TIPS FOR LOCAL COURT PRACTITIONERS:

- **Contravene Extended Supervision Order (ESO)**
- **Child Protection Register (CPR)**
- **Child Protection Prohibition Orders (CPPOs)**

Diane Elston (Accredited Specialist in Criminal Law) in consultation with the High Risk Offender Unit, Legal Aid HRO@legalaid.nsw.gov.au

---

This paper a reference tool for Local Court practitioners who are encountering the following matters at an increasingly frequent rate according to anecdotal evidence:

1. Offence of contravene extended supervision order (**ESO**)
2. Applications to include someone on the child protection register (**CPR**)
3. Applications for a child protection prohibition prder (**CPPO**)

The work that duty lawyers undertake is vitally important to the outcomes of these matters. The High Risk Offender Unit (**HRO Unit**) at Legal Aid would like to offer greatersupport and resources aimed at **improving outcomes** and **sharing resources** in response to these matters.

The HRO Unit is particularly interested in acting in acting for clients charged with breach ESO and CPPO applications that pre-empt or follow an ESO, when there is capacity within the team - it is certainly desirable to maintain continuity in representation, however, this is not always practical.

If you act for someone charged with breach of an ESO, please contact the HRO Unit to advise them of the matter or the outcome. The nature of the breach or outcome may lead to a variation or revocation application being filed in the Supreme Court for the substantive ESO. It will also form part of the data collected to measure outcomes for HRO clients against the skeletal JIRS data available.

Most importantly, **if you are advising in one of these matters**, generally, **the best course of action** is to advise your client that **seeking a two week adjournment** to consider some of the complex legal issues, research your client's history including previous court proceedings and consult with or referthe matter to the HRO Unit.

Quick Reference

This is a working paper and will be updated on a regular basis. Please go to the Legal Aid intranet and access HRO resources for the current version: 21 July 2021

Breach of an ESO: Offence + Outcomes

An ESO is an order of the Supreme Court of New South Wales which imposes intense supervision over serious violent, sexual and terrorist offenders who are a high risk of re-offending. The ESO contains a raft of complementary conditions particular to the offender and which will be enforceable for a finite period of time determined by the Supreme Court.

Objectives of ESOs:

1. The primary objective is to ensure the **safety and protection of the community**.
2. Another objective is to encourage high risk offenders to **undertake rehabilitation**.[1]

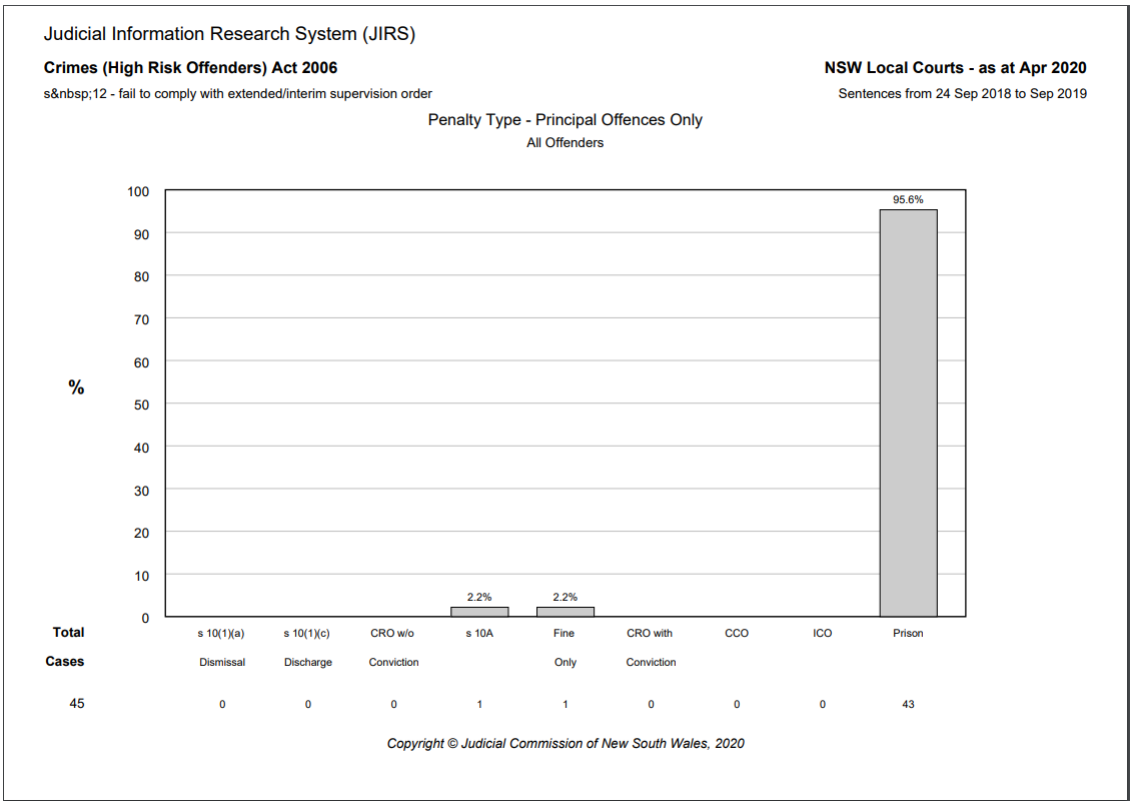
Charge and penalties

A person can be charged with breach of an ESO under the following two Acts:

- *Crimes (High Risk Offenders) Act 2006* NSW (**CHROA**) section 12
- *Terrorism (High Risk Offenders) Act 2017* NSW (**THROA**) section 30

The maximum penalty is 5 years imprisonment or 500 penalty units or both. In the overwhelming majority of matters, a sentence of full-time imprisonment is imposed, even for minor breaches, which is a problematic outcome for persons subject to an ESO in regard to their rehabilitation.

In a large number of cases, the breach would not constitute criminal behaviour if it were not for the existence of the ESO. In many others, if the breach conduct would ordinarily be criminal conduct, it would only amountto a relatively minor criminal offence (e.g. drug possession). In response to the bleak statistics, we aim to improve the outcomes in these matters across the board by equipping lawyers to tackle the complex issues associated with high risk offenders.



[1] *Crimes (High Risk Offenders) Act* 2000 NSW s 3; *Terrorism (High Risk Offenders) Act 2017* s 3.

Particulars of contravene ESO

How the charge is particularised, like all criminal matters, is important to clarify. Consider the following issues that are specific to ESOs:

Is the order interim or final?

Interim There will be a final hearing in the Supreme Court in the near future and a breach offence will be extremely relevant to these proceedings.

There is most likely a solicitor in the HRO Unit who is already acting for the client and you should contact them ASAP.

There will likely be a Supreme Court decision from the preliminary hearing accessible from NSW CaseLaw. If you are applying for bail, it will be very helpful to apprise yourself of the issues recently ventilated at the preliminary hearing and familiarise yourself with the other conditions of the interim order.

Final There will be a Supreme Court decision which you need to read that is available from NSW Caselaw unless it is restricted. There may be multiple decisions on Caselaw, look for the most recent decision that states '(Final)' in the citation.

Does the alleged breach arise from a direction given by a Departmental Supervising Officer (DSO) employed by Corrective Services New South Wales (CSNSW) or a condition imposed by the Supreme Court?

Direction Departmental Supervising Officers (DSOs) are allocated to supervise your client on an ongoing basis for the duration of theESO. The DSO has the power to issue directions that facilitate the flexible and purposeful operation of an ESO.

A direction issued must be both within the power of the DSO and reasonable. If you have cause to doubt either or both requirements, the person should be given advice in consultation with the HRO Unit about defending the matter (a collateral challenge).

Generally, advice about the nature of directions should not be given without careful consideration of the circumstances of the person on the order. This will require reading the Supreme Court decision and perhaps accessing psychological and psychiatric reports.

When giving advice about seeking an adjournment for the purpose of looking into the validityof the direction, be mindful that clients on an ESO are particularly vulnerable. Most areat risk or are institutionalised, and in the face of a breach matter, often feel defeated and ready to give up. Please reassure them that there is a team at Legal Aid which can offer them specialised legal assistance now.

It is preferable to **contact the HRO Unit** about these types of alleged breaches. We are inclined **to instruct a trial advocate or counsel in the Local Court.**

Some examples of improper directions might include:

- Failure to take into account **cultural issues** such as insensitivity to Aboriginality and the importance of connection to community when issuing directions for example, not allowing or indirectly preventing someone from living within their community for no good reason as a result of a direction. The decision of Hamill J in *State of New South Wales v Carr* [2014] NSWSC 1348 at [8], [24] – [26] identified gross mismanagement of an ESO over a young Aboriginal man with disabilities, and who as a consequence of breaching the ESO spent considerable periods in custody despite there being no evidence of criminal offending but for the breaches.
- Failing to take into account **age, mental illness or disability** when issuing directions.
- **An ambiguous direction**.
- A direction that is not in the **required form** for example, directions not given in writing when required.[2]
- **Banning contact** with an intimate partner suddenly and without any apparent reason might be unreasonable if there is no recent indication of tension or violence.
- Banning certain types of **living arrangements** such as shared utilities rendering the person homeless.
- Issuing directions that are **punitive not protective**.[3]

Thinking about the directions and defending a breach will involve **novel issues** and the prospects of having a charge dismissed are **fairly uncertain**. This should not necessarily deter your client from pleading not guilty - the harsh sentences across the board suggest the utilitarian discount is not materialising in lower sentences. Although, of course this is an issue to consider on a case by case basis.

Note: In bail or sentencing, you may argue that breach of a direction is less serious, depending on the circumstances, because it is not flagrant disregard of a Supreme Court Order which is arguably more serious.

Condition These types of breaches are usually straight forward and arise directly from a condition imposed by the Supreme Court. A typical example is illicit drug and alcohol use in cases which this is completely prohibited.

Of course, these matters are not always straight forward. For example, we have seen an allegation which our elderly and immobile client was accused of departing from his schedule of movements in a manner that would have required him to jump over a series of fences.

If the ESO is **terrorism related**, please contact the HRO Unit.

[2] Not all directions must to be given in writing to be valid but some do or should be given in writing.

[3] *State of New South Wales v Green (Final)* [2013] NSWSC 1003 [36] - [38]. Conditions or directions ought not be imposed that are unjustifiably onerous or simply punitive.

Bail applications for contravene ESO

These matters are 'show cause' by operation of section 16B(1)(i) of the *Bail Act 2013* NSW (***Bail Act*).**

To bolster your submissions in respect of showing cause, you may consider the following:

1. **Showing cause is closely tied to the ultimate question of unacceptable risk in the way described by McCallum J in *M v R* [2015] NSWSC 138 [8]. The unacceptable risk can be eliminated by the existence of the ESO. This can be explained without conflating the two considerations (show cause and risk) per Hamill J in *Director of Public Prosecutions (NSW) v Tikomaimaleya* [2015] NSWCA 83 [24] – [25].**

The test which the Supreme Court was required to apply at the time of making the ESO has been crafted in a similar fashion to the test for bail in some ways.

It may be argued that if the risk of committing a serious offence has been carefully considered by the Supreme Court and on the advice of two forensic experts in psychiatry and/or psychology, the Supreme Court has found they are no longer an unacceptable risk providing there is an ESO in force. Therefore, the requirement that an accused person is to be released if there is no unacceptable risk is also met.

> ***Bail Act 2013* - section 20**
>
> **Accused person to be released if no unacceptable risks**
>
> (1) If there are no unacceptable risks, the bail authority **must**:
>
> (a) grant bail (with or without the imposition of bail conditions), or
>
> (b) release the person without bail, or
>
> (c) dispense with bail.
>
> (2) This section is subject to Divisions 1A [show cause] and 2A.

This submission has more force according to the high standard of the proof which the Supreme Court had to consider. The test for an ESO under CHROA and THROA requires the Supreme Court to be satisfied to a **high degree of probability** when making an ESO:

> *The Supreme Court is satisfied to a **high degree of probability** that the offender **poses an unacceptable risk** of committing another serious offence **if not kept under supervision** under the order.*[4]

It follows, that the Supreme Court must have been satisfied that the conditions of the ESO address unacceptable risk. This is a particularly strong argument where the alleged breach, but for the existence of the ESO, would not be criminal.

The conditions of an ESO require strict and vigilant compliance to the extent that almost every aspect of the person's life is controlled and importantly, monitored. Some of the more onerous conditions of an ESO which you can draw the court's attention to include:

i. Providing a schedule of movements each week for approval.
ii. Not deviating from the schedule of movements except in an emergency.

[4] *Crimes (High Risk Offenders) Act 2006* NSW s 5B; *Terrorism (High Risk Offenders) Act* NSW 2017 s 20.

iii. Maintaining electronic monitoring equipment.
iv. Complying with directions of the specialised unit at Corrective Services in relation to place restrictions, residing in approved accommodation, non-association including with children and adults as directed, employment, voluntary work and restricted access to telecommunication services.
v. Prohibitions on alcohol and drug use.
vi. Submitting to property searches including searches of electronic storage devices and social media accounts.
vii. Complying with medical treatment as directed and allowing records of medical treatment to be made available to Corrective Services.

These conditions are not standard, you will still need to seek instructions from your client and review the Supreme Court decision. For example, there may be sunset clauses requiring electronic monitoring or scheduling to be removed or there may be adjustment arising from a discretionary decision by the DSO. If the DSO has relaxed the supervision in response to your client's positive progress, you can use this to your advantage when explaining how a period of remand will be counter-productive since their efforts to rehabilitate under the ESO have come to fruition in some respects.

When the Supreme Court decides what conditions are imposed, they do so by exercising broad discretion with regard to the objectives of CHROA or THROA. The conditions are designed to mitigate risks which the court has identified, however, the conditions are not restricted to risk factors clearly linked to prior offending.[5] If the breach involves drug use, which will often be detected by a random test administered by the DSO, the submission that the risk was theoretical as opposed to a risk that had materialised may be open. This is because drug use does not mean the person will inevitably commit a serious offence nor does it prove they were intoxicated or significantly disinhibited in a risky situation. Therefore, the actual risk your client posed in unknown and cannot be proven beyond reasonable doubt as an adverse fact for sentencing purposes. **The breach conduct needs to be put in context together with the other protective conditions at play under the ESO.**

These arguments will often be rebutted by the prosecution if the person was intoxicated by alcohol or drugs at the time of their index offending and on the basis that the Supreme Court carefully considered the conditions which were necessary to address an unacceptable risk of offending – but your submission is still meritorious. Isolating a breach of one or two conditions of an ESO, in the context of a risk assessment is an artificial exercise, in our view. The likelihood of offending in a serious way ought to be considered having regard to:

a) the length of time which has passed since the last serious offence,
b) the presence of other protective factors such as no longer being homeless, reconnecting with family, friends and community, employment, education etc (that may not have been present when the index offending occurred), and
c) the range of highly protective conditions under the ESO that were first, not in existence at the time of the index offence and second, were in existence when the breach was detected.

If the person is released on bail their ESO will resume. If your client is subject to electronic monitoring (EM), they should not be released from custody until the DSO has reapplied the EM bracelet

[5] *State of New South Wales v Steven Single* [2019] NSWSC 176 [28] per Hamill J citing *Wilde v State of New South Wales* [2015] NSWCA 28 [47] - [54] per Beazley P, McColl and Ward JJA.

2. Show cause and rehabilitation

As set out above, the second objective of an ESO is to encourage the rehabilitation of the person on the order. There is an abundance of empirical evidence that demonstrates **short periods of incarceration, whether remanded or sentenced are counter-productive to a person's rehabilitation. The same views have been expressed by the Supreme Court** in obiter.

There are some very helpful observations by the Supreme Court in respect of the counter-productive consequence of incarceration and the disruption of an ESO. These cases are set out at page 12 in respect of sentencing but they are equally relevant to bail.

As Legal Aid lawyers, it goes without saying that we understand the detrimental impact of incarceration. When appearing for HRO clients, the challenge of persuading a Local Court magistrate that cause is shown due to the detrimental impact of incarceration on your client's rehabilitation is a great challenge – the often-heinous crimes which appear on the bail report can be overwhelming at first glance.

To address this challenge you may submit that the fact of the breach can be used as an opportunity to progress your client's rehabilitation. This is because the breach with alert the DSO to your client's particular vulnerabilities which will fluctuate during the term of the ESO. This will occur because, the DSO will be informed of the breach and in response can increase supervision e.g. twice daily drug or alcohol testing (which is not uncommon on an ESO) or give appropriate directions to help your client stay engaged with their supervision as opposed to completely stripping them of supervision.

We have commissioned an expert report from Doctor Eagle as to the counter-productive impact of short periods of custody (remanded or sentenced) on a person's prospects of rehabilitation and risk profile in the context of ESO matters. Doctor Eagle's report draws on the large body of research about the ineffectiveness of short-term prison sentences. The report contains some helpful opinions, but it is the sources that are most helpful. Some of these sources are hyperlinked in the footnotes.[6]

Bail conditions

There are unlikely to be many conditions that can be proposed to supplement the extensive conditions of an ESO. Since the bail decision is likely occurring before the DSO has had the opportunity to consider issuing directions in response to the breach, you can draw the court's attend to the power of the DSO to issue further directions noting the DSO is equip with extensive background information about your client.

---

[6] Wang and Poynton (2017) 'Intensive Correction orders versus short prison sentence: A comparison of re-offending'.
Wan, Poynton, Doorn and Weatherburn 'Parole supervision and re-offending'.
Eaton and Mews (2019) 'The Impact of short custodial sentences, community orders and suspended sentence orders on re-offending'.
Schmucker and Losel (2017) 'Sexual offender treatment for reducing recidivism among convicted sex offenders: a systematic review and meta-analysis'.
Villettaz, Gillieron and Killias (2015) 'the effects on re-offending of custodial vs. non-custodial sanctions: An updated systematic review of the state of knowledge'.
Wormith, Althouse, Simpson, Reitzel, Fagan and Morgan (2007) 'The rehabilitation and reintegration of offenders'.

If bail is refused

Please consider filing a Supreme Court bail application. Regardless of how the matter proceeds, it will certainly help the outcome if the person is able to continue their ESO.

If the breach relates to an interim order, again, it is helpful to notify the solicitor with carriage of the Supreme Court matter as the hearing of Supreme Court bail may be listed on the same date as the final hearing and we can involve Counsel who is already instructed in that matter.

Sentencing preparation for breach of an ESO

In breach ESO matters, the Crown Solicitor's Office will usually appear even though they may not have appeared at the first bail hearing. Often the Crown Solicitor's Office will instruct counsel or a trial advocate to appear if the matter is listed for any substantial hearing.

In preparation for the sentence hearing, it can be very helpful to issue a subpoena to CSNSW. For ease of reference, the details are below:

To: The Proper Officer, Office of the General Counsel, Department of Justice

GPO Box 6, SYDNEY NSW 2001[7]

The types of records held by CSNSW is available online.[8] Generally, the subpoena schedule would include a request for all Offender Integrated Management System case notes (**OIMS**) for the relevant period.

The relevant period may easily include the total length of the ESO including from the commencement of an interim order. This will help you look at how your client has been responding to supervision and gauge their prospects of rehabilitation. For example, the intensity of their supervision may have been relaxed or there might have been recent consideration about relaxing supervision. Perhaps a recent risk assessment has been undertaken and the level of risk has dropped since the ESO commenced.

It is also helpful to contact the Crown Solicitors Office in advance of the sentence hearing and request that they only tender a 'convictions report' and not a 'bail report'. This will save you from making an objection to a bail report.

Don't assume the Crown Solicitor's Office will obtain a copy of your client's custodial record as they frequently do not. You can easily obtain a custodial history by contacting sentence administration Sentence.Admin@justice.nsw.gov.au.

[7] Registered post is required for service but you can *also* email the subpoena to Subpoenas@justice.nsw.gov.au

[8] Corrective Services Custodial Operations Policy and Procedures. Page 5
https://www.correctiveservices.justice.nsw.gov.au/Documents/copp/requests-for-reports-and-records.pdf

Subjective case

Expert reports prepared by the court appointed experts in ESO proceedings can, in our interpretation of the legislation, be used in breach matters and we have tendered these reports without issues arising. Section 25D(3) of CHROA states:

> (3) An expert report concerning an offender may be disclosed and used in any proceedings in respect of the offender if the court determines that:
>
> (a) the proceedings are closely related to the proceedings under section 7 or 15 in which the expert report was used, and
>
> (b) it is in the public interest, and
>
> (c) the information would inform the court about the history of the offender's mental state with respect to his or her offending.

However, these reports must not be relied upon as a matter of course, they are quite different to forensic reports commissioned in criminal proceedings. The court appointed expert reports are primarily focused on risk and will provide opinions and summarise past offending in a manner that can be very unfavourable in the sentencing arena.

If you think you need access to the court appointed expert reports, please contact one of the Grade IV or V solicitors in the HRO Unit about getting access to the report and to discuss the limitations around disclosing this report.

If you need to obtain material to prove that your client suffers from mental illness, you may be able to obtain this from the OIMS notes or tracking down your client's GP or treating psychologist for a letter evidencing their condition/s and current treatment. It is **rarely necessary** to obtain another psychological report specifically for sentence as a wealth of subjective material will be available.

If your client has suffered from a deprived background, this may well have been a factor that increases their risk profile for the purpose of an ESO but in sentence proceedings can be approached differently pursuant to the principles in *Fernando,*[9] *Bugmy*[10] and *Millwood*[11]. Consider preparing an affidavit from your client using the information that is already contained in the court appointed expert reports and other material you may find in archived matters. This will hopefully reduce the time spent taking this evidence from your client and reduce the trauma your client experiences (as much as is possible) by re-telling their story. You may also be able to obtain this evidence from a family or community member.

The Bar Book Project is an excellent resource, especially for clients who are Aboriginal or Torres Strait Islander. There is a wealth of information which is accessible online from the Public Defender's website.[12]

[9] *R v Fernando (*1992) 76A Crim R 58, 62.

[10] *Bugmy v The Queen* [2013] HCA 37 [40], [42].

[11] *R v Millwood* [2012] NSWCCA 2 [69].

[12] https://www.publicdefenders.nsw.gov.au/barbook

Written submissions for contravene ESO

If the prosecutor intends to rely on written submissions, our practice is to also prepare written submissions. Although, consider this approach on a case by case basis. Sometimes preparing written submissions can create a different atmosphere in the court room that you might want to avoid.

Below is an outline of some submissions for a breach ESO by illicit drug use that could be moulded into speaking notes or written submissions in addition to other relevant sentencing considerations.

OUTLINE OF SUBMISSIONS FOR THE OFFENDER

The offence

1. Mr/Ms has pleaded guilty to one count of failing to comply with a condition of the interim/final extended supervision order ("I/ESO") contrary to section 12 of the *Crimes (High Risk Offenders) Act 2006* NSW (CHROA).

2. The nature of the breach is uncomplicated. It was a condition of the ESO that Mr/Ms not use any illicit drug and submit to testing for the same. A random saliva sample collected on [date] returned a positive result for methylamphetamine.

3. The offence carries a maximum penalty of 5 years imprisonment if dealt with on indictment and 2 years imprisonment when dealt with in the Local Court. The maximum fine that can be imposed is 500 penalty units ($55,000).

Objective seriousness

4. The objective seriousness is towards the lowest order of objective seriousness for offences of this nature. Factors that inform the objective seriousness include the following:

    i. This was a randomly detected offence. Mr/Ms made no attempt to conceal or evade detection. It occurred in the context of someone who has experienced long term drug addition since their formative years as a teenager of parents who were also drug addicted.

    ii. The blood test does not indicate the quantity of methylamphetamine used, it is not proven beyond a reasonable doubt that the quantity consumed was ever sufficiently high enough to cause significant inhibition. That is, it cannot be assumed that Mr/Ms was ever "high" – this evidence is completely absent and must not be assumed. It would be erroneous to make such a finding unless there was stronger circumstantial evidence or direct evidence such as Mr/Ms being arrested and found in an intoxicated state. Nor is there evidence that if Mr/Ms was high that they were in a high risk situation.

    iii. A more serious example of contravention of an ESO, that does not necessarily coincide with a discrete criminal offence may be loitering near schools or childcare centres or attempting to befriend a child.

    iv. The breach, but for the existence of the ESO would be considered a relatively minor criminal offence akin to possession of a prohibited drug.

    v. Mr/Ms was not subject to conditional liberty and this offence should not be found to be aggravated on the basis. That is, the currency of the ESO was not in lieu of a continuing detention order nor does it operate on the same basis conditional liberty in the form of bail or parole because it is a civil regime and not designed to be punitive.

    vi. The offence is not aggravated by any factors that would directly endanger the community. Risk generally, is not a predicator of outcomes. That is, whilst Mr/Ms has been found to be a high risk to the community by the Supreme Court, he/she was **not actually a risk** to the community by reason of this offending –

the risk was theoretical. He/she was not brought to the attention of authorities for acting in a manner that was dangerous to the public.

vii. The methylamphetamine was ingested whilst there were **many other risk-mitigating conditions** in place to address the overall risk he posed to the community.

viii. It is submitted that the actual risk he/she posed to the community, despite illicit drugs being a particular risk factor, was in all of the circumstances, low. This is because risk factors are a complicated and circumstantial matrix - one factor alone cannot be assessed in a vacuum. The general risk posed by breach of the condition must be balanced with the raft of other protective conditions, such as non-association and electronic monitoring.

Objects of an ESO

5. The objective of CHROA is primarily to ensure the safety and protection of the community. The other purpose is to encourage the offender to undertake rehabilitation. These objectives are **not mutually exclusive** of one another.[13]

6. The conditions of an ESO are, in part, designed to mitigate risk factors that are known to be, or are associated with this offender or offenders of a similar type. The conditions ought not be viewed in isolation but as complementary, meeting the requirement to protect the community and promote Mr/Ms' rehabilitation.

7. Almost all aspects of Mr/Ms' life are closely monitored under the ESO administered by a specialised team within CSNSW. The nature of these conditions requires pro-active and vigilant compliance each day by Mr/Ms. Some of the more onerous conditions include the following in summation:

   [is a good opportunity to emphasise how strict the conditions are by example and reference to the schedule]

8. Over the [time on order] which Mr/Ms has been subject to an ESO [this is the first occasion which he/she has failed to comply with a condition or despite their efforts to comply each day with the order, they have previously breached and commenced a cycle of custody for offending solely arising from the existence of the ESO].

9. Whilst Mr/Ms is in custody, the ESO is suspended. He/She will be required to resume compliance with the ESO upon release from custody for the entire balance of the order which is [length remaining].

Purposes of sentencing s 3A

10. It is accepted that specific and general deterrence and denunciation are relevant though moderated by reason of [mental illness, circumstances of the offending?].[14]

11. Moreover, these factors are shadowed by the weight which ought to be given to this offender's rehabilitation, especially in circumstances which the offending does not involve [violence or sexual offending] or directly endanger the community.

12. The objects of CHROA crucially include rehabilitation of the offender. It is submitted that rehabilitation should be given significant weight in sentencing for an offence created by the same statute.

---

[13] *The State of New South Wales v BG (Final)* [2019] NSWSC 200 [39] per Fagan J.

[14] *Muldrock v The Queen* (2011) 244 CLR 120 at [53]; D*PP (Cth) v De La Rosa* [2010] NSWCCA 194 (2010) 79 NSWLR 1 at [177].

13. It has been said that the two separate objects of the *Act* are not mutually exclusive. In *State of New South Wales v BG (Final)*, Fagan J proceeded to impose conditions with regard to the following observation:

> *The second objective, of encouraging rehabilitation, may be entirely frustrated if stringent conditions are imposed that are not reasonably specific to reducing the particular risks of reoffending which the defendant poses. If unreasonably sweeping and undirected constraints are imposed then breach of them followed by prosecution and imprisonment may become an unacceptable hazard flowing from the order. Interruption of the defendant's liberty under the ESO by prosecution and return to prison for infringement of unnecessary conditions would disrupt and impede prospects of rehabilitation. The two objectives identified in s 3 are not mutually exclusive.* ***Rehabilitation of an offender will of itself contribute to the safety and protection of the community.***[15]

14. Further consideration has been given to the detrimental continuation of a cycle of custody and how this hinders the objects of CHROA. In *State of New South Wales v McQuilton (Final)*[16] His Honour Fagan J set out a detailed history of breaches of the relevant order and the action taken by authorities in response. In relation to the history of breaches of one such condition, namely a condition prohibiting access to pornography, His Honour remarked:

> *It is apparent that when such a condition is in place and is breached, Corrective Services officers and police exercise their prosecutorial discretion very readily in favour of laying a charge. The proper purpose of prosecuting a breach is to enforce compliance with the conditions, by securing a penalty to deter the defendant from future breaches. Prosecution should not be seen as a means of securing preventive detention. The Act does not provide for or envisage intermittent preventive custody as a means of protecting the community.*[17]

[a very similar argument could be made in respect of drug use]

Use of criminal history

15. Section 21A(2)(d) of the *Crimes (Sentencing Procedure Act) 2000* NSW provides that it is an aggravating factor if: *'the offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences).'*

16. In *R v McNaughton*[18], the Court of Criminal Appeal considered how a prior criminal record can operate as an 'aggravating feature' in accordance with the principle of proportionality. Prior offending is not a factor to consider in the assessment of objective seriousness and is not to be used to determine the upper boundary of a proportionate sentence, rather it assists to determine what the sentence should be having regard to the objective seriousness.[19]

17. It is important that a serious criminal history is not conflated with the objective seriousness of the offending in a way that would produce a disproportionate sentence. This submission accords with the fundamental principle of proportionately enunciated by the High Court in *Veen 2*. A poor criminal history "*cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences*"[20]

Alternative to imprisonment

18. Having regard to the objects of the *Crimes (High Risk Offenders) Act 2006* and the purposes of sentencing set out above, and the objective seriousness of this offence, it is submitted that a sentence of imprisonment is not appropriate.

---

[15] *State of New South Wales v BG (Final)* [2019] NSWSC 200 [39].

[16] *State of New South Wales v McQuilton (Final)* [2019] NSWSC 265.

[17] *State of New South Wales v McQuilton (Final)* [2019] NSWSC 265 [43].

[18] *Regina v Darrell Terry McNaughton* [2006] NSWCCA 242; (2006) 66 NSWLR 566.

[19] *Regina v Darrell Terry McNaughton* [2006] NSWCCA 242 [25]-[26].

[20] *Veen v The Queen (No 2)* [1988] HCA 14 [14].

19. A Community Correction Order is an alternative sentence to full time imprisonment that carries a conviction and the burden of the courts power to recall the offender to answer any alleged breach of the order. A Community Correction Order [coupled with the period of remand custody or community service] allows the court to give due weight to all of the purposes of sentencing pursuant to section 3A of the *Crimes (Sentencing Procedure) Act 1999* NSW with emphasis on promoting the objects of CHROA - protection of the community through continuing the offender's rehabilitation.

20. In the instinctive synthesis, paramountcy ought to be given to the consequences of imposing a sentence of imprisonment in circumstances where it would exacerbate the existing condition of institutionalisation experienced by this offender and be counter-productive to the progress which they have made under the ESO to date.

Application for the CPR and CPPOs

NSW Police are making an increasing number of applications to include someone on the Child Protection Register (**CPR**) and for Child Protection Prohibition Orders (**CPPOs**). Both of these types of proceedings are initiated by an application under Part 4 of the *Local Court Act 2007* (NSW) and fall within the 'special jurisdiction' of the Local Court.

These applications are made pursuant to the following Acts:

- *Child Protection (Offenders Registration) Act 2000* (NSW) **(CPR Act) at Part 2A**
- *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) **(CPPO Act) at sections 5 and 7**

NSW Police usually appear in these matters. Sometimes the applicant officer is a member of the Child Abuse Squad however, this is not always the case. In respect of CPPO matters, the applicant officer is often the officer responsible for monitoring compliance with the CPR (sometimes called a case officer).

The 2-Stage Approach to applications for CPPOs and CPR applications

Applications for CPPOs on an interim and final basis (sections 5, 7 CPPO Act) and applications made to a court pursuant to Part 2A of the CPR Act both require the court to engage in a two stage approach.

Stage 1 *Judgment* about the evidence in accordance with the legal test.

Stage 2: *Discretionary* exercise about whether or not an order should be made.

The discretion to make the order is derived from the word 'may' which appears in all legislative provisions that create the mechanism for these applications to be made to a court.

Factors that guide the exercise of discretion in the case of final CPPOs are drawn from subsection 5(3) considerations in the CPPO Act. In the case of applications for the CPR, guidance is taken at subsection 3AA(3) of the CPR Act. These considerations are not exhaustive so you can be creative depending on the circumstances of the case.

O'Neill v Commissioner of Police [2020] NSWSC 1805 **is among the few authorities available to guide how the legal test is understood and the type of expert evidence that is expected to support such an order that will inevitably have a significant impact on a person's liberty.**

Brief overview of the CPR

Registration on the CPR is permanent and exceeds the reporting period. The fact of registration triggers 'reporting obligations.' These reporting obligations require the 'registrable person' to notify police of changes to their circumstances and if there has not been a change, make contact on an annual basis with police to verify their circumstances. Divisions 2 and 3 of the CPR Act set out reporting obligations and ***attached*** is a copy of the Form 3 issued to registrable persons by NSW Police.

The reporting obligations are not prohibitions except for travel which has been restricted by the enactment of a Commonwealth offence (see offences section). However, if someone is on the CPR and the police are concerned about their activities, this may trigger an application for a CPPO to control their activities (even if their reporting period has expired).

There are two ways which a person can become a registrable person, and therefore eligible for a CPPO to be made against them in the future. The terms "automatic" and "manual" are descriptive only and not used in the legislation.

1. **"Automatic registration"** is registration following sentence for a 'registrable offence', that is a 'Class 1' or 'Class 2'.[21] This is the most common and well-known way onto the CPR.

   Notably, a person ordered to be detained on a limiting term or detained after a finding of not guilty by reason of mental illness for a registrable offence is deemed to be 'sentenced' and subject to automatic registration.

2. **"Manual registration"** via an **application to the Local Court** against someone who has been sentenced for an offence but that offence is **not** a 'Class 1' or 'Class 2' offence.[22] This allows an application to be made against someone who has been sentenced for a criminal offence that does not involve a child – the 'relevant offence'.

   These applications are made pursuant to section 3D and 3E of the CPR Act either **when the person is sentenced for an offence that is not a 'Class 1' or 'Class 2'** offence or **within 60 days** after the sentence for the relevant offence, respectively. Also, a verdict available at a special hearing or a special verdict pursuant to sections 22 or 38 of the *Mental Health (Forensic Provisions) Act 1990* (NSW), respectively, constitute a finding of guilt causing automatic registration.

3. Sections 3F also allows applications to be made to the Local Court in some limited circumstances relating to old offences. Section 3G allows for the court to impose reporting obligation on a person who is granted bail under the *Mental Health (Forensic Provisions Act 1990* (NSW).

[21] *Child Protection (Offender Prohibition Orders) Act 2004* (NSW) ss 3 and 3A. Refer to definitions of class 1, class 2 and 'same incident' offences.

[22] *Child Protection (Offenders Registration) Act 2000* (NSW) Pt 2A.

Exceptions for being a registrable person

There are a few exceptions to automatic registration. Common exceptions occur when the person is sentenced under section 10 (non-conviction conditional release order) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) or section 33 (1)(a) of the *Children (Criminal Proceedings) Act 1987* (NSW) for a 'registrable offence'. Section 14 and 19 orders pursuant to the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) are consistent with the predecessor provisions, arguably, but in my view, another exception. There are additional exceptions that apply to children only. Interestingly, a sentence under section 19B of the *Crimes Act 1914* (Cth) is not expressly cited as an exception.

Calculating reporting periods

Offence	Reporting Period
Single Class 1	15 years
Single Class 2	8 years
A Class 1 registrable person committing a subsequent registrable offence	Life
A Class 2 registrable person committing a subsequent Class 1	Life
A Class 2 registrable person committing a subsequent Class 2 offence who has ever been sentenced for 3 or more Class 2 offences.	Life
A person sentenced for more than a single registrable offence not covered above	15 years
By application to the court for non-Class 1 or Class 2 offence	8 years

Multiple offences are treated as a single offence for the purpose of calculating reporting periods if the offending arises from the **same incident** that is against the same victim and within 24 hours.[23]

Form 1 offences in NSW and s16BA Commonwealth count as separate offences unless they meet the definition of 'same incident'.

These reporting periods are halved for registrable persons who were children at the time of the registrable offence.[24]

Reporting periods are suspended whilst a person is in government custody (including prisons and forensic hospitals), travelling oversea or outside NSW and not reporting. It is also suspended whilst they are subject to an interim or final extended supervision order.

Is your client actually a 'registrable person'?

NSW Police are responsible for notifying a person of their reporting obligations which includes both the fact of their reporting obligations and the length of their reporting obligations.

NSW Police have made systemic errors in respect of issuing reporting notices that should not have been issued and incorrectly calculating reporting periods. Both types of errors have enormous

[23] *Child Protection (Offenders Registration) Act 2000* (NSW) s 3(3).

[24] *Child Protection (Offenders Registration) Act 2000* (NSW) 14B.

ramifications and are difficult to detect. These errors were investigated and reported in the 2019 LECC report.

If you act for someone who is a registrable person whether it is because they are charged with failing to report or providing false information in respect of reporting obligations, because they are charged with subsequent offences or have been served with an application for an ESO or CPPO **you need to check that they are actually a registrable person and how long they should be reporting**.

If an error has been made by NSW Police, this may give rise to some of the following:

1. A **permanent stay of criminal proceedings** in respect of reporting obligations.
2. A **permanent stay of a CPPO application**.
3. **Internal review** and other avenues of **administrative appeal** and **judicial review.**
4. **Civil action**, especially if your client has been providing personal information, unlawfully searched, arrested or imprisoned in respect of the CPR when they should not have been on the CPR (think trespass, false imprisonment, misfeasance in public office).

To check if your client is actually a registrable person you will likely need to obtain their custodial history and the court file for the index offending.

Brief overview of CPPOs

The CPPO Act introduced special orders that are designed to restrict the activities of 'registrable persons' via conditions such as non-association and place restrictions.[25] CPPOs can only be applied for against an already 'registrable person' as defined in the CPR Act. The CPPO application is usually framed in a manner that suggests prohibitions are a necessary addition to the management tools police can use to minimise sexual offending against children by registrable persons.

CPPOs do not occur automatically as a consequence of becoming a registrable person. They are standalone applications that can be brought at any time.

Reading the CPPO application

First, check the particulars. Is the application particularised under either Part 2 or Part 2A the CPPO Act? Most applications are made under Part 2 and this paper will only address Part 2 applications.

Be alert to the application of the Evidence Act. Seeking interim or final orders is not like a bail application or sentence hearing, it is a hearing which section 4 of the *Evidence Act* mandates the application of the rules of evidence.

Whilst in interlocutory hearings section 75 of the Evidence Act applies creating a hearsay exception, the exception can only be relied upon when the party seeking to adduce the evidence can show the source of that evidence. That means the police officer who obtained the documents needs to give evidence about this and the mode which they obtained those documents should comply with section 16 of the CPPO Act when it comes to material from Corrective Services and other agencies.

It is common for the application to be accompanied by a summary of material annexed to the application titled 'grounds'. This summary is usually blended with submissions in support of the orders

[25] Refer to the Second Reading Speech attached to this paper.

sought on an interim and final basis. The nature of documents annexed to the application can vary. Often, these documents include 'facts sheets' from previous proceedings, COPS entries or criminal histories.

The annexures are rarely in admissible form and have limited evidence of provenance. The source of the documents often fails to comply with section 16 of the Act and accordingly police often obtain documents improperly.

Provenance Where did the documents come from?

For example, the facts sheet may be in the original police generated form but how will you know these were the facts your client was sentenced on when there isn't even a statement about where the document came from (i.e. court file)?

Section 16 Information relating to registrable persons

(1) For the purposes of determining whether to make an application under this Part, or making an application under this Part, the Commissioner of Police may, by notice in writing served on a government agency, direct the government agency to provide to the Commissioner, on or before a day specified in the notice, any information held by the agency that is relevant to the assessment of the risk posed by a registrable person to the lives or sexual safety of one or more children, or children generally.

(2) A government agency is authorised and required to provide information requested under subsection (1) to the Commissioner of Police.

(3) A government agency is not required to give information that is subject to legal or other professional privilege.

Unless the annexures are under cover of an affidavit like a forensic procedure application or the applicant officer is at court to give evidence about their provenance and produce the section 16 notices, you have grounds to make objections. Even if there is an affidavit, objections can stillbe made for example if there has been impropriety by police accessing sensitive reports or potentiallyusing court appointed expert reports from HRO proceedings that are otherwise protected.

CPPOs Interim hearings

A CPPO matter will require you to spend more time reading than most matters in a list court. In addition to reading, your workload is likely to significantly increase if the police are seeking interim orders on the same day. **You may consider advising your client to delay the hearing of the interim orders *and* resistinterim orders as much as possible**. If you have these instructions, some good reasons to raise in submissions on your client's behalf include:

1. The proceedings must occur in **closed court** (but can be adjourned in an anonymised way without identifying the client or the nature of the application). Take the opportunity to ask for your client's name to be anonymised in the court list.[26]

2. **Unexpected and significant use of court time** for reading (below) and the time for objections* and submissions.

[26] Child Protection (Offender Prohibition Orders) Act 2004 (NSW) s 14.

3. **Unexplained late notice (without leave of the court)** of the application against the onerous nature of conditions sought surely demands that procedural fairness favour the defendant's representatives having time to prepare. Whilst section 7 permits interim orders to be made without notice and in the absence of the defendant, that does not necessarily mean the court should exercise such a power to make the order – a stay is available for an abuse of process and arguably, unexplained late notice is an abuse of process.

   If interim orders are pressed and there is a lack of notice, consider cross-examining the applicant officer about why they were unable to give **reasonable notice**.

   Just because the court has the power pursuant to section 7(2) to make interim orders without notice and in the absence of defendant does not mean they should exercise that power! If the police have made no effort to serve the application (which frequently occurs) or served it with insufficient notice they should be seeking leave of the registrar to file and putting on some evidence about why they have not served it. Consider whether the lack of notices raises issues such as abuse of process or a serious denial of procedural fairness.

Section 50 *Local Court Act 2007* - Service of application notice

(1) An application notice issued by a police officer must be served by a police officer in accordance with the rules **(see Rule 5.13 below).**

(2) An application notice issued by a public officer must be served by a police officer or public officer or other person authorised by the rules in accordance with the rules.

(3) An application notice issued by a person other than a police officer or a public officer must be served by a person authorised by the rules in accordance with the rules.

(4) A copy of an application notice must be filed in the Court in accordance with the rules.

Section 50 of the *Local Court Act 2007* – When proceedings commence

(1) All proceedings are taken to have commenced on the date on which an **application notice** is filed.

(2) An application notice may be filed even though it has **not been served IF**:

(a) the **notice is not able to be served, despite reasonable attempts** to do so, or

(b) the **registrar gives leave to do so after forming the opinion that it is not reasonable in the circumstances of the case to require prior service of the notice.**

(3) Nothing in this section affects any other Act or law under which proceedings are taken to have commenced on another date.

Rule 5.13 of the Local Court Rules 2009 - Doubtful service

If a document issued in proceedings is not served personally, the Court may, on the application of a party or on the motion of the Court—

(a) stay the proceedings,

(b) adjourn the proceedings,

(c) set aside any order made in the proceedings,

if satisfied that there is a doubt as to whether the document came to the party's **notice within a reasonable time.**

Also refer to Rule **8.9** which requires applications to be filed prior to the first return date.

4. If the application is not prepared like a forensic procedure application with a covering affidavit explaining where and how the material was obtained and the applicant officer is not available for cross examination, there is a good argument to be made that the police have noted complied with section 75 of the *Evidence Act* such that they can rely upon it. **Interim hearings are not like a bail applications or sentencing where the rules of evidence have been abrogated or not invoked, this is a proper hearing and theEvidence Act must apply.** Even though there are hearsay exceptions at the interlocutory stage, it is not an absolute exception – showing where the documents came from is essentialto qualify the exception at section 75.

5. The application will likely include **a summary containing errors and exaggerated or opinion statements, this is really best described as supposition not evidence**. If the summary isn't accurate, this could be a goodreason to delay any hearing about interim orders as the police summary is **not a satisfactorysubstitute for the magistrate reading all of the annexures** which they will ordinarily need to do unless there is consent.

6. If your client is on parole or already under supervision this may **offset the immediacy** of additional restrictions in a CPPO. This is a strong argument if:
    - Current conditions of **parole or other supervision** (ICO, CCO, CRO or ESO) may already allow for directions to be given that are consistent with the CPPO or achieve a similar purpose to that which the CPPO application is intended (the CPPO could be an abuse of process and warrant a temporary stay if the CPPO mirrors the restrictions imposed through another forum e.g. the Supreme Court in an ESO or the State Parole Authority if the person is still on parole).
    - Current conditions of parole or other supervision may offer satisfactory protections in lieu of a CPPO. If this type of supervisory regime is close to expiration, your adjournment might be framed on the basis that the supervision is close to expiration hence the CPPO application for a *final* order might be reasonable but interim relief is not 'necessary' at this stage, particularly if there has been no recent incidents.

7. There may be **current ESO proceedings on foot in the Supreme Court** and holding an interim hearing or making an interim order could interfere with the Supreme Court proceedings – primacy might need to be given to allowing those proceedings to run their course but you can highlight that should the Supreme Court consider your client to be an unacceptable risk of committing a serious sexual offence, they have the power to make an ISO.

8. As a general principle, it is desirable that an interlocutory hearing evaluates the final issue in dispute when determining any interim relief being sought: *Kolback Securieties Ltf v Epoch Mining NL* (1987) 8 NSWLR 533. It is sensical to take notice of the considerations at subsection 5(3) despite the restrictions at subsection 7(7) of the CPPO Act. Consideration of the final outcomesincludes the question of whether it is possible for the evidence to be produced in admissible form at final hearing.

9. If the application contains **court appointed expert reports from ESO proceedings** (that are unhelpful) an objection could be raised. This is significant because it can be argued that these reports are not permitted to be used in any other proceedings that are not closely connected to CHROA pursuant to section 25D of CHROA (page 9 above). Contravene ESO or subsequent ESO applications would be closely connected.

The judgment of Fagan J in The *State of New South Wales v McCarthy* [2015] NSWSC 1780 [28] is helpful. This is a matter which a Notice of Motion was filed by the state of new South Wales to disclose court appointed expert reports to another expert in subsequent criminal proceedings for stalk/intimidate whilst subject to an ESO. Fagan J said "*The circumstances in which the 2009 reports have come into the plaintiff's hands give rise to a power of the Court to make orders with respect to their collateral use, based on the Court's inherent jurisdiction to protect its own processes against abuse*." Please note that whilst Fagan J determined that the reports could be released, section 25D of CHROA is an amendment which came into force after this decision.

*Below is a section summarising the rules of evidence in CPPOs at interim and final hearings and CPR hearings.

The **test for an interim order** is found at section 7 of the CPPO Act as follows:

> *The Local Court **may** make an interim child protection prohibition order prohibiting a registrable person from engaging in specified conduct **if it appears** to the Local Court that it is necessary to do so to prevent an **immediate risk** to the lives and sexual safety of one or more children, or children generally (on the balance of probability).*[27]

This is a slightly different test to that required to be met for a final order.

Importantly, since CPPO applications can only be made against registrable persons, it is worth asking your client about the level of contact they have with police in respect of their reporting obligations. This could **mitigate any immediacy** about the perceived risk and highlight the powers which police already have available to use. If you do not have time to issue a subpoena, you can obtain this information from your client or possibly cross examine the applicant officer.

Directions before CPPO or CPR final hearing

If the application is contested, the court will likely issue directions for the filing and service of evidence and bring the matter back for further directions to set the hearing date. However, it is entirely a matter for the presiding magistrate as to how the matter proceeds, there is no practice note to refer to for guidance or consistency.

When directions are made, consider whether or not the defence will make a positive case and obtain an expert report or call and expert to give evidence about risk and other considerations pursuant to the legal test. If so, you may need a couple of months to obtain your report and confirm the availability of the expert to give evidence if they will be required for cross examination.

A practical timetable might be as follows:

1. Applicant to file and serve evidence relied upon for the final hearing 4 weeks after the directions hearing/mention
2. Defendant/respondent file and serve evidence relied upon for the final hearing 8 weeks after the directions hearing/mention
3. Matter listed for further directions on X to check compliance with orders 1 and 2 above and set a final hearing date.

[27] *Child Protection (Offender Prohibition Orders) Act 2004* (NSW) s 7.

Consent not available for CPR applications

A person **cannot consent** to an application to include them on the CPR. This is because the Local Court needs to be "satisfied" that there is evidence which appears to meet the test.[28]

If your client does not want to challenge the evidence, we suggest you take a neutral approach so not to object but also not to make concessions,admissions or agree to any facts. Whilst this may assist the presiding magistrate, admissions or agreed facts could be used in an application for a CPPO, ESO or tendency evidence in criminal proceedings.

If you are going to be silent at the hearing of the evidence, your client needs to be firmly advised of the consequences which follow (some of these are outlined above on page 16 (Legal Aid eligibility).

Negotiating CPPOs

If you are instructed to negotiate consider making offers *"without prejudice save as to costs"* as your offer may be relied upon in a similar manner as a '*Calderbank* offer' in a later costs application.[29] For example, if you areinstructed to make an offer to consent to certain conditions and a specified term but it is rejected, if alater hearing occurs and orders are made consistent with your offer, you may have a good basis for a costs application. However, raise the issue of costs cautiously as it cuts both ways.

Consent to CPPOs on an interim or final basis

Unlike applications for the CPR, your client can consent to a CPPO being made.[30] Consent of the defendant can be taken in lieu of a hearing of the evidence. You can state on the record that consent is given "without admitting to the allegations contained in the application or supporting documentation". There is no specific provision to ***"consent without admissions"*** however, this is largely unchartered territory so making novel arguments in your client's interests is part of this type of advocacy work.

If your client is consenting to a CPPO on an interim or final basis, the conditions of the order must be carefully considered. Whilst applications can be made to vary or revoke a CPPO, your client would be required to come back to Legal Aid and have the merit of such an application re-determined.

---

[28] *Child Protection (Offenders Registration) Act 2000* (NSW) s 3E.

[29] Judicial Commission of New South Wales, Civil Trials Bench Book – Costs
https://www.judcom.nsw.gov.au/publications/benchbks/civil/calderbank_letters.html
A Calderbank letter (*Calderbank v Calderbank* [1975] 3 All ER 333) leaves costs in the discretion of the court.

[30] *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 10.

CPPO Conditions

The application will contain numerous proposed conditions. There is no 'proforma' set of conditions similar to AVOs. Whilst the conditions of CPPOs are usually similar in nature, they are drafted by different police officers and are very inconsistent.

These orders are not dynamic, there is no one overseeing them or providing any form of flexibility to your client. This is particularly important considering the order can be made for up to 5 years. Unlike ESOs, CPPOs are not monitored and so the conditions must be different. You can structure the conditions of the CPPO to include **'sunset clauses'** so that overtime, the restrictions are relaxed.

The types of conditions are prohibitions or restrictions. The orders should not include positive obligations, nor should conditions be framed as a means to abrogate LEPRA by ordering consent to searches of a person or property (including electronic devices) as this type of behaviour falls within the ambit of reporting obligations.

Section 8 CPPO Act: Conduct that may be the subject of orders

(1) A prohibition order may prohibit conduct of the following kind:

(a) associating with or other contact with specified persons or kinds of persons,

(b) being in specified locations or kinds of locations,

(c) engaging in specified behaviour,

(d) being a worker (within the meaning of the *Child Protection (Working with Children) Act 2012*) of a specified kind.

(2) Subsection (1) does not limit the kinds of conduct that may be prohibited by a prohibition order.

Take careful instructions about how the proposed conditions will affect your client. For example, is their home near a school and would a place restriction severely limit their freedom of movement?

The conditions need to be drafted in a manner that will not set your client up to inevitably breach the order, whether it is interim or final.

Consider the tests in sections 5 and 7 for final and interim orders, respectively. This may lead you to negotiate or challenge the proposed conditions and the length of the order if they exceed what is necessary to reduce the risk posed by your client to children.

Remember, the purpose of the order is not to completely eliminate risk. There will always be some risk.

Also consider re-vamping the conditions so that they are in **plain English**.

Non-association and non-contact with child (under 18), generally

First, it is impossible to live in society without approaching or contacting a person under 18 years. People under 18 years old are going to be at the shops, in cafés and restaurants, working in retail and essential services, on public transport, in public places like events, concerts, parks, beaches. Absolute prohibitions about contact with children are impractical and will set your client up for failure.

Conditions about non-association with children can be framed in terms that will still allow your clientto go about their normal life and have normal access to goods and most services – especially essential services such as transport, groceries, medical and education.

Proposed conditions

- Not approach or contact any child for the purpose of befriending them.
- Not enter the private premises which a person under the age of 18 years is known to reside.
- Not allow a person under the age of 18 years old to enter premises which you reside.
- Not to engage in any childcaring activities or teaching activities involving a person under the age of 18 years old.
- No contact with persons under 18 except if contact arises in the course of the young person's employment

NOTE: **Exceptions are essential if you cannot narrow the condition in line with the above.** Otherwise, your client could be committing a breach offence by ordering food at McDonald's or using the check-out at Coles.

A plain English version could be used in lieu of the jargonistic conditions or by way of further explanation like AVOs.

- You are not allowed to touch a person who you know or think is under the age of 18 years old.
- You are not allowed to spend time with a person who you know or think is under 18 years old, for example you cannot hangout with someone under 18 years old.
- You are not allowed to speak to someone who is under 18 years old over the phone, or by writing emails or text messages, using Facebook or similar types of internet applications or writing letters.
- You **are allowed** to do things that you have to do such as going shopping for groceries or other retail stores such as buying clothes and electronics, going to the doctor, going to the chemist, catching the bus or the train.
- You cannot invite someone who is under 18 years old to your home or go to someone else's home where someone under 18 years old lives.
- You are not allowed to look after a person who is under the age of 18 years.
- You are not allowed to be a teacher for a person who is under the age of 18 years.

Drug and alcohol prohibition

Think about whether your client suffers from alcohol or drug addiction. Will a total ban on illicit drug use or alcohol be impossible for them to comply with? This may be especially difficult if your client is not already engaged in support services.

Is there any evidence in the application that suggests your client is a higher risk of committing an act that would endanger the safety of children if they are using drugs and alcohol? If not, you could counter the police submission that this condition is necessary on the basis that it is purely speculative and based on opinion evidence which they do not have sufficient expertise to form – arguably, this is not a matter which judicial notice should be taken.

You may not be able to escape a condition relating to illicit drug use or alcohol, however, you could limit the scope of the prohibition.

Proposed conditions

- ~~Not being in public whilst under the influence of alcohol~~ Not be in the company of children whilst under the influence of alcohol or other drug that is not prescribed.
- Not be under the influence of alcohol or other drug in the same premises as a person under the age of 18 years (e.g. only premises where persons over 18 are permitted entry).
- Not consume more than 1 standard drink of alcohol per hour.

Non-association (organisations and other venues)

A restriction on joining or attending upon a club or other organisation which persons under the age of 18 years also attends could extend to gyms, sports clubs, RSL clubs etc.

In response, instead of having a blanket prohibition, perhaps a condition with exceptions such as gyms generally or a specific local gym or club.

Miscellaneous conditions

- Not use a phone or computer or other device that accesses the internet **that does not belong to you unless it is for an emergency.**
- Not associate with anyone **who you know** is also a 'registrable person' under the Child Protection Register including in person and speaking to them by phone, email, Facebook, instant messaging or normal mail.

Preparation for hearings: CPR + CPPO applications

A subpoena to NSW Police can be very useful in these proceedings. That is not to suggest that a subpoena should always be issued – this must be carefully considered on a case by case basis.

In an application for a CPPO, a subpoena to NSW Police may be very useful to obtain information about how the CPR is being managed in respect of your client. The CPPO is there to supplement the CPR but if police are not using the supervisory powers available to them under the CPR you could build a case that:

a) the CPPO is not necessary because the powers under the less restrictive CPR satisfactorily meet the risk your client poses; and
b) if NSW Police are concerned about the risk the person poses to the community, surely they would be using the powers available to them under the CPR?

The subpoena may also reveal police misconduct in respect of how the CPR is being managed. Section 21E of the CPR Act creates an offence if the fact of someone's registrable status is disclosed

without consent or the disclosure is not made in connection with the administration of the CPR Act. When you review subpoena material, look out for any sign of misfeasance.

Legal Aid funding is available for expert reports to be commissioned in exceptional circumstances and approval needs to be obtained from an SIC, Grade 5 solicitor or Grade IV solicitor from indictable appeals. One of the considerations which can give rise to exceptional circumstances is where steps have been taken to find alternative evidence or an alternative supplier within the fee scale but none is available.[31]

If you are going to call evidence from an expert, note that you will need to disclose this evidence in accordance with the directions for filing and service of evidence and be prepared to call your expert as a witness. If you are calling an expert, do not forget to establish them as an expert.

Specific evidential issues in CPPO and CPR hearings

By operation of section 4 of the *Evidence Act 1995* (NSW), the *Evidence Act* applies to interim and final CPPO matters and CPR applications.

The Uniform Civil Procedure Rules do not apply.

In interim proceedings, the hearsay rule does not apply (section 75 *Evidence Act 1995* (NSW) **IF** the party who adduces the evidence adduces evidence of its source.

- Police facts sheets – are they from the police database or the court file?
- COPS entries – who downloaded them?
- Psych reports – who commissioned the report, was it produced in word document, is it privileged?
- CHECK WHETHER SECTION 16 NOTICES WERE ISSUED

Even if hearsay evidence is admitted, the **weight** to be given to that evidence remains in issue.

The business records exception (section 69 *Evidence Act*) does not apply if the representation was made in connection with an investigation **relating** or leading to a criminal proceeding.

There are less protections covering admissions in civil proceedings. However, the court still has the discretion to exclude evidence pursuant to section 135 of the *Evidence Act.* The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might

(a) Be unfairly prejudicial to a party

(b) Be misleading or confusing

(c) Cause or result in an undue waste of time

Police prosecutors and police officers may offer opinions about risk in submissions or evidence. **Opinion evidence is inadmissible unless** '*a person has specialised knowledge based on the*

[31] Refer to Criminal Law Procedures Manual last updated April 2019 pages 36 and 37 (check for the current version) http://intranet/Practice/Criminal/Documents/Criminal%20Law%20Procedures%20Manual.pdf#search=expert%20funding%20in%20local%20court%20matters

person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge' (section 79 *Evidence Act*). It is arguable that a police officer from the Child Protection Squad may have some experience sufficient to justify limited opinion evidence but in terms of risk, a forensic psychologist or psychiatrist is the proper person to give such opinions.

The test for a final CPPO

The Second Reading Speech is a very useful resource so far as explaining the objects of the CPPO Act and is annexed to this paper for ease of reference. The second reading speech states:

> *"This bill recognises that special risk that child sex offenders and other violent offenders against children may still pose after they are released back into the community. Child protection prohibition orders are intended as a means of managing offenders of the highest risk to children. By prohibiting high-risk offenders from specified conduct previously shown to be a precursor to offending."*

Section 5 of the CPPO Act (excl subsections 5 + 6):

(1) The Local Court **may** make a child protection prohibition order prohibiting a person from engaging in conduct specified in the order if it is **satisfied that the person is a registrable person** and that, on the **balance of probabilities**:

(a) there is **reasonable cause to believe**, having regard to the **nature and pattern of conduct** of the person, that the person **poses a risk to the lives or sexual safety** of **one or more children**, **or children generally**, and

(b) the making of **the order will reduce that risk**.

[NOTE: Even if the court is satisfied of the test, they still have the discretion not to make the order].

(2) The Local Court may make an order under this section against a young registrable person only if, in addition to the matters set out in subsection (1), it is satisfied that all other reasonably appropriate means of managing the conduct of the person have been considered before the order was sought.

(3) In determining whether to make an order under this section against a registrable person, the Local Court is to **consider the following**:

(a) the **seriousness of each offence** with respect to which the person is a registrable person,

(b) the period of **time since those offences were committed**,

(c) the **age of the person when those offences were committed**,

(d) the **age of each victim** of the offences when they were committed,

(e) the **difference in age** between the person and each such victim,

(f) the **person's present age**,

(g) the seriousness of the person's **total criminal record**,

(h) the **effect of the order sought on the person in comparison with the level of the risk** that a further registrable offence may be committed by the person,

(i) to the extent that they relate to the conduct sought to be prohibited, the **circumstances of the person,** including the person's accommodation, employment needs and integration into the community,

(j) in the case of a young registrable person, the **educational needs** of the person,

(k) any **other matters** it thinks relevant.

(4) The Local Court is not required to be satisfied that the person is likely to pose a risk to a particular child or children or a particular class of children.

The test for applications for the CPR

NOTE: All the rules of evidence that apply in civil proceedings apply like a CPPO application.

Section 3D – Orders made during criminal proceedings

(1) If a court finds a person **guilty** of an offence that is **not a Class 1 or a Class 2 offence**, it may order that the person comply with the reporting obligations of this Act.

(2) A court **may** make an order under this section only if--

(a) **the court is satisfied that the person poses a risk to the lives or sexual safety of one or more children, or of children generally, and**

(b) the court imposes a sentence on the person in relation to the offence (other than an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999* or section 33 (1) (a) of the *Children (Criminal Proceedings) Act 1987*), and

(c) an application for the imposition of the order is made by the prosecution.

Section 3E – Orders made within 60 days of criminal proceedings

(1) The Local Court may, on application by the Commissioner of Police, order a person who has been **sentenced** by a court of New South Wales in respect of an offence that is **not a Class 1 offence or a Class 2 offence** to comply with the reporting obligations under this Act.

(2) The Local Court **may** make an order under this section only if--

(a) **the Court is satisfied that the person poses a risk to the lives or sexual safety of one or more children, or of children generally, and**

(b) the sentence imposed on the person in respect of the offence was not an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999* or under section 33 (1) (a) of the *Children (Criminal Proceedings) Act 1987* .

Note : The effect of subsection (2) (b) is to prevent a child protection registration order being made if an order is made dismissing the charge or conditionally discharging the offender [**i.e. non-conviction**].

(3) An application for an order under this section must be made **within 60 days** after the person with respect to whom the order is sought is sentenced for the relevant offence.

(4) For the purposes of Division 6 of Part 3, if the Local Court makes an order in respect of a person under this section, the person is taken to have been found guilty of, and sentenced for, a Class 2 offence on the date an order under this section is made [**8 years reporting**].

The meaning of posing a risk to the lives or sexual safety of children or children generally is defined at section 3AA of the CPOR Act. It specifically relates to 'a risk that a person will engage in conduct that may constitute a Class 1 or Class 2 offence'.

Legal Aid eligibility policy: CPR Applications + CPPOs

Under Policy **4.18.8** Legal Aid is available to oppose applications for CPPOs and applications to the Local Court to include someone on the CPR.

Although these are civil law proceedings, they are managed as criminal law grants and should be dealt with by criminal lawyers rather than referred on for civil advice.

The following tests need to be met:

- means test;
- availability of funds test;
- Legal Aid NSW must be satisfied that the conditions of the proposed order would **unreasonably restrict the applicant's personal freedom**; and
- there must be **reasonable prospects** either of successfully opposing the application or of the application being granted on amended terms that place less restriction on the liberty of the applicant.

In considering what is an unreasonable restriction, note that both applications can expose your client to increased criminal liability. You need to have regard to the criminal antecedents of the person and consider their personal circumstances, (dis)ability, living arrangements etc – even if the application is strong, the conditions sought will likely require rigorous advocacy to ensure they are practical.

Also consider that in the case of an application to include someone on the CPR, the obligations of registrable persons are extensive and in practice prevent overseas travel. Once the person is on the CPR an application for a CPPO may be made against them, they will unlikely be cleared to work with children and there may be other consequences specific to that person.

Costs for CPR and CPPO matters

Bear in mind that this is a costs jurisdiction. Costs could be awarded to either party under the *Local Court Act 2007* (NSW). The decision of costs is at the **discretion** of the court.

Some circumstances which you may consider a costs application include but are not limited to the following. Costs do not follow, ordinarily one would expect there to be a feature in the case such as delay, unreasonableness or impropriety to justify costs.

Local Court Act 2007 (NSW) s 69:

(1) The Court may award costs in application proceedings at its discretion and may determine by whom, to whom and to what extent costs are to be paid in or in relation to application proceedings.
(2) The Court may order costs to be assessed on the basis set out in the legal costs legislation (as defined in section 3A of the *Legal Profession Uniform Law Application Act 2014*) or on an indemnity basis.
(3) This section is subject to this Act, the rules and any other Act.

Appeals, variation and revocation – CPR and CPPOs

At the conclusion of a contested hearing (including an interim CPPO hearing), if an order is made against your client, an appeal can be filed in the District Court, but the orders will not be stayed (section 70 *Local Court Act 2007* (NSW).

Appeals are made to the District Court pursuant to Part 3 of the *Crimes (Appeal and Review) Act 2001* (NSW) and section 70 of the *Local Court Act 2007* (NSW). Your client has 28 days to appeal or3 months with leave of the District Court.

The Supreme Court can also hear appeals of interim and final CPPO and CPR application decisions with leave, that relate to a question of law (subsection 53 *Crimes (Appeal and Review) Act 2001* NSW).

Applications to vary or revoke CPPOs can be made. It is helpful to advise your client that they have these options and should their circumstances change, they can contact Legal Aid and seek assistance. These applications are made pursuant to section 11 of the CPPO Act and require leave. The applicant must demonstrate *'changes in the applicant's circumstances since the order was granted or last varied, it is in the interests of justice that leave be granted'.*

Offences relating to CPPOs and CPR and defences

Contravention of a CPPO or failing to comply with reporting obligations or reporting false information are criminal offences which each carry a maximum penalty of 5 years imprisonment.[32]

Importantly, the offences of contravening a CPPO and failing to comply with reporting obligations provide a statutory defence of 'reasonable excuse'. Subsection 17(2) of the CPR Act provides some

[32] *Child Protection (Offenders Registration) Act 2000* (NSW) ss 17, 18; *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 13.

circumstances that the court **must** have regard to in determining whether a registrable person had a reasonable excuse for failing to comply with their reporting obligations, as follows:

a) the person's age,
b) whether the person has a disability that affects the person's ability to understand, or to comply with, those obligations,

b1) whether the form of the notification given to the person as to the person's obligations was adequate to inform the person of those obligations, having regard to the person's circumstances,

c) any matter prescribed by the regulations,
d) any other matter the court considered appropriate.

There is also a Commonwealth offence if a registrable person leaves Australia without permission. Section 271A.1 of the *Criminal Code Act 1995* (Cth) provides restrictions on overseas travel by certain registered offenders:

(1) A person commits an offence if:
  (a) the person is an Australian citizen; and
  (b) the person's name is entered on a child protection register (however described) of a State or Territory; and
  (c) the person has reporting obligations (however described) in connection with that entry on the register; and
  (d) the person leaves Australia.
  Penalty: Imprisonment for 5 years.
(2) Absolute liability applies.
(3) Subsection (1) does not apply if:
  (a) a competent authority (within the meaning of section 12 of the Australian Passports Act 2005 (Cth) or section 13 of the Foreign Passports (Law Enforcement and Security Act 2005 (Cth) has given permission (however described) for the person to leave Australia; or
  (b) the reporting obligations of the person are suspended at the time the person leaves Australia.

Note: The defendant bears an evidential burden in relation to the matters in this subsection: see subsection 13.3(3).

Past experience of having approached the Child Protection Squad on behalf of a client to commence an application for overseas travel has revealed it is extremely difficult and slow to obtain approval, nay impossible.

It is important to be aware that a conviction for one of these offences can also make your client eligible for an ESO under CHROA because it is classed as an offence of a 'sexual nature'.[33]

Thank you for taking the time to read this paper.

Any general feedback, corrections or calls for additional information is most appreciated.

Please email diane.elston@legalaid.nsw.gov.au if you have feedback.

[33] *Crimes (High Risk Offenders) Act 2006* (NSW) s 5.