex or serious violence offence, the current Act already applies. This change would clarify that the Act can also apply when the current sentence of imprisonment is for an offence of a sexual nature but the person has previously served a sentence of imprisonment by way of an ICO or home detention for an eligible (serious sex or serious violence) offence.

Recommendation 2: The Act should be amended to clarify that imprisonment excludes suspended sentences and includes full time custody, ICOs, and home detention.

Extension to offences committed as a child

Since 2013, the first threshold under the Act has applied to adult offenders who have at any time in the past been sentenced to imprisonment for serious sex or violent offences, including offences which were committed as a child.

To come within this first threshold, an offence committed as a child must have resulted in the child's conviction and imprisonment. This limits the amendments to serious offences. Significantly, an offence committed as a child does not count where it is dealt with by the Children's Court under the Children (Criminal Proceedings) Act.[19] There is no evidence that this limitation should be removed.

As noted during the 2013 bill's second reading, although the number of offenders affected by the extension of the scheme was anticipated to be low 'it is important that heinous crimes committed as a juvenile do not fall outside the scheme'.[20]

[19] *Children (Criminal Proceedings) Act 1987* (NSW) s 33
[20] NSW, *Parliamentary Debates,* NSW Legislative Council, 12 March 2013, p 9, Hon. David Clarke (Parliamentary Secretary).

Stakeholder views

The majority of stakeholders either did not consider further change was required to the application of the scheme to offences committed as a child or did not comment on this consultation question.

Both Legal Aid NSW and the Law Society recommended the Act be amended to only apply to offences committed by children aged over 16. The Aboriginal Legal Service noted that this provision disproportionately impacts Aboriginal offenders and would support further limitation of the scheme in relation to juvenile offences.

Conclusion

In the context of a scheme directed to the safety of the community and minimising anticipated risk to the community posed by small cohort of high risk offenders, the Department considers no further change is required to the framework.

Australian citizens who commit qualifying offences overseas

At present, the Act does not apply to people who arrive in Australia within 6 months of ceasing to be subject to any sentence, supervision conditions or order imposed by an overseas court. Migration restrictions do not apply to Australian citizens who commit an offence overseas and then seek to return to Australia post-sentence but non-citizen offenders seeking to enter Australia would be refused entry based on character requirements.[21] The practical effect is that Australian offenders subject to a domestic court order come within the scheme, whereas the scheme would not apply had they committed the same offence in a foreign country and then travelled to Australia.

New Zealand recently amended its parole legislation to expand the cohort of those offenders eligible for the equivalent of an ESO and CDO to include a person who:

- has arrived in New Zealand within 6 months of ceasing to be subject to any sentence, supervision conditions or order imposed on the person by an overseas court, and
- since their arrival, has been in New Zealand for less than 6 months and resides or intends to reside in New Zealand.[22]

Similarly, the *Public Safety (Public Protection Orders) Act 2014* (NZ) enables a New Zealand Court to make a public protection order in respect of a person who has arrived in New Zealand within 6 months of ceasing to be subject to any sentence, supervision conditions or order imposed on the person for a serious sexual or violent offence by an overseas court. A public protection order is the equivalent of a CDO and enables the imprisonment of very high risk individuals.

[21] *Migration Act 1958* (Cth) s 501.
[22] *Parole Act 2002* (NZ) s 107C.

The primary purpose of the NSW scheme is to ensure the safety and protection of the community. Australian citizens who committed a *serious violence offence* or *serious sex offence* overseas may pose the same level of unacceptable risk as those who committed these offences in Australia. Alternatively, it could be argued that the scheme should not extend to these offenders where they have already served their original sentence in a foreign country (particularly in countries which require a different standard of proof or where other relevant judicial processes may be less rigorous).

Imposing an ESO or CDO on an offender where the original sentence occurred overseas would give rise to challenges. For example, under the New Zealand scheme, an offender may be subject to extended supervision or continuing detention where the original offence is committed overseas and would, had it been committed in New Zealand, have come within the description of a prescribed sex or violence offence under the *Crimes Act 1961* (NZ). This necessarily requires the New Zealand Court to re-examine the original offence and align the elements of the original offence with those in the *Crimes Act 1961* (NZ). Further, it is important to note that New Zealand was prompted to extend its preventative detention framework by a shift in Australia's visa cancellation policy resulting in an increased number of individuals being deported from Australia.[23]

If a similar proposal were adopted in NSW, the Supreme Court may need to examine whether the elements of a *serious violence offence* or *serious sex offence* are met. It could be difficult to get sufficient information to do this as the original sentencing court might have considered different elements to establish the crime. A further challenge would be gathering sufficient background information on such offenders to enable an accurate assessment of the risk they pose to the community.

Stakeholder views

Stakeholder views on this proposal were mixed, with a slim majority supporting the proposal but citing logistical and practical difficulties in implementation. The DPP noted the proposal would significantly lengthen and complicate ESO and CDO applications. In particular it would be difficult:

- to ensure that the offences committed overseas correspond with the spirit of the NSW high risk offenders' scheme
- to ensure that the overseas conviction was recorded with commensurate NSW evidentiary and procedural safeguards, and
- to obtain evidence of the court records and expert evidence in relation to court procedure and evidence.

Further, applying the scheme to those who have completed their sentence of imprisonment (albeit overseas) and been released into the community would be inconsistent with the current scheme.

[23] In response to recent changes in Australia's visa cancellation policy and increased rate of deportations since June 2015: see Cabinet Social Policy Committee Proposal on Management of offenders returning to New Zealand: available at www.justice.govt.nz.

The Rule of Law Institute supported the proposal and noted that concerns over the rigour or integrity of foreign proceedings, or lack of sufficient information about the proceedings, could be dealt with by NSW courts on a case-by-case basis.

Legal Aid NSW noted that the *Child Protection (Offenders Registration) Act 2000* and *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) already applies to sex offences committed overseas. The first Act provides that registrable persons (i.e. sex offenders) must register with police and provide information. The second Act allows the Local Court to make orders restricting the conduct of registrable persons. NSW Police submitted that Child Protection Register arrangements are not a method for managing these offenders and that Child Protection Prohibition Orders are not prohibitive or restrictive enough to provide effective management of serious offenders.

Conclusion

Given the similarity of our legal systems, New Zealand would likely be one of the only countries from which NSW could consider returning offenders for the scheme. However in practice, a number of the returning offenders would be those engaging in child sex tourism from South East Asian countries. Given the significant practical and logistical challenges anticipated if this proposal were adopted, coupled with the lack of clear examples where returning overseas offenders have not come within the scheme, the Department concludes that no change should be made at this time.

2. Making an Order

This Chapter examines the process of making an order for post sentence supervision or detention including the Court's consideration of relevant threshold requirements and the use of information and reports to inform the Court's decision. The Chapter considers:

- the application of the scheme to Commonwealth and interstate offences
- the Court's consideration of community safety and whether this should be the paramount factor when making an order
- safeguards for emergency detention orders
- how the scheme should interact with parole
- the provision of information to and by the Attorney General
- disclosure of information to a defendant, and
- application timing and commencement of orders.

Application to offenders serving sentences for both Commonwealth and interstate offences

The Department identified the need for legislative clarity as to what constitutes *another offence* for the purposes of making an ESO/CDO application. The Attorney General may make an ESO/CDO application where an offender is a *supervised sex offender* or *supervised violent offender.* This is an offender who, when the order is made, is in custody or under supervision under a current ESO/CDO or while serving a sentence for:

- a serious sex offence
- a serious violence offence
- an offence of a sexual nature
- an ESO breach offence, or
- *another offence* which is being served concurrently or consecutively, or partly concurrently and partly consecutively, with one or more sentences of imprisonment referred to above.

It is unclear whether *another offence* includes certain offences committed in other jurisdictions where there is no corresponding NSW law (e.g. Commonwealth internet child pornography offences).[24] Statutes are generally restricted to activities that take place within the relevant jurisdiction unless the legislation expressly provides otherwise.[25] It is important that high risk offenders who may have contravened relevant Commonwealth offences or offences in another State or Territory come within the ambit of the Act and are not excluded based on a legislative anomaly.

[24] *Crimes (High Risk Offenders Act) 2006* (NSW) s 5(1)(c) and s 5A(3)(b) only extend the relevant definitions to offences committed in other jurisdictions where, 'if [the offences were] committed in NSW, [they] would be a serious indictable offence'.
[25] *Interpretation Act 1987* (NSW) s 12(1).

Stakeholder views

The vast majority of stakeholders either supported or did not comment on this proposal. The DPP noted that the increasing prevalence of federal offences, such as using a carriage service for the dissemination of child abuse material, highlights the need to expressly include offences from another jurisdiction in the definition.

Conclusion

The Department consider that the Act should be amended to clarify that another offence includes offences committed in other jurisdictions. The Act should be amended to clarify that an offender who is serving a relevant Commonwealth or interstate sentence concurrently or consecutively, or partly concurrently and partly consecutively, with a NSW serious sex or violence offence can be considered for an application under the Act. Clarifying the definition of *another offence* at s 5I(2)(a)(iii) and 5J(2)(a)(iii) would be consistent with the existing definitions of 'serious sex offence' and 'serious violence offence' which extend to offences committed outside NSW.

Recommendation 3: The Act should be amended to clarify that the scheme applies to offenders serving Commonwealth and/or interstate offences consecutively or concurrently, or partly concurrently and partly consecutively, with a NSW offence.

Commonwealth sex offences

The current NSW scheme potentially does not always apply to offenders serving sentences for Commonwealth sex offences only (not offenders serving sentences for both NSW and Commonwealth offences). While the NSW scheme would apply to equivalent Commonwealth offences committed elsewhere, in practice there are some differences between the NSW and Commonwealth offence provisions. In Victoria, the *Serious Sex Offenders (Detention and Supervision Act) 2009* (Vic) separately prescribes certain Commonwealth sex offences.

The NSW scheme applies to offenders serving sentences of imprisonment for serious sex offences or a broader range of offences of a sexual nature if they have committed a serious sex offence in the past. This two tiered approach means repeat sex offenders are covered by the scheme if they are serving a sentence of imprisonment for a less serious offence, if they have committed a serious sex offence in the past. In NSW, the question of whether an offence is serious or less serious for the purposes of the scheme is broadly based on whether the offence was against a child, the seriousness of the offending conduct (e.g. child sexual assault is a serious sex offence), the maximum penalty and whether the offence was committed in circumstances of aggravation.

Stakeholder views

NSW Police support the recommendation. NSW Police, the Department of Family and Community Services, Legal Aid NSW, the Law Society and the Aboriginal Legal Service noted that clarification is needed about which Commonwealth offences should be included in the NSW scheme. Legal Aid NSW and the Law Society raised concerns about the recommendation being premature. Legal Aid NSW and the Aboriginal Legal Service noted that there is a lack of clarity about what the nexus to NSW offences would be. Legal Aid NSW, the Law Society and the Aboriginal Legal Service suggested that further consultation should be conducted.

Conclusion

The Act should apply to offenders serving sentences for certain Commonwealth offences. In line with the approach under Victoria's legislation, with the nexus with the state being that the sentence is being served in NSW.

Further consultation should be undertaken on which Commonwealth sex offences the Act should apply to. The consultation should consider:

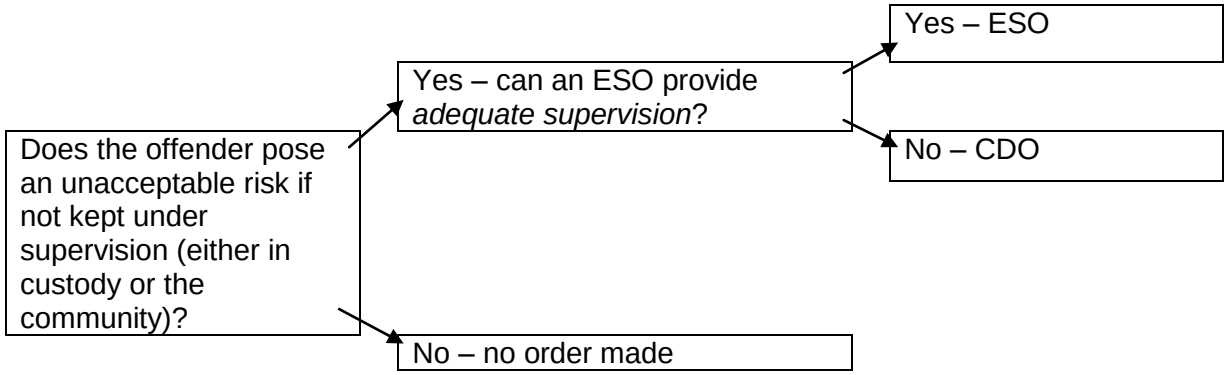
- the similarity between Commonwealth offences and NSW offences;
- the classification of Commonwealth sex offences as serious sex offences or offences of a sexual nature as compared to how similar NSW offences are classified;
- the maximum penalties for Commonwealth sex offences;
- the position taken in other jurisdictions.

Recommendation 4: The Act should apply to offenders serving sentences of imprisonment for certain Commonwealth sex offences. The Commonwealth sex offences to be included will be the subject of further consultation.

Considering 'unacceptable risk' and 'adequate supervision'

The current test

When deciding whether to make an order under the Act, the Court must follow the process set out below:



The first threshold requires the Court to be satisfied to a high degree of probability of a serious sex or violence offence being committed (that is, whether there is an unacceptable risk) in the absence of *any* supervision. Once this threshold is satisfied, the Court can impose an ESO if satisfied *adequate supervision* can be provided. If adequate supervision cannot be provided, the Court can then impose a CDO.[26] This structure ensures that a CDO is the option of last resort; the Court must consider and rule out other alternatives, such as whether any order is needed and whether an ESO would be sufficient, before it can make a CDO. The Court has held that *adequate supervision* and *unacceptable risk* are not 'anchored' together.[27] Both terms entail evaluative judgments, but serve different purposes and operate in different ways. The Court:

- first, needs to be satisfied that there is an unacceptable level of risk in the absence of *any* supervision under an ESO (s 5B and 5E), and
- secondly, needs to be satisfied that a particular ESO will provide adequate supervision (s 5D and 5G).[28]

Issues identified with the current test

The Department identified a number of issues with the current process for making an order:

- offenders who pose an unacceptable risk which cannot be managed on an ESO are being granted an ESO by the Court under the current test
- offenders cycle between ESOs and being in custody (having breached that ESO) with no change to underlying behaviour
- CSNSW is required to provide detailed information on how an 'unmanageable' offender *might* be supervised in the community, even when CSNSW does not have confidence that the proposed supervision measures will be effective to keep the community safe.

[26] See *Crimes (High Risk Offenders Act) 2006* (NSW) ss 5D(1) and 5G(1).
[27] *State of New South Wales v Donovan* [2015] NSWCA 280 at [75]-[78].
[28] Ibid at [70].

The current test has resulted in offenders being given ESOs even where the risk they pose of committing a serious sex or violence offence cannot be managed in the community. Currently, the Court is required to make a finding of unacceptable risk and *then* determine whether supervision will be adequate. As these two considerations are not 'anchored together' in such a way that an ESO could *only* be viewed as providing 'adequate supervision' where it eliminated or substantially reduced the risk of serious offending,[29] the requirement for the Court to consider whether supervision will do anything to address and minimise offender risk or bring it within acceptable levels is limited. This leads to the situation where an offender posing an unacceptable risk of future serious offending will be released to supervision, because the Court is satisfied that the supervision will be *adequate*. *Adequacy* is justified on its own terms.[30] In some instances the Court has expressed the view that although the risk of reoffending is 'high', the nature of the supervision being provided will allow the State to 'intervene' in a high risk scenario before a serious offence would be committed. That is, the current framework enables breach of an order to be considered an effective form of intervention.

This issue with the current test has led to offenders being placed on ESOs only to repeatedly breach their orders because they present too high a risk to be managed in the community. In most cases of breaches of an ESO, offenders will receive short sentences of imprisonment which precludes them from having any form of treatment while incarcerated. This leads to a cycle in which any gains made in the reintegration of the offender are undermined – for example accommodation or employment can be lost due to a return to custody. This also means that efforts to reduce the intensity of supervision are impacted. In short, this can result in longer periods of supervision and reimprisonment.

There are some high risk offenders who present such a significant and concerning risk of committing further serious sex offences or serious violent offences that no amount of supervision can adequately protect the community under an ESO. For these offenders, a CDO would be the most appropriate order. Nevertheless, in making an application for a CDO, detailed submissions must be prepared on how that offender could, theoretically, be *adequately* supervised in the community under an ESO. This results in the Court being presented with information on how an 'unmanageable' offender *might* be supervised in the community, even when CSNSW does not have confidence that the proposed supervision measures are appropriate. Courts are, in effect, constrained to release an offender on an ESO as soon as the test for *adequate supervision* is made out, even in the knowledge that breach of the ESO conditions is likely.

The current legislative test does not require the Court to turn its mind to these complex aspects of managing and reducing risk because it is not strictly relevant to the question of the *adequacy* of supervision. What results are ESO offenders who cycle in and out of prison (when they breach their ESO) with no change to underlying behaviour.

Stakeholder views

The Department has consulted with stakeholders on various options and frameworks to address these issues. During stakeholder consultation, legal stakeholders were concerned

[29] Ibid at [75]-[78].
[30] Ibid.

about changing the current model. The NSW Bar Association, the Law Society, Legal Aid NSW, the Rule of Law Institute and the Aboriginal Legal Service considered that the current test is adequate and voiced concern about any model which would:

- not have further detention under a CDO as an option of last resort
- result in more offenders being subject to an ESO or CDO
- result in more offenders being given a CDO rather than an ESO, and
- rely on rehabilitative programs being available in the community before being granted an ESO.

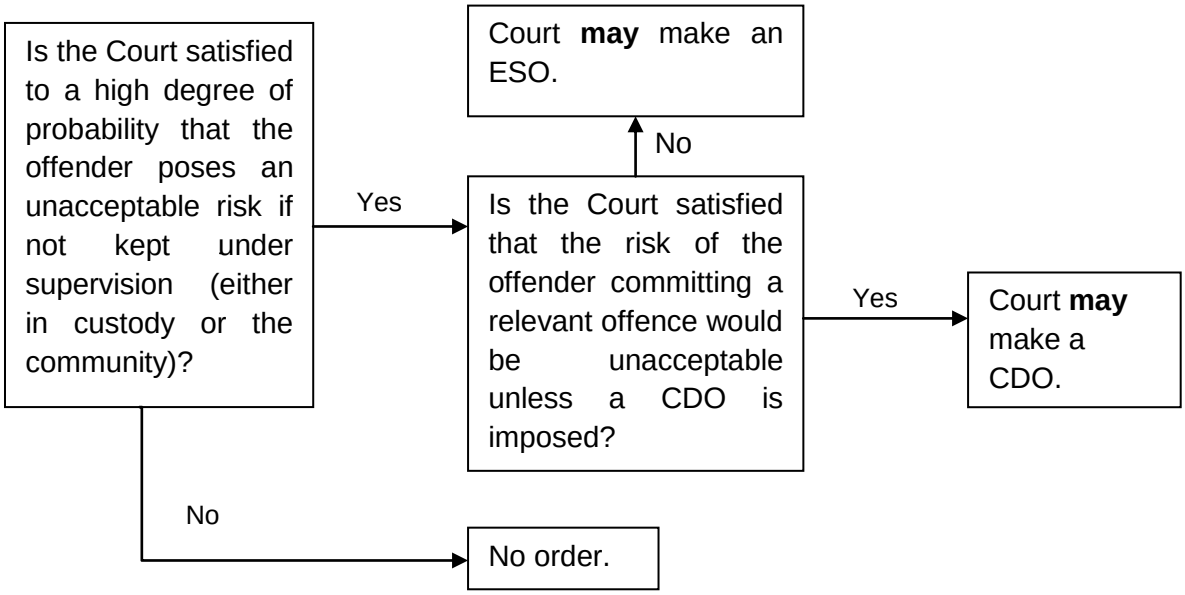
By contrast, the NSW Sentencing Council and the Supreme Court had no objection to changing the test to address the issues identified.

The Victims of Crime Assistance League recommended that provision should be made to accommodate the *practicality* of an ESO. It submitted that often the needs of a prisoner are better served in full time custody as opposed to under an ESO, which may require disproportionate costs to ensure adequate supervision.

Conclusion

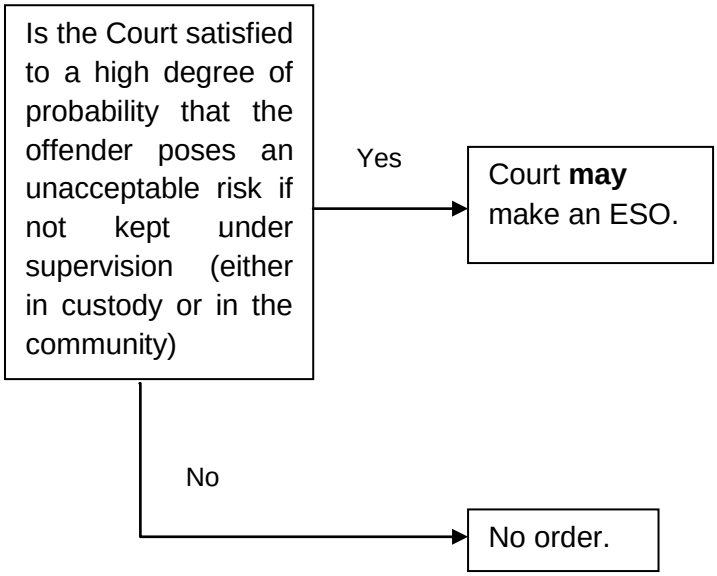
The Department proposes new tests to address community safety concerns, while still ensuring CDOs are an option of last resort. The model removes the concept of *adequate* supervision of offenders and ensures that the Court's consideration is focussed on the unacceptable risk. The tests are similar to those currently in place in Victoria which were recently reviewed and endorsed by the Harper review.[31]

State applies for a CDO



[31] *Serious Sex Offenders (Detention And Supervision) Act 2009* s 9, s 35 and s 36.

State applies for an ESO



Under the proposed model, the Court may make an order where satisfied to a high degree of probability that the risk of the offender committing a serious sex or violence offence would be unacceptable unless kept under supervision (either in custody or in the community). This would retain the first limb of the current test and ensure that orders under the Act are confined to the same overall pool of offenders.

If the State applied for an ESO, the Court would be able to make an ESO if satisfied to a high degree of probability that the offender posed an unacceptable risk if not kept under supervision. To impose a CDO, the Court would need to be satisfied that the risk of an offender committing a relevant offence would be unacceptable unless a CDO is made. If it were not satisfied of this second limb, it would be open to the Court to make an ESO or to make no order. In practice this would mean that in deciding which order would be most appropriate to make, the State would need to satisfy the Court that a CDO is necessary to manage the unacceptable risk that the offender poses.

The Court would be required to have regard to the considerations in s 9 and s 17 of the Act that it is currently required to take into account. These considerations include community safety, risk assessment reports, CSNSW reports, the offender's criminal history, and the sentencing remarks of the original sentencing court. In addition to the existing considerations in s 9 and s 17, the reframed CDO test would require the Court to consider two additional factors. These would be:

- whether the offender is likely to comply with an ESO, and
- options in the community or in custody that would help reduce the offender's risk of reoffending over time e.g. ESO conditions tailored to target the underlying causes of reoffending or programs in custody.

Further, when considering whether to make a CDO, the Act would state that the Court must not consider a breach of an ESO condition as an effective form of intervention that indicates the risk would not be unacceptable under an ESO. This is intended to make it clear that relying on the breach framework is not an effective form of intervention to manage high risk offenders.

The newly framed test is intended to focus on whether an offender can be safely managed in the community and whether they are likely to breach their ESO. In our view, the proposal has the following features and safeguards:

- **It would not increase the number of offenders subject to the scheme**. As with the current test, only offenders who pose an unacceptable risk of committing a serious sex or serious violence offence will be considered for the scheme. The first limb for the current model and the first limb for the proposed model are the same. The cohort of offenders who will be subject to the scheme is therefore the same as under the current model.
- **It would retain further detention under a CDO as an option of last resort**. The Court would only be able to impose a CDO if satisfied that the risk of the offender committing a relevant offence would be unacceptable unless a CDO is imposed. This necessarily requires the Court to impose a CDO only where satisfied that such an order is necessary to address the unacceptable risk.
- **It would be likely to result in somewhat more offenders being given a CDO than currently.** This is because there are a small group of offenders who are currently subject to ESOs who are unable to be safely managed in the community and who repeatedly breach their ESO. It is anticipated that these offenders would receive a CDO under the new test. For most offenders, this will be so they can be stabilised through programs in custody on a CDO.

The reframed second limb of the NSW test for an ESO and CDO is based on the second limb of the test used under the Victorian framework for post sentence supervision and detention. Significantly, the equivalent Victorian post-sentence detention legislation was recently reviewed as part of the Harper Review. The Harper Review recommended retaining the unacceptable risk test used under the Victorian framework.[32] The Victorian Government has agreed to all 35 recommendations made by the Harper Review. The test has also been considered in Victorian Court of Appeal decisions.[33]

Recommendation 6 provides guidance to the Court to assist in its determination of what order to impose. In practice, the Court considers whether the offender is likely to comply with the conditions of an ESO and the available options in the community or in custody to reduce the risk of reoffending over time. These factors are generally considered under the broad requirement for it to consider 'any other matter it considers relevant'.[34] Consideration of these issues is appropriate in the context of determining which order to impose. Recommendation 6 would update the non-exhaustive list of considerations to reflect these considerations. This includes a requirement for the Court to consider whether there are options available in custody or in the community to reduce the risk of reoffending over time. This is framed to enable the Court to consider a range of options (e.g. proximity to family, ensuring the offender's links to community are retained, rehabilitative programs, or other options available in custody or in the community). Further, when considering a CDO, the Court is not to consider breach of an order as an effective form of intervention that indicates the risk would not be unacceptable under an ESO.

[32] Recommendation 6
[33] For example, the Victorian Supreme Court case of *Director of Public Prosecutions v CGM* [2014] VSC 485 and in the Victorian Court of Appeal case of *A S v The Secretary to the Department of Justice* [2014] VSCA 83.
[34] *Crimes (High Risk Offenders Act) 2006* (NSW) s 9(3) and s 17(4)

In parallel with the proposed tests, the Department is implementing strategies to identify potential high risk offenders earlier into their sentence to allow intensive case management including targeted intervention. This earlier identification and targeted management should enable these offenders to undertake programs and move to progressively lower classifications in a structured way during their sentence of imprisonment as their risk profile decreases. In parallel with these administrative changes, a reframed ESO/CDO model could better focus the framework on addressing underlying behaviour and managing risk rather than adequate supervision.

Recommendation 5: (a) The test for making an order should remain that the offender poses an unacceptable risk of committing a serious sex or violent offence if not kept under supervision (either in custody or in the community).
(b) The test for deciding whether to make a CDO should be changed so that the Court may impose a CDO if satisfied that the risk of the offender committing a serious sex or violence offence would be unacceptable unless a CDO is imposed.

Recommendation 6: The Act should be amended to provide that the Court should consider (as part of the existing non-exhaustive list):

- **whether the offender is likely to comply with the conditions of an ESO, and**
- **available options in the community or in custody to reduce the risk of reoffending over time.**

The Act should state that, when considering a CDO, the Court should not consider breach of an order as an effective form of intervention that indicates the risk would be acceptable.

Community safety as the paramount consideration when making an order

Victoria recently amended its Act to expressly state that all decisions relating to serious sex offenders must give paramount consideration to the safety and protection of the community.[35]

It could be argued that the NSW legislation already adequately reflects this. Ensuring the safety and protection of the community is the primary object of the Act.[36] In determining whether or not to make an ESO or CDO, the Supreme Court must have regard to a number of matters, including, as the first listed factor, the safety of the community.

[35] *Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016* (which received Royal Assent on 31 May 2016) amends the *Serious Sex Offenders (Detention and Supervision) Act 2009.*
[36] As set out in *Crimes (High Risk Offenders Act) 2006* (NSW) s 3.

Also, the Court of Appeal recently affirmed that *unacceptable risk* is a gateway or threshold requirement to the Court's power to make an order.[37] Any further factors (such as the offender's liberty) are considered only once this threshold requirement is met. *Unacceptable risk* is primarily concerned with the likelihood of an offender committing a serious sex or violence offence. In other words, in considering 'unacceptable risk', the Court is primarily focused on community safety.

Stakeholder views

Victims' groups (including the Victims of Crime Assistance League, Enough is Enough and Survivors and Mates Support Network) supported *community safety* being the Court's paramount consideration in determining whether or not to make an order. The Homicide Victims Support Group supported the proposal only if victim protection would be specifically included as part of such consideration. The Department considers that the Court would turn its mind to victim protection in its consideration of community safety as a whole.

Legal stakeholders' overarching view was that *community safety* is a consideration already sufficiently referenced in the legislation. The NSW Bar Association, Public Defenders, the Law Society, Legal Aid NSW and the Aboriginal Legal Service submitted that the commitment to community safety is reflected through its inclusion as the primary object of the Act and through the focus of community safety in determining whether an offender poses an unacceptable risk. These stakeholders submitted that the emphasis on community safety is 'clear and plain on the face of the legislation' and noted that courts already give primacy to the safety and the protection of the community.[38]

Conclusion

The Department concludes that an amendment requiring the Court to consider community safety as the paramount consideration in determining whether to make an ESO or CDO would reflect the current position and codify that this is the primary focus of all decisions under the Act. It would not change the current court process in determining whether, and what kind of, order to impose.

Recommendation 7: The Act should be amended to clarify that community safety is the paramount consideration for the Court in making an ESO or CDO.

Safeguards for emergency orders

The Rule of Law Institute and the Aboriginal Legal Service suggested further safeguards be incorporated into the process of obtaining emergency orders.

[37] *Lynn v State of NSW* [2016] NSWCA 57.
[38] See Legal Aid NSW submission which references McCallum J in *State of NSW v Donovan* [2015] NSWSC 125 4 at [128]; *State of NSW v Kamm* [2016] NSWSC 1 at [22]

The State can apply for an emergency detention order where the offender is subject to an ESO or interim supervision order and, because of altered circumstances, cannot be provided with adequate supervision under the existing order. An amendment introduced in 2014 expanded the ability of NSW Attorney General to make *ex parte* applications for emergency detention orders.[39] As at October 2016, no emergency detention orders have been made.

Situations in which the State might apply for an emergency order might include where an offender has breached their ESO and poses a significant risk to the community. The Act contains safeguards about using this power, including requiring:

- robust supporting documentation, and
- the order not to have effect for longer than is reasonably necessary to enable action to be taken to ensure the offender is provided with adequate supervision (with a maximum of 120 hours).[40]

The Rule of Law Institute and the Aboriginal Legal Service submitted that a Public Interest Monitor be established who could appear at emergency *ex parte* hearings. The Monitor would test the content and sufficiency of information in applications and promote accountability and transparency in the process.

The role of Public Interest Monitors in other jurisdictions (although not in the post-sentence detention context) is to test the cogency of cases made in support of applications (e.g. for a covert search warrant), to cross-examine applicants (e.g. law enforcement bodies) and to make submissions.[41] Introducing a similar role under the Act would provide a further safeguard and protective mechanism to mitigate risk in these proceedings. No Public Interest Monitor role exists in the parole context in NSW, where breach of an order can result in revocation of the parole and the offender's return to custody. However, it could be argued that the unique nature of the post-sentence detention regime might justify additional safeguards compared to parole decision making.

On the other hand, the current scheme already incorporates a number of procedural safeguards for offenders. For example, the State must present evidence for and against an emergency detention order because of the absence of the respondent, the rules of evidence apply and the matter is heard and determined by the Supreme Court, rather than by an executive body. Further, the proposal would also have resource implications.

The orders are often made *ex parte* because of the urgency involved. The State, both as a model litigant and in accordance with the normal duties of legal practitioners to the Court, has a heavy onus of frankness and candour. Importantly, the period of detention in these orders is relatively short, and, unless the matter is brought *inter partes* (i.e. both parties appear), emergency detention orders lapse after a maximum of five days.

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[39] *Crimes (High Risk Offenders) Amendment Act 2014*. An *ex parte* matter is an exception to the basic rule of court procedure that both parties must be present at any argument before a judge. It enables applications to be made without the presence of the offender.

[40] *Crimes (High Risk Offenders Act) 2006* (NSW) s 18CD

[41] *Police Powers and Responsibilities Act 2000* (QLD); *Public Interest Monitor Act 2011* (VIC).

Stakeholder views

Most stakeholders supported including additional safeguards in relation to the use of emergency detention orders. Strong support was received for amending the legislation to require immediate notification to Legal Aid NSW where an emergency detention order application has been filed or is likely to be filed.[42] Legal Aid NSW noted that this would have resource implications and would require additional funding.

The Victims of Crime Assistance League submitted that the current safeguards in the scheme are sufficient.

The Rule of Law Institute and Aboriginal Legal Service reiterated their support for a Public Interest Monitor. The Institute suggested that resource implications for this role would be minimal. The Public Defenders Office noted that there would unlikely be any overlap between this proposed role and the role they perform under the *Public Defenders Act 1995*. The Bar Association noted that any requirement to notify a Public Interest Monitor should not be at the expense of a duty to notify Legal Aid NSW to attempt to arrange legal representation for the offender.

Conclusion

The Department considers that requiring immediate notification to Legal Aid NSW where an emergency detention order application has been filed, or is likely to be filed, is an appropriate safeguard. The Department notes that these applications are, by their nature, made in emergency circumstances. Therefore while it is recommended that Legal Aid NSW be notified, urgent timeframes may mean that the matter is still heard by the Court *ex parte.*

To date no emergency detention orders have been made. To the extent there was a significant increase in emergency detention orders, this would have resourcing implications for Legal Aid NSW. In the context of there being no emergency detention orders to date, it is difficult to justify additional resources for a public interest monitor and support staff; particularly where State applicants are already under model litigant obligations to act with complete propriety, fairly and in accordance with the highest professional standards. That said, it is appropriate that, even in the context of urgent applications, reasonable effort is made to ensure an offender is represented. In this context, Legal Aid NSW should be alerted when an emergency detention application is filed or is likely to be filed and appropriate procedures should be in place to manage where this occurs out of hours.

Recommendation 8: The Act should be amended to require immediate notification of Legal Aid NSW when an emergency detention application is filed.

[42] Submissions from Law Society, Public Defenders Office and Legal Aid NSW

Interaction with parole

Under the current scheme there is only a limited statutory relationship between parole decision making and the processes for consideration of an ESO or CDO.[43] This may result in the NSW State Parole Authority (**SPA**) being unaware of an intention to make an ESO/CDO application despite the fact that such a decision would be relevant to a SPA decision about parole. This leads to complications where an offender who is seeking parole may, due to their criminal history, ultimately be the subject of an ESO or CDO application.

SPA must not make a parole order unless satisfied, on the balance of probabilities, that the release of the offender is appropriate in the public interest.[44] In determining whether the release is appropriate, SPA must have regard to criteria including the offender's criminal history and sentencing court comments.[45] It is not currently clear on the face of the legislation whether SPA can take into account the fact that an ESO/CDO application is likely, or that an application for an order has been made to the court.[46] In practice, SPA has advised that it cannot take this information into account during its deliberations.

One option would be to amend the *Crimes (Administration of Sentences) Act 1999* (**CAS Act**) to require SPA to take into consideration whether the State has signalled an intention to make a CDO application when deciding whether or not to release an offender on parole. This amendment could be implemented by including a 'person of interest' provision requiring SPA to consider whether there are any potential or pending applications under the Act against an offender.

The NSW Law Reform Commission (**LRC**) recommended in its 2015 report on *Parole* that SPA should not consider the possibility of an ESO/CDO when an application has not yet been made.[47] In the LRC's view this would remove the need for SPA to attempt to predict whether (and what type) of order might be made. The LRC did however recommend that SPA take an ESO/CDO application into account once made given this forms a very significant factor in its assessment of the risks of not granting parole.[48] There is an argument that if SPA is considering current applications on foot (i.e. where there is no guarantee that any order would be made), it should also consider anticipated applications.

A related issue is that under the Act, the State can only apply for a CDO if the offender is in custody. An offender might be paroled when the State is considering making a CDO application. The Act does not specify whether the application remains valid if the offender is paroled before the application has been determined. On one interpretation, where the SPA grants parole during this period, the CDO application would be invalidated. The more straightforward reading is that the CDO application would remain valid even if SPA grants

[43] For example, s 160A(3) of the *Crimes (Administration of Sentences Act) 1999* (NSW) provides that an offender's parole order is revoked if a CDO is made against the offender.
[44] *Crimes (Administration of Sentences) Act 1999* (NSW) s 135.
[45] *Crimes (Administration of Sentences) Act 1999* (NSW) s 135(2)
[46] Section 126(4) of the *Crimes (Administration of Sentences) Act 1999* (NSW) provides that an offender is not eligible for parole if they are subject of a CDO, an interim detention order or an emergency detention order (ie, once ordered by the Court). Once a CDO is made, s 160A(3) of the *Crimes (Administration of Sentences) Act 1999* provides that any parole order to which an offender is subject is revoked.
[47] NSW Law Reform Commission Report, *Parole*, Report 142, 5.78.
[48] NSW Law Reform Commission Report, *Parole*, Report 142, 5.80.

parole before the CDO application is determined. An option to clarify the process and ensure that an offender is not paroled only to be reimprisoned on a CDO would be to require SPA not to release an offender from custody (either by granting parole or rescinding a revocation of parole) where a CDO application is on foot.

Stakeholder views

SPA's view is that requiring it to consider actual ESO/CDO applications would avoid possible complications and potential release in circumstances where the Supreme Court is still considering an order. In the event that an application or interim ESO/CDO order is unsuccessful, the provisions of manifest injustice would enable the offender's parole consideration to be revaluated.[49]

A number of stakeholders cited concerns in requiring SPA to consider potential ESO/CDO applications. SPA held strong views on this proposal and noted that consideration of anticipated applications might lead to perceptions that the State was deliberately trying to delay an offender's release by not making a timely decision regarding an application for an ESO/CDO. The Law Society submitted that SPA's consideration of potential applications would be extremely prejudicial to any consideration of parole and opposed any proposal that would fetter SPA's discretion in granting parole. It was submitted that if SPA were required to consider a potential application (which might never eventuate into an actual application), it might have a negative impact on SPA's consideration of that offender and whether or not to grant parole. The Homicide Victims Support Group supported SPA considering actual *and* potential ESO/CDO applications.

Conclusion

It is sensible to ensure that offenders are not granted parole only to be re-incarcerated under an ESO/CDO. In line with the reasoning examined in more detail in the LRC's Report on *Parole*[50], the Department consider that it is important that offenders are not prevented from being granted parole on the basis that an application *may* be made at some unknown and undefined time in the future.

Recommendation 9: The *Crimes (Administration of Sentences) Act 1999* should be amended to require SPA to take into account that a current ESO/CDO application is on foot in determining whether to grant an offender parole.

Recommendation 10: In making a parole decision, SPA must not consider whether an ESO/CDO application *may* be made in determining whether to grant an offender parole.

[49] *Crimes (Administration Of Sentences) Regulation 2014*, Regulation 223. While an offender is generally required to wait 12 months once refused parole prior to parole reconsideration, offenders can be considered for parole prior to this 12 month period if their situation fulfils the provisions of manifest injustice. Circumstances which constitute manifest injustice include where requirements being met that were beyond the offender's control such as the availability of relevant programs, external leave, suitable accommodation, etc.

[50] NSW Law Reform Commission, *Parole* (2015) 5.48-5.89

Victims and victim impact statements

The definition of 'victim' in the Act serves two purposes. Firstly, 'victims' of an offender are sent written notice that an application for an order has been made in respect of an offender.[51] Secondly, victims are able to provide a written statement to the Supreme Court setting out their views on the proposed order, any proposed conditions on the order and any other matters prescribed in the regulations.

The definition of victim in the Act is narrower than that in the *Crimes (Administration of Sentences) Act 1999* (**CAS Act**). The Act has a two-step, rather than single, definition for determining who constitutes a victim. Section 21A(8) defines a victim as a person who is:

- recorded on the Victims Register in respect of the offender; and
- a victim of an offence committed by the offender for which the offender is currently serving, or most recently served, a sentence of imprisonment.

The phrase 'victim of an offence' is not defined in the Act. Courts have interpreted the second bullet point as confining the definition of victim to the person who is the primary victim of the offence. This has worked to exclude family representatives of victims (if the victim is dead or under any incapacity) or others who suffer harm as a result of the offence who would be able to make submissions to the State Parole Authority.

The CAS Act defines victim of a serious offender as a person whose name is recorded in the Victims Register as a victim of that offender.[52] The different definitions of victim arose in a matter under the Act in which a relative who had witnessed a victim's murder was not considered a victim under the Act, but *would* have been considered a victim under the broader definition in the CAS Act. That is, while meeting the first step of the definition under the Act, the relative was not considered a victim of the offence and therefore did not come within the legislative definition of victim under the Act.

A former victim of an offender also does not come within the definition of the Act. This results in a situation where, for example, a victim of an offence for which the offender has already served the sentence of imprisonment may want to make a victim impact statement but is not considered a victim for the purposes of the Act.

The LRC commented on the role of victims in its 2015 report on *Parole*. That report recommended requiring SPA to consider submissions made by any registered victim of the offender (i.e. any victims on the Victims' Register)[53]. The LRC noted that by notifying registered victims and inviting them to make submissions, SPA ensures that victims have a voice before a decision is made and that registered victims' concerns can be taken into account when setting parole conditions if parole is granted. Further, registered victims should be notified of a SPA decision to grant or refuse parole.

[51] *Crimes (High Risk Offenders) Act 2006* (NSW) s 21A.
[52] *Crimes (Administration of Sentences) Act 1999* (NSW) s 3.
[53] NSW Law Reform Commission, *Parole* (2015) 6.44-6.56

Stakeholder views

The majority of stakeholders supported having family representatives being victims for the purposes of the Act. It would be important to ensure that this recognition aligned with other NSW sentencing legislation.[54] Victims Services and the Homicide Victims Support Group cited cases where relatives of deceased victims or previous victims of an offender have been precluded by the Court from making a submission.

The Victims of Crime Assistance League noted often there are multiple victims, who are removed from the register once the offender has completed their original sentence, only to reoffend and be made subject to an ESO/CDO. This relates to the operation of the register itself. Under the current framework the Victims Register will not likely have details for all of an offender's other victims. The operation of the Victim's Register is outside the scope of this review.

The Homicide Victims Support Group recommended the definition of victim be further expanded to include witnesses of an offence, family members who had a relationship with either the victim or the offender or people with a personal connection to the crime. Victims Services recommended that the definition not be broadened to this degree, but rather be consistent with current sentencing legislation.

The DPP agreed that the definition of victim should be consistent across NSW legislation to avoid unnecessary frustration and confusion for victims. More broadly, the Aboriginal Legal Service recommended that the CSP Act be reframed to recognise the Aboriginal family and kinship structures. The Department considers this would broaden the definition of victim considerably, would not align with other NSW sentencing legislation and, in the context of a scheme directed to the consideration of future risk, might extend the definition too far.

Victims Services recommended removing the reference to '*registered*' victim and enabling the Court to hear oral submissions, rather than only receiving written submissions.

Legal Aid NSW and the Law Society did not support the proposal and drew the distinction between the role of victim impact statements under legislation directed at assessment of future risk and their role in sentencing proceedings and submissions about parole. It was submitted as appropriate in this context for the Act to have a narrower definition of victim.

Conclusion

The high risk offender legislation is a process very separate from sentencing. The scheme is directed to community safety and the assessment of risk rather than the sentence to be imposed by the court. Recommendations similar to that made by the LRC in its *Parole* report could be applied in the context of high risk offenders. That is, all registered victims should be made aware whether an offender will be released into the community on an ESO and victims should be able to make both written and oral submissions. The Department considers that the legislation should not constrain the form of statement which can be

[54] The *Crimes (Administration of Sentences) Act 1999* (NSW) s 256(5)(b) restricts the circumstances within which a family representative can be considered a *victim*.

provided.

The Department is of the view that family representatives (where the victim is dead or under any incapacity) should be able to give victim impact statements; this would include persons who suffer actual physical bodily harm, mental illness or nervous shock, or whose property is deliberately taken, destroyed or damaged, as a direct result of the offender's offence.

Recommendation 11: The Act should be amended to define *victim* as a person who is recorded on the Victims Register in respect of the offender. This would enable a broader range of victims (including a family representative where the victim of the crime is deceased) to provide victim impact statements.

Recommendation 12: The Act should be amended to enable victims to provide statements in written form or direct to the court.

Recommendation 13: To the extent possible, all registered victims of an offender should be advised when an offender is subject to an ESO/CDO application.

Provision of information to and by the Attorney General

The Act enables the Attorney General to order a person (or request a Court) to provide any documents, reports or other information that relates to the behaviour, or physical or mental condition, of an offender. The penalty for a person's failure to comply with this requirement is 100 penalty units or imprisonment for two years, or both.[55]

Some stakeholders have raised concerns that the Act does not give the Attorney General sufficient powers to collect information for the purposes of making an application nor provide sufficient guidance regarding the use of that information.

Extending section 25 to expressly apply to financial information

Section 25 of the Act empowers the Attorney to require information that relates to the behaviour, or physical or mental condition, of any offender. The provision currently does not expressly refer to financial information and may be too narrowly framed to cover this material. There may be situations in which an offender's financial information (such as bank statements, etc) would inform the Court's consideration of whether to make an order. For example, a serious sex offender's financial information might support a submission that the offender had sought to procure child pornography material. Similarly, a serious violent offender's financial information might indicate attempts to purchase prohibited weapons.

[55] *Crimes (High Risk Offenders) Act 2006* (NSW) s 25

Stakeholder views

Most stakeholders did not comment on this proposal, with a small majority being in favour of expressly referring to the provision of financial information. The Victims of Crime Assistance League submitted that the amendment would enable the Court to determine the capacity of an offender to comply with an ESO and capacity to comply with any geographical restrictions. Legal Aid NSW suggested that financial information may already come within section 25, being information relating to an offender's behaviour. If the current provision did not extend to financial information, Legal Aid NSW submitted that material should be sought on a case by case basis. For example, it could be obtained through other avenues under the normal rules of civil procedure or on warrant at the request of investigating police, should they suspect a fresh offence has been committed. The Bar Association submitted that there was no compelling argument in favour of expanding the current provision.

Conclusion

There are situations in which the provision of financial information will better inform the Attorney General's decision whether to make an application, what type of order to seek and if the Court grants that order, what conditions should attach to an ESO.

Recommendation 14: The Act should be amended to clarify that the Attorney General can order a person to provide financial information.

Enabling section 25 orders to apply extraterritorially

Section 25 is currently limited in application to NSW given statutes are generally restricted to activities that take place within the relevant jurisdiction.[56] This creates practical difficulties where documents, reports or information relating to the offender are interstate. It would be possible to extend the provision to enable section 25 orders to apply in other jurisdictions. This would allow the Attorney General to obtain information about an offender's time in custody interstate or offences committed in another jurisdiction. For example, the Attorney General might seek information about an offender's time in custody interstate or offences committed in another Australian jurisdiction.

Stakeholder views

All stakeholders either supported or did not comment on this proposal. The Bar Association had no objection to the proposal and noted that in practice, case law has shown that information held in other jurisdictions has been obtained.[57]

[56] *Acts Interpretation Act 1901* (Cth) s 21(1); *Interpretation Act 1987* (NSW) s 12(1).
[57] *State of NSW v Brookes* [2008] NSWSC 150

Conclusion

A legislative amendment would clarify that the Attorney General may obtain information held in other jurisdictions.

Recommendation 15: The Act should be amended to enable the Attorney General to be able to request a person in other Australian jurisdictions to provide information in relation to the offender.

Expressly allowing disclosure of reports

Section 7, 15 and 25 material cannot currently be used for purposes outside that contemplated by the provision. The Act currently does not explicitly enable the use of other reports prepared by court appointed expert psychiatrists and psychologists to inform an application for separate purposes.[58] The Department have explored whether in the context of a scheme concerning high risk offenders that takes place in the public interest, it should be possible to use and communicate material or information mandatorily reported more widely. For example, the Act could be amended to enable disclosure of material obtained under sections 7, 15 and 25 to third party agencies providing services to the offender, to other government agencies (such as Justice Health) to provide assessment and treatment to the offender and to private individuals for the purpose of providing the offender assessment and treatment. There are limits on disclosure of health and privacy information by Government agencies that would still apply.

The common law view on the use of reports generated under section 25 or expert reports is unclear. The High Court of Australia has held that any information collected under statutory powers is held as confidential and may only be used or disclosed in accordance with express or implied statutory authority.[59] That is, it would only be possible to use this material for other purposes if the provision is expressly amended to enable such use. This decision should be contrasted with two 2015 decisions in which the Supreme Court held that the State does not require the leave of the Supreme Court to disclose reports that were generated in high risk offender proceedings or to use the reports in separate proceedings.[60] The position on the use of these reports needs to be clarified in the legislation. Sections 7, 15 and 25 could be amended to note that despite the Act or any other law, information

[58] *Crimes (High Risk Offenders) Act 2006* (NSW) s 7 and s 15

[59] In *Johns v Australian Security Commission* a majority of the High Court (Brennan, Dawson, Gaudron and McHugh JJ; Toohey J dissenting) held that a statute conferring a power to obtain information compulsorily, expressly or impliedly limits the purposes for which the information obtained can be used or disclosed. Information obtained in the exercise of a statutory power must therefore be treated as subject to a statutory duty of confidentiality, except to the extent that the statute otherwise allows. Similarly in *Hearne v Street* (2008) 235 CLR 125 it was held that restrictions on the use of a document or information compulsorily disclosed to a party to litigation for the purpose of the proceedings is subject to a restriction confining its use and disclosure to the same purpose for which the document or information was disclosed (at [102] as per Hayne, Heydon and Crennan JJ; Gleeson CJ).

[60] *State of New South Wales v McCarthy* [2015] NSWSC 1780 (followed by his Honour in *State of New South Wales v Andrew Robert Manners*).

obtained under these provisions could be further communicated or disclosed to third parties.

Stakeholder views

The Bar Association, Law Society and Legal Aid NSW opposed the disclosure of information to third parties. In particular, it was submitted that information collected under section 25 powers is highly confidential and should only be used or disclosed in accordance with express or implied statutory authority. NSW Health noted that the Justice Health and Forensic Mental Health Network would welcome being provided s 25 material that could be utilised for the purpose of clinical and risk assessment of clients.

Conclusion

The Department considers that the provision of Risk Assessment Reports and court appointed expert reports to other relevant persons is important for the proper assessment of risk, development of risk management strategies and the implementation of programs aimed to enhance the offender's prospects of rehabilitation. This helps to ensure that those assessing and managing an offender have expert guidance on an offender's behaviour and risk.

While disclosure of reports produced under sections 7 and 15 should be restricted, it is prudent to ensure that those managing an offender are aware of the risk that they pose so that management plans appropriately cater to the offender's needs. The use of reports produced under sections 7 and 15 by people who are involved in the supervision, treatment or assessment of offenders will also improve the delivery and content of rehabilitation programs provided to offenders. The expert reports should be available to those involved in the supervision, treatment or assessment of the offender prior to the final hearing (and after the hearing) and should also be available to those involved in dealing with breaches of orders. Further disclosure of such materials should be prohibited.

It is not proposed to amend the Act to permit the disclosure of section 25 material. The powers at section 25 for the Attorney General to request information are broader than those that apply to sections 7 and 15 which are subject to Supreme Court orders. It is appropriate in these circumstances that further disclosure of information be confined to material produced under sections 7 and 15.

Recommendation 16: The Act should be amended to permit the disclosure of reports prepared under section 7 and section 15 to those who are involved in the supervision, treatment or assessment of offenders and should prohibit secondary disclosure.

Use of reports for other proceedings

The Act provides no guidance as to how reports obtained for an application (including reports prepared by qualified psychiatrists, psychologists or medical practitioners) can be used outside proceedings under the Act. Further, there is no legislative guidance regarding the use of reports (such as risk assessment reports, court appointed experts' reports or risk management reports) in the course of proceedings, but prior to the matter proceeding to final hearing.

Applications for an ESO or CDO are supported by reports that assess the likelihood of the offender committing a further offence.[61] These reports often include expert guidance as to the current state of the offender and treatment and management programs from which the offender would benefit. For example, the Attorney General may request a person to provide any document, report or other information that relates to the behaviour or physical or mental condition of any offender.[62] Similarly, the Court may request relevant experts to provide psychiatric or psychological reports on the offender.[63]

The Act is silent on whether reports can be used for any purpose other than proceedings arising under the scheme (for example, it is not clear whether experts' reports can be provided to the offender's treating psychiatrist).

The common law view on the use of expert reports or information provided further to section 25 in separate proceedings is unclear. On one view, there are restrictions on the use of a document or information compulsorily disclosed to a party to litigation for the purpose of proceedings to the same purpose for which the document or information was disclosed.[64] Nevertheless, recent decisions of the Supreme Court indicate that the State does not require the leave of the Supreme Court to disclose reports that were generated in high risk offender proceedings or to use the reports in separate proceedings.[65]

The use of reports was considered by the Supreme Court in *State of New South Wales v McCarthy*[66] in which the Court examined whether reports prepared by court appointed experts under the Act could be used in sentencing proceedings before a separate court. The Supreme Court found that the State was under no obligation to refrain from disclosing or using the reports in other proceedings. There were certain qualifying factors in making this finding:

- the reports would greatly assist in providing expert opinion to the separate court about the progression and development of the defendant's mental state, with respect to offending
- the reports were not proposed to be released publicly but only to a forensic medical expert and only for the purpose of another proceeding

[61] See *Crimes (High Risk Offenders) Act 2006* (NSW) s 7(4) and s 14(3).
[62] See *Crimes (High Risk Offenders) Act 2006* (NSW) s 25
[63] See *Crimes (High Risk Offenders) Act 2006* (NSW) s 7 and s 15
[64] *Hearne v Street (2008) 235 CLR 125*
[65] *State of New South Wales v McCarthy* [2015] NSWSC 1780 (followed by his Honour in *State of New South Wales v Andrew Robert Manners*).
[66] [2015] NSWSC 1780.

- the proceeding for which the reports would be used were closely related to the proceedings for which the reports were first produced, and
- there was a very strong public interest, involving protection of the community, in releasing the reports for this purpose. The Court noted that Brennan J recognised public interest as a factor which may be important in deciding whether the prohibition on collateral use should be relaxed in *Esso Australia Resources Ltd v Plowman*.[67]

This reasoning was extended to include risk assessment reports[68] in the unreported decision of *State of NSW v Manners*[69] in which the Court held that risk assessment reports could be used in subsequent criminal proceedings.

Stakeholder views

The Bar Association, Law Society and Legal Aid NSW opposed the use of reports in separate proceedings. These reports may contain sensitive information (including where offenders have disclosed sexual abuse as victims themselves to other offenders). It was submitted that the abrogation of long-standing rights to privacy, confidentiality of communications with medical professionals and the right to silence justifies strict limits around the use of the information.

In addition, section 25 information is obtained under compulsion and it was submitted that it would be prejudicial if used in unrelated proceedings. Legal Aid NSW recommended that amendments *confine* the use of section 25 material and prevent it being disclosed for collateral purposes, including those at issue in *State of NSW v McCarthy*.

Conclusion

There are compelling arguments why use of reports would assist forensic medical experts in separate proceedings. It would enable assessment of patterns of behaviour, progression of offending and recommended management. It could be argued that the use of these reports has been sufficiently addressed and confined through case law. During the stakeholder consultation process, it was recommended that while legislative clarity is required, the permissible use of this information should be closely defined.

Amendments would provide statutory clarity to the circumstances in which section 7 and section 15 reports could be used for separate proceedings. These amendments could codify the Court's test in *State of NSW v McCarthy* to confine use to situations in which:

- it was in the public interest,
- the information would inform the progression and development of the defendant's mental state, with respect to offending, and
- the proceeding for which the reports would be used is closely related to the proceedings for which the reports were first produced.

[67] (1995) 183 CLR 10 at [37].

[68] Reports prepared by a qualified psychiatrist, registered psychologist or registered medical practitioner under *Crimes (High Risk Offenders) Act 2006* (NSW) s 6(3)(b) and s 14(3)(b) that assess the likelihood of the offender committing a further offence.

[69] [2015] NSWSC 241390

It is not proposed to disturb the current position with respect to s 25 information.

Recommendation 17: Circumstances in which section 7 and section 15 reports can be used in separate proceedings or for separate purposes should be narrowly defined in legislation based on the test established in *State of NSW v McCarthy*.

Disclosure of material to a defendant

The Department has identified that the disclosure provisions require a significant volume of material to be provided to a defendant. Sections 7(2) and 15(2) set out the pre-trial procedures for ESO and CDO applications respectively. These provisions require the State to disclose to an offender any documents, reports and other information relevant to the proceedings as soon as practicable after the application is made or after it becomes available.

In practice, an application often involves large volumes of documents, reports and other information which are often sourced but not relied upon at court. Informal advice is that approximately five per cent of sourced material is used. The current provisions require the entire bundle of material (even that not used at court) to be reviewed, redacted and served. Given this practical resourcing issue, during consultations it was submitted that the provision be narrowed to only that material used at court, with an option for the defendant to also request all information relevant to the proceedings.

It is a long standing tenet of the Australian justice system that a person subject to court proceedings by the State is entitled to know the case against him or her, the evidence that is to be brought in support of a case, and also whether there is any other material which may be relevant to their defence. One option consulted on was whether to prioritise the provision of the information relied on by the State for an application, with an option for the defendant to obtain all information relevant to the proceedings by request.

Stakeholder views

Certain stakeholders noted that one of the difficulties with ESO/CDO applications is the volume of material provided and this proposal might reduce the volume of material tendered by the State and enable defendants to be selective about what they select to tender.

The majority of legal stakeholders had concerns with this proposal and recommended no amendment to the Act. The Bar Association submitted that a defendant is entitled to know the case against him or her and the evidence that may be brought in support of the case. Additional information may be highly relevant to the case of a defendant even if it is not relied upon by the State. Legal Aid NSW submitted that the volume of material should not dictate rules of procedural fairness where evidence not otherwise relied upon by the State may be relevant to an offender's response. Shifting the onus to a defendant in these

circumstances is inconsistent with procedural fairness. The Aboriginal Legal Service submitted that to ensure a fair trial disclosure requirements should be equivalent to that placed on the prosecution in criminal matters. Further, delaying disclosure of relevant material until requested by the defendant would reduce the amount of time that the defendant has to comprehend large volumes of complex material and give adequate instructions on the basis of that material.

The Crown Solicitor's Office advised that under current practice, once proceedings have commenced, a letter is sent to Legal Aid NSW disclosing the existence of all documents that are relevant to the proceedings (and whether or not those documents are intended to be tendered in evidence). Offender's legal representatives are then invited to inspect all documents.

NSW Police noted that under the current framework, the DPP is required to produce material from Police prosecution files within relatively short timeframes. NSW Police recommended a centralised and proactive approach to recording information to inform an application. NSW Police further submitted that CSNSW is best placed to systematically collect information to inform an application and recommended amending the privacy provisions to facilitate the flow of information between agencies for this purpose.

Conclusion

Current arrangements strike the appropriate balance and ensure a defendant can access relevant material. Under proposed changes to CSNSW administrative practices (see page 49), a greater number of treatment reports will be available earlier in the application process. These revised CSNSW processes will address NSW Police concerns to some extent.

Proceedings commencement timeframe

The State is not permitted to commence ESO/CDO proceedings until six months before the expiration of an offender's head sentence.[70] Issues identified by stakeholders include:

- the Court is not provided sufficient time to consider an order, and
- applications occur very shortly before the expiry of an offender's head sentence.

If an offender's sentence will expire before the application is finally determined, the Court can make interim detention or supervision orders if it considers that the matters alleged would support the making of a final ESO or CDO if proved.[71]

In *State of NSW v Schmidt*, Button J made remarks that suggest a need for legislative reform to ensure judicial officers are not forced to make final orders involving a significant amount of documentary evidence '…with only days to spare before any interim order expires absolutely'.[72] Similarly in *State of NSW v Anderson* Hamill J noted:

[70] See *Crimes (High Risk Offenders) Act 2006* (NSW) s 6(2).
[71] See *Crimes (High Risk Offenders) Act 2006* (NSW) s 10A, 10B, 18A and 18B.
[72] *State of NSW v Schmidt* [2016] NSWSC 41.

'*…given the voluminous nature of the material that generally accompanies such applications, the significant impact of the application on the human rights of the offender and the pressure on the Court to list and properly determine the applications, Parliament should consider increasing the period in s 13B(3) to 12 months and should require the application to be brought at least one month before the expiration of the offender's sentence*'.[73]

An issue with this approach is that information and documents required to inform an application (such as treatment completion reports, etc) are generally only available towards the end of an offender's time in custody.

During the February 2016 consultation round, CSNSW recommended instead that interim supervision and detention orders be extended from three to six months. Under s 10C(2) and 18C(2), an interim supervision or detention order may be renewed from time to time, but not for more than three months. The Department consulted on this proposal with stakeholders during the second consultation round.

Stakeholder views

Legal stakeholders were not supportive of any proposal to extend the length of interim detention orders. It was submitted that interim orders should by definition be short; particularly given interim orders are decided on a lower threshold and rely on limited information.[74] The Aboriginal Legal Service noted that the liberty of an offender should not be sacrificed due to the Court's perceived inability to hear a matter. It was suggested that the Court's concerns could be resolved by ensuring that applications are made in a timely manner and the Court given sufficient time to consider the relevant documents. Legal Aid NSW noted that there is no time limit on the Attorney General's broad and coercive legislative power to require production of documents relating to the behaviour, or physical or mental condition of the offender.[75] That is, the state could commence the fact finding process earlier than six months prior to the end of the offender's custody or supervision. The Public Defenders Office highlighted an option identified by Hamill J in *R v Anderson* whereby applications be made between twelve months and one month prior to the expiry of an offender's sentence.[76]

The Homicide Victims Support Group submitted that the timeframe for applications be extended from six to twelve months before the expiry of an offender's sentence. An alternative would be to have applications brought no sooner than nine months and no later than three months before the conclusion of an offender's sentence. In some cases, the issues at final hearing are complex and additional time is required by the Court. To address this issue, a further option would be to allow three month interim orders up to a final hearing and then three months afterwards for the Court to consider the matter.

[73] *State of NSW v Anderson* [2015] NSWSC 1515 at [10].
[74] See submission of NSW Bar Association.
[75] *Crimes (High Risk Offenders) Act 2006* (NSW) s 25.
[76] [2015] NSWSC 1515 at [10]

Conclusion

CSNSW is refining administrative practices around the identification of offenders. Under the revised model, relevant offenders are to be identified three years prior to their non-parole period. These refined processes will address concerns to some extent.

The process of an application through preliminary and final hearing is a process that involves a significant amount of work and coordination including initial referral; preparing summons and affidavit; consulting with psychologists to determine appropriate conditions to recommend to the court; liaising with witnesses; preparing, filing, and serving affidavits; having court appointed psychologists examine and prepare reports on the offender; having the matter heard for preliminary hearing within 28 days of commencing the application; notification of witnesses and preparation of witness statements; and liaison with Justice Health, Housing and psychologists. The Court is then presented with a significant amount of information that it is required to consider to determine whether to make an order.

In this context, the Department considers that the extension of the application period to nine months before sentence experience should reduce the pressure on the court to list and properly determine matters and avoid the need to extend the permissible period of interim detention orders. Ensuring the Court has adequate time to consider the material will help to ensure that the process is fair for the offender. It is not proposed to require applications to be made no less than one month before the end of an offender's time in custody, as this would risk giving rise to situations where CDO or ESO applications are made without all appropriate information or where applications cannot be made against a high risk offenders that should be subject to CDOs or ESOs.

Recommendation 18: The timeframe for applications should be extended from six to nine months before the expiry of an offender's sentence.

Timing for commencement of orders

During initial consultation, one of the issues identified was that there is no legislative delay mechanism once orders are made. Where the Court makes an ESO it generally takes effect immediately, which means that necessary arrangements regarding accommodation and supervision need to be in place ahead of time. This poses a problem where the State has actually applied for a CDO rather than an ESO, in particular where the basis for seeking the CDO involves practical difficulties in supervision under an ESO (such as accommodation).

An alternative approach could be to adopt a provision similar to that in s 35(4) of the *Mental Health Act 2007* where the commencement of an order can be deferred for up to 14 days so appropriate post order arrangements can be made. A similar approach is found in s 138 of the CAS Act which enables a parole order to commence at the date on which the order is made or '…no later than 35 days after that date'.

Stakeholder views

The majority of stakeholders either did not comment or supported deferring orders to enable post-order arrangements to be made. Courts generally supported the proposal and recommended adopting a provision similar to that in s 35(4) of the Mental Health Act. Similarly the Rule of Law Institute noted that such a provision would enable appropriate post-order arrangements to be finalised.

Compelling arguments were made against the proposal. The Aboriginal Legal Service noted that any extra period of detention for an indigenous offender is dangerous and potentially life threatening. Citing MacKenzie J in *Attorney-General v Francis* (2005) it was noted that '*undue protraction of incarceration of the person… because the administrative procedures unduly delay such rehabilitation…is hard to convincingly justify.*'[77] It was also noted that provisional arrangements should be in place ahead of a final hearing if there is any possibility that an ESO could be ordered.

Citing *State of NSW v Donovan*,[78] the Bar Association noted that the Act already permits short interim orders to be made to facilitate accommodation arrangements to manage the transition from custody to supervision. Therefore, it was submitted that a specific deferral provision is unnecessary. Making an interim order is only available in a certain proportion of cases. For example, the State may have applied for a CDO but have been granted an ESO by the Court and already exhausted the three month time frame for an interim detention order.

Conclusion

There are circumstances where the Court may determine not to make any order, or where an interim detention order cannot be extended beyond three months. In these circumstances, the Department considers it appropriate that the Court have the ability to defer the commencement of orders, if necessary, to enable suitable post sentence detention arrangements to be made. Given this would have the effect of detaining a person beyond their sentence, this should be for a limited period and limited to one week.

Recommendation 19: Courts should be able to defer commencement of orders for up to 7 days to allow post-order arrangements to be made in circumstances where an interim detention order is not an available option.

[77] 158 A Crim R 399 at [33]
[78] [2015] NSWCA 280 at [130]

3. Management of an offender

This Chapter examines frameworks for managing offenders under the scheme. The Chapter considers:

- whether there should be core statutory ESO conditions that apply to all offenders
- whether the current list of ESO conditions in the Act needs to be amended or expanded
- options to address situations of ESO breach, and
- consistency in responses to ESO breach.

Standard ESO conditions

Section 11 of the Act sets out the conditions that the Court may apply to an ESO. The Aboriginal Legal Service raised concerns that ESO conditions are too complex (often resulting in breach). The Law Society also submitted that offenders often struggle to comply with ESO conditions that are detailed and numerous. The Law Society submitted that orders should more comprehensively accommodate the complex needs of high risk offenders to reduce technical and more substantial breaches caused by complexity and lack of clarity in order conditions.

By contrast, the area of the Department involved in recommending that applications be made suggested that offenders have a sufficient understanding of ESO obligations, and breaches by offenders are generally deliberate rather than caused by a lack of understanding. As a result of consultation between the Department and stakeholders over the past two years, ESO conditions have been simplified and standardised.

The Department considered whether statutory ESO conditions (comparable with parole conditions) could address issues regarding complexity of conditions. Core conditions could include a requirement to accept supervision (including visits by CSNSW staff), to abide by reasonable directions and to agree to a schedule of movements. This would address inconsistencies in the phrasing of conditions that, in practice, can result in difficulties in the prosecution of breaches. Victoria has introduced core conditions in its ESOs including requirements:

- not to commit a relevant sexual offence or violent offence in Victoria or elsewhere,
- not to leave Victoria except with the permission of the Adult Parole Board, and
- to obey all reasonable instructions given by a supervision officer to ensure the good order of a residential facility or the safety and welfare of offenders or staff or visitors to the facility.[79]

Stakeholder views

A small majority of stakeholders supported having core ESO conditions providing the Court retained ultimate discretion as to what conditions to impose.

[79] *Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016* (VIC)

The Bar Association, the Rule of Law Institute and Legal Aid NSW submitted that ESO conditions should be adapted to the risk needs of each particular offender. Conditions need to be sufficiently flexible to address the risks of an individual and also to be appropriately directed to the cognitive capacity of each offender. Legal Aid NSW supported measures to simplify and streamline standard orders and noted that a high number of their clients are cognitively impaired and/or have limited literacy skills.

It was noted that CSNSW has adopted a practice of presenting a standard set of conditions for each offender that are amended by the Court as required.

Conclusion

The Department consider that the current practice strikes the appropriate balance between consistency of conditions between offenders and retaining ultimate Court discretion as to which conditions are imposed on an offender.

Additional ESO conditions

During consultations, a number of stakeholders recommended the conditions that the Court can apply to an ESO be expanded. Proposals included having discretionary conditions:

- to accept supervision and comply with directions,
- to submit to search and seizure,
- to cooperate with assessment and treatment options (that is, extend s 11(d) which currently refers to participation in treatment and rehabilitation programs to include a requirement to undertake assessment and take prescribed medication),
- to disclose criminal history/fact of supervision,
- to comply with rules and or by-laws of any approved accommodation, and
- to submit to drug and alcohol testing.

Broadening the available ESO conditions would give the courts more flexibility to tailor ESOs to a particular offender, including through imposing conditions that address the causes of a particular offender's reoffending. The current conditions listed in s 11 are a non-exhaustive list that can already be tailored to a particular offender's needs.

Stakeholder views

Stakeholders supported ensuring conditions can flexibly meet offender management needs. Some stakeholders recommended broadening the legislative ESO conditions for this purpose while others suggested that no additional legislative conditions were required. In general, stakeholders recommended that the courts retain discretion in respect of conditions.

Legal Aid NSW submitted there is no need for additional conditions, particularly given there are over 16 inclusive categories of potential conditions. Legal Aid NSW noted that the

Supreme Court commonly attaches up to 60 detailed conditions on ESOs.[80] The Bar Association noted that s 11 is not exhaustive and that many of the conditions listed above are already used by CSNSW. The Aboriginal Legal Service supported maintaining flexibility in ESO conditions, but maintained its concerns regarding the availability of culturally appropriate treatment options for Aboriginal offenders and the availability of these services in remote and regional areas. That is, it would be important to ensure that conditions were sufficiently flexible to facilitate rehabilitation of offenders from remote and regional areas.

Conclusion

As the s 11 conditions form a non-exhaustive list, no change is required to current practice.

Breaches of ESOs

Breaching an ESO is an offence carrying a maximum penalty of 500 penalty units or imprisonment for 5 years, or both. The NSW Police Force submits that there has been little consistency regarding the sentences imposed by courts for the offence of breaching an ESO. NSW Police submitted that inconsistent sentencing under the scheme and giving warnings for breaches has resulted in offenders having minimal incentive to comply with ESO conditions.

Although an ESO is imposed by the Supreme Court, the sentence for a breach offence under the Act is determined by the Local Court (unless the prosecutor elects to have it heard in the District Court). Judicial Commission data indicate that of the 18 offenders sentenced for ESO breach between January 2015 and December 2015:

- Eight received prison sentences (ranging from one month to nine months). A review of these cases indicates offenders sentenced to prison for breach generally had a number of breach counts or had also committed criminal offences (drug possession, common assault, etc.).
- Five received suspended sentences. A review of these cases indicates offenders sentenced to a suspended sentence either had less than three counts of breach or a single count with other criminal offences. Two cases at the lower end of the spectrum had only one count of breach and these offenders were sentenced to suspended sentences at the lower end of the spectrum.
- Two received community service orders. A review of these cases indicates that these offenders had one count of breach with a plea of guilty (sentenced to 60 hours on a CSO) and three counts with a plea of guilty (sentenced to 100 hours on a CSO).
- Three received a s 9 bond.

The Department consulted with stakeholders on three options to reframe the current breach framework:

[80] Citing *State of NSW v Kamm* [2016] NSWSC 1 at [186]

Option 1 — mandatory sentencing for breach

In the first round of consultation, the NSW Police Force recommended introducing mandatory sentences for breach. The justification for mandatory sentences – including mandatory minimum sentences – is said to lie in consistency of sentencing, incapacitation of offenders, and deterrence.

Mandatory sentencing is usually only considered for a narrow category of offences[81] and such schemes are often criticised for jeopardising the rule of law through legislative and executive encroaching upon the purview of the judiciary. Spigelman CJ has noted:

> *'…preservation of a broad sentencing discretion is central to the ability of the criminal Courts to ensure justice is done in all the extraordinary variety of circumstances of individual offences and individual offenders'.*[82]

ESO conditions are often offender-specific. A breach of a particular condition might slightly increase the risk of one offender committing a serious offence but significantly increase the risk of a second offender committing a serious offence. For example, a condition might require an offender not to consume any alcohol given the significant correlation between that particular offender's alcohol consumption and offending. Imposing a mandatory penalty on all offenders for consuming alcohol (even offenders for whom there was only limited correlation between alcohol consumption and offending) may be disproportionate and undermine the legislative intention of the Act given such a penalty would not go to community safety or rehabilitation.

Option 2 — Graduated sanctions

An alternative mechanism for dealing with breach could be a graduated system of sanctions. The LRC report on parole contained several recommendations in respect of breach and revocation of parole, including a system of graduated sanctions. According to the LRC, a good breach and revocation system should feature:

- the dual goals of managing risk and ensuring compliance
- a system of graduated sanctions enabling proportionate, swift and certain responses to breach, and
- powers for supervision authorities (e.g. SPA and CSNSW) that reflect the core functions each body performs in the system.

The system of graduated sanctions recommended by the LRC in respect of parole breach involved a series of responses increasing in severity until the CSNSW officer must refer the breach to SPA (which, in the case of the Act, would be reporting by the CSNSW to the NSW Police Force). Once CSNSW had reported the breach, Police could:

- work with agencies and the Court to seek to have ESO conditions varied including through requiring electronic monitoring or home detention, or
- work with agencies to seek a CDO.

Any graduated sanction regime under the high risk offenders framework would need to be supported by robust guidelines regarding the consistent application of sanctions.

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[81] Eg *Migration Act* 1958 (Cth) s 236B (people smuggling offences) and *Crimes* Act (NSW) s 19B (murder of a police officer in certain circumstances).

[82] *R v Jurisic* (1998) 45 NSWLR 209 at [221C].

Option 3 — Streamlined CDO process for ESO breach

A further option would be to implement a streamlined one-step CDO process where an offender has made a *material* breach of their ESO. Under the current Act, to make a CDO, the Court needs to be satisfied that adequate supervision will not be provided by an ESO (see s 5D and 5G). Under the revised test at Recommendation 5, this would be reframed whereby the Court may impose a CDO if satisfied that the risk of the offender committing a serious sex or violence offence would be unacceptable unless a CDO is imposed.

It could be argued that, where the offender has committed a material breach of their ESO, the offender has clearly demonstrated that the required level of supervision cannot be provided under an ESO. One option identified is a more streamlined CDO process in these circumstances where the Court does not need to determine whether adequate supervision would be provided or, under the new test, if the offender poses an unacceptable risk if not kept under supervision (either in custody or in the community) and only has to consider the s 17(4) factors in making an order.

Stakeholder views

The majority of stakeholders did not support any of the options for change to the current breach framework. The NSW Bar Association, Law Society, Legal Aid NSW and the Aboriginal Legal Service did not support Options 1, 2 or 3. The Rule of Law Institute recommended that any change to the breach framework retain the flexibility and fairness inherent to court proceedings. The Aboriginal Legal Service's view was that CDOs should be used as a last resort rather than as part of any streamlined breach process.

NSW Police Force recommended that offenders guilty of the offence of multiple ESO breaches receive a mandatory 12 month CDO. All legal stakeholders strongly opposed Option 3 and reiterated the concerns identified above regarding mandatory sentencing.

Conclusion

The framework for responding to breach of an ESO, and how efficiently and effectively that breach is handled, is a fundamental aspect of how the high risk offenders scheme operates. In this context it is important that frameworks are in place to ensure any breach is properly addressed. The current framework operates by way of a graduated system of sorts. The Department works with Police Prosecutors to ensure the most appropriate sanction is sought, where a sanction is appropriate to the particular case. The involvement in these matters by informed prosecutors who have previous experience prosecuting these breach matters has been beneficial. Further, CSNSW (Community Corrections) has an established framework for dealing with breaches. This includes a requirement that a supervising officer determine a response to the breach and implement the response within 5 working days. If a decision is made to request the offender be charged, or if the circumstances of the breach are urgent, the request must be made within 24 hours.

Courts can impose a maximum penalty of 5 years imprisonment which is a substantial penalty. During consultation, stakeholders suggested that inconsistency of breach penalties may be due to courts not understanding the seriousness of a particular breach in the high risk offenders framework. To the extent that courts impose inconsistent sentences for ESO breach, the Department can work with the Judicial Commission of NSW to ensure there is sufficient training material available to inform sentencing. For example, conduct that seems very minor (for example, where an offender is two hours late past curfew) can be very serious in an ESO context. Further, the Department can work with the Crown Solicitor's Office to ensure there is sufficient information available to the prosecution during breach proceedings to inform sentencing courts as to the seriousness of ESO breaches.

Under the current Act, the Court may make a CDO where circumstances have altered since it made an ESO and the 'altered circumstances' mean that adequate supervision of an offender cannot be provided under the ESO. The Department proposes amending the Act to provide that the test of 'altered circumstances' can be satisfied where there has been an alleged breach of an ESO or a pattern of ESO breaches. This will assist the Court in determining how to better address instances of breach through including further legislative context around what constitutes 'altered circumstances'. This would be similar to Option 3 in that, as with that Option, through a material breach of an ESO the offender has demonstrated that the required level of supervision cannot be provided under an ESO. Significantly, clarification of the term *altered circumstances* would only enable a CDO *application* to be made. It does not guarantee that a CDO will be made by the Court. Under the proposal, the Court would need to be satisfied that the altered circumstances meant that the risk of the offender committing a relevant offence would be unacceptable unless a CDO is imposed. This would be consistent with the removal of the concept of *adequate supervision* at Recommendation 5.

The Department consider that the reframed test for making an ESO (Recommendations 5 and 6) will also assist in ensuring that ESO breaches are minimised. The reframed model focuses the Court's attention on *addressing* underlying behaviour and managing risk. The reframed model would enable the Court to impose ESO conditions to *address* and *reduce* risk rather than simply postponing risk through *adequate* supervision.

Recommendation 20: The Department should work with the Judicial Commission of NSW to ensure sufficient training material is available to inform ESO breach proceedings.

Recommendation 21: The Department should ensure the prosecution has the necessary information to inform sentencing courts about the seriousness of an ESO breach.

Recommendation 22: The Act should be amended to clarify that an alleged breach of an ESO can constitute altered circumstances to enable a CDO application to be made.

4. Administration of the scheme

This Chapter examines the most appropriate framework and practices to administer the scheme. The Chapter considers:

- whether the current requirement for the Commissioner to report annually on offenders subject to an order under the Act should change,
- safeguards under the scheme,
- notification arrangements to advise offenders that they may be eligible for the scheme,
- the interaction of the scheme with bail, and
- the Commonwealth scheme for post sentence detention of terrorist offenders.

Annual reporting

Since 2013, the Act has included a requirement for the Commissioner of Corrective Services to report to the Attorney General on offenders subject to an ESO or CDO.

The report must cover whether the Commissioner considers the continuation of an extended supervision order or continuing detention order is necessary and appropriate for each offender. This safeguard seeks to ensure that the orders made are the minimum necessary intrusion on individual liberty to protect the public. Stakeholders did not raise concerns with this provision.

Since the amendments commenced, the Commissioner of Corrective Services has reported as required to the Attorney General whether he considers it is no longer necessary or appropriate for offenders to be subject to the continuation of an extended supervision order or continuing detention order. This process appears to be working appropriately under the Act and provides for continued monitoring of the effectiveness of the scheme.

Stakeholder views

Most stakeholders did not comment on this aspect of the scheme. Legal Aid NSW recommended that in the interests of procedural fairness, it would be appropriate for offender-specific aspects of the annual reports to be served on the offender.

CSNSW has noted that these annual reports contain highly sensitive information including case management plans for how offender risk will be managed. Providing these reports to offenders may compromise community safety as offenders would be made aware of detailed information on how CSNSW plan to manage risks. It would also disclose all sources of information for the offender and this may include sources not previously disclosed to the offender. If these reports were issued to offenders, the content would need to be significantly altered to be much more generalised to ensure the integrity of case management and community safety is maintained.

Conclusion

Providing offender-specific aspects of the annual reports to an offender would significantly undermine the intent of the process of the annual reporting requirements. The Department therefore concludes that no changes are necessary to the current annual reporting requirements.

Proposal to establish a Risk Management Authority

During initial consultations the Law Society of NSW recommended (referencing a 2012 recommendation by the Sentencing Council) creating a Risk Management Authority to facilitate and regulate best practice in relation to risk assessment and risk management of high risk offenders. In Scotland, a Risk Management Authority (**RMA**) accredits risk assessors. These risk assessors undertake risk assessments, oversee the management of offenders who are subject to an order, provide guidance on the preparation, implementation or review of risk management plans and approve and direct revisions to individual risk management plans. Once a risk management plan is in place, the RMA receives annual reports on the implementation of the plan and takes action if there has been a failure to properly implement the plan. According to independent observers, the RMA has led to more consistent practice by mental health and criminal justice professionals on the assessment and management of risk.[83] The RMA operating costs for the 2014-15 financial year were £1,041,000 (equivalent to approximately $A1.8 million) with a staffing level of 18 non-authority members and 8 authority members (total staffing cost of £816,000). One review of the Scottish model noted that the RMA '*has provided the Courts with a more structured approach to high-risk offenders than existed in the past.*'[84] Significantly, the RMA undertakes two roles — both risk assessment *before* an order is made and risk management *after* an order is made.

The Sentencing Council has previously submitted that while CSNSW has extensive experience in the assessment of risk, 'it is preferable that risk assessments carried out for the purpose of determining qualification for [post sentence detention] should be undertaken independently of the corrections system, so as to avoid potential claims of bias and interference by the Executive government in the sentencing process.'[85]

The 2014 amendments to the Act established a multi-agency response to the management of high risk offenders through the creation of a High Risk Offenders Assessment Committee, and the imposition of duties on agencies to cooperate in the management of offenders.[86] The Committee is chaired by the Commissioner of CSNSW, and comprised of representatives from nominated agencies including the Department of Justice, NSW Police Force, Department of Family and Community Services and the Justice Health and Forensic Mental Health Network. The Committee is tasked, amongst other things, with reviewing risk assessments of sex and violent offenders and making recommendations about taking

[83] McSherry and P Keyzer, "'Dangerous' people: The Road Ahead for Policy, Prediction and Practice", in B McSherry and P Keyzer (eds), *Dangerous People* (2011) 251, 253.
[84] Ibid as cited in NSW Sentencing Council, *High-Risk Violent Offenders Sentencing and Post-Custody Management Options*, Report (2012) 2.84.
[85] NSW Sentencing Council, *High-Risk Violent Offenders Sentencing and Post-Custody Management Options*, Report (2012) 2.112.
[86] See *Crimes (High Risk Offenders) Act 2006* (NSW) Part 4A.

action against those offenders under the Act. The Committee also facilitates cooperation and information sharing between agencies exercising 'high risk offender functions', develops best practice standards and guidelines for agencies, identifies training and resource gaps, and undertaking research. These multi-agency cooperation arrangements are an important development in the management of high risk offenders in NSW. However, they do not address the specific concerns raised by the NSW Sentencing Council in relation to risk assessment and accreditation.

Stakeholder views

The majority of stakeholders either did not comment or were supportive of strengthened risk assessment processes.

Public Defenders submitted that there is no body addressing the Sentencing Council's specific concerns regarding independence from Corrective Services to address concerns of bias and, more importantly, the interference of the executive in the judicial process. Legal Aid NSW submitted that there is no representation on behalf of offenders' interests on the High Risk Offenders Assessment Committee, no transparency around its operations and no public accountability of its general functions beyond provision of reports to the Minister for Corrective Services. Legal Aid NSW recommended that resourcing of a body similar to the Scottish Risk Management Authority should not replace measures to address the presently inadequate resourcing of community based and culturally appropriate offender treatment and rehabilitation programs. The Aboriginal Legal Service submitted that it would be appropriate to have an individual or organisation that is competent in dealing with Aboriginal justice issues involved with the Risk Management Authority.

The NSW Ministry of Health considered that a Risk Management Authority is not required, as there is sufficient oversight built into the administration of risk assessment schemes and those administering them. With regard to employees of Justice Health and Forensic Mental Health Network, where practitioners are members of the Royal Australian and New Zealand College of Psychiatrists (RANZCP) or members of the Forensic Psychiatry Faculty of the RANZCP, they already have the training and expertise and are required to participate in ongoing peer supervision and continuing professional development. They are also subject to an accreditation process and have annual performance reviews, which considers the professional's suitability to prepare risk assessment and risk management reports. Similarly, forensic psychologists are subject to credentialing with the Forensic College, Australian Psychological Society, and Australian Health Practitioner Regulation Agency, which ensure appropriate qualifications to practice as a specialist psychologist, and require psychologists to engage in ongoing training and peer reviews to maintain their registration and membership within the Forensic College. Psychologists are also bound by practice requirements to ensure they attend certified training prior to administering risk assessment tools, to ensure information is appropriately managed and coded in accord with the respective risk assessment schemes. Creating a separate risk assessment body might create duplication and have unintended consequences. The Department consider that a Risk Management Authority is an unnecessary and expensive layer of bureaucracy that would add little value.

The Aboriginal Legal Service cited concerns with the Static-99, which is an actuarial assessment instrument for use with adult male sexual offenders. Specifically that 'there is simply no evidence to suggest whether the Static 99 result has any efficacy whatsoever in relation to Australian Aboriginal men'.[87] This concern was also discussed by the NSW Sentencing Council which noted that '…assessment instruments should be validated in each population and sample in which it is intended that they will be used'[88]

Conclusion

CSNSW employs best practice standards and a 'convergent risk assessment' approach. This means that other risk assessment tools (generally dynamic risk assessment tools) or Structured Professional Judgement approaches are used *in conjunction with* the Static-99 or Static-99-R. Ideally in these risk assessment processes, the risk ratings of all of the tools should converge, which gives weight to the initial baseline score provided by the Static-99 or Static-99-R. Where the results are different, CSNSW would then further investigate the individual/personal factors to determine the reason for any divergence.

In the context of the recommendations of the Victorian Harper review, CSNSW is exploring modification to existing administrative processes that will help address stakeholder concerns. This includes CSNSW identifying high risk offenders earlier into their sentence to enable earlier implementation of risk management plans and more opportunity and incentive for offenders to engage in rehabilitative programs. This may result in less eligible offenders for the scheme. That is, if high risk offenders are identified earlier, they will have more opportunity while in prison to engage in rehabilitation programs which may mean that by the time they reach the end of their sentence, they no longer pose a high risk of the community. The Department recommends CNSW implement practices which identify high risk offenders earlier in their sentence (both six months after sentencing and three years before the earliest release date) to earmark high risk offenders for targeted rehabilitation programs earlier. These refined notification practices should be reflected in CSNSW policies. Failure to notify offenders within these timeframes would not preclude a later notification (for example, there may be offenders who demonstrate high risk behaviour and destabilisation closer to the end of the sentence of imprisonment).

Offenders would also be aware of an application being made through notification requirements in the months before their release. The aim is to ensure that by the end of an offender's original sentence of imprisonment, fewer offenders will be at risk of committing a serious offence and therefore an ESO or CDO will not be necessary. The Department considers the current framework already includes sufficient oversight and accreditation processes including accreditation of experts, annual reviews of employee's suitability to prepare risk assessment and management report and external credentialing (including through the Forensic College, Australian Psychological Society and the Australian Health Practitioner Regulation Agency).

[87] Citing *Director of Public Prosecutions (WA) v Samson* [2014] WASC 1999 at [51]
[88] NSW Sentencing Council, 'High Risk Violent Offenders: Sentencing and Post-Custody Management Options' (Report, Department of Attorney-General and Justice (NSW), May 2012) 25

Recommendation 23: CSNSW should notify eligible offenders three years before their earliest possible release date that they may be subject to the scheme.

Court warnings at sentencing

Stakeholders have suggested strengthening the statutory requirement for courts to warn offenders that post-sentence supervision and detention orders may apply to them.[89]

Section 25C requires a court that sentences a person for a serious violence offence to warn the person about the Act and its potential application to the offender. A suggested form of warning was circulated to magistrates upon the introduction of the 2013 amendments and is now included in the Sentencing Bench Book. A failure by a court to issue such a warning does not prevent the making of an order against a person under the Act.[90] There is no equivalent requirement under the Act for warning eligible sex offenders. That is, currently there is no requirement for the court to give a warning in sentencing someone for a serious sex offence.

It is important to ensure offenders are made aware as soon as practicable after sentencing that they are eligible for a post-sentence ESO or CDO. An eligible offender needs to be advised that unless the likelihood of relevant further offending is significantly reduced, that they could be subject to post-sentence detention or supervision, and that failure to participate fully in the scheme will be taken into account if an application for post-sentence detention or supervision is made. This warning is important for two reasons:

- it may assist in the management of offenders' expectations, and minimise negative reactions, where from the outset of a sentence an offender is aware of the possibility of further supervision or detention, and
- it provides offenders an incentive to engage in intensive rehabilitation and treatment pathways, when they are assessed as suitable, and makes the consequences of refusing to engage clear.

Any warning must necessarily occur with sufficient time for the relevant offender to enter and complete programs in custody.

It is difficult to gauge how universally this warning is being made. The DPP suggests that anecdotally 'it would appear that some judicial officers are not administering the warning, probably through oversight'.[91] It is important that offenders are sufficiently receptive to comprehend the significance of the warning. There may be a role for DPP lawyers and defence legal representatives in reminding the court of this requirement where it has been overlooked. More stringent adherence to section 25C would benefit any offender to whom the warning is given through encouraging a positive attitude to rehabilitation.

[89] See submissions from Law Society of NSW and Legal Aid NSW.
[90] *Crimes (High Risk Offenders) Act 2006* (NSW) s 25C(1).
[91] See paragraph 2.4 of NSW DPP submission.

Noting that there is no equivalent requirement under the Act that sex offenders be warned of eligibility under the scheme, to ensure consistency across the framework the Department consulted on extending the statutory warning requirement to high risk sex offenders. Further, regular training of judicial officers, the provision of training material and updated guidance in the Sentencing Bench Book could be considered to ensure judicial warnings are made in appropriate cases.

Stakeholder views

The majority of stakeholders supported extending the current warning requirements to sex offenders. Legal Aid NSW noted that it is an anomaly under the current framework that warnings only apply to high risk violent offenders. Legal Aid NSW recommended that current offenders who may be subject of applications and who were not warned prior to commencement of the 2013 amendments should be provided information about the Act and rehabilitation options in custody. The Aboriginal Legal Service recommended that the warning should be delivered by courts, to ensure it carries the appropriate level of gravitas. Further, genuine and culturally-appropriate engagement was recommended to ensure that offenders are given every opportunity to engage with rehabilitative programs prior to an application under the Act being made.

The Bar Association noted that it is appropriate to provide a warning as soon as practicable after sentencing given an early warning encourages a positive attitude toward rehabilitation. It further recommended that court registries issue a written notice once an offender receives a sentence.

In *State of NSW v Bugmy*, McCallum J noted that '… *the objects of the Act might be better served by having a mechanism for clear communication to prisoners earmarked for applications under the Act of the goals they are expected to achieve*'. Measures are being introduced within CSNSW to ensure offenders who may be eligible are aware at least three years before their earliest release date of their potential eligibility under the Act.

Certain stakeholders noted that an offender's attention during sentencing will typically be focused upon the immediate issue of the sentence being imposed, with the consequence that they may not be receptive to a seemingly peripheral matter such as warning about the potential future application of the Act. One stakeholder recommended that the warning requirement not be required in respect of Table matters which have been finalised summarily. The Department considers that this approach might result in courts having to engage in a complex process in determining whether or not an offender should be warned if the offender has previously committed a number of offences (which may be deemed serious enough to come within the scheme) and only the most recent was dealt with summarily. Other stakeholders submitted it would be preferable to have a formal communication sent to offenders after they have been sentenced.

Conclusion

Adequate warning ensures offenders have motivation to proactively engage in rehabilitative services and programs. This warning should be applied to both sex and violent offenders

equally and offenders should also be warned in circumstances outside sentencing at court, of their potential eligibility for the scheme.

Recommendation 24: Sentencing courts should be required to warn *all* offenders who have committed an eligible offence about the Act's potential application to them.

Recommendation 25: CSNSW should provide eligible offenders written notification of the potential application of the scheme within six months after sentencing.

Offenders and bail

Section 28 of the Act provides that the *Bail Act 2013* does not apply to a person who is a defendant in proceedings under the Act unless the bail relates to an offence of:

- breach of an ESO (s 12), or
- provision of information (e.g. reports to inform an application) by third parties to the Attorney General (section 25(2)).[92]

It is unclear whether an offender subject to an ESO/CDO application (such as an application to vary an order or an application for an emergency detention order) who has not received an interim detention order might receive bail in respect of other criminal charges brought in parallel (that is, proceedings separate from the high risk offender application on foot) with the high risk offender proceedings.

For example, an offender may be on remand for separate offences brought in parallel with an ESO/CDO application being on foot (but not yet determined). The Act is currently unclear whether the offender could be granted bail for these separate charges while the ESO/CDO application is still ongoing. The explanatory notes and second reading speeches to the original bill do not provide detail as to whether the current provision is intended to extend to any bail sought in respect of the offender or is confined to where proceedings are on foot under the Act.

Stakeholder views

Some stakeholders submitted that under the current framework, the Bail Act *would* apply to concurrent charges if an ESO/CDO application is on foot. That is, there is no basis upon which section 28 could be said to affect any other bail decision in separate criminal proceedings for offences contained in other Acts in which the person is a defendant.

The Rule of Law Institute submitted that the Bail Act *should not* apply to offenders who are subject to an ESO/CDO application but not subject to an interim supervision or detention

[92] Section 28.

order. The Victims of Crime Assistance League noted that any offender charged with a further offence should not be granted bail.

In contrast, the Bar Association submitted that offenders subject to an ESO or CDO *should* be entitled to apply for bail if they are charged with a further offence. The Office of the Director of Public Prosecutions' submission aligned with this view and noted that extending the provision more broadly would be 'out of step with criminal practice and procedure'. The Office of the Director of Public Prosecutions submitted that application of the Bail Act could be limited to offences that are not serious violent offences or serious sex offences. Courts submitted that the Bail Act should apply to unrelated offences regardless of their type. Legal Aid NSW advocated for the *extension* of the provision to enable offenders to apply for bail even where they are charged with an offence under section 12 or section 25(2).

Conclusion

If an offender is charged with an offence the Bail Act applies. This would encompass proceedings that run in parallel with an application for an ESO or an offence under the Act. The Bail Act does not apply to an application for an ESO as this is a civil application, but a breach is a criminal offence. The Department does not recommend trying to exclude the Bail Act from having application to criminal proceedings running parallel with an ESO application.

The Department also do not support a *requirement* for courts to incorporate ESO conditions into parallel bail conditions. Rather, this should remain a discretion available to the court (as it is now) but not fetter the court's discretion. The alternative proposition may result in unintended consequences, for example where an application may be withdrawn and then bail conditions are in place with which the accused may not be able to comply. However, in determining bail conditions for an offender subject to an ESO application in parallel proceedings, the court should consider the ESO conditions proposed in the ESO application.

Recommendation 26:	**In determining bail conditions for an offender subject to an ESO application in parallel proceedings, the court should consider the ESO conditions proposed in the ESO application.**

Application of NSW high risk offender legislation to terrorist offenders and terrorism offences

On 1 April 2016, First Ministers at the Council of Australian Governments supported the development of a nationally consistent-post sentence preventative detention scheme, with appropriate protections, that covers high risk terrorist offenders. On 1 December 2016 the Commonwealth Parliament passed the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (the **Commonwealth Act**). The Commonwealth Act creates a national post-sentence detention scheme for terrorist offenders.

The Commonwealth scheme will only cover certain *Commonwealth* terrorism offences. The scheme will not cover:

(i) the NSW terrorism offence[93]
(ii) NSW non-terrorism offences (e.g. firearms offences) where there is an underlying connection to terrorism, and
(iii) NSW non-terrorism offences (e.g. fraud) where there is no underlying connection to terrorism but where the offender is subsequently radicalised in prison and may pose a risk to the community if released.

Certain NSW offenders who have committed offences within (i)-(iii) will come within the required thresholds for the NSW high risk violent offenders scheme. However there may be high risk offenders with a high risk of committing a future serious terrorist offence who would not come within either scheme. These offenders would not meet the Commonwealth threshold of having committed a Commonwealth terrorist *index* offence. For example, if an offender is found guilty of the NSW offence of supply of a firearm which is used to kill a person as part of a terrorist act, this offender would not come within the NSW scheme and would only come within the proposed Commonwealth scheme if there were *also* relevant Commonwealth terrorism offences for which the offender was imprisoned.

Under the current NSW scheme, there must be a link between an offender's previous offence and the anticipated future offending (e.g. the Court can only make an ESO or CDO for a serious violent offender where there is future unacceptable risk that the person will commit further serious violence offences). For example, where an offender is imprisoned for the NSW offence of murder and is at risk of committing a future serious violent offence. Unless these thresholds are met, these offenders would not currently come within the NSW scheme. The High Court has noted that there must be a link between a conviction for a previous *serious* offence and future *serious* offending.[94]

Conclusion

The Department considers that the NSW Government should commence work to explore the possibility of extending the NSW scheme, taking into account lessons learned from the implementation of the Commonwealth scheme.

Recommendation 27:	**Work should commence to explore extension of the NSW scheme to terrorist offenders, including consideration of lessons learned from the implementation of the Commonwealth's High Risk Terrorist Offenders Scheme.**

[93] The majority of NSW's anti-terror laws relate to police powers in *investigating* terrorism offences. There is one offence under NSW legislation which criminalises membership of a terrorist organisation [s 310J *Crimes Act 1900* (NSW)]. Offenders are generally prosecuted under the equivalent Commonwealth offence (s 102.3 Criminal Code) (see *Regina v Elomar* [2010] NSWSC 10; *R v Vinayagamoorthy* [2008] VSC 599; *Benbrika v R* [2010] HCA Trans 160).

[94] *Fardon v Attorney General* (2004) 223 CLR 575 at [108] per Gummow J: '*To this degree there remains a connection between the operation of the Act and anterior conviction…. A legislative choice of a factum of some other character may well have imperilled the [scheme's] validity*'

5. Miscellaneous amendments

During the second stage of consultation, the Department received proposals not tied to the issues identified in the consultation paper. These proposals are minor, machinery (or similar) changes but would, if implemented, result in a more effective post sentence detention scheme. These proposals include:

- clarification that an interim detention order is 'current custody' for the purposes of the definition of *supervised sex offender* or *supervised violent offender*
- enabling a CDO application while an offender subject to an ESO is on remand (for example, if an offender is in custody for breach of ESO, or for any other offence and is neither serving a sentence of imprisonment nor 'subject to an ESO' because the ESO is suspended whilst they are in custody), and
- enabling CSNSW to issue a certificate regarding an offender's time in custody when an ESO is extended because of that offender's time in custody.

Recommendation 28: Minor and machinery changes to the scheme should be made to ensure the framework is operating effectively. These would include:

- **28A — clarifying that an interim detention order is 'current custody' for the purposes of the definition of *supervised sex offender* or *supervised violent offender***
- **28B —clarify the effect of the suspension of an ESO order when an offender is in lawful custody and enable a CDO application while an offender subject to an ESO is on remand, and**
- **28C — enabling CSNSW to issue a certificate regarding an offender's time in custody.**

Current post-sentence supervision and detention regime

Overview

The Act enables the extended supervision or continued detention of high risk sex and violent offenders after they have completed their sentence of imprisonment. The Supreme Court can order that high risk violent offenders and high risk sex offenders be supervised or detained after their sentence has expired. The safety and protection of the community is the primary purpose of these orders. Encouraging offenders to undertake rehabilitation is a further objective. These arrangements were first introduced in 2006 for serious sex offenders and were extended to apply to serious violent offenders in 2013.

Extended supervision and continuing detention orders

Extended supervision orders enable Corrective Services NSW to supervise offenders in the community for up to five years after their sentence expires. Continuing detention orders enable an offender to be detained in a correctional centre for up to five years after their sentence expires. The Attorney General is responsible for making applications to the Supreme Court for ESOs and CDOs. For an application to be made, the offender must be in custody (in respect of a CDO application) or in custody or under supervision (in respect of an ESO application) while serving a sentence of imprisonment for:

- a serious violence offence,
- a serious sex offence, or
- a less serious sex offence if the person has previously been sentenced to imprisonment for a serious sex offence.

If the application relates to a high risk violent offender, the Court can make an order if it is satisfied that the offender poses an unacceptable risk of committing a ***serious violence offence***.

If the application relates to a high risk sex offender, the Court can make an order if it is satisfied that the offender poses an unacceptable risk of committing a ***serious sex offence***.

Where the Court is satisfied of the above but considers that the required level of supervision cannot be provided under an ESO, it may make a CDO. In deciding whether to make a CDO, the Court must consider a number of matters, such as the safety of the community, the results of any statistical or other analysis as to the likelihood of re-offending, and the offender's criminal history.

Interim supervision and detention orders

The Supreme Court can also make orders for the interim supervision or detention of an offender. These orders can be made if the Court is considering an application for an ESO or CDO and the offender's current custody or supervision (in the case of an ESO) or

custody (in the case of a CDO) is going to end before those proceedings will be determined. To make an interim order, the Court needs to be satisfied that the matters alleged in the application would, if proved, justify the making of an order.

Emergency detention orders

Emergency detention orders (EDOs) are available for responding quickly where altered circumstances mean an offender cannot be adequately supervised in the community (such as if a breach suggests an escalation in risk). An EDO cannot exceed 120 hours from the time it is made. EDOs were introduced in 2014. To date it has not been necessary for the State to seek an EDO.

2013 amendments

The *Crimes (High Risk Offenders) Amendment Act 2013* introduced a number of amendments to the Act. Section 32 of the Act requires review of the 2013 amendments to determine whether their policy objectives remain valid and the terms of the Act, as amended, remain appropriate for securing those objectives. The 2013 amendments included:

- the addition of high risk violent offenders to the existing scheme which previously only covered high risk sexual offenders,
- the introduction of continuing detention orders and extended supervision orders for high risk violent offenders, similar to the previous arrangements for high risk sex offenders,
- the introduction of interim supervision orders and interim detention orders for both high risk sex offenders and high risk violent offenders (sections 10A-10C and 18A-18C) that can be used when proceedings for an ESO or CDO are on foot and the offender's current custody or supervision will expire before the ESO/CDO proceedings are determined,
- clarification of the power of the Supreme Court to revoke an extended supervision order or a continuing detention order where there has been a change in circumstances which renders the order unnecessary (sections 13(1B) and 19(1B)),
- a requirement that the Commissioner for Corrective Services report annually to the Attorney General on whether he or she considers a continuing supervision or detention order remains necessary,
- a mandatory Court warning about the Act and its application, to be delivered to a person being sentenced for a serious violent offence (section 25C), and
- extension of the scheme to offenders who are now adults but were convicted of and imprisoned for a serious sex or violence offence as a child (not including a sentence imposed under section 33 of the *Children (Criminal Proceedings) Act 1987*).

2016 amendments

The *Crimes (High Risk Offenders) Amendment Act 2016* introduced amendments to the Act to clarify how the existing scheme for continued detention and extended supervision applies to offenders serving sentences of imprisonment for violent offences. The

amendments clarified 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 amendments addressed limitations where some very violent crimes, such as shootings and stabbings, would potentially not be covered by the Act due to the technical elements of the offence the person was charged with.

February 2016 written submissions to the review

1. Aboriginal Legal Service
2. Chief Judge of the District Court of NSW
3. Chief Justice of the Supreme Court New South Wales
4. Chief Magistrate of the Local Court
5. Corrective Services NSW
6. Enough is Enough Anti Violence Movement Inc.
7. Legal Aid NSW
8. Office of the Director of Public Prosecutions
9. Office of General Counsel
10. NSW Bar Association
11. NSW Police
12. Rule of Law Institute Australia
13. The Law Society of NSW

August 2016 written submissions to the review

1. Aboriginal Legal Service
2. District Court
3. Homicide Victims Support Group
4. Law Society of NSW
5. Legal Aid NSW
6. Local Court
7. NSW Bar Association
8. NSW Department of Family and Community Services
9. NSW Ministry of Health
10. NSW Police Force
11. Office of the Director of Public Prosecutions
12. Public Defenders Office

13. Rule of Law Institute
14. Supreme Court
15. State Parole Authority
16. Victims of Crime Assistance League

November 2016 written submissions to the review

1. Aboriginal Legal Service
2. Enough is Enough Anti Violence Movement Inc.
3. Law Society of NSW
4. Legal Aid NSW
5. NSW Bar Association
6. NSW Department of Family and Community Services
7. NSW Ministry of Health
8. NSW Police Force
9. Sentencing Council
10. Supreme Court

January 2017 written submissions to the review

1. NSW Bar Association
2. Supreme Court