Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
Department of the House of Representatives
PO Box 6021
Parliament House
Canberra ACT 2600
Australia

12 October 2016

Dear Committee Secretary,

Inquiry into the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016

Thank you for the opportunity to make a submission to the inquiry into the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 ('the Bill'). This is a joint submission by legal academics from the:

- Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales;
- TC Beirne School of Law, University of Queensland; and
- University of Western Australia Law School.

We are solely responsible for the views and content contained in this submission.

At the outset, we acknowledge that the objective of the Bill is legitimate. It seeks to prevent those who have served sentences for terrorism offences – but have not been rehabilitated during that period – from being released into the community. We also acknowledge that the proposed scheme is grounded in recommendations made by the former Independent Monitor of National Security Legislation, Bret Walker SC. In his 2012 Annual Report, Walker recommended that 'consideration be given to replacing [control orders] with *Fardon* type provisions authorising control orders against terrorist convicts who are shown to have been unsatisfactory with respect to rehabilitation and continued dangerousness'.[1]

However, we do not believe that the Bill should be enacted in its present form. Post-sentence detention can only ever be justified if:

- a mechanism exists to accurately assess the level of risk that a convicted terrorist poses upon his or her release; and,
- effective rehabilitation programs are available for convicted terrorists in gaol.

Neither of these currently exists. Remedying this situation goes beyond simply amending the terms of the Bill. There is a need for further research into both the assessment of risk in the terrorism context as well as the development of effective rehabilitation programs. It will obviously take some time to commission and conduct such research. However, the need to establish a post-sentence detention regime is not so urgent as to justify taking action without it. The reality is that any post-sentence detention regime which is enacted in the absence of such research runs the considerable risk of being ineffective or even counter-productive.

[1] Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20th December 2012) 44.

Our primary recommendation is that the introduction of a post-sentence detention regime for convicted terrorists should be delayed until research has been conducted into the above two issues.

We also recommend that amendments be made to address issues regarding the scope, criteria and process under the Bill, as well as the constitutional validity of post-sentence detention.

(a) Scope

The Bill enables a 'continuing detention order' – that is an order that commits a person to detention in prison at the end of his or her prison sentence – to be made in respect of a 'terrorist offender'. This is defined as a person who has been convicted of an offence listed in s 105A.3(1)(a), and either is in custody serving a sentence of imprisonment for the offence and will be at least 18 years old when the sentence ends, or is in custody pursuant to an interim or continuing detention order. Relevantly, section 105A.3(1)(a) lists the following offences:

- international terrorist activities using explosive or lethal devices;
- treason;
- a serious Part 5.3 offence; and,
- a foreign incursions and recruitment offence.

In turn, a 'serious Part 5.3 offence' is defined as 'an offence against this Part, the maximum penalty for which is 7 or more years of imprisonment'. This includes all of the Part 5.3 offences, with the exception of:

- associating with a member of a terrorist organisation (3 years, s 102.8);
- misusing photographs and impressions of fingerprints (2 years, s 104.22);
- contravening a control order (5 years, s 104.27);
- disclosure offences in the preventative detention order regime (5 years, s 105.41); and,
- contravening safeguards in the preventative detention order regime (2 years, s105.45).

Our concerns about the current scope of the Bill rely upon a comparison with the existing State post-sentence detention regimes. We attach as Annexure A to this submission is an article by one of the authors of this submission, Tamara Tulich, which sets the background to post-sentence detention regimes in the States: 'Post-Sentence Preventive Detention and Extended Supervision of High Risk Offenders in New South Wales' (2015) 38(2) *UNSW Law Journal* 823.

The *Crimes (High Risk Offenders) Act 2006* (NSW) defines a 'serious sex offence' by reference to a list of prescribed offences that are punishable by imprisonment for seven years or more. It also requires that – where committed against an adult – the offence must have been committed in circumstances of aggravation.[2] In contrast, a 'serious violence offence' is

[2] *Crimes (High Risk Offenders) Act* 2006 (NSW) s 5(1)(a)(i)–(ii); The further offences identified are: an offence under s 61K (Assault with intent to have sexual intercourse) or s 66EA (Persistent sexual abuse of a child) of the *Crimes Act 1900* (NSW): *Crimes (High Risk Offenders) Act 2006* (NSW) s 5(1)(a1); any of the following offences under the *Crimes Act 1900* (NSW), where committed with intent to commit an offence under pt 3 div 10 that is punishable by seven years or more: using intoxicating substance to commit an indictable offence, s 38; kidnapping with the intention of committing a serious

defined according to the type of harm caused. That is, it is a serious indictable offence constituted by a person:

(a) engaging in conduct that causes the death of another person or grievous bodily harm to another person, with the intention of causing, or while being reckless as to causing, the death of another person or grievous or actual bodily harm to another person, or
(b) attempting to commit, or conspiring with or inciting another person to commit, an offence of a kind referred to in paragraph (a).[3]

The Bill differs significantly from both of the above approaches. It captures within the definition of a 'serious Part 5.3 offence' not only the commission of a terrorist act but also a broad range of preparatory conduct. This includes, in the first place, the five preparatory terrorism offences in Division 101 of the *Criminal Code*.[4] These go beyond the traditional inchoate offences by criminalising activities which are merely preparatory to the commission of a terrorist act.

Australia's anti-terrorism preparatory offences are also themselves subject to inchoate liability. For example, it is an offence to attempt to possess a thing connected with a terrorist act or to conspire to do an act in preparation for a terrorist act. These offences 'render individuals liable to very serious penalties even before there is clear criminal intent' to engage in a terrorist act.[5]

By contrast, the scope of the serious sex offence and serious violence offence post-sentence detention regimes have been carefully confined to circumstances where a particularly serious offence has actually been committed or where a person has attempted or conspired to do so. This includes sexual offences involving violence or children, as well as violent offences causing death or grievous bodily harm. It is interesting to note that the NSW regime would already apply to a person who conspired, attempted or engaged in an act of terrorism that caused death or grievous bodily harm.[6] The issue therefore is not whether *any* terrorism offences should be subject to the possibility of post-sentence detention but rather whether such a regime should extend to the preparatory terrorism offences.

We recommend that the definition of a 'serious Part 5.3 offence' be narrowed in two respects.

- *First, it should be limited to:*
    - *the offence of engaging – or attempting or conspiring to engage – in a terrorist act contrary to s 101.1 of the Criminal Code Act 1995 (Cth); or,*

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indictable offence, s 86(1)(a1); enters any dwelling-house, with intent to commit a serious indictable offence there, s 111; breaking into a house and committing indictable offence, s 112; breaking into a house with intent to commit indictable offence, s 113; armed with any weapon, or instrument, with intent to commit an indictable offence, s 114: *Crimes (High Risk Offenders) Act 2006* (NSW) s 5(1)(b).

[3] Ibid s 5A (1). A serious indictable offence is an indictable offence punishable by life imprisonment or imprisonment for five or more years: *Crimes Act 1900* (NSW), s 4.

[4] *Criminal Code* ss 101.2–6.

[5] Edwina MacDonald and George Williams, 'Combating Terrorism: Australia's *Criminal Code* Since September 11, 2001' (2007) 16(1) *Griffith Law Review* 27, 34.

[6] *Crimes (High Risk Offenders) Act 2006* (NSW) s 5A (1). A serious indictable offence is an indictable offence punishable by life imprisonment or imprisonment for five or more years: *Crimes Act 1900* (NSW), s 4. For the purposes of the *Crimes (High Risk Offenders) Act 2006* (NSW), this includes an offence committed outside of New South Wales that would be a serious indictable offence if committed in New South Wales: s 5A (3).

- *in the alternative, an offence under Part 5.3 – as well as attempting or conspiring to commit such an offence – that causes the death of another person or grievous bodily harm to another person, with the intention of causing, or while being reckless as to causing, the death of another person or grievous or actual bodily harm to another person.*

- *Secondly, it should be limited to offences for which a person has been given a head sentence of at least seven years.*

(b) Criteria and process

Subdivision C of the Bill outlines the three-stage process for issuing a 'continuing detention order'. First, an application must be made by the Attorney-General or his or her legal representative to the Supreme Court. Secondly, the Supreme Court holds a preliminary hearing within 28 days of the offender being given a copy of the application to 'determine whether to appoint one or more relevant experts'. Finally, the Supreme Court determines the application in a substantive hearing.

The role of the expert

The Bill proposes that at the preliminary hearing, the Court *may* appoint *a* relevant expert. In contrast, the New South Wales post-sentence detention regimes provide that if the Court is satisfied that 'the matters alleged in the supporting documentation would, if proved, justify the making of' an extended supervision or continuing detention order, the Court must appoint two psychiatrists or registered psychologists, or a combination of both, to undertake separate examinations of the offender'.[7] The *requirement* of *two* reports is critical to ensuring that the Court has sufficient and impartial evidence available to it to make a decision regarding post-sentence detention. In our opinion, this safeguard should be incorporated into the Bill.

The Bill defines a 'relevant expert' as any of the following persons who is competent to assess the risk of a convicted terrorist committing a serious Part 5.3 offence if s/he is released into the community:

(a) a person who is:
    (i) registered as a medical practitioner under a law of a State or Territory; and
    (ii) a fellow of the Royal Australian and New Zealand College of Psychiatrists
(b) any other person registered as a medical practitioner under a law of a State or Territory;
(c) person registered as a psychologist under a law of a State or a Territory;
(d) any other expert.

The breadth of this list is concerning. It is unclear who might qualify as 'any other expert'. There is also no explanation as to why the Bill includes 'any other person registered as a medical practitioner'.

We recommend that Bill be amended to require two independent expert reports be provided to the Court. The definition of a 'relevant expert' should also be clarified.

[7] *Crimes (High Risk Offenders) Act 2006* (NSW) ss 7(4), 15(4).

Determining risk

The Bill provides that the expert must assess the risk of the offender committing a serious Part 5.3 offence if s/he is released and then provide a report to the Court and parties (s 105A.6(4)).

At present, there is no way to accurately assess the level of risk that a convicted terrorist will reoffend. This is because no validated terrorism-specific risk assessment tools currently exist. Extensive research has been conducted in this regard by Charisse Smith and Mark Nolan. With respect to the existing tools for assessing the level of risk posed by violent offenders, they explain that these 'would not produce results to a sufficient level of accuracy to justify their use in a CDO [continuing detention order] regime for terrorist offenders. Therefore, in order to accurately assess risk for terrorism recidivism, the development of a new tool is necessary, which includes risk factors relevant to terrorism.'[8] Smith and Nolan further state that:

> There are currently no terrorist-specific risk assessment tools that have been validated adequately. The three tools in development, the VERA-2, the ERG22+ and the MLG, seem likely to be able to assess risk, as they reflect psychological findings regarding terrorist offenders. However until research suggests that they can validly assess risk for terrorist recidivism, and are applicable to Australian offenders, the introduction of a CDO regime is more controversial. The deprivation of liberty a CDO regime imposes is only defensible if there are accurate and reliable risk assessment tools that can determine which offenders are at a high risk of reoffending and which offenders are not. Adopting tools that have not yet been shown to accurately do this would "undermine the objectives of the regime" and may unjustifiably deprive individuals who are not at risk of reoffending of their liberty.[9]

We agree with the statement of the Victorian Sentencing Advisory Council that the defensibility of post-sentence detention regimes depends upon on the accuracy and quality of risk assessments.[10] The development of a reliable assessment mechanism in the terrorism context presents significant challenges because of the character of terrorism and the unique motivations of terrorists.

We recommend that the introduction of a post-sentence detention regime should be delayed until a validated risk assessment tool has been developed.

Rehabilitation and treatment programs

The Bill states that the relevant expert's report must address the matters outlined in s 105A.7, including whether the offender participated in rehabilitation or treatment programs. This presupposes that appropriate rehabilitation or treatment programs are available. Appropriate rehabilitation or treatment programs, building on international best practice, must be available to ensure an individual has the opportunity to avoid the operation of the regime. In

[8] Charisse Smith and Mark Nolan, 'Post-sentence continued detention of high-risk terrorist offenders in Australia' (2016) 40 *Crim LJ* 163, 169
[9] Charisse Smith and Mark Nolan, 'Post-sentence continued detention of high-risk terrorist offenders in Australia' (2016) 40 *Crim LJ* 163, 178.
[10] Victorian Sentencing Advisory Council, *Review of Maximum Penalties for Preparatory Offences Report* (December 2006).

order to be effective, these programs must both understand and respond to the particular characteristics of terrorism-related activities which distinguish those activities from ordinary crime. These include: the underlying political, religious or ideological motive of convicted terrorists; and their intention to coerce a government or intimidate the public. Existing programs which apply generally in gaols – for example, education and vocational courses – are insufficient to address these particular characteristics.

We accept that the ultimate responsibility for rehabilitation rests with the individual. However, there is also an obligation on the State to give convicted terrorists meaningful opportunities for rehabilitation in gaol. If they are not, then the State is effectively condemning every person convicted of a terrorism offence covered by the Bill to the possibility – if not likelihood – of detention beyond the sentence handed down by the trial judge. Indeed, there is a very real possibility of life imprisonment. If a post-sentence detention regime is introduced, we believe that it must be accompanied by a much greater emphasis on rehabilitation in gaol to limit the need to use the regime.

We recommend that the introduction of a post-sentence detention regime should be delayed until further research is conducted into the most effective tools for reducing recidivism in the counter-terrorism context in Australia.

The rules of evidence

Procedural fairness is an essential characteristic of courts and therefore entitled to constitutional protection.[11] The High Court considered the procedural fairness of post-sentence detention orders issued by State Supreme Courts in the cases of *Kable v Director of Public Prosecutions* (1996) 189 CLR 51 (‘*Kable*’) and *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 (‘*Fardon*’). In *Kable*, the provisions were struck down as incompatible with the separation of powers; in *Fardon*, the provisions were upheld. These cases demonstrate that the constitutional validity of a post-sentence detention scheme turns on its adherence to certain aspects of procedural fairness.

The High Court grounded its decision to uphold the legislation in *Fardon* in a number of procedural aspects of the Act. In particular:

- the standard of proof was a ‘high degree of probability’ as opposed to the balance of probabilities;[12]
- the Act vested a substantial discretion with the Court as to what form the order should take, unlike the more limited choice of simply whether or not to order detention;
- the Court’s discretion was subject to precise standards, including ‘serious danger to the community’ and ‘unacceptable risk’[13] (compared to the broader standards of ‘more likely than not’ and appropriateness guiding decisions under the *Kable* Act);[14]
- the Act imposed a duty to disclose on the party seeking the order;[15]

[11] *Wainohu v NSW* (2011) 243 CLR 181, 208 (French CJ and Kiefel J); *Leeth v Commonwealth* (1992) 174 CLR 455, 469-70 (Mason CJ, Dawson and McHugh JJ); *International Finance Trust* (2009) 240 CLR 319, 354-5 (French CJ), 379-80 (Heydon J); *Pompano* (2013) 252 CLR 38, 72 [68] (French CJ). For the requirements of fair process, see eg *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 quoted in, eg, *Fardon* (2004) 223 CLR 575, 615 [92] (Gummow J).
[12] *Fardon* (2004) 223 CLR 575, 597 (McHugh J), 616 (Gummow J), 656 (Callinan and Heydon JJ).
[13] Ibid 592 and 593 (Gleeson CJ), 597 (McHugh J), 657 (Callinan and Heydon JJ), all citing *M v M* (1988) 166 CLR 69, 78 in which that same magnitude of risk was found to be an acceptable justification for a court denying a parent access to a child.
[14] *Community Protection Act* 1994 (NSW) s 5(1).

- the rules of evidence applied and could not be avoided by the Court;[16]
- the Act obliged the Supreme Court to provide detailed reasons for its decision.[17]

Based on these factors, the High Court concluded that the orders were issued in accordance with 'ordinary judicial process' and therefore upheld the separation of powers.[18]

Against this background, and acknowledging the fundamental importance of basic procedural fairness to human rights and the rule of law, a number of provisions of the Bill are to be commended. For instance:

- the threshold of a high degree of probability that the offender poses an unacceptable risk of committing a defined list of serious offences;
- the Attorney-General bears the onus of proof;
- the Court must give reasons for its decision;
- the preservation of appeal rights.

We also acknowledge the general application of civil evidence and procedure rules in s 105A.13 of the Bill, and the requirement that the Court ground its decision in admissible evidence in s 105A.7.

However, in *Fardon*, the High Court emphasised that the separation of powers requires that a court not be capable of avoiding the rules of evidence (as was the case in *Kable*). As such, we recommend that the Bill be amended to close any potential loopholes by which information may be adduced despite the rules of evidence. For instance, s 105A.8 sets out a list of matters to which the Court *must* have regard in making its decision whether or not to issue the detention order. This list is framed very broadly. It includes reference to: 'any report' of a relevant expert (s 105A.8(b)) or of a state or competent body regarding the management of the offender in the community, 'the results of any other assessment…' (s 105A.8(c)), 'any treatment or rehabilitation programs' (s 105A.8(e)), 'any other information as to the risk of the offender committing a serious Part 5.3 offence' (s 105A.8(i)), and 'any other matter the Court considers relevant' (s 105A.8(j)).

In our view, ambiguity arises as to whether the obligation on the Court to consider these matters is subject to ss 105A.13 and 105A.7. This ambiguity creates a potential for a loophole by which information not subject to the rules of evidence may be adduced in these proceedings. It follows that the provisions risk constitutional challenge.

We recommend the Bill be amended to clarify that the rules of evidence and procedure apply to all information on which the Court bases its decision whether or not to issue a detention order.

We note the exception to the rules of evidence for information relating to the offender's prior criminal history (s 105A.13(2)). In the context of this scheme, we understand and accept that this limited exception to the rules of evidence is necessary to render the scheme workable.

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[15] *Fardon* (2004) 223 CLR 575, 592 (Gleeson CJ), 615, 616 (Gummow J), 656 (Callinan and Heydon JJ).
[16] Ibid 592 (Gleeson CJ), 596 (McHugh J), 615-616 (Gummow J), 656 (Callinan and Heydon JJ).
[17] Ibid 617 (Gummow J), 658 (Callinan and Heydon JJ).
[18] Ibid 592 (Gleeson CJ), 658 (Callinan and Heydon JJ), who used the similar phrase 'full and proper legal process'.

(c) Sunset clause

Our final recommendation is that any post-sentence detention regime for convicted terrorists should be subject to a sunset clause of five years.

Yours sincerely,

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POST-SENTENCE PREVENTIVE DETENTION AND EXTENDED SUPERVISION OF HIGH RISK OFFENDERS IN NEW SOUTH WALES

TAMARA TULICH*

I INTRODUCTION

In November 2013, following a high-profile trial, Simon Gittany was found guilty of murdering his fiancée Lisa Harnum. The Court found that Gittany had, in a fit of rage, 'unloaded' Harnum over the balcony of the 15th floor apartment they shared near Hyde Park in Sydney.[1] On 11 February 2014, McCallum J sentenced Gittany to 26 years' imprisonment, with a non-parole period of 18 years.[2] The trial and sentencing of Gittany attracted considerable media attention. However, recent changes to the law in New South Wales that enables violent offenders, such as Gittany, who are 'high risk', to be preventively detained at the end of their sentence have not.

This article examines the legislative regime for the post-sentence preventive detention and ongoing supervision of high risk offenders in New South Wales. This regime, contained in the *Crimes (High Risk Offenders) Act 2006* (NSW), enables a high risk sex or violent offender to be preventively detained or supervised in the community upon the completion of a custodial sentence where a court determines the individual poses an unacceptable risk of committing a further serious sex or violence offence.

This form of preventive restraint is of recent origin: first conceived in the 1990s by state governments seeking to preventively detain one named offender at the expiration of his sentence of imprisonment. It was in the subsequent decade that state parliaments legislated to enable post-sentence restraints to be placed on the liberty of one class of offender: serious sex offenders. Queensland was the first Australian jurisdiction to introduce post-sentence preventive detention and

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1 *R v Gittany [No 4]* [2013] NSWSC 1737.

2 *R v Gittany [No 5]* [2014] NSWSC 49, [91].

supervision of serious sex offenders, followed by Western Australia, New South Wales, Victoria and, in 2013, the Northern Territory.[3] In 2013, New South Wales became the first Australian jurisdiction to extend its legislative scheme beyond serious sex offenders to a new category of offender: high risk violent offenders.[4] It is also, following the passage of the *Crimes (High Risk Offenders) Amendment Act 2014* (NSW), the first jurisdiction to provide for ex parte emergency detention orders.[5]

The introduction of state and territory post-sentence regimes has been accompanied by a developing literature that examines the policy, legal and

3 Queensland was the first Australian jurisdiction to introduce post-sentence preventive detention and supervision, followed by WA, NSW, Victoria and, in 2013, the NT: *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Dangerous Sexual Offenders Act 2006* (WA); *Crimes (Serious Sex Offenders) Act 2006* (NSW); *Serious Sex Offenders Act 2013* (NT). Victoria first introduced extended supervision orders in March 2005 in the *Serious Sex Offenders Monitoring Act* 2005 (Vic). This was followed by the introduction of post-sentence preventive detention orders in the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) which commenced operation on 1 January 2010. In 2007, the Victorian Attorney-General requested that the Victorian Sentencing Advisory Council advise on whether to introduce a scheme of post-sentence preventive detention of 'dangerous' offenders in Victoria. A majority of the Council concluded, with regard to the existing sentencing options available in Victoria, such as indefinite detention, 'that regardless of how a continuing detention scheme were to be structured, the inherent dangers involved outweigh its potential benefits, particularly taking into account the existence of less extreme approaches to achieving community protection, such as extended supervision': Victorian Sentencing Advisory Council, *High-Risk Offenders: Post-sentence Supervision and Detention: Final Report* (2007) 64. See generally: at 61–4. For a comparative study of the different regimes, see Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (Routledge, 2014) 77–88, 132–6.

4 On 19 March 2013, the *Crimes (Serious Sex Offenders) Amendment Act* 2013 (NSW) received Royal Assent and commenced operation. It extended the regime of post-sentence preventive detention and supervision of serious sex offenders to high risk violent offenders. Consequently, the *Crimes (Serious Sex Offenders) Act* 2006 (NSW) has undergone a name change and is now the *Crimes (High Risk Offenders*) *Act* 2006 (NSW). Other Australian jurisdictions employ protective sentencing measures, such as indefinite sentencing schemes, to protect the community from 'dangerous' offenders. The NSW Sentencing Council recommended the extension of the serious sex offender regime and this was adopted by the Government: NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-custody Management Options* (2012), chs 4–5.

5 This Act received Royal Assent in October 2014, commenced operation on 7 January 2015 and was therefore automatically repealed by s 30C of the *Interpretation Act 1987* (NSW).

human rights implications of this form of preventive detention.[6] This literature has provided considered analysis of the concerns raised by these regimes – including in relation to constitutional validity, principles of procedural fairness, proportionality and finality in sentencing, and principles against retrospectivity and double punishment.[7] This article builds on this literature by providing a detailed treatment of the New South Wales regime and the implications of the 2013 and 2014 amendments, which have not yet been examined.

This article begins, in Part II, by briefly outlining the history and key provisions of the high risk offender legislative framework in New South Wales. In Part III, the article explores the implications of the 2013 and 2014 reforms, namely the extension of the regime to high risk violent offenders, the introduction of ex parte emergency detention orders, and the increased penalties for breach of an extended supervision order. This article focuses, in particular, on the fresh policy and procedural issues arising from these reforms.[8] It argues that the 2013 and 2014 amendments comprise both improvements to, and new challenges in the operation of, the New South Wales regime. Further reforms are required to ensure that the regime contains adequate safeguards and achieves its objective to protect the community from high risk offenders.

II PREVENTIVE RESTRAINT OF HIGH RISK OFFENDERS IN NEW SOUTH WALES

A Brief History of Post-Sentence Liberty Restraints

Governments have long sought to protect the community from 'dangerous' offenders. Since the late 19th century this has chiefly occurred through indefinite

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6 Bernadette McSherry, 'Indefinite and Preventive Detention Legislation: From Caution to an Open Door' (2005) 29 *Criminal Law Journal* 94; Stephen Smallbone and Janet Ransley, 'Legal and Psychological Controversies in the Preventive Incapacitation of Sexual Offenders' (2005) 28 *University of New South Wales Law Journal* 299; Bernadette McSherry, 'Sex, Drugs and "Evil" Souls: The Growing Reliance on Preventive Detention Regimes' (2006) 32 *Monash University Law Review* 237; Bernadette McSherry, Patrick Keyzer and Arie Freiberg, 'Preventive Detention for "Dangerous" Offenders in Australia: A Critical Analysis and Proposals for Policy Development' (Report, Criminology Research Council, December 2006); Heather Douglas, 'Post-sentence Preventive Detention: Dangerous and Risky' [2008] *Criminal Law Review* 854; Bernadette McSherry and Patrick Keyzer, *Sex Offenders and Preventive Detention: Politics, Policy and Practice* (Federation Press, 2009); Bernadette McSherry and Patrick Keyzer (eds), *Dangerous People: Policy, Prediction, and Practice* (Routledge, 2011); Patrick Keyzer and Bernadette McSherry, 'The Preventive Detention of "Dangerous" Sex Offenders in Australia: Perspectives at the Coalface' (2013) 2 *International Journal of Criminology and Sociology* 296; McSherry, *Managing Fear*, above n 3.

7 See above n 6; Victorian Sentencing Advisory Council, above n 3; NSW Sentencing Council, above n 4.

8 For an analysis of the justifications for post-sentence regimes, see Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014) 144–52. For commentary on whether post-sentence regimes should exist, see Keyzer and McSherry, 'Perspectives at the Coalface', above n 6.

detention ordered at sentence.[9] Pratt, for example, highlights how in the late 19th century the English-speaking world was increasingly concerned with the 'dangerous', the threat they posed and how best to incapacitate them.[10] At that time, 'dangerous' offenders were habitual offenders: their danger emanating from their recurrent breach of the law. Pratt explains: 'it was as if habituality itself was a sign of incorrigibility, thus placing the habituals beyond any redemption that the existing criminal justice system could offer'.[11]

In Australia, legislation prescribing the indefinite detention of habitual criminals began to appear at the beginning of the 20th century.[12] The New South Wales regime, contained in the *Habitual Criminals Act 1905* (NSW), empowered a judge, at sentence, to declare a person to be a 'habitual criminal'. All declared habitual criminals were, at the completion of their sentence, detained in prison at His Majesty's pleasure.[13] A person could be declared a habitual criminal upon the third or subsequent conviction for an offence of the same nominated class, either poisoning, sexual offence or abortion, or upon the forth or subsequent conviction for an offence of a class scheduled to the Act.[14] The Governor could direct release

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9 McSherry defines 'indefinite detention' 'to refer to legislation that enables an order to be made *at the time of sentence* for an offender to be detained indefinitely': McSherry, 'From Caution to an Open Door', above n 6, 94 (emphasis in original).

10 John Pratt, 'Dangerousness, Risk and Technologies of Power' (1995) 28 *Australian and New Zealand Journal of Criminology* 3, 6. See also John Pratt, *Governing the Dangerous* (Federation Press, 1997); John Pratt, 'Dangerousness and Modern Society' in Mark Brown and John Pratt (eds), *Dangerous Offenders: Punishment and Social Order* (Routledge, 2000) 35. Floud, looking at dangerous offenders in the United Kingdom, reported that '[d]angerousness is a thoroughly ambiguous concept', it is 'prevalent but elusive. It is not used consistently or with any precision and the nature of the risk to which it refers is never clearly defined': Jean Floud, 'Dangerousness and Criminal Justice' (1982) 22 *British Journal of Criminology* 213, 214. Pratt suggests dangerousness now has a specific penological meaning: John Pratt, 'Dangerousness and Modern Society' in Mark Brown and John Pratt (eds), *Dangerous Offenders: Punishment and Social Order* (Routledge, 2000) 35, 35. However, I note that Pratt's treatment of dangerousness has been critiqued for the lack of attention it paid to 'the discourses of dangerousness that originated in lunacy legislation': Mark Finnane and Susan Donkin, 'Fighting Terror with Law? Some Other Genealogies of Pre-emption' (2013) 2(1) *International Journal for Crime and Justice* 3, 13. Dangerousness is also referred to in the literature on involuntary detention pursuant to civil mental health legislation to mean detention on the basis of a risk of harm to self or others: see, eg, M M Large et al, 'The Danger of Dangerousness: Why We Must Remove the Dangerousness Criterion from Our Mental Health Acts' (2008) 34 *Journal of Medical Ethics* 877; McSherry, *Managing Fear*, above n 3, 52–6;

11 Pratt, 'Dangerousness, Risk and Technologies of Power', above n 10, 5.

12 See, for example, M W Daunton-Fear, 'Habitual Criminals and the Indeterminate Sentence' (1969) 3 *Adelaide Law Review* 335. For a discussion of the *Indeterminate Sentences Act 1907* (Vic), see also McSherry, 'From Caution to an Open Door', above n 6, 94.

13 *Habitual Criminals Act 1905* (NSW) ss 3, 5, 13.

14 *Habitual Criminals Act 1905* (NSW) s 3. The scheduled classes of offences were:

> Classification for the purposes of this Act of sections of the *Crimes Act, 1900.*
>
> Class (i) Sections 33 to 37 inclusive—Wounding.
>
> '' (ii) Sections 38 to 41 inclusive—Poisoning.
>
> '' (iii) Sections 62 to 81 inclusive—Sexual offences.
>
> '' (iv) Sections 83 to 84 inclusive—Abortion.

if satisfied the habitual criminal was reformed.[15] If released, the offender was required to periodically report to the police for two years.[16]

Australian jurisdictions have continued to feature regimes enabling protective sentencing measures to be imposed on 'dangerous' offenders *at the time of sentence*. These include indefinite or indeterminate sentencing, mandatory sentencing and disproportionate sentencing regimes.[17] However, during this time who was regarded as 'dangerous' changed – expanding from habitual offenders in the late 1800s to include, at the turn of the 20th century, professional criminals and in particular property offenders,[18] to become, in the 1970s, 'almost exclusively confined to (repeat) violent/sexual' offenders.[19] These changes have been accompanied by a shift in the language used to describe 'dangerous' offenders. The growing emphasis on risk and precaution in the latter part of the 21st century has seen the language of risk co-opted to label – or rather pre-label – those viewed as dangerous.[20]

'' (v) Sections 94 to 98 inclusive—Robbery.
Sections 99 to 105 inclusive—Extortion.
Sections 106 to 114 inclusive—Burglary, &c.
Sections 117 to 125, and 148 to 149 inclusive—Larceny.
Sections 155 to 178 inclusive—Embezzlement.
Sections 179 to 193 inclusive—False pretences.
'' (vi) Sections 196 to 202 inclusive—Arson.
'' (vii) Under any of the sections in Part V of the Crimes Act, 1900—Forgery.
'' (viii) Under any of the sections in Part VI of the Crimes Act,1900—Coinage.

15 *Habitual Criminals Act 1905* (NSW) s 7.

16 *Habitual Criminals Act 1905* (NSW) ss 7–8.

17 Victoria, Queensland, NT, SA, Tasmania and WA, for example, each have indefinite sentencing regimes that target a category or categories of offender; Victoria and SA also have disproportionate sentencing regimes for certain types of offenders: see NSW Sentencing Council, above n 4, 67–81, 92–4. See also Honor Figgis and Rachel Simpson, 'Dangerous Offenders Legislation: An Overview' (Briefing Paper No 14, Parliamentary Library, Parliament of New South Wales, 1997); Arie Freiberg, 'Guerrilas in Our Midst? Judicial Responses to Governing the Dangerous' in Mark Brown and John Pratt (eds), *Dangerous Offenders: Punishment and Social Order* (Routledge, 2000) 51; McSherry, 'From Caution to an Open Door', above n 6; McSherry, Keyzer and Freiberg, above n 6; *Fardon v A-G (Qld)* (2004) 223 CLR 575, 590 (Gleeson CJ), 613 (Gummow J), 634 (Kirby J).

18 Pratt, 'Dangerousness, Risk and Technologies of Power', above n 10, 7.

19 Ibid 13. It was also at this time, Pratt highlights, that questions of dangerousness began to adopt a future orientation. Habituality and public protection remained criterion upon which dangerous laws were based but they were accompanied by 'a growing interest in the kind of crime one might commit in the future' made possible by the growth of actuarialism and risk in the prediction of dangerousness: at 14.

20 See generally Jonathan Simon, 'Managing the Monstrous: Sex Offenders and the New Penology' (1998) 4 *Psychology, Public Policy and Law* 452; Jonathan Simon and Malcolm M Feeley, 'The Form and Limits of the New Penology' in Thomas G Blomberg and Stanley Cohen (eds), *Punishment and Social Control* (Transaction Publishers, 2nd ed, 2012) 75; Richard V Ericson, *Crime in an Insecure World* (Wiley, 2007); Lucia Zedner, *Security* (Routledge, 2009); McSherry, *Managing Fear,* above n 3.

In contrast to measures imposed at sentence, post-sentence restraints on the liberty of 'dangerous' persons are of more recent origin. These types of regimes differ in that they enable liberty restraints to be imposed *at the end of an offender's sentence of imprisonment*. The preventive detention and ongoing supervision of a 'dangerous' offender is ordered not at the time of sentence, but proximate to its expiration. In three of the Australian regimes, for example, a Supreme Court may make an order upon an application made in the last six months of the offender's sentence.[21]

State governments first enacted post-sentence preventive detention regimes in the 1990s. Crucially, however, these regimes were specifically targeted at a particular individual and only provided for preventive detention. Victoria was the first jurisdiction to enact a post-sentence preventive detention regime that related to one individual: Garry David. David was serving a custodial sentence for two counts of attempted murder and other offences, and his behaviour in prison raised concerns for the safety of the community on his release.[22] Attempts to have him detained under mental health legislation were unsuccessful. David was diagnosed as suffering from antisocial personality disorder and not a mental illness as defined by the *Mental Health Act 1986* (Vic).

In 1990, the Victorian Parliament passed the *Community Protection Act 1990* (Vic) which empowered the Supreme Court to order the preventive detention of David on the expiration of his sentence where satisfied, on the balance of probabilities, that he posed a serious risk to public safety and was 'likely to commit an act of personal violence to another person'.[23] David was detained pursuant to the Act until his death, in prison, in 1993. The constitutional validity

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21 In Queensland and NSW, the application is made by the Attorney-General in the last six months of the offender's sentence: *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ss 5, 13(5)(a)–(b); *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5H–J, 6(2), 9, 13A–C, 17, 24A. In WA, the Attorney-General or the Director of Public Prosecutions may apply to the court in the last six months of the offender's sentence: *Dangerous Sexual Offenders Act 2006* (WA) ss 6, 8, 17. In Victoria, an application is not time limited and may be made during the term of a sentence. For a supervision order, the application is made by the Secretary to the Department of Justice or delegate to the relevant court (Supreme or County court); for a continuing detention order the application is made by the Director of Public Prosecutions to the Supreme Court: *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ss 4, 7–9, 33–4, 36, 38. In NT, the Attorney-General may make an application to the Supreme Court in the last 12 months of the offender's sentence: *Serious Sex Offender Act 2013* (NT) s 23.

22 This included 'prison disruption and broad-ranging threats to the community' and self-mutilation: Deidre N Greig, *Neither Bad Nor Mad: The Competing Discourse of Psychiatry, Law and Politics* (Jessica Kingsley Publishers, 2002) 47. See generally at 40–9. See also Paul Ames Fairall, 'Violent Offenders and Community Protection in Victoria – The Garry David Experience' (1993) 17 *Criminal Law Journal* 40.

23 *Community Protection Act 1990* (Vic) s 8.

of the *Community Protection Act 1990* (Vic) was not challenged. The regime was repealed in 1993.[24]

The New South Wales Parliament followed Victoria's lead in 1994, passing the *Community Protection Act 1994* (NSW). This Act was also directed at a particular offender: Gregory Wayne Kable.[25] Kable was serving a sentence of imprisonment for the manslaughter of his wife. While in prison, Kable sent threatening letters to, amongst others, members of his deceased wife's family, raising concerns for their safety on his release. The *Community Protection Act 1994* (NSW) provided for the preventive detention of Kable on the expiration of his sentence where the Supreme Court was satisfied, on reasonable grounds, that Kable was 'more likely than not to commit a serious act of violence', and his detention was appropriate to protect the community or part thereof.[26] In February 1995, Kable was detained pursuant to the Act and, after being unsuccessful on appeal to the Court of Appeal, he appealed to the High Court. A majority of the High Court held the Act to be invalid as it required the Supreme Court to perform non-judicial functions that were incompatible with the exercise of federal judicial power.[27]

A decade later, in 2003, state parliaments again moved to create regimes of post-sentence preventive detention. However, this time they targeted a class of offender: serious sex offenders. In 2003, Queensland became the first Australian jurisdiction to introduce post-sentence preventive detention and supervision orders with the passage of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). This Act empowers the Supreme Court to make a preventive detention or extended supervision order where satisfied to a high degree of probability that the offender poses a 'serious danger to the community', that is, there 'is an unacceptable risk that the prisoner will commit a serious sexual offence' if an order is not made.[28] The Queensland regime withstood constitutional challenge in *Fardon v Attorney-General (Qld)*,[29] green lighting the introduction of similar regimes in Victoria, Western Australia, New South Wales and the Northern Territory.

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24 The Act was repealed following Garry David's death and the enactment of indefinite sentencing provisions: see McSherry, 'From Caution to an Open Door' above n 6, 99. For detailed discussion of the circumstances surrounding Garry David's imprisonment and detention, as well as the *Community Protection Act 1990* (Vic), see Fairall, above n 22; Greig, above n 22.

25 The Bill was, however, originally presented as having general application but amended to apply only to Kable: see *Kable v DPP (NSW)* (1996) 189 CLR 51, 62–3 (Brennan CJ).

26 *Community Protection Act 1994* (NSW) s 5.

27 The majority, Toohey, Gaudron, McHugh and Gummow JJ, with Brennan CJ and Dawson J in dissent, differed in their reasoning. For an analysis of the different judgments, see McSherry, 'From Caution to an Open Door', above n 6. See also *New South Wales v Kable* (2013) 252 CLR 118.

28 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13.

29 (2004) 223 CLR 575. It was held that the powers conferred on the Supreme Court were not incompatible with that Court's exercise of federal jurisdiction under Chapter III of the *Constitution*.

In 2006, the New South Wales Government moved to create its own legislative scheme for the post-sentence preventive detention and extended supervision of serious sex offenders. In March 2006, the Iemma Labor Government introduced the Crimes (Serious Sex Offenders) Bill 2006 (NSW). The Bill received bipartisan support and was viewed by various members of Parliament as a necessary measure to protect the public from sex offenders and prevent the commission of future sex offences.[30] The Bill was directed at 'a handful of high-risk, hard-core offenders who have not made any attempt to rehabilitate whilst in prison'.[31] It passed each House of Parliament in one day.[32] This regime was viewed by many parliamentarians as neither new nor novel,[33] 'extreme' nor 'unique'.[34] Rather, it was regarded as representative of a new suite of initiatives undertaken by Australian and foreign governments. A Member of Parliament remarked that this legislative initiative formed 'part of a worldwide pattern to deal with a serious social problem … Governments around the world see this as a matter of high priority and legislation has moved in these new directions'.[35]

The *Crimes (Serious Sex Offenders) Act 2006* (NSW) commenced operation on 3 April 2006. At 1 September 2010, there were 27 offenders in New South Wales subject to extended supervision orders and two offenders detained pursuant to continuing detention orders.[36] Despite its initial focus on a small number of a specific category of offender, in March 2013, the New South Wales Parliament extended the *Crimes (Serious Sex Offenders) Act 2006* (NSW) to a new category of offender. The Crimes (Serious Sex Offenders) Amendment Bill 2013 (NSW) ('2013 Bill') was introduced into Parliament to extend the regime of post-sentence preventive detention and supervision of serious sex offenders to high risk violent offenders, and to certain offences committed by children.[37]

The genesis of the 2013 Bill came in 2010 when then Premier Keneally directed New South Wales Corrective Services to conduct an audit of 750 offenders in New South Wales – the 'worst of the worst' – with the view to extending the post-sentence regime for serious sex offenders to violent

30 See New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 March 2006, 21 730–2 (Carl Scully), 21 732 (Andrew Humpherson), 21 735 (Matt Brown); New South Wales, *Parliamentary Debates*, Legislative Council, 30 March 2006, 21 801, 21 819 (Tony Kelly), 21 804–5 (David Clarke).

31 New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 March 2006, 21 730 (Carl Scully).

32 The Bill was introduced into and passed the Legislative Assembly on 29 March 2006. The following day, 30 March 2006, the Bill was introduced into the Legislative Council and passed without amendment.

33 New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 March 2006, 21 732 (Andrew Humpherson).

34 New South Wales, *Parliamentary Debates*, Legislative Council, 30 March 2006, 21 809 (Fred Nile).

35 Ibid.

36 NSW Department of Justice and Attorney-General, *Review of the Crimes (Serious Sex Offenders) Act 2006* (2010) 20.

37 See Explanatory Note, Crimes (Serious Sex Offenders) Amendment Bill 2013 (NSW) 1.

offenders.[38] The audit identified 14 offenders, 11 male and three female, to be a high risk of reoffending if released.[39] The 2009 Statutory Review of the *Crimes (Serious Sex Offenders) Act 2006* (NSW), which reported the audit results, recommended that the issue of post-sentence management of high risk violent offenders be referred to the New South Wales Sentencing Council ('NSW Sentencing Council').[40]

In line with this recommendation, the NSW Sentencing Council was tasked with advising the Attorney-General 'on the most appropriate way of responding to risks posed by serious violent offenders'.[41] Importantly, the NSW Sentencing Council did not reach a consensus on whether a gap existed that required the introduction of a sentencing or post-custody management option for serious violent offenders.[42] The Council reported that their 'research and consultation process has not given rise to any demonstrable failure of the current framework, as it is outlined in chapter 3, which requires reform by way of legislative response'.[43]

Nonetheless, a majority of the Council considered that a gap existed in the New South Wales legislative framework in respect to high risk violent offenders that 'might justify' a legislative response.[44] The majority considered that the current legislative framework was inadequate and that the introduction of a sentencing or post-custody management option for high risk violent offenders was 'necessary to protect the community'.[45] A minority of the Council was of the view that a gap did not exist and that there was no justification for the introduction of a sentencing or post-custody management option given 'no discernible failure of the existing system'.[46]

A majority of the members of the Council who voted considered that a post-sentence regime was preferable to a regime of indefinite sentencing.[47] There were three reasons for the majority's view: first, a risk assessment undertaken closer to release is more likely to be accurate than one undertaken at sentence; secondly, it is therefore more likely that the regime will apply only to those who pose a high risk to the community prior to release; and, thirdly, 'it is unsatisfactory' that New

38 K Keneally, 'State to Audit Worst of the Worst' (Media Release, 11 April 2010); NSW Sentencing Council, above n 4, 1–2; NSW Department of Justice and Attorney-General, above n 36, pt 3.
39 NSW Department of Justice and Attorney-General, above n 36, 81.
40 Ibid 100.
41 Its terms of reference included advising on 'options for and the need for post sentence management of serious violent offenders': NSW Sentencing Council, above n 4, 1 [1.1].
42 Ibid 124 [5.7].
43 Ibid 124 [5.8].
44 Ibid 124 [5.10].
45 Ibid 125 [5.11].
46 Ibid 125 [5.12].
47 Ibid 141 [5.84].

South Wales is the only Australian jurisdiction to lack a 'clear legislative mechanism to deal with' high risk violent offenders.[48]

Following this recommendation, the O'Farrell Government introduced the 2013 Bill into Parliament.[49] The 2013 amendments were the subject of four days debate, two in each House.[50] The 2013 Bill passed Parliament in mid-March with bipartisan support, and commenced operation on 19 March 2013. Consequently, the *Crimes (Serious Sex Offenders) Act 2006* (NSW) has been renamed the *Crimes (High Risk Offenders) Act 2006* (NSW).

In October 2014 further changes were made to the regime, with the passage of the *Crimes (High Risk Offenders) Amendment Act 2014* (NSW). This amending Act, which commenced operation in January 2015, increases the penalty for breach of an extended supervision order,[51] creates an ex parte emergency detention order,[52] establishes a High Risk Offenders Assessment Committee,[53] and imposes duties on agencies to cooperate in the management of offenders.[54] The Crimes (High Risk Offenders) Amendment Bill 2014 (NSW) ('2014 Bill') was not opposed. As at 1 September 2014, there were 36 extended supervision orders in place in New South Wales – 35 of these were made against high risk sex offenders and one against a high risk violent offender.[55] At that time, no continuing detention order was in place in New South Wales.[56]

B The High Risk Offender Legislative Framework

The *Crimes (High Risk Offenders) Act 2006* (NSW) creates a comprehensive regime for the ongoing supervision and detention of high risk offenders at the completion of the term of a custodial sentence and, subsequently, at the completion of the term of an existing extended supervision or continuing detention order. The Act creates two categories of high risk offender, 'high risk sex offenders' and 'high risk violent offenders', in respect of whom two types of

48 Ibid 141 [5.84].
49 Ibid chs 4–5.
50 The introduction and first reading of the Bill have not been counted as they did not involve any debate.
51 The increase is from 100 penalty units and/or two years' imprisonment to 500 penalty units and/or five years' imprisonment: *Crimes (High Risk Offenders) Amendment Act 2014* (NSW) sch 1 cl 6; *Crimes (High Risk Offenders) Act 2006* (NSW) s 12.
52 *Crimes (High Risk Offenders) Amendment Act 2014* (NSW) sch 1 cl 9; *Crimes (High Risk Offenders) Act 2006* (NSW) pt 3 div 3A.
53 The Committee consists of agency representatives and such other members with relevant expertise that the Minister appoints: *Crimes (High Risk Offenders) Amendment Act 2014* (NSW) sch 1 cl 15; *Crimes (High Risk Offenders) Act 2006* (NSW) s 24AB.
54 *Crimes (High Risk Offenders) Amendment Act 2014* (NSW) sch 1 cl 15; *Crimes (High Risk Offenders) Act 2006* (NSW) pt 4A.
55 New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 September 2014, 703 (Paul Lynch), citing the Attorney-General's response to a supplementary question on notice during an estimates hearing.
56 Ibid.

orders may be made: extended supervision orders and continuing detention orders.[57] An extended supervision order imposes obligations on an offender when released from custody, which may include electronic tagging and not residing in specific locations.[58] A continuing detention order requires a person to remain in custody at the completion of a term of imprisonment or of an existing detention order, and may be imposed upon breach of an extended supervision order or where altered circumstances mean that adequate supervision cannot be provided under an extended supervision order. The *Crimes (High Risk Offenders) Amendment Act 2014* (NSW) creates a third type of order – an emergency detention order – which may be made against an offender subject to an interim or extended supervision order.

The Act establishes an identical three step process for the issuance of an extended supervision order and a continuing detention order: first, an application must be made by the Attorney-General to the Supreme Court;[59] secondly, the Supreme Court conducts a preliminary hearing within 28 days of the filing of the Attorney-General's application;[60] and thirdly, the Supreme Court determines the application in a substantive hearing. The Court is empowered to make interim, as well as final, extended supervision and detention orders.[61] Appeal lies to the Court of Appeal from any determination of the Supreme Court to make, or refuse to make, an extended supervision order or a continuing detention order.[62]

1 Application of the Attorney-General

The Attorney-General may only apply to the Court for an extended supervision order in the last six months of the offender's current custody or supervision.[63] An application for a continuing detention order against an offender may only be made in the six months before the completion of the offender's total sentence or 'the expiry of the existing continuing detention order'.[64] The Attorney-General's application must be supported by prescribed documentation, which includes a report of a psychiatrist, psychologist or medical practitioner assessing 'the likelihood of the offender committing' a further serious sex

57 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5B(1), 5E(1).
58 The non-exclusive list of conditions that may be imposed pursuant to an extended supervision order are set out in s 11 of the *Crimes (High Risk Offenders) Act 2006* (NSW).
59 The Attorney-General is entitled to act on behalf of the NSW for the purposes of the Act: *Crimes (High Risk Offenders) Act 2006* (NSW) s 24A. No other person has been prescribed by the regulations to the Act.
60 Unless the Supreme Court allows further time: *Crimes (High Risk Offenders) Act 2006* (NSW) ss 7(3), 15(3).
61 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5C–5D, 5F–5G, 10A–10B, 18A–18B.
62 *Crimes (High Risk Offenders) Act 2006* (NSW) s 22.
63 *Crimes (High Risk Offenders) Act 2006* (NSW) s 6(2).
64 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 13B(3), 13C(3).

offence, in the case of a high risk sex offender, or a further serious violence offence, in the case of a high risk violent offender.[65]

The Attorney-General may only apply for an extended supervision order in respect of a 'supervised sex offender' or a 'supervised violent offender'.[66] A 'supervised sex offender' is a sex offender who is in custody or under supervision:

> (a) while serving a sentence of imprisonment:
>
> (i) for a serious sex offence, or
>
> (ii) for an offence of a sexual nature, or
>
> (iii) for another offence which is being served concurrently or consecutively, or partly concurrently and partly consecutively, with one or more sentences of imprisonment referred to in subparagraph (i) or (ii), or
>
> (b) pursuant to an existing extended supervision order or continuing detention order.[67]

A 'supervised violent offender' is defined as a violent offender who is in custody or under supervision, serving a sentence of imprisonment for a serious violence offence; for breach of an extended supervision order; or for another offence being served concurrently or consecutively, or partly thereof, with either of first two named offences, or is currently subject to an extended supervision or continuing detention order.[68] In respect of both categories of offenders, a person is taken to be serving a sentence of imprisonment whether it is being served by way of full-time detention, intensive correction in the community or home detention, whether the offender is in custody or released on parole.[69]

The Act also defines 'sex offender', 'violent offender' and 'serious sex offences' and 'serious violence offences'. A sex offender is defined as a person who is 'over the age of 18 years who has at any time been sentenced to imprisonment following his or her conviction of a serious sex offence'.[70] The Act similarly defines a violent offender as a person 'over 18 years of age who has at any time been sentenced to imprisonment' following a conviction for a serious violence offence.[71] The only distinction between the two categories of offenders relates to the respective qualifying offences: whereas the Act defines a serious sex offence according to a list of prescribed offences, a serious violence offence is defined according to the harm caused by the offence.

A 'serious sex offence' is defined as one that falls within a list of offences specified in section 5 of the Act. These include offences against an adult or child

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65 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 6, 14.
66 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5H–5J, 24A.
67 *Crimes (High Risk Offenders) Act 2006* (NSW) s 5I(2).
68 *Crimes (High Risk Offenders) Act 2006* (NSW) s 5J(2).
69 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5I(3), 5J(3).
70 *Crimes (High Risk Offenders) Act 2006* (NSW) s 4.
71 *Crimes (High Risk Offenders) Act 2006* (NSW) s 4.

contained in division 10 (offences in the nature of rape, offences relating to other acts of sexual assault) of part 3 of the *Crimes Act 1900* (NSW) that are punishable by imprisonment for seven years, and where against an adult the offence is committed in circumstances of aggravation.[72]

In contrast, the Act defines a 'serious violence offence' according to the harm caused by the offence. That is, a serious violence offence is a serious indictable offence 'that is constituted by a person':

> (a) engaging in conduct that causes the death of another person or grievous bodily harm to another person, with the intention of causing, or while being reckless as to causing, the death of another person or grievous or actual bodily harm to another person, or
>
> (b) attempting to commit, or conspiring with or inciting another person to commit, an offence of a kind referred to in paragraph (a).[73]

This would, obviously, include the offence of murder in respect of which Gittany was found guilty. Serious sex and violence offences are defined to include offences committed outside of New South Wales that would be serious sex offences or serious indictable offences respectively if committed in the jurisdiction.[74]

As noted above, an application for an extended supervision order may only be made in respect of a 'supervised sex offender'. A 'supervised sex offender' is defined to include a sex offender who is serving a sentence of imprisonment for a serious sex offence or an offence of a sexual nature.[75] An offence of a sexual nature encompasses offences of lesser severity than serious sex offences, such as breach of an extended supervision order, loitering by convicted child sexual offenders near premises frequented by children, and any offences contained in division 10 of part 3 of the *Crimes Act 1900* (NSW).[76] Serious sex offences, by contrast, are only those contained in division 10 of part 3 that are punishable by

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72 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5(1)(a)(i)–(ii). The further offences identified are: an offence under s 61K (Assault with intent to have sexual intercourse) or s 66EA (Persistent sexual abuse of a child) of the *Crimes Act 1900* (NSW): *Crimes (High Risk Offenders) Act 2006* (NSW) s 5(1)(a1); any of the following offences under the *Crimes Act 1900* (NSW), where committed with intent to commit an offence under pt 3 div 10 that is punishable by seven years or more: using intoxicating substance to commit an indictable offence, s 38; kidnapping with the intention of committing a serious indictable offence, s 86(1)(a1); enters any dwelling-house, with intent to commit a serious indictable offence there, s 111; breaking into a house and committing indictable offence, s 112; breaking into a house with intent to commit indictable offence, s 113; armed with any weapon, or instrument, with intent to commit an indictable offence, s 114: *Crimes (High Risk Offenders) Act 2006* (NSW) s 5(1)(b).

73 *Crimes (High Risk Offenders) Act 2006* (NSW) s 5A(1). A serious indictable offence is an indictable offence punishable by life imprisonment or imprisonment for five or more years: *Crimes Act 1900* (NSW) s 4. For the purposes of the *Crimes (High Risk Offenders) Act 2006* (NSW), this includes an offence committed outside of NSW that would be a serious indictable offence if committed in NSW: at s 5A(3).

74 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5(1)(c)–(d).

75 *Crimes (High Risk Offenders) Act 2006* (NSW) s 5I.

76 *Crimes (High Risk Offenders) Act 2006* (NSW) s 5(2). Offences contained in pt 3 div 10 of the *Crimes Act 1900* (NSW) include: indecent assault, s 61L; act of indecency, s 61N.

imprisonment of seven years or more and, if the offence is against an adult, committed in aggravated circumstances.

A continuing detention order may be applied for in respect of a 'detained' or 'supervised' sex offender or violent offender.[77] A 'detained' sex or violent offender is a sex or violent offender who is, at the time of the application, in custody in a correctional centre either pursuant to an existing continuing detention order or serving a sentence of imprisonment by way of full-time detention for, in the case of a sex offender, a serious sex offence or offence of a sexual nature, or, for a violent offender, a serious violence offence or an offence for breach of a continuing supervision order.[78] For the purposes of continuing detention orders, the definition of 'supervised sex offender' and 'supervised violent offender' differ from those provided in respect of extended supervision orders. A supervised sex or violent offender is here defined as a sex or violent offender subject to a supervision order who has been found guilty of the offence of breaching an extended supervision order or, 'because of altered circumstances, cannot be provided with adequate supervision under an' existing supervision order.[79]

2 Preliminary Hearing

At the preliminary hearing, if the Court is satisfied that 'the matters alleged in the supporting documentation would, if proved, justify the making of' an extended supervision or continuing detention order, the Court must appoint two psychiatrists or registered psychologists, or a combination of both, to undertake separate examinations of the offender.[80] If the Court is not satisfied that the matters alleged would justify the making of an order, the Court must dismiss the application.[81] This preliminary hearing does not involve the Court in 'weighing the supporting documentation or predicting the ultimate result', but is more akin to the 'prima facie case' test for committal proceedings in the Local Court in New South Wales.[82]

3 Substantive Hearing

Where an application is not dismissed at the preliminary hearing, the Supreme Court determines the application in a substantive hearing. The Court may only make an order for the extended supervision of an offender if he or she meets the statutory definition of 'high risk sex offender' or 'high risk violent

77 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 13A–13C.
78 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 13B(2), 13C(2).
79 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 13B(4), 13C(4).
80 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 7(4), 15(4).
81 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 7(5), 15(5).
82 *A-G (NSW) v Hayter* [2007] NSWSC 983, [6] (Price J); NSW Sentencing Council, above n 4, 98 [4.148].

offender'.[83] The Supreme Court may only make an order for continuing detention where the offender meets this definition and the Supreme Court is satisfied that adequate supervision will not be provided by an extended supervision order.[84] Thus, for the issuance of a continuing detention order, the applicant must further establish that a supervision order is insufficient to alleviate the risk posed by the offender.[85]

A 'high risk sex offender' is defined as a 'sex offender' in respect of whom 'the Supreme Court is satisfied to a high degree of probability that the offender poses an unacceptable risk of committing a serious sex offence if he or she is not kept under supervision'.[86] The Act similarly defines a 'high risk violent offender' as a 'violent offender' who the Supreme Court is satisfied, to a high degree of probability, poses an unacceptable risk to the community if not supervised.[87]

In determining whether the offender poses an 'unacceptable risk', the Court is not required to determine that 'the risk of a person committing' a serious sex or violence offence 'is more likely than not'.[88] The applicant bears the onus of establishing the offender poses an 'unacceptable risk' to the community.[89] What amounts to unacceptable risk is not statutorily prescribed, and the question of what test the Court should apply to determine what is an acceptable and unacceptable risk has, unsurprisingly, been the subject of considerable case law and remains unresolved.[90] The Act provides that the proceedings before the Supreme Court are civil proceedings, and to be conducted according to the law and rules of evidence relating to civil proceedings, unless otherwise provided by the Act.[91]

At the substantive hearing for an extended supervision order, the Supreme Court may either make an extended supervision order or dismiss the application.[92] In respect to continuing detention orders, the Supreme Court is empowered to determine an application by making an extended supervision order, a continuing detention order or by dismissing the application.[93] The Supreme Court may issue both a continuing detention order and extended supervision order in respect to the same person at the same time, with the latter commencing on the expiration of the former.[94] In determining whether or not to

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83 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5B(1), 5C, 5E(1), 5F.
84 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5D, 5G.
85 NSW Sentencing Council, above n 4, 99 [4.152].
86 *Crimes (High Risk Offenders) Act 2006* (NSW) s 5B(2).
87 *Crimes (High Risk Offenders) Act 2006* (NSW) s 5E(2).
88 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5B(3), 5E(3).
89 NSW Sentencing Council, above n 4, 98 [4.151].
90 For a study of the different approaches adopted to determining what amounts to 'unacceptable', see the NSW Sentencing Council, above n 4, 104 [4.170]. See generally: at 102–4.
91 *Crimes (High Risk Offenders) Act 2006* (NSW) s 21.
92 *Crimes (High Risk Offenders) Act 2006* (NSW) s 9.
93 *Crimes (High Risk Offenders) Act 2006* (NSW) s 17.
94 *Crimes (High Risk Offenders) Act 2006* (NSW) s 25B.

make a continuing detention or extended supervision order, the Court must have regard to an enumerated list of prescribed matters as well as any other matter it considers relevant.[95] The prescribed matters include the safety of the community, medical reports, and any other available information as to the likelihood of reoffending and the offender's criminal history.[96]

A Court may make an extended supervision order for a term of up to five years, and subsequent extended supervision orders may be made against the same offender.[97] The conditions that may be imposed pursuant to an extended supervision order include reporting to corrective services, participating in treatment, not engaging in specific conduct or specific employment, not residing in specific locations or associating with specified persons, electronic tagging, and residing at a particular address.[98] It is an offence to fail to comply with the requirements of an interim or extended supervision order, punishable, following the 2014 amendments, by five years' imprisonment, a fine of 500 penalty units, or both.[99] A continuing detention order may be made for a term of up to five years and subsequent continuing detention orders may be made against the same offender.[100]

III THE 2013 AND 2014 REFORMS

The 2013 and 2014 reforms implemented a number of the recommendations of the NSW Sentencing Council's 2012 Report and the 2009 Statutory Review. These reforms resulted in many improvements being made to the regime, including the creation of the High Risk Offenders Assessment Committee and provision for multi-agency responses,[101] the inclusion of a statutory warning on sentence for serious violent offences,[102] clarification of the grounds for revoking an order,[103] and enhanced annual review requirements for the Commissioner of Corrective Services.[104] Following the 2013 amendments, the Commissioner is

95 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 9(3), 17(4).
96 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 9(3), 17(4).
97 *Crimes (High Risk Offenders) Act 2006* (NSW) s 10.
98 *Crimes (High Risk Offenders) Act 2006* (NSW) s 11.
99 *Crimes (High Risk Offenders) Act 2006* (NSW) s 12.
100 *Crimes (High Risk Offenders) Act 2006* (NSW) s 18.
101 *Crimes (High Risk Offenders) Act 2006* (NSW) pt 3 div 3A.
102 The 2013 Act inserted s 25C which requires a court sentencing a person for a serious violent offence 'to cause the person to be advised of the existence of this Act and of its application to the offence'. Failure to do so does not affect the validity of the sentence or prevent the making of an order under the Act. Interestingly, a comparable warning provision does not exist for serious sex offenders.
103 The 2013 Act inserted ss 13(1B) and 19(1B) into the Act to clarify that the Supreme Court may revoke an order under the Act 'if satisfied that circumstances have changed sufficiently to render the order unnecessary'.
104 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 13(3), 19(3).

required to indicate, in his or her annual report to the Attorney-General on offenders supervised or detained under the Act, whether he or she 'considers the continuation of the' order to be 'necessary and appropriate'.[105] This is an important safeguard to ensure that the orders made are the minimum necessary intrusion on individual liberty to protect the public.

However, a number of the reforms – in particular, the extension of the regime to violent offenders, the introduction of ex parte emergency detention orders, and increased penalty provisions – give rise to fresh policy and procedural concerns. This Part will explore the implications of these three reforms, which range from new challenges for the assessment of risk of reoffending to procedural fairness, and will canvas options for reform. Addressing these concerns is important to achieving the objectives of the regime – to facilitate incapacitation and supervision of high risk offenders to protect the community, and encourage offender rehabilitation[106] – and to minimising the risk of counter-productivity. In *Pollentine v Bleijie*, a case concerning the constitutional validity of an indeterminate detention regime in Queensland, the joint judgment of the High Court referred to the following comments, made by Sir Leon Radzinowicz in 1945: 'Unless indeterminate sentences are awarded with great care, there is a grave risk that this measure, designed to ensure the better protection of society, may become an instrument of social aggression and weaken the basic principle of individual liberty'.[107]

These comments are equally relevant to post-sentence preventive detention regimes. A recent study by Keyzer and McSherry highlights the concerns of professionals working in the area about the increased risks created by post-sentence preventive detention regimes: namely, that they only target known offenders and do not reduce recidivism; that, due to the regime, the community falsely believes they are protected from sex offenders; and that the regime increases the anger and dissatisfaction of offenders.[108]

Importantly, failure to address the concerns raised by the 2013 and 2014 reforms also risks contributing to the development of an alternative system of

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105 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 13(3), 19(3).

106 *Crimes (High Risk Offenders) Act 2006* (NSW) s 3. The objects are ranked: the primary object is protection of community and another object is rehabilitation. This was not always the case: when enacted, s 3 of the *Crimes (Serious Sex Offenders) Act* 2006 (NSW) contained twin and equally weighted objectives 'to ensure the safety and protection of the community' and 'to facilitate the rehabilitation of serious sex offenders'. In 2007, amending legislation was passed to clarify that the 'primary' object of the Act is to provide for the extended supervision and continuing detention of serious sex offenders to ensure community safety and protection and 'another object' is to encourage rehabilitation: *Law Enforcement and Other Legislation Amendment Act* 2007 (NSW) sch 3. See also New South Wales, *Parliamentary Debates,* Legislative Assembly, 5 December 2007, 5192 (David Campbell).

107 (2014) 311 ALR 332, 337 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), quoting Leon Radzinowicz, 'The Persistent Offender' in L Radzinowicz and J W C Turner (eds), *The Modern Approach to Criminal Law* (Macmillan, 1945) 162, 167.

108 Keyzer and McSherry, 'Perspectives at the Coalface', above n 6.

justice devoid of, or containing an attenuated version of, the normal civil liberties protections afforded.[109] Post-sentence preventive detention and supervision orders straddle the civil–criminal divide. While they are connected to a criminal process, in that an individual may be detained or restrained upon the completion of a term of imprisonment, they are imposed consequent to civil proceedings, for the purpose of public protection – not punishment – and at a point in time after that which is traditionally accepted in the criminal justice system. The state may thereby impose significant restrictions upon an individual's liberty while 'side-stepping' the enhanced procedural and evidentiary safeguards that attach to the criminal justice system.[110] At the same time, failure to comply with the requirements of an interim or extended supervision order is a criminal offence.[111]

This is not an abstract concern: modelling of preventive innovations – within and between jurisdictions – has become an increasingly prominent feature of Australian lawmaking since September 11. State and territory governments have, for example, been quick to model anti-terror control orders in their legislative responses to organised crime,[112] and, as will be discussed below, the ex parte emergency detention order resembles the anti-terror preventive detention order. Conversely, safeguards or protections devised in respect of one preventive law may be used to improve others – providing an opportunity to enhance the integrity of preventive measures employed in Australian jurisdictions.[113]

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109 Eric S Janus, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (Cornell University Press, 2006) 94.

110 Lucia Zedner, 'Seeking Security by Eroding Rights: The Side-Stepping of Due Process' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing, 2007) 257; Kent Roach, 'The Criminal Law and Its Less Restrained Alternatives' in Victor V Ramraj et al (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 91.

111 *Crimes (High Risk Offenders) Act 2006* (NSW) s 12.

112 Serious organised crime control orders have been introduced in several Australian jurisdictions: *Serious Crime Control Act 2009* (NT); *Criminal Organisation Act 2009* (Qld); *Serious and Organised Crime (Control) Act 2008* (SA) – in 2010, the control order provisions of this Act, contained in s 14(1), were held to be constitutionally invalid by the High Court in *South Australia v Totani* (2010) 242 CLR 1. In 2012, the South Australian Parliament passed the *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012* (SA) which introduced an amended control order scheme in pt 3 of the *Serious and Organised Crime (Control) Act 2008* (SA). In a recent decision, the High Court found the *Crimes (Criminal Organisations Control) Act 2009* (NSW), which provided for the declaration of criminal organisations and control of the members of declared organisations, to be invalid: *Wainohu v New South Wales* (2011) 243 CLR 181. Following *Wainohu*, the O'Farrell Government introduced into Parliament the Crimes (Criminal Organisations Control) Bill 2012 (NSW), which received Royal Assent on 21 March 2012. In 2012, the WA Parliament followed suit with the passage of the *Criminal Organisations Control Act 2012* (WA).

113 See, eg, Lucia Zedner, 'Preventive Justice or Pre-punishment? The Case of Control Orders' (2007) 60 *Current Legal Problems* 174, 189.

A Violent Offenders and Risk Assessment

The extension of the regime to high risk violent offenders presents new challenges for the assessment of risk and thereby for the regime to target only those offenders likely to reoffend. The impossibility of accurately determining the risk an individual poses is well documented,[114] so too the potential for errors: false positives and false negatives. False positives relate to the finding of harm where none exists, with an order based on a false positive amounting to an unwarranted interference with the offender's liberty. False negatives are equally problematic. A false negative will arise where there is an incorrect prediction that future offending will not occur. In this case, a post-sentence regime would fail to protect the community. These errors can undermine the objectives of the regime. As the Victorian Sentencing Advisory Council has articulated, a defensible post-sentence regime relies on the accuracy and quality of risk assessments.[115] The New South Wales regime's ability to achieve this is further complicated by its extension to violent offenders.

Assessment of risk is central to the *Crimes (High Risk Offenders) Act 2006* (NSW) – it is part of the threshold test of 'high risk violent offender' and 'high risk sex offender'. In respect of each type of offender the Court must be satisfied to a high degree of probability that, if not supervised, the offender poses an 'unacceptable risk' of committing a future relevant offence.[116] As Mason P made clear in *Tillman v Attorney-General (NSW)*, this predictive inquiry is 'specific to the particular offender', 'implicitly addresses the time frame within which the Court's order can operate' and is 'referable to a single future event' – reoffending.[117]

The Act mandates that a risk assessment be conducted by nominated professionals and stipulates the types of risk assessment that may be taken into account by the Court. At the preliminary hearing stage, if satisfied that the matters alleged would justify an order, the Court must appoint psychiatrists and/or psychologists to examine the offender.[118] In determining an application for either type of order, the Court must have regard to these reports and a number of prescribed matters including statistical assessments and psychiatric assessments as to the likelihood of reoffending.[119]

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114 See, eg, McSherry, *Managing Fear,* above n 3, 34–52; Bernadette McSherry, 'Risk Assessment by Mental Health Professionals and the Prevention of Future Violent Behaviour' (Trends and Issues in Crime and Criminal Justice No 281, Australian Institute of Criminology, July 2004); James R P Ogloff and Michael R Davis, 'Assessing Risk for Violence in the Australian Context' in Duncan Chappell and Paul Wilson (eds), *Issues in Australian Crime and Criminal Justice* (LexisNexis Butterworths, 2005) 294; *Fardon v A-G (Qld)* (2004) 223 CLR 575, 623 (Kirby J).

115 Victorian Sentencing Advisory Council, above n 3.

116 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5B(2), 5E(2).

117 (2007) 70 NSWLR 448, 450–1.

118 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 7(4), 15(4).

119 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 9(3)(c)–(d), 17(4)(c)–(d).

The NSW Sentencing Council reported that predicting the risk of reoffending of high risk violent offenders poses particular challenges for professionals, a concern also identified in the 2009 Statutory Review.[120] This is due to two factors: the diversity of the cohort and the fact that high risk violent offenders 'are not generally specialists – they engage in violent behaviour as part of a broader criminal career'.[121] Like sex offenders, violent offenders are not a homogeneous group.[122] However, unlike sex offenders, violent offenders do not share identifiable commonalities.[123] Sex offenders, for example, often share methods of offending, grooming behaviour and choice of victims.[124] The 14 violent offenders identified as 'high risk' in the 2010 Audit had committed offences ranging from robbery to kidnapping to murder.[125] Barry, Loucks and Kemshall explain:

> Violent offenders are a heterogeneous group that can be difficult to 'compartmentalise' either from other types of offenders (violent and sexual offenders are not necessarily distinct groups, for example) or from other violent offenders (for example perpetrators of domestic violence can be specialist or generalist violent offenders).[126]

This diversity also poses problems for predicting the risk of reoffending as the type of offence to be prevented – 'violence offences' – captures a broader range of conduct than 'sex offences'. The assessment undertaken is thus not whether a person who has been found guilty of kidnapping is likely to commit another offence of kidnapping, but whether they are likely to commit a further 'violence offence' (which encompasses a broader category of offences). This task is further complicated by the fact that violent offenders, as noted above, tend to be 'generalists' not 'specialists'.[127]

To address these difficulties, the NSW Sentencing Council recommended the following support structures: inter-agency cooperation, to maximise the support provided to offenders; and the creation of an Independent Risk Management Authority, 'to undertake the exercise of risk-management and risk-assessment'.[128] The New South Wales government adopted the first of these recommendations, but not the second.

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120 NSW Sentencing Council, above n 4; NSW Department of Justice and Attorney-General, above n 36.
121 NSW Sentencing Council, above n 4, 25 [2.93].
122 NSW Department of Justice and Attorney-General, above n 36, 81–2, 95–6; NSW Sentencing Council, above n 4, 11–12.
123 NSW Department of Justice and Attorney-General, above n 36, 97; NSW Sentencing Council, above n 4, 11 [2.42].
124 NSW Department of Justice and Attorney-General, above n 36, 96; NSW Sentencing Council, above n 4, 11 [2.43].
125 NSW Department of Justice and Attorney-General, above n 36, 81.
126 Monica Barry, Nancy Loucks and Hazel Kemshall, 'Serious Violent Offenders: Developing a Risk Assessment Framework' (Report, Risk Management Authority, November 2007) 52 [3.92].
127 NSW Sentencing Council, above n 4.
128 Ibid 130 [5.36].

The 2014 amendments provide for a multi-agency response to the management of high risk offenders through the creation of a High Risk Offenders Assessment Committee, and the imposition of duties on agencies to cooperate in the management of offenders.[129] The Committee is to be chaired by the Commissioner of Corrective Services New South Wales or a nominee, and comprised of representatives from nominated agencies and such other members with relevant expertise that the Minister appoints.[130] The Committee is tasked, amongst other things, with reviewing risk assessments of sex and violent offenders and making recommendations to the Commissioner about taking action against those offenders under the Act.[131] Further functions of the Committee include facilitating cooperation and information sharing between agencies exercising 'high risk offender functions',[132] developing best practice standards and guidelines for agencies, identifying training and resource gaps, and undertaking research.[133] These amendments are modelled on the United Kingdom's Multi-Agency Public Protection Arrangements ('MAPPA'), which have been successfully implemented in that jurisdiction since 2000.

These multi-agency cooperation arrangements are an important development in the management of high risk offenders in New South Wales. However, they do not address the specific concerns raised by the 2009 Statutory Review and NSW Sentencing Council in relation to risk assessment and accreditation, nor the challenges posed by the extension of the regime to high risk violent offenders. The second recommendation of the NSW Sentencing Council would have gone some way to addressing these concerns; however, as will be discussed below, this option would require considerable resource investment.

The NSW Sentencing Council recommended the creation of an Independent Risk Management Authority, with the following functions:

- setting out best-practice risk-assessment and risk-management processes and developing guidelines and standards with respect to such processes;
- validating new risk assessment tools and processes;
- providing for rigorous procedures by which practitioners become accredited for assessing risk;
- providing education and training for practitioners;
- increasing the pool of experts available to give evidence in matters which require risk-prediction;
- facilitating risk assessment by an independent panel of experts;

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129 *Crimes (High Risk Offenders) Act 2006* (NSW) pt 4A.
130 *Crimes (High Risk Offenders) Act 2006* (NSW) s 24AB.
131 *Crimes (High Risk Offenders) Act 2006* (NSW) s 24AC.
132 That is, agency functions 'in connection with risk assessment and management of high risk offenders': *Crimes (High Risk Offenders) Act 2006* (NSW) s 24AC(b).
133 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 24AC(e)–(g).

- developing an individual risk-management plan when an offender likely to become subject to a SPCMO [sentencing or post-custody management option] enters custody.[134]

This is not the first time such a recommendation has been made in the Australian context. Similar recommendations have been made by Keyzer and McSherry, as well as by professionals working in the area.[135] These recommendations draw on the Scottish model of a Risk Management Authority. The Scottish Risk Management Authority is an independent statutory body, established in 2003 pursuant to the *Criminal Justice (Scotland) Act 2003* (Scot). The Risk Management Authority has policy and research functions, including promoting effective practice and advising Ministers, as well as preparation of guidelines and standards on risk assessment and minimisation, formulation of risk management plans and accreditation of risk assessors.[136] It is worth noting that, similar to the recommendation of the NSW Sentencing Council, Scotland has had, since 2007, both the Risk Management Authority and MAPPA support structures for its lifelong restriction regime.[137]

The Scottish model has received positive treatment in the literature.[138] However, it is resource intensive, a fact acknowledged by the NSW Sentencing Council.[139] For this reason, the Victorian Sentencing Advisory Council did not recommend the introduction of a like authority. The Council explained:

> we were concerned that the establishment of such a new body would require a significant ongoing commitment of funding that may not seem warranted if a post-sentence scheme is limited, as we believe it should be, to the 'critical few'. We were conscious, too, of concerns expressed by Forensicare that such an approach would not only be resource-intensive, but could also potentially limit the time senior clinicians may have available to perform risk assessments should these clinicians be involved in developing and delivering training.[140]

The Victorian Sentencing Advisory Council opted, instead, to recommend the establishment of a Risk Management Monitor – an independent office to be held by an experienced clinician.[141] It recommended the Monitor be tasked with functions similar to those recommended by the NSW Sentencing Council for the Risk Management Authority, but with additional special powers as necessary to perform these functions, such as inspecting documents, premises and treatment interventions.[142]

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134 NSW Sentencing Council, above n 4, 131 [5.37].
135 See, eg, McSherry and Keyzer, *Sex Offenders and Preventive Detention*, above n 6; Keyzer and McSherry, 'Perspectives at the Coalface', above n 6.
136 *Criminal Justice (Scotland) Act 2003* (Scot) ss 3–12.
137 Barry, Loucks and Kemshall, above n 126.
138 See, eg, McSherry and Keyzer, *Sex Offenders and Preventive Detention*, above n 6.
139 NSW Sentencing Council, above n 4, 139 [5.70].
140 Victorian Sentencing Advisory Council, above n 3, 115 [3.6.27].
141 Ibid 115 [3.6.30].
142 Ibid recommendations 10, 70, 86–7, 109–19.

Resource issues are a significant hurdle to the creation of the statutory body recommended by the NSW Sentencing Council. The argument can readily be made that the regime should target but a 'critical few' and therefore neither warrants, nor is likely to attract, such an investment of resources. At the same time, a regime that does not promote accurate and reliable risk assessments has its own costs, including false negatives and false positives, which undermine its ability to target the 'critical few' and achieve its objective of public protection. The introduction of an Authority or Monitor may also be challenged on the basis that it could serve to legitimise provisions that are otherwise indefensible as they deviate from accepted principles of the criminal justice system. As noted in Part II, governments have long sought to protect the community from dangerous offenders through preventive innovations that deviate from criminal law principles and protections. Post-sentence regimes are likely to remain on our statute books for the foreseeable future and, while they so remain, attention should be paid to ensuring that regimes are defensible and constitute the minimum necessary intrusion on offenders' rights to achieve public protection.

It is important to note that an Authority or Monitor need not be limited to high risk offender post-sentence regimes; it could also serve a similar function in other contexts in which risk assessment forms the basis for detention, such as in the mental health and anti-terror contexts.[143] In this way, the introduction of an Authority or Monitor is also an opportunity to enhance oversight and best practice in relation to preventive measures as employed more generally in New South Wales. The establishment of a Risk Management Monitor will likely be a more economically viable alternative that builds transparency, best practice and oversight into a regime that is reliant on accurate risk assessments to achieve its objects.

B Ex Parte Emergency Detention Orders

The 2014 amendments create a new category of detention order – emergency detention orders – which may be made against an offender subject to an interim or extended supervision order.[144] This development has implications for the rights of the individual subject to the order, in particular because an emergency detention order may be made by a court in the absence of the offender. The Legislative Assembly's Legislative Review Committee expressed concern that emergency detention orders would trespass the offender's right to a fair trial and to liberty.[145] This is so, however the narrow circumstances in which an order can be made and its short duration limits the severity of the intrusion on liberty.

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143 For a detailed discussion of the different Australian regimes that rely upon risk assessment and the human rights and ethical issues to which they give rise, see McSherry, *Managing Fear*, above n 3.

144 *Crimes (High Risk Offenders) Act 2006* (NSW) pt 3 div 3A.

145 Legislation Review Committee, Parliament of New South Wales, *Legislation Review Digest No 61/55* (2014) 9–10.

Nonetheless, the introduction of ex parte emergency detention orders gives rise to fresh procedural fairness concerns.

The genesis of, and need for, emergency detention orders is somewhat opaque. The introduction of emergency detention orders was not a recommendation of the NSW Sentencing Council in its 2012 Report, or of the 2009 Statutory Review. On the second reading of the 2014 Bill in the Legislative Assembly, Attorney-General Hazzard justified the introduction of emergency detention orders as:

> an additional and necessary tool to help manage offenders who are being supervised in the community. ... This new emergency detention order will ensure that the offender can be kept safely in custody while the problem created by the change of circumstances is sorted out. ... Safeguards are incorporated into the new emergency detention order provisions that recognise the extraordinary nature of such orders and ensure that they are used appropriately as a last-resort measure.[146]

Emergency detention orders are not a feature of any other post-sentence regimes in Australia. However, the emergency detention order bears some resemblance to one of the two federal anti-terror preventative detention orders. This preventative detention order is an executive order that prescribes the limited detention of a person to prevent an imminent terrorist act.[147] An 'initial' preventative detention order may be made in the absence of the affected person and enables detention for up to 24 hours.[148] This period may be extended pursuant to a 'continued' preventative detention order; however the affected person must be notified before an application is made for a continued order.[149] The duration of continued preventative detention order is also limited and may not exceed 48 hours from the time at which the person was first detained pursuant to the initial order.[150] A further extension is possible pursuant to state or territory preventative detention legislation.[151]

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146 New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 September 2014, 259–60 (Brad Hazzard).

147 Two types of preventative detention order are provided for in div 105 of the *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*'): the first is designed to be issued before a terrorist act to prevent it, the second after a terrorist act to preserve evidence. For the first type of order, the terrorist act '(a) must be one that is imminent; and (b) must be one that is expected to occur, in any event, at some time in the next 14 days': at s 105.4(5). For further discussion, see Claire Macken, 'The Counter-Terrorism Purposes of an Australian Preventive Detention Order' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 30, 32–4.

148 *Criminal Code* s 105.8(5). An initial preventative detention order is issued by a senior member of the Australian Federal Police on the application of a member of the Australian Federal Police: at ss 100.1(1), 105.8.

149 *Criminal Code* s 105.10A; An issuing authority for a continued preventative detention order is a person appointed by the Minister under s 105.2, and includes serving judges acting in their personal capacity: see at ss 100.1(1), 105.2.

150 *Criminal Code* s 105.12(5).

151 See Macken, above n 147, 30, 33; Michael McHugh, 'Terrorism Legislation and the *Constitution*' (2006) 28 *Australian Bar Review* 117, 127–9.

The high risk offender emergency detention order is, by comparison, limited, in that it targets only those already the subject of an interim or extended supervision order. It also provides for an order to be made in the absence of the offender; however, it does not provide for a two-step process where the offender is notified prior to an application for a continued order. Indeed, the Act is silent on notification. A further point of distinction is that an emergency detention order may be made, ex parte, consequent to a judicial process. This raises different considerations regarding the fairness of the proceedings.

1 Application by the Attorney-General

The process for making an emergency detention order is as follows. The state may apply to the Supreme Court for an emergency detention order in respect to an offender who is subject to a supervision order on the basis that, due to 'altered circumstances', adequate supervision cannot be provided to the offender.[152] This application must be supported by an affidavit of the Commissioner of Corrective Services New South Wales or Assistant Commissioner which addresses the reasons for the application, and why an emergency detention order is both necessary and the least restrictive alternative.[153] In relation to the last point, the affidavit must outline 'the reasons why there are no other practicable and available means of ensuring that the offender does not pose an imminent risk of committing a serious offence (other than detention)'.[154]

2 Substantive Hearing

Emergency detention order proceedings are civil proceedings, and the Court may hear the application in the absence of the offender.[155] The Supreme Court may issue an emergency detention order where 'it appears to the Court that the matters alleged in support of the application for the order would, if proved, establish': that because of altered circumstances adequate supervision cannot be provided, and 'without adequate supervision, the offender poses an imminent risk of committing a serious offence'.[156] The Act does not define altered circumstances. The Supreme Court may only make 'one emergency detention order in respect of the same occasion of altered circumstances', and for a term not exceeding 120 hours.[157] An emergency detention order commences when made,[158] and the Court must issue a warrant for the committal of the offender to a

152 *Crimes (High Risk Offenders) Act 2006* (NSW) s 18CA.
153 *Crimes (High Risk Offenders) Act 2006* (NSW) s 18CC.
154 *Crimes (High Risk Offenders) Act 2006* (NSW) s 18CC(c).
155 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 18CA, 21.
156 *Crimes (High Risk Offenders) Act 2006* (NSW) s 18CB.
157 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 18CB(2), 18CD.
158 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 18CB(2), 18CD.

Correctional Centre on making the order.[159] Appeal lies to the Court of Appeal against an emergency detention order.[160]

There are safeguards built into this process: the application must be supported by an affidavit of the Commissioner, the order has a maximum duration and is issued by the Supreme Court, and the offender has the right to appeal against an order. However, the question remains whether these safeguards are sufficient to guard against abuse when an order may be made in the absence of an offender. While ex parte proceedings are not foreign to Australian law, the liberty context in which this regime operates is significant. Where the substantive hearing proceeds ex parte, the Court is left in a position to rely solely upon evidence of the applicant – evidence that has not been the subject of nor withstood adversarial challenge – where the consequence of an order being made is the restraint of individual liberty.

This departure from the principle of procedural fairness raises potential questions of constitutional validity and the sufficiency of the safeguards built into the regime. Procedural fairness, or natural justice, is a fundamental principle of the Australian legal system that has two limbs: the hearing rule and bias rule. The hearing rule relates to the fairness of proceedings, a key element of which is that a party has an opportunity to answer a case put against them.[161] At the federal level, procedural fairness is constitutionally protected. This protection derives from the judicial processes enshrined in Chapter III of the *Constitution*: procedural fairness is regarded as lying 'at the heart of the judicial function'.[162]

The constitutional guarantee of procedural fairness is a limitation on the exercise of state legislative power. However, state legislation providing for ex parte hearings in state courts will not automatically be unconstitutional.[163] Invalidity will only arise where the functions conferred on the court jeopardise its institutional integrity; that is, where a state parliament requires a court to act in a manner contrary to its 'defining characteristics' as a court such as independence, impartiality and fairness.[164] A state court must remain a fit repository of federal

159 *Crimes (High Risk Offenders) Act 2006* (NSW) s 20.

160 *Crimes (High Risk Offenders) Act 2006* (NSW) s 22.

161 See, eg, the commentary of French CJ in *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 354 [54] ('*International Finance Trust*'); Gageler J in *Assistant Commissioner v Pompano Pty Ltd* (2013) 252 CLR 38, 104–15. See generally Sarah Murray, *The Remaking of the Courts: Less-Adversarial Practice and the Constitutional Role of the Judiciary in Australia* (Federation Press, 2014) 57–84.

162 *International Finance Trust* (2009) 240 CLR 319, 354 [54] (French CJ). See also Murray, above n 161, 59–66.

163 Murray, above n 161, 66; *International Finance Trust* (2009) 240 CLR 319; *Assistant Commissioner v Pompano Pty Ltd* (2013) 252 CLR 38.

164 *South Australia v Totani* (2010) 242 CLR 1, [70] (French CJ). See also *Assistant Commissioner v Pompano Pty Ltd* (2013) 252 CLR 38; *Pollentine v Bleijie* (2014) 311 ALR 332.

judicial power,[165] and a law providing for an ex parte hearing will not necessarily offend this principle.

In *International Finance Trust Co Ltd v New South Wales Crime Commission*, a majority of the High Court held that section 10 of the *Criminal Assets Recovery Act 1990* (NSW), which required the court to receive, hear and determine an application for a restraining order ex parte, was invalid. Chief Justice French explained that section 10 directed 'the court as to the manner in which it exercises its jurisdiction and in so doing to deprive the court of an important characteristic of judicial power'.[166] The 2014 amendments do not require the Court to hear the application ex parte, but provide that the Court *may* hear an application in the absence of the offender.[167] As such, it is unlikely to offend this principle. In any event, procedural fairness is not an absolute entitlement and may be 'qualified if countervailing interests, such as pressing public interest considerations, apply'.[168] The countervailing public interest in incapacitating high risk offenders who pose an imminent risk to the community would be sufficient to support this.

It does not, however, follow that the safeguards enumerated above are sufficient. These safeguards do not address the fact that, if the hearing proceeds ex parte, the Supreme Court has no option but to rely solely upon evidence of the applicant, which has not withstood adversarial challenge. These concerns are practically limited – an emergency detention order is likely to be used in limited circumstances, in relation to a limited number of people who are subject to a supervision order under the Act, for a limited period. However, this does not obviate the need for additional safeguards to mitigate the potential unfairness to the offender. In the Legislative Council, David Shoebridge provided a useful summary of the issue and of the reforms needed. He explained:

> It is also clear that a judge in the common law system does not have the training or, in many cases, the skills or capacity to adequately test ex parte applications that come before the court. This bill proposes another set of ex parte applications for emergency detention orders. If these kinds of arrangements are to remain on the statute books in the medium to long term in New South Wales – and it is likely they will – a public interest security monitor must be appointed. The monitor must have genuine independent statutory powers and adequate funding in order to be the necessary contradictor in ex parte cases. A monitor will be needed to test the evidence, to cross-examine deponents of applications and to inject integrity into the system. Indeed, that necessary office is required not only for these kinds of ex

165 *Kable v DPP (NSW)* (1996) 189 CLR 51, 103 (Gaudron J).

166 *International Finance Trust* (2009) 240 CLR 319, 354–5 [55].

167 *Crimes (High Risk Offenders) Act 2006* (NSW) s 18CA(2); ibid 354–5 [54]–[55] (French CJ).

168 Murray, above n 161, 65, discussing Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash University Law Review* 248, 262 and Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 279.

> parte security-related applications but also for the raft of terrorism-related laws where warrant and detention applications are also made on an ex parte basis.[169]

Public interest monitors are not foreign to Australian jurisdictions, existing in both Queensland and Victoria.[170] The Queensland and Victorian Monitors appear in court proceedings where applications are made for warrants and other orders. Their role is to test the cogency of the case made in support of the application, cross-examine the applicant and make submissions. The introduction of a Monitor with like functions in New South Wales would serve as a protective mechanism to mitigate the unfairness to an offender who is absent from emergency detention order proceedings. A Monitor could also, as David Shoebridge explained, be employed in other contexts in which liberty restraints are imposed on ex parte, presenting an opportunity to enhance not only the integrity and transparency of ex parte emergency detention orders but of other like orders employed in New South Wales.

C Increased Penalty Provisions

Failure to comply with the requirements of either an interim or extended supervision order is an offence punishable, following the 2014 amendments, by five years' imprisonment, a fine of 500 penalty units or both.[171] Prior to the 2014 reforms, the offence of failure to comply with the requirements of an interim or extended supervision order was punishable by two years' imprisonment, a fine of 100 penalty units or both.[172] It is important to recall that an extended supervision order is a hybrid civil–criminal order: it is issued in civil – not criminal – proceedings, but attracts criminal liability on breach.[173] The implications of these types of orders for the rights of the person subject to it are heightened by the increased penalty provided by the 2014 amendments.

The civil nature of a supervision order when issued enables the government to target offenders it believes are likely to reoffend in the future and to restrain their liberty to prevent them from reoffending. As Callaway AP remarked in *TSL v Secretary, Department of Justice* (Buchanan JA and Coldrey AJA concurring) in respect of the Victorian regime:

> Because it was concerned with the future, Parliament could not require the court to be satisfied that the offender will commit a relevant offence. All that the court

169 New South Wales, *Parliamentary Debates,* Legislative Council, 15 October 2014, 1125 (David Shoebridge).

170 The Queensland Monitor was established in 2000 and the Victorian monitor in 2011: *Police Powers and Responsibilities Act 2000* (Qld); *Public Interest Monitor Act 2011* (Vic).

171 *Crimes (High Risk Offenders) Act 2006* (NSW) s 12.

172 *Crimes (High Risk Offenders) Act 2006* (NSW) s 12.

173 *Crimes (High Risk Offenders) Act 2006* (NSW) s 21.

> could be satisfied of is that the offender is likely to do so or that there is a risk that the offender will do so.[174]

This risk or likelihood cannot be proved beyond a reasonable doubt, as past acts can be in a criminal trial. To make an extended supervision order, the Court must be satisfied to a 'high degree of probability' that the offender is a sex or violent offender and poses an 'unacceptable risk' of reoffending if not supervised.[175] The standard to which the Court must be satisfied – 'a high degree of probability' – is a standard of proof between the criminal and civil standard.[176]

Ashworth and Zedner point out that an individual subject to a civil preventive order, such as an extended supervision order, has fewer rights than if charged with a criminal offence. Nonetheless, following the civil proceedings in which the order is issued, the individual is 'subjected to a detailed and possibly wide-ranging personal criminal code' that attracts a maximum term of imprisonment on breach that is higher than that of most criminal offences.[177] The concerns regarding these hybrid civil–criminal orders have generally focused on orders against those who are not charged with or convicted of a criminal offence. To be the subject of an extended supervision order, an individual must meet the definition of a sex or violent offender and therefore have pleaded guilty to, or been found guilty of, a qualifying offence. This finding of guilt would have occurred following a criminal trial with heightened procedural and evidentiary requirements such as the burden of proof beyond reasonable doubt, the presumption of innocence and prosecutorial disclosure requirements.[178]

While a post-sentence hybrid civil–criminal order is, arguably, more justifiable on this basis,[179] the more than doubling of the maximum penalty for breach of a supervision order raises questions of proportionality – about whether the type and extent of punishment is 'proportionate to the gravity of the harm and the degree of the offender's responsibility'.[180] This is a considerable extension of

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174 (2006) 14 VR 109, 112 [9], quoted in *Tillman v A-G (NSW)* (2007) 70 NSWLR 448, 459 [74] (Giles and Ipp JJA).

175 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5B(2), 5E(2).

176 *Cornwall v A-G (NSW)* [2007] NSWCA 374, [21] (The Court). See NSW Sentencing Council, above n 4, 104 [4.171].

177 While these remarks were made in respect to another species of civil preventive order in the United Kingdom, the Anti-Social Behaviour Order, they are of equal relevance to post-sentence restraints: Andrew Ashworth and Lucia Zedner, 'Preventive Orders: A Problem of Undercriminalization?' in R A Duff et al (eds), *The Boundaries of the Criminal Law* (Oxford University Press, 2010) 59, 74–5.

178 *Azzopardi v The Queen* (2001) 205 CLR 50; *Dyers v The Queen* (2002) 210 CLR 285; *R v Carroll* (2002) 213 CLR 635, 643 (Gleeson CJ and Hayne J). See also J J Spigelman, 'Public Confidence in the Administration of Criminal Justice' (2007) 19 *Current Issues in Criminal Justice* 219, 221.

179 See, eg, the commentary by the then National Security Legisaltion Monitor, Bret Walker, who recommended the repeal of the anti-terror control order regime and called for consideration instead of a post-sentence regime for terrorist offenders similar to the high risk offender regime: Bret Walker, Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) 37.

180 Victorian Sentencing Advisory Council, above n 3, 43 [2.4.24]. See also *Hoare v The Queen* (1989) 167 CLR 348, 354 (The Court); *R v Whyte* (2002) 55 NSWLR 252, 277 [156]–[158] (Spigelman CJ).

the regime – a concerning development as the modelling of preventive innovations is an increasingly prominent feature of Australian lawmaking.

IV CONCLUSION

Post-sentence preventive detention and supervision regimes are a comparatively recent development in the regulation of 'dangerous' – now 'high risk' – offenders in Australia. In the last two decades, five Australian jurisdictions have introduced post-sentence regimes for serious sex offenders: Queensland, Western Australia, New South Wales, Victoria and the Northern Territory. This article has focused on the New South Wales regime which, following the NSW Sentencing Council's 2012 Report and the 2009 Statutory Review, has been the subject of recent reform.

The 2013 and 2014 reforms are, however, a mixed bag. Many of these reforms have improved the regime, notably the creation of the High Risk Offender Assessment Committee and obligations for multi-agency cooperation, provision for statutory warning on sentence, clarification of the grounds for revoking an order, and enhanced annual review requirements for the Commissioner of Corrective Services. However, a number of the reforms – in particular, the extension of the regime to violent offenders, the introduction of ex parte emergency detention orders, and increased penalty provisions – give rise to new policy and procedural concerns.

The extension of the regime to high risk violent offenders presents new challenges for the assessment of risk of reoffending; challenges that need to be addressed to ensure that the regime targets only those offenders that are likely to reoffend. The creation of the High Risk Offender Assessment Committee as part of the 2014 amendments is an important development; however it does not go far enough. To address the challenges of risk assessment, the recommendations of the Victorian Sentencing Council and NSW Sentencing Council should be heeded. The Victorian Sentencing Council recommended the establishment of a Risk Management Monitor – an economically sustainable alternative that builds transparency, best practice and oversight into a regime that is reliant on accurate risk assessments to achieve its objects.

The introduction of ex parte emergency detention orders has implications for the procedural fairness afforded to the offender. While there are safeguards built into the regime, these do not overcome the potential unfairness to the offender where the Supreme Court is left in a position to rely solely upon evidence of the applicant – evidence that has not been the subject of nor withstood adversarial challenge. One way to address this concern would be through the creation of a Public Interest Monitor, similar to that which exists in Queensland and Victoria. The Monitor, appearing in ex parte proceedings to, amongst other things, test the cogency of the case made in support of the application, would serve an important protective function and mitigate the unfairness to an offender who is absent from proceedings.

It is only by addressing these concerns that the objectives of the regime – to facilitate incapacitation and supervision of high risk offenders to protect the community, and encourage offender rehabilitation – can be achieved. Defensible post-sentence regimes depend, as the Victorian Sentencing Advisory Council has articulated, 'on the accurate and reliable assessment of an individual's risk of reoffending'.[181] Addressing these policy and procedural concerns will enhance the integrity and transparency of the regime while guarding against the creation of an alternative – or second tier – system of justice that contains reduced protections for individuals subject to preventive restraints. The modelling of preventive laws is an increasingly prominent feature of the Australian legal landscape, and provides an opportunity to enhance the quality of preventive justice in Australia through the development and replication of safeguards and protections.

181 Victorian Sentencing Advisory Council, above n 3, 12 [2.2.9].