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

Legal Aid NSW Submission to Department of Justice

August 2016

323 CASTLEREAGH ST
HAYMARKET NSW 2000 / DX 5 SYDNEY

Legal Aid NEW SOUTH WALES

Table of Contents

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the Legal Aid Commission Act 1979 (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 33 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW provides state-wide criminal law services through the in-house Criminal Law Practice and through legal aid funding to private practitioners. The Criminal Law Practice services cover the full range of criminal matters before the Local Courts, District Court, Supreme Court of NSW and the Court of Criminal Appeal as well as the High Court of Australia.

Legal aid is available to applicants who are opposing an application to the Supreme Court for an extended supervision or continuing detention order under the *Crimes (High Risk Offenders) Act 2006 (NSW)*. Legal aid is also available for appeals, revocations and variations of orders under the Act.

This submission has been prepared with input from Legal Aid NSW's Criminal Law Division, Children's Legal Service and Prisoners Legal Service.

Legal Aid NSW welcomes the opportunity to make a submission to the Statutory Review of the Crimes (High Risk Offenders) Act 2006 (NSW).

Should you require any further information please contact Annmarie Lumsden, Director, Strategic Planning and Policy, at Annmarie.Lumsden@legalaid.nsw.gov.au or Harriet Ketley, Senior Legal Project Officer, Strategic Policy and Planning, Legal Aid NSW at Harriet.Ketley@legalaid.nsw.gov.au.

Introduction

> *After serving any sentence of imprisonment lawfully imposed, an offender has the right to personal liberty. That is "the most fundamental and important of all common law rights". It is one which "cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes*."[1]

Any impact on the fundamental rights of freedom from arbitrary detention and personal must strictly and carefully calibrated. With those principles in mind, the NSW Government introduced a post sentence preventative detention regime in 2006 on the basis that it apply to only:

> *a handful of high-risk, hard-core offenders who have not made any attempt to rehabilitate whilst in prison. These offenders make up a very small percentage of the prison population, yet their behavior poses a very real threat to the public. These concerns are compounded where the offender never qualifies for parole and is released at the end of their sentence totally unsupervised. The bill addresses this problem by allowing this small group of high-risk offenders to be placed on extended supervision or, in only the very worst cases, kept in custody. The Department of Corrective Services has advised that only a small number of offenders would fall into this very high-risk category.*[2]

Since that time, the regime was extended in 2013to apply to high risk violent offenders, and in 2016, to broaden the scope of offences within the high risk violent offender category. At the time of the recent amendments, the Government reiterated that the regime under the Act is used only for "a small number of offenders in the most serious cases."[3]

The proposals outlined in the Consultation Paper for the Statutory Review of the *Crimes (High Risk Offenders) Act 2006 (NSW)* (**the Act**) would, if implemented, go significantly further than the 2013 and 2016 amendments. They signify an increasingly punitive approach to high risk offenders, contrary to the Act's objective to encourage their rehabilitation.

---

[1] *Williams v The Queen* [1986] HCA 88; 161 CLR 278 at 292 per Mason and Brennan JJ, cited in *State of New South Wales v Donovan* [2015] NSWSC 1254 per McCallum J at [2] (upheld on appeal in *State of New South Wales v Donovan* [2015] NSWCA 280 at [58].

[2] The Hon Carl Scully MP, Minister for Police, Second Reading Speech to the Crimes (Serious Sex Offenders) Bill 2006: Extract from NSW Legislative Assembly Hansard and Papers Wednesday 29 March 2006

[3] The Hon. David Clarke MP, Second Reading Speech to the Crimes (High Risk Offenders) Amendment Bill 2016, (11 May 2016), p 1.

Rather than expressly expanding the cohort of individuals covered by the Act, the proposals seek to remove a number of important safeguards in the Act. This is likely to increase the numbers of offenders who are subject to Extended Supervision Orders (**ESOs**) and Continued Detention Orders (**CDOs**). In removing important safeguards in the Act, the proposals lose sight of the extraordinary status of a post sentence detention regime in the NSW legal system. The proposals are not justified by any evidence that the Act is not working as intended.

Legal Aid NSW acknowledges the role that a strictly limited preventative detention scheme plays in respect of a very small group of offenders, and where applications for detention or supervision are subject to the rigorous and independent scrutiny of the Supreme Court. However, any weakening of the current safeguards in that scheme risks eroding the institutional integrity of the judicial system, contrary to both the principles laid down in *Kable v Director of Public Prosecutions (NSW)*[4] and international law.

Legal Aid NSW is particularly concerned about the disproportionate impact of the proposals on indigenous offenders. This group is already starkly overrepresented in applications under the Act. Any reforms to the Act should start with a consideration of proactive measures to reduce the already high rates of incarceration of Aboriginal and Torres Strait Islander people.

These concerns underpin the following submissions in response to questions in the Consultation Paper. In a practical context, it should also be noted that any weakening of the Act's current safeguards will lead to an increase in applications and an increasing numbers of defended breaches. This will have resource implications for Legal Aid NSW.

Since 2006, in-house criminal lawyers from the Legal Aid NSW Indictable Section of the Criminal Law Division have been providing representation in applications under the Act. Almost all defendants who have been the subject of applications under the Act have been granted legal aid. The responses below have been informed by Legal Aid NSW's extensive work in this area.

[4] [1996] HCA 24

Eligibility

Question 1: How should the high risk offenders framework apply to people whose current sentence of imprisonment is for an eligible sex offence but their future risk is of serious violent offending (and vice versa)?

Legal Aid NSW opposes the removal of the statutory distinction between high risk sex offenders and high risk violent offenders.

From a broad policy perspective, a concern arises that conflating sex offending with non-sexual violent offending undermines recognition of the gendered nature of sexual offending, where the majority of sexual assault victims are women and girls.[5]

Further, any decision making about unacceptable risk, the core element on which orders under the Act are made, is highly fact specific.[6] This is appropriate, given the Legislature's intention that the Act apply only to a small cohort of hard core serious sex or violent offenders, and the intrusive nature of orders made under the Act.

Thirdly, no evidence is provided as to the purported legislative gap in the current categorisation of high risk offenders. To the extent that any such gap has existed, it was closed in 2013 at the time of the Act's expansion to serious violent offenders.[7] This expansion was recommended by a majority of members of the NSW Sentencing Council (**the Council**) following a comprehensive review of the then *Crimes (Serious Sex Offenders) Act 2006*.[8]

The Council's reasoning does not support merging of the high risk sex and high risk violent offender categories. Indeed, its observations are to the opposite effect. The Council was concerned about extending the regime to violent offenders, because of the well accepted challenges for professionals in predicting the risk of future reoffending by such offenders.

Predicting the future risk of recidivism is notoriously difficult, and even more so in respect of a group beyond the relatively well-defined sex offender cohort. The Council

[5] 7 Approximately 83 per cent of victims of sexual violence are women or girls: Australian Bureau of Statistics, 'Recorded Crime – Victims – Australia' (2012). Available at http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/E850B8189D9F2A44CA257B8800 1295CF?opendocument.

[6] *State of NSW v Kamm* [2016] NSWSC 1 at [45]

[7] At which time the Government stated that *The New South Wales Sentencing Council in its report on high risk violent offenders noted that there is a gap in the New South Wales legislative framework for dealing with high-risk violent offenders. This bill closes that gap by expanding the scheme in place for sex offenders that has been tested in the High Court*: The Hon David Clark MP Extract from NSW Legislative Council Hansard and Papers Tuesday 12 March 2013 (Second Reading Speech to the Crimes (Serious Sex Offenders) Amendment Bill 2013

[8] NSW Sentencing Council (2012) Report on *High-Risk Violent Offenders Sentencing and Post-Custody Management Options*

identified to two reasons for this: first, the diversity of the cohort; and second, the fact that high risk violent offenders 'are not generally specialists – they engage in violent behavior as part of a broader criminal career.'[9]

Therefore, contrary to the suggestion in the Consultation Paper that the Act does not cater well to offence "generalists", the 2013 amendments aimed to do precisely that. Further broadening of the cohort through removal of the distinction between high risk sex and high risk violent offenders is not necessary.

Question 2: Does a definition of imprisonment need to be included in the Act? If so, how?

Legal Aid NSW agrees that, to avoid any doubt, the Act should be amended to clarify that the term "sentence of imprisonment" for the purposes of the first threshold definition of "sex offender" and "violent offender" is confined to "full time imprisonment."[10] Further, the Act should make clear that "full time imprisonment" excludes control orders under section 33(g) of the *Children (Criminal Proceedings) Act 1987.*

We do not support any expansion of the definition of sex offender or violent offender to include suspended sentences, home detention and Intensive Corrections Orders for the purposes of the first threshold. Any preventative detention scheme should target that small group of hard core offenders who, close to the time of their release, pose an unacceptable risk to community safety.

There are sound policy reasons why the definition of sex offender or violent offender for the purpose of the first threshold is narrower than the broader definition of offences for the second threshold under the Act. For the purpose of the first threshold, there may be very good reasons why a person has received a community based order for an initial sex offence, for example, they may be a young person who engaged in consensual sex with their under-aged girlfriend.

Significantly, the definition in section 4 already covers an offender who has at any time been sentenced to imprisonment for a serious sex offence.

In addition, the second threshold could also be clarified by an amendment confirming that suspended sentences are not included. Again, there may be very good reasons why a person has received a suspended sentence for an initial sex offence.

[9] NSW Sentencing Council, *High-Risk Violent Offenders Sentencing and Post-Custody Management Options*, Report (2012) at paragraph 2.93

[10] That is, Option 3 on page 12 of the Consultation Paper

Question 3: Is any change required to the application of the scheme to offences committed as a child?

Including an offence committed as a juvenile as a potential index offence under the Act runs counter to the well accepted understanding of the unique nature of juvenile offending. Legal Aid NSW submits that the Act should be amended to provide that only offences committed by children aged over 16 are captured. We otherwise agree with the Consultation Paper's position that the exclusion of offences dealt with under the *Children (Criminal Proceedings) Act 1987* should be maintained.

Question 4: Does the scheme need to include high risk offenders recently arrived in Australia having been imprisoned overseas?

It is noted that the *Child Protection (Offenders Prohibition Orders) Act 2004 (NSW*) and the *Child Protection (Offenders Registration) Act 2000 (NSW)* applies to sex offences committed overseas.

Significant practical obstacles would arise however in extending this Act to offences committed by Australian citizens throughout the world, including the need for arrangements with overseas jurisdictions for a returning individual to be flagged or brought to the attention of NSW Corrective Services. These matters are preferably dealt with by the Federal Government.

Legal difficulties also arise where overseas' convictions relate to offences with different constituent elements than are recognized under Australian law. For example, the age of consent in international child sex legislative regimes varies from between 13 and 18 years.[11] Further, convictions may have been obtained with disregard to equivalent procedural rights that protect accused persons under Australian law. In light of these issues, the Supreme Court would be obliged to embark on a potentially time-consuming analysis of evidence said to support a conviction for an offence committed overseas. Such a task would be inconsistent with the Act's role to impose:

> *a regime of curtailment of the liberty of citizens that was founded upon precise preconditions, in the sense of a person (and his or her lawyers) being able readily to determine whether or not the person is liable to have an order made against him or her, simply on the basis of an analysis of one's convictions, and not on an analysis of (perhaps voluminous and contestable) evidence*.[12]

[11] Danielle Ireland-Piper *Extraterritoriality and the Sexual Conduct of Australians Overseas* Bond Law Review (2010) Volume 22, Issue 2, page 22

[12] See comments on Button J in *R V McLeod* [2016] NSWSC 1052 at [58].

Analogies with New Zealand's preventative detention regime may not be helpful in this context, as that country's extension of the ESO regime has been prompted by individuals deported from Australia.[13]

For these reasons, Legal Aid NSW does not support the extension of the Act to include offences committed by Australian citizens in overseas jurisdictions.

Question 5: Does the definition of "another offence" need to expressly include offences committed in other jurisdictions?

We do not oppose clarification that the definition of "another offence" for the purposes of sections 5I (2)(a)(iii) and 5J(2)(a)(iii) includes offences committed in other jurisdictions. This would be consistent with existing definitions of "serious sex offence" and "serious violence offence" which extend to offences committed outside NSW.

Question 6: Should the test for making a CDO be changed? If so, how?

Legal Aid NSW is strongly opposed to any change in the test for making a CDO. Both proposed options undermine the principle of detention as the option of last resort. No evidence is provided as to why the current formulation of the unacceptable risk test is not meeting the objectives of the Act.

Of particular concern is the apparent reasoning for the reform that "*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.* [14]

Contrary to this reasoning, both the determinations of unacceptable risk and of adequate supervision as it relates to the ultimate outcome of high risk offender applications, should continue be undertaken by the judiciary, and not by the executive. Notably, the Court is already required to take into account any report prepared by Corrective Services NSW as to the extent to which the offender can be "reasonably and practicably" managed in the community.[15]

[13] 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. It should also be noted that It is also noted that the New Zealand Attorney General's formal advice to Parliament on the 20xx reforms to the ESO regime reforms were inconsistent with the *Bill of Rights Act* and not demonstrably justified in a free and democratic society: see *Report of the Attorney General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision Orders) Amendment Bill (March 2014)* available at: https://www.justice.govt.nz/assets/Documents/Publications/BORA-Standing-Order-262-Parole-Extended-Supervision-Orders-Amendment-Bill.pdf

[14] Consultation Paper, page 16

[15] Sections 9(3)(d1) and 17(4)(d1) of the Act

As noted above, the Act constitutes an extraordinary limit on fundamental rights and freedoms. Such limits should be proportionate and should be scrutinised by the Court. The proposal to "delink" consideration of the ESO and CDO tests significantly undermines the independent role of the Court in a post sentence detention regime because the executive is removing the presumption in favor of the least restrictive option. The lawfulness of this reform would questionable in light of the *Kable* decision.[16]

Finally, the proposal is inconsistent with Australia's obligations under Article 9(1) of the *International Covenant on Civil and Political Rights* which safeguards the fundamental human right to liberty and protection from arbitrary arrest or detention. In response to the 2010 Tillman complaint, the United Nations Human Rights Committee found:[17]

> *the State party should have demonstrated that the [complainant's] rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention, particularly as the State party had a continuing obligation under article 10, paragraph 3, of the Covenant to adopt meaningful measures for the reformation, if indeed it was needed, of [Tillman*].[18]

The Australian Government rejected these findings. It did so by reference to the Court's duty to consider less restrictive means of achieving the purposes of the Act before imposing CDOs.[19] Any qualification on this duty, such as the two options proposed in Question 6, would be incompatible with Australia's international legal obligations.

Question 7: Should community safety be the paramount consideration for the court in making an ESO or CDO?

Ensuring the safety and protection of the community is the primary object of the Act. This is clear and plain on the face of the legislation. The other object of the Act is to encourage high risk offenders to undertake rehabilitation. The two objects are not dichotomous - the rehabilitation of high risk offenders is conducive to the safety and protection of the community. To the extent of any tension between those objects in an individual case, Courts already give primacy to the safety and protection of the community.[20]

Amending the objects of the Act is unnecessary.

---

[16] *Kable v Director of Public Prosecutions* (NSW) [1996] HCA 24
[17] Mr Tillman was detained under the *Crimes (Serious Sex Offenders) Act 2003* (NSW)
[18] See: https://www.ag.gov.au/RightsAndProtections/HumanRights/DisabilityStandards/Documents/TillmanvAustralia-Viewsof18March2010.pdf
[19] See: https://www.ag.gov.au/RightsAndProtections/HumanRights/DisabilityStandards/Documents/TillmanvAustralia-AustralianGovernmentResponse.pdf
[20] McCallum J in *State of NSW v Donovan* [2015] NSWSC 1254 at [28]. See also State of *NSW v Kamm* [2016] NSWSC 1 at [22].

Question 8: Are any additional safeguards needed in relation to the use of emergency detention orders?

Legal Aid NSW shares the concerns of the Aboriginal Legal Service and the Rule of Law Institute of Australia concerning the lack of procedural fairness in ex parte emergency detention applications. The urgency of applications and the limited availability of Public Defenders across NSW leads to a significant risk that such applications will not be tested in any way before an order is made to remove an individual's liberty where no crime has been committed.

The extraordinary nature of such power requires greater safeguards than presently exist. In our view, the legislation should provide for immediate notification to Legal Aid NSW wherever an emergency detention order application is filed or within reasonable contemplation of the State. We would also support the introduction of a Public Interest Monitor to appear at any hearing for such orders where the respondent would be otherwise unrepresented, in order to test the appropriateness and validity of the application.

Question 9: Do potential or actual applications for orders under the Act need to be taken into account in parole decision making?

Legal Aid NSW strongly opposes any fettering by the executive of the State Parole Authority (**SPA**)'s functions under section 135 of the *Crimes (Administration of Sentences) Act* (**the CAS Act**) beyond existing provisions relating to the interaction between parole and the Act.[21]

The duty of SPA is carefully prescribed in section 135(2) of the CAS Act. SPA's overriding duty is to:

> *not make a parole order for an offender unless it is satisfied, on the balance of probabilities, that the release of the offender is appropriate in the public interest.* [22]

This duty should not be fettered by requiring SPA to take into account an application that is pending or might be filed in the Supreme Court under the Act. High Court authority supports the principle that such matters are, on their own, irrelevant to consideration of parole.[23]

[21] Section 126(4) of the CAS Act: if a final or interim CDO is made before parole is granted, parole cannot be granted. By section 160A (1) of the CAS Act, if an ESO or an interim ESO is made after parole is granted, the parole order is suspended. Sections 13B (2) and 13C(2) of the Crimes (High Risk Offenders Act): An application for a CDO cannot be made once parole is granted.
[22] Under section 135(1) of the CAS Act
[23] See comments of High Court in *R v Shrestha* [1991] HCA 26

Determinations of parole and of high risk offender applications entail different considerations. The Commissioner of Corrective Services and, in relation to serious offenders, [24]the State have the right to appear and make submissions before SPA to argue against parole. A decision is made by SPA, in light of detailed information and reports provided to it, as to whether parole is appropriate in the public interest.[25] However, if the Supreme Court makes an interim or final CDO before parole is granted, SPA's jurisdiction will be ousted under section 126(4) of the CAS Act.

Information as to possible applications under the Act is extremely prejudicial to a consideration of parole. If SPA was required to take into account such information, it would be left with little alternative but to refuse parole and wait for the outcome of the application. This would effectively usurp the duty of SPA whenever Correctives Services foreshadowed an application under the Act.

A CDO can only be made in the last 6 months of an offender's sentence. This period is the last opportunity for an offender to obtain parole before their sentence fully expires. It would be fundamentally unfair, and contrary to the principles referred to at the outset of this submission, if an offender's final opportunity to obtain parole could be thwarted by an application under the Act.

A further concern arises in the context of approval of leave for inmates by the Commissioner of Corrective Services. With long term serious offenders, in practice, SPA will generally not grant parole unless the offender has first had a period of at least 6 months of testing in the community by way of unescorted leave, such as day or weekend leave. Approval of leave lies solely in the hands of the Commissioner. In the experience of the Prisoners Legal Service there have been cases where the Commissioner, in otherwise deserving cases, has refused to grant leave and the offender has not been given parole. Refusal of leave also supports an application for a CDO. Any expansion of these powers is unwarranted.

SPA should continue to be able to decide in the last 12 months of a long sentence that it is appropriate in the public interest to grant parole, so that the offender has a brief period of parole supervision to help reintegrate into the community rather than be released without any parole support.

In response to the related issues identified on page 20-21 of the Consultation Paper Legal Aid NSW submits:

[24] Under section 153 of the CAS Act
[25] See respectively sections 141A and 153 of the CAS Act.

- **Validity of a CDO application if parole is granted before application is determined**: No support is provided for the proposition that the granting of parole after an application for a CDO is made invalidates the CDO application. This proposition is clearly inconsistent with the role of interim CDOs and with section 160A (3) of the CAS Act which provides that once a CDO is made, any parole order to which the offender is subject is revoked. These provisions would have no work to do if CDO applications were invalidated on the grant of parole pending determination of the State's application. Clarification is not required. In any event, Legal Aid NSW strongly opposes the proposal that SPA be required not to make an order for release to parole where a CDO or an ESO application is on foot.
- **Commencement of CDO:** Section 18 of the Act is clear about when a CDO commences. The word "custody" can be clearly distinguished from the word "sentence." We oppose the suggestion that this section should be "clarified" by requiring SPA not to release an offender from custody where an order under the Act has been imposed but not yet commenced.

Question 10: How should parole interact with an ESO?

In light of our response to question 9 we consider the current provisions regarding the interaction of parole with the high risk offenders scheme should not be changed.

Question 11: How should parole interact with a CDO?

In light of our response to question 9 we consider the current provisions regarding the interaction of parole with the high risk offenders scheme should not be changed.

Question 12: Should family representatives of the victim who are on the Victims Register be considered victims for the purposes of the Act?

The role of victim impact statements under legislation directed at the assessment of future risk and prevention of future harm (and not at re-punishing the offender for their past offences) is quite different from the role of these statements in sentencing proceedings under the *Crimes (Sentencing Procedure) Act 1999* (**CSPA**) and in submissions about parole. It is therefore appropriate that section 21A (8) of the Act is more narrowly defined than the CAS Act and the CSPA. We do not consider the definition should be changed.

Question 13: Does s 25 need to expressly refer to the provision of financial information?

No. If not already caught by the unqualified term "behavior" in section 25, financial information, where relevant, could be obtained through other avenues available to the

state under normal rules of civil procedure or indeed on warrant at the request of investigating police, should they suspect a fresh offence has been committed. Whether particular material sought is within the scope of section 25 should be dealt with on a case by case basis.

Question 14: Should the Attorney General be able to obtain information held in other jurisdictions?

Legal Aid NSW does not oppose the extension of the Attorney General's powers under section 25 to obtain information held in other Australian jurisdictions relating to the behavior, or physical or mental condition of any offender.

Question 15: What, if any, disclosure of s 25 material should be expressly permitted?

Legal Aid NSW considers the Act should be amended to make clear that material obtained under sections 7 and 15 should only be used for the purposes of the Act. It should not be disclosed for collateral purposes, including those at issue in *State of NSW McCarthy*. [26]

The reason for this is the compulsive nature of psychiatric/psychological examinations ordered under section 25. The willingness of the offender to participate in such examinations, and their level of participation, is material to the court's determination of the State's application.[27] In essence, an offender is compelled to disclose detailed personal and private information, or risk adverse findings being made against them.

Reports provided to the Court are invariably lengthy and detailed in their disclosures. They may contain material of a very sensitive and personal nature which may be highly prejudicial if admitted in unrelated court proceedings. Offenders may have disclosed sexual abuse as victims themselves of other offenders. 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. Given the "novel and very specific power of the court" to compel disclosure under sections 9 and 17,[28] any use of material provided should be strictly confined to the purposes of the Act.

Question 16: Do the circumstances in which reports can be used in separate or for separate purposes need to be clarified? If so, how?

We repeat our submissions in response to Question 15.

[26] [2015] NSWSC 1780
[27] Sections 9(3)(c) and 17(4)(c)
[28] Ibid per Fagan J at [24]

Question 17: Should the disclosure requirements prioritise provision of information relied on for an application? If so, what information should be prioritised?

Legal Aid NSW opposes any amendment to the current provisions in sections 7 and 15 around disclosure of materials.

Proceedings under the Act are quasi-criminal in nature. A successful application results in the detention of an individual beyond their lawful sentence, or the substantial restriction of their liberty. The onus of proof of applications under the Act lies on the State which, unlike parties in conventional civil litigation, is uniquely positioned to possess material of potential relevance to applications. This position was strengthened by the introduction of section 25 of the Act, under which the Attorney General can compel production of a broad range of information concerning the offender. Given these factors, procedural fairness is served by disclosure to an offender of all relevant material as soon as practicable after the application is made or becomes available.

The potential volume of material, which is as much a burden for the respondent's representative to assess as it is for the State to provide, should not dictate rules of procedural fairness when such important rights are at stake, and where evidence not otherwise relied upon by the State may be relevant to an offender's response. Shifting the onus to the respondent to identify and request potentially relevant material is inconsistent with procedural fairness.

Question 18: What should be the maximum length of an interim detention order and interim supervision order?

Legal Aid NSW acknowledges the concerns raised in a number of recent cases regarding late notice of applications.[29] However, we do not agree that extending the maximum length of interim orders is the appropriate solution to this problem.

[29] See, for example, the comments of Hamill J in *State of NSW v Anderson* [2015] NSWSC 1515 at [10].

The State is in the position to identify potential ESO/CDO candidates in advance of their sentence expiry dates well in advance of the Act's time limits because:

- if offenders have been non-compliant in custody they will have been refused parole a substantial period in advance of that date, and
- there is no time limit on the broad and coercive power of the Attorney General to require production of documents relating to the behavior, or physical or mental condition of the offender under section 25 of the Act.

In these circumstances, the State should not be taken by surprise by upcoming applications. Indeed, in the experience of Legal Aid NSW the Act's timeframes are usually met by the State, albeit on occasions with limited time before listing of the preliminary hearing for the respondent to prepare his or her case. In addition, the Act already provides for the extension of interim detention orders to be renewed for up to 3 months, an option that is already over utilised.[30]

The proposal to extend the duration of interim orders would mean that these orders, which are founded as they are on a lower level of proof than required for a final order, would effectively operate as final orders. The period of an offender's potential detention should not be increased due to practical issues which the State can remedy. Increasing the length of interim orders is likely to increase rates and duration of incarceration of offenders beyond their lawful sentence.

The preferable means of addressing the time constraints inherent in the Act should therefore focus on the State's inability, in a practical rather than legal sense, to file applications in a timely manner.

In the alternative, the legislative solution identified by Hamill J in *R v Anderson* of introducing a window period in which applications under the Act can be made[31] is supported:

Question 19: Are there any other options to give the Supreme Court more time to consider ESO/CDO applications?

We repeat our response to the preceding question.

Question 20: Should courts be able to defer commencement of orders to allow post order arrangements to be made?

Legal Aid NSW considers that existing Court powers to extend interim orders and to order a stay on those orders pending appeals are sufficient to enable practical difficulties

[30] For example, in *State of NSW v Donovan*, the interim detention order was renewed 3 times: see footnote 1 above.
[31] *State of NSW v Anderson* [2015] NSWSC 1515 at [10]. The recommended window period in that case was between 12 and 1 month prior to the expiry of the offender's sentence.

around supervision under an ESO to be overcome. We reiterate the above submissions concerning the unique position of the State to obtain information regarding the timing of an offenders' release and likely application of the Act.

The power of the Mental Health Tribunal to defer operation of discharge orders is not analogous, because that power is only exercised to further the best interests of the patient. In contrast, introducing a "legislative delay mechanism" for the commencement of orders under the Act would only operate to continue the detention of an offender beyond the expiry of their lawful sentence.

Management of an offender

Question 21: Do ESOs require core conditions?

Legal Aid NSW supports measures to simplify and streamline current standard orders which, for many offenders, are overly complex and voluminous. A high number of Legal Aid NSW clients are cognitively impaired and/or have limited literacy skills. For these individuals, the complexity and volume of conditions only increases the likelihood of inadvertent breach of the order.

However, we do not support the proposal for mandatory "core conditions" on ESOs. Conditions should continue to be imposed on a discretionary basis, tailored by the Supreme Court to the specific facts of each case.

There are a number of dangers in a "one-size fits all" approach to ESO conditions.

First, there may be conditions which are not warranted in the particular circumstances of the case. For example:

- A search and seizure condition will not be required in many cases, and its inclusion as a core condition would amount to undue and arbitrary intrusion into the privacy and home of the offender. It would not promote the offender's rehabilitation in furtherance of the Act's objects.[32] A particular concern arises for offenders residing in group accommodation, where co-residents will be affected by exercise of this power.
- Alcohol use may have played no role in the offender's index offence and may not be relevant to their risk of future offending.
- A condition "not to commit a relevant sexual offence or violent offence," would expose offenders to an additional and greater penalty for such an offence because of the additional liability attaching to any breach of the ESO.

[32] See, for example, *State of NSW v Carr* [2014] NSWSC 1348

Second, flexibility of orders is important in meeting the objective of the Act to encourage offenders to maintain progress towards rehabilitation.[33] The power of the Court to delete conditions that are unnecessary or inappropriately restrictive is vital to furthering the protective, as opposed to punitive, objects of the Act.[34]

Thirdly, expanding the already wide powers of direction in Correctives Officers could be used to effectively detain an offender, undermining the principle of the separation of powers. This danger has been realized in New Zealand, where a "core condition" on an ESO delegated specific powers to the parole service. A direction was made by the parole service requiring the offender to be accompanied by two Correctives staff whenever he left his residence. The New Zealand High Court found the direction to be unlawful because the probation service had effectively assumed complete control over the offender's movements. The Court held that this amounted to "de facto detention" in probable breach of the right not to be arbitrarily arrested or detained.[35]

Question 22: What discretionary ESO conditions should be available to the court?

The scope of potential conditions available to the Supreme Court was expanded less than two years ago. There are now over 16 inclusive categories of potential orders listed in section 11 of the Act. The Supreme Court commonly attaches up to 60 detailed conditions on ESOs.[36] There is no need for additional discretionary conditions to be specified in the Act.

Question 23: Are changes need to the breach framework? If so, what changes?

Legal Aid NSW does not consider the breach framework requires amendment as proposed in the Consultation Paper.

[33] *State of NSW v Tilman* [2008] NSWSC 1293 at [62]ff
[34] See, for example, *State of NSW v Kamm* [2016] NSWSC 1 at [186]
[35] *Stuart Murray Wilson v New Zealand Parole Board* [2012] NZHC 2247
[36] See, for example, *State of NSW v Kamm*, footnote 34 above.

The stated lack of consistency in sentencing for breach of ESOs is to be expected, given the myriad of ways in which an ESO can be breached, the volume and diversity of ESO conditions and the individual subjective and objective features that contextualize all offending. A wide range of penalties under section 12 of the Act does not mean that Courts are inconsistent in sentencing. Appeal rights are available to the State if it considers a court has not applied sentencing principles appropriately. As noted by the High Court:

> *'Consistency is not demonstrated by, and does not require, numerical equivalence. Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were… The consistency that is sought is consistency in the application of the relevant legal principles…When it is said that the search is for "reasonable consistency", what is sought is the treatment of like cases alike, and different cases differently. Consistency of that kind is not capable of mathematical expression."* [37]

Maximum penalties for breach of ESOs were significantly increased less than 2 years ago, providing an already a significant deterrent. In Legal Aid NSW's experience, many ESO breaches are unintentional and are trivial or technical in nature, yet are met with already very harsh penalties under section 12 of the Act.

As example of this can be found in *State of NSW v Carr* where a young, intellectually disabled indigenous offender was incarcerated five times after the ESO was made, not for committing independent crimes (let alone crimes of violence) but because he had breached the conditions of his ESO. One offence arose because Mr Carr returned a positive result for cannabis use, resulting in a 3 month sentence of full time imprisonment. In that case, the Supreme Court noted that "it is inconceivable that a person in this day and age would otherwise be incarcerated for using cannabis.[38]

In light of these concerns, Legal Aid NSW submits that a defence of reasonable excuse should be introduced in section 12 of the Act.

We respond as follows to the options outlined in the Consultation Paper for reform of penalties for breach.

[37] *Hili v R*; *Jones v R* [2010] HCA 45; (2010) 242 CLR 520, [48] – [49]

[38] Supra footnote 37 at [9]. The case of *State of NSW v Hill [2010] NSWSC 1504* provides another example of the disproportionate nature of penalties for breach of an ESO. In that case, a series of minor breaches lead to Mr Hill, an Aboriginal person found to be a high risk sex offender, spending over 15 months in custody after the ESO was made, despite no further sex offending having occurred.

Option 1: Mandatory sentencing

Legal Aid NSW agrees with the observations made in the Consultation Paper that imposing mandatory penalties for breach of an ESO under section 12 of the Act would be disproportionate and would undermine the express intention of the Act to promote rehabilitation of offenders. It would also inappropriately fetter the discretion of the sentencing court. We strongly oppose this option.

Option 2 – Graduated sanctions

Common law sentencing principles, and the statutory hierarchy of penalties in the *Crimes (Sentencing Procedure) Act 1999,* already provide a system of graduated sanctions in respect of ESO breaches. Legislating such sanctions would inappropriately fetter the sentencing discretion of courts. This option is not supported.

Option 3 – Streamlined CDO process for ESO breach

A "streamlined" one-step CDO process in the event of a "material" breach of an ESO, the definition of which is ambiguous, is not supported. Such reform would undermine the principle of imprisonment as a last resort by removing any consideration by the Supreme Court of the less restrictive option of an ESO, and whether adequate supervision of the offender can be provided in the community.

This reform is also not necessary because the Act already provides that an offender who commits a "material" breach (and that concept is by no means clear):

- Would be subject to the show cause test under the *Bail Act 2013*
- May be subject of an application to vary or revoke the ESO
- Could be subject to an application for a CDO
- Faces a maximum penalty of 5 years' jail, if convicted of the breach.

A sentencing court, or the Supreme Court, in assessing an application by the State for a fresh CDO or a variation of the ESO conditions, is best placed to assess the nature of the breach and its consequences. Directing the Supreme Court as to a particular outcome, and one effectively based on a presumption in favour of detention, is contrary to the rule of law and Australia's international legal obligations.

Administration of the scheme

Question 24: What, if any, changes are needed to the requirement for the Commissioner to report annually on the offenders subject to an order under the Act?

Annual reports provided by the Commissioner of Corrective Services to the Attorney are not provided to the offender or to their representatives in the previous proceedings. This is contrary to principles of natural justice and procedural fairness. We submit that section 13 of the Act should be amended to require reports provided to the Attorney under section 13(2) to be served on the offender.

Question 25: How well do the current arrangements for risk assessment work? Does the proposal of a Risk Management Authority need to be further explored?

Legal Aid is not aware how current arrangements for risk assessment are working. 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.[39] These shortcomings should be addressed by the Statutory Review.

The Sentencing Council recommended that an independent risk management body, such as the Risk Management Authority in Scotland, be established to facilitate and regulate best practice in relation to risk assessment and risk management.[40] Legal Aid NSW supports the establishment of such a body to undertake and review independent risk assessments of high risk offenders. However, resourcing of that body should not replace measures to address the presently inadequate resourcing of community based and culturally appropriate offender treatment and rehabilitation programs.

Question 26: Should sentencing courts also be required to warn sex offenders about the Act?

Yes. It is an anomaly that warnings are required in respect of the Act's application to high risk violent offenders only. Procedural fairness requires that this provision be extended to high risk sex offenders. In addition, current prisoners who may be the subject of applications and who were not warned prior to commencement of the 2013 amendments should be properly informed about the Act and rehabilitation options in custody.

[39] Pursuant to section 25AE(1)
[40] See footnote 9 above, Recommendation 3(b))

Question 27: Are any other steps needed to ensure offenders are aware that they may be subject to continued detention or extended supervision after their sentence ends?

Yes. For the scheme to be effective as intended, and for the offender to have the chance to take part in pre-release rehabilitative courses such as the Violent Offender Treatment Program (VOTP), the warning scheme should be more robust. The warning provisions should be expanded to ensure that all high risk offenders are made fully aware of the Act and its implications both at the commencement of the sentence and then again towards the end of their sentence, for example, two years and/or 12 months prior to the expiry of their sentence.

The absence of clear communication of the implications of the Act to offenders, was recently highlighted in the Supreme Court's decision in *State of NSW v Bugmy*:[41]

> *In my respectful opinion, 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 in order to be eligible for acceptance into the kind of accommodation that will be acceptable to their supervising officers.*[42]

The Bugmy decision also highlights the fact that even the most comprehensive warning scheme will be pointless where the offender's efforts to reintegrate in the community are not supported by appropriate supervision in the community, or where culturally appropriate accommodation is not available. This is addressed further on page 23.

At a more general policy level, measures should be taken to address the reasons why inmates may be unable to participate in custody-based programs. These include:

- the limited options for sex offender programs for inmates with intellectual disabilities
- the lack of available programs in the Correctional Centre where an inmate is being held
- limited space in programs, which may or only run once a year, and
- inmates may also be moved between Correctional Centres before they are able to complete a program in which they have been successful in gaining a place.

These issues are exacerbated by increased demands for programs due to the burgeoning prison population.

[41] [2016] NSWSC 1128
[42] *R v Bugmy* [2016] NSWSC 1128 per McCallum J at [42]

Question 28: Should offenders subject to an application under the Act get bail if they are charged with a further offence?

Legal Aid NSW agrees with the observations in the Consultation Paper concerning the potential ambiguity of section 28 of the Act and the scope of application of the *Bail Act 2013* when ESO or CDO applications are on foot. These observations are not reflected in Question 28 as framed, which is directed at the outcome of a bail application rather than the application of the legislation.

In any event, we consider that section 28 of the Act (and the *Bail Act)* should be amended to clarify, in positive terms, that offenders subject to an ESO or CDO should be entitled to apply for bail if charged with a further offence, including an offence under sections 12 and 25(2) of the Act.

As to the outcome of bail applications, the show cause test already applies to consideration of bail for offences under the Act. No further amendment is required to further direct the bail authority in this regard.

Question 29: If so, should this be for any further offence, or a limited class of offences (e.g. serious violence offences or serious sex offences)?

See our response to Question 28 above. Apart from the clarification suggested, no further amendment is required. The show cause test already applies to a serious indictable offences committed while on an ESO. Any proposal to amend that test with respect to bail and undetermined ESO/CDO applications should, if pursued, be referred by the Attorney General to NSW Sentencing Council in accordance with the recommendations of the Hatzistergos Review of the *Bail Act*.[43]

Additional reform proposals

Indigenous offenders

As noted in the Introduction to this submission, Legal Aid NSW acts on behalf a significant majority of respondents to applications under the Act. Of those respondents, a striking and concerning number of them are indigenous. Anecdotally, the use of CDO applications against indigenous offenders appears to be increasing.

[43] At pages 10 and 64.

Cases such as *State of NSW v Carr*[44] and *Bugmy*, reveal the harsh and unjust impact of the legislation on indigenous offenders. In the latter case, the Court noted the limited availability of Community Offenders Support Program facilities beyond metropolitan Sydney, an option that necessarily involves removing offenders such as Mr Bugmy from their country, their people and their family.[45]

Cases where the Supreme Court has been left with no alternative but to make a CDO due to the availability of suitable pre-release accommodation are not unique to indigenous offenders.[46] However, the unduly harsh and disproportionate impact of the Act on indigenous offenders should be closely considered prior to any extension of the cohort and removal of the current safeguards in the Act. We are concerned about the lack of any data supporting the proposals to remove safeguards, particularly their likely impact on rates of indigenous incarceration.

Given the unacceptably high rates of indigenous incarceration in NSW, and the significantly high proportion of indigenous people against whom orders under the Act are routinely sought and granted, Legal Aid NSW submits that:

- the Act should be amended to require the Supreme Court to take into account that an offender is indigenous where that is relevant to determinations under sections 9 and 17,[47] and
- resources should be directed, in consultation with indigenous stakeholders, to the expansion of COSP to enable culturally suitable supported accommodation and programs to be established beyond the Sydney metropolitan area.

The Habitual Criminals Act 1957 (NSW)

Legal Aid NSW submits that the *Habitual Criminals Act 1957 (NSW)* should be repealed, as recommended by the Sentencing Council in 2012[48] and the Law Reform Commission in 1996.[49]

[44] Supra footnote 37 above
[45] At [41]
[46] See, for example *State of NSW v Scott* [2014] NSWSC 276.
[47] Consistent with Recommendation 17.1 of the Law Reform Commission's *Report 139 Sentencing* (2013)
[48] Footnote 9 above, Recommendation 6
[49] *Report 79: Sentencing* (1996). See in particular, Recommendation 52 and Chapter 10: Protective Sentences (at paragraphs [10.10]-[10.20]).