SENTENCING SERIOUS VIOLENT OFFENDERS
CONSULTATION PAPER
MAY 2011

Sentencing Serious Violent Offenders – Consultation Paper

This consultation paper is in preparation for the drafting of a report by the NSW Sentencing Council ("the Council") pursuant to section 100J(1)(c) of the Crimes (Sentencing Procedure) Act 1999.

The views expressed in this paper do not necessarily reflect the private or professional views of individual Council members or the views of their individual organisations. A decision of the majority is a decision of the Council – Schedule 1A, clause 12 *Crimes (Sentencing Procedure) Act 1999* (NSW).

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This consultation paper is issued in response to the Terms of Reference which have been given to the Sentencing Council. It outlines some of the issues concerning the sentencing and post-sentence management of serious violent offenders in NSW. Options for possible reform are identified for the purpose of stakeholder and community consultation.

The issues and questions raised are not intended to be exhaustive, but are a guide to facilitate preliminary discussions. The Council welcomes comments on any other issues that respondents consider might be appropriate for exploration.

The Council intends to use the results of these consultations in preparing its Report to the Attorney General in response to the Terms of Reference. Unless otherwise requested by respondents, all submissions received will be treated as public documents and may be published on the Council's website. If a submission discloses personal information concerning a third party, please indicate clearly whether or not consent is given by that person to the publication of that information.

Closing date for submissions: 27 June 2011

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TERMS OF REFERENCE

The Attorney General has sought the advice of the Council on the most appropriate way of responding to the risks posed by serious violent offenders. The Council has been asked to:

(1) Advise on options for sentencing serious violent offenders;
(2) Examine and report on existing treatment options for and risk assessment of serious violent offenders;
(3) Examine and report on the adequacy of existing post custody management including parole and services available to address the needs of serious violent offenders and to ensure the protection of the community on their release;
(4) Advise on options for and the need for post sentence management of serious violent offenders; and
(5) Identify the defining characteristics of the cohort of offenders to whom any proposals should apply.

CONTENTS

1. BACKGROUND

THE CORRECTIVE SERVICES AUDIT OF SERIOUS VIOLENT OFFENDERS

1.1 In April 2010, at the direction of the Premier, Corrective Services NSW (CSNSW) conducted an audit (**the Audit**)[1] of all serious offenders with convictions for serious violent offences, who were currently under the management of the Serious Offenders Review Council (SORC). The purpose was to identify inmates who posed a significant high risk to the community of serious violent offending upon the expiration of their sentence.

1.2 Included in the Terms of Reference of the Audit were the following guidelines:

> *Without restricting the criteria for inclusion in the audit the following may be considered to be indicators of suitability for inclusion:*
>
> *i. an inmate who remains in custody at the expiration of the non-parole period.*
> *ii. an inmate who within two years of his or her non-parole period has not progressed to minimum security.*
> *iii. an inmate who has refused to participate in the Violent Offender Treatment Program or who has been removed from the program prior to completion.*
> *iv. An inmate whose behaviour in custody has resulted in extensive periods in segregation or placement in specialised behaviour management programs including High Risk Management and Security Threat Group programs.*
> *v. an inmate who is non-compliant with the case plan developed by the SORC and ratified by the Commissioner.*
> *vi. an inmate who at the time of sentencing or sentence redetermination has been identified by the sentencing court as a person who is likely to remain a serious risk to community safety.*
>
> *Consideration should be given to reports, particularly risk assessments, that indicate that the inmate poses a high risk of violent re-offending. Particular regard is to be given to the results of the Violence Risk Appraisal Guide (VRAG), Violence Risk Scale (VRS), Psychopathy Checklist (PCL-R) and Level of Service Inventory Revised (LSI-R).*[2]

1.3 The audit identified 14 offenders who met the criteria. The methodology and findings of the audit are detailed further in the (attached) Statutory Review[3]. There were some limitations in the way in which the audit was conducted which may have affected the final list of offenders[4]. It was completed on the basis of the current records held by Corrective Services NSW and a comprehensive clinical or medical assessment was not undertaken in every case.[5]

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[1] *Serious Violent Offender Audit*, Corrective Services NSW, May 2010
[2] Ibid, Terms of Reference at 6
[3] *Review of the Crimes (Serious Sex offenders) Act 2006*; Part 3: Serious Violent Offenders, Department of Justice and Attorney General (Criminal Law Review), November 2010 at 80
[4] Ibid at 80-81
[5] Corrective Services NSW, Op. Cit., at 3

THE STATUTORY REVIEW OF THE CRIMES (SERIOUS SEX OFFENDERS) ACT 2006

1.4 The results of the audit were provided to Criminal Law Review (CLR) of the Department of Attorney General and Justice which was conducting a review (**the Statutory Review**) of the *Crimes (Serious Sex Offenders) Act 2006* (**CSSOA**) pursuant to s 32 of that Act. The scheme established under the Act provides for the extended supervision or continuing detention, of serious sex offenders, beyond the expiration of their sentences. Its objectives are to ensure the safety and protection of the community and to encourage serious sex offenders to undertake rehabilitation.[6]

1.5 The findings of the audit were taken into account by CLR in the course of its consideration of whether a continuing detention or supervision scheme, similar to that which exists under the *Crimes (Serious Sex Offenders) Act 2006* for sex offenders, should be introduced for violent offenders.

1.6 The findings of CLR in relation to serious violent offenders is contained in Part 3 of its Statutory Review, a copy of which is attached to the Consultation Paper **(Attachment 1)**.[7] It recommended that the formulation of a response to the risks of reoffending posed by serious violent offenders should be the subject of further detailed examination and consultation. This is the basis for the Sentencing Council's current Terms of Reference.

KEY ISSUES

1.7 In this Consultation Paper, the Sentencing Council deals with three key issues:

1. Which offenders comprise the cohort of 'serious violent offenders' who pose a significant high risk of re-offending upon expiration of their sentences?

2. Are current sentencing and management strategies in NSW for serious violent offenders inadequate, and if so, in what respects?

3. If current sentencing options or management strategies in NSW for serious violent offenders are inadequate, how should this be addressed consistently within accepted principles?

    a. What are the sentencing principles that should guide any reforms?
    b. Should the current legislation applicable to serious violent offenders be amended and / or supplemented by additional legislation?
    c. Should current therapeutic and management options for serious violent offenders be amended and / or should new rehabilitation programs be introduced?

[6] Crimes *(Serious Sex Offenders) Act 2006*
[7] The full Statutory Review is available at http://www.lawlink.nsw.gov.au/clrd

2. CHARACTERISTICS OF SERIOUS VIOLENT OFFENDERS AND DETERMINING RISK OF RE-OFFENDING

2.1 A key issue of this review is to identify the cohort of serious violent offenders whose risk of serious reoffending is not adequately addressed under the current sentencing and offender management regime. In order to identify this cohort, it is necessary to determine:

- the common characteristics of serious violent offenders; and
- the means of assessing the risks they pose.

Characteristics of serious violent offenders

2.2 The Statutory Review was asked to consider options for serious violent offenders in the context of its review of the management of serious sex offenders. This raises the question whether it is possible to draw analogies between the two groups for the purposes of determining whether legislation similar to the CSSOA could be useful for identifying and managing serious violent offenders.

2.3 The Review[8] considered the difficulties that arise in identifying a specific or exhaustive list of characteristics that apply to serious violent offenders. In that respect it may be noted that the CSSOA which applies to serious sex offenders makes provision for the assessment of those offenders who may potentially be brought within its reach[9], and also provides threshold criteria to be applied by the Court before it makes an order under the Act.[10] The Review noted that there are a number of common factors present within the sex offender cohort, as distinct from the position which applied in relation to the group of 14 serious offenders that were identified. That group was said to be 'disparate'[11]in its composition, in that their offences ranged from offences involving violence, such as robbery and kidnapping, through to aggravated and more serious forms of violence such as murder[12].

2.4 When comparing the category of 'serious violent offenders' identified in the audit, with the category of serious sex offenders to which the CSSOA applies, the Review noted that:

> *"there is a clear category of serious sex offences that the serious offender must have at one point committed, and which must be at risk of committing again before an order under the CSSOA can be made. Put another way, the offender must not be at risk of committing offences at large, but rather a serious sexual offence. However, the results of the audit of serious violent offenders show no such common thread amongst the offenders found to be "high-risk". As such, it is more difficult to mandate what would be*

[8] Department of Justice and Attorney General, Op. Cit., at 80-83
[9] *Crimes (Serious Sex Offenders) Act 2006 (NSW),* ss 7 and 15
[10] *Crimes (Serious Sex Offenders) Act 2006 (NSW),* ss 15 and 17
[11] Ibid at 82
[12] Ibid

an appropriate way of managing such risk in the community; and difficult to predict exactly what type of offence is being prevented."[13]

2.5 An issue for consultation is whether it is appropriate to extend a scheme, such as is provided for by the CSSOA, which provides for extended supervision and continuing detention of serious sex offenders, to violent offenders. If such an extension is recommended, consideration will need to be given to how any proposed legislative scheme for violent offenders can take into account the differences of those who fall within the relevant cohort.

Methods of assessment of risk

2.6 The Statutory Review[14] gave consideration to the question of which *offences* should be considered to be serious violent offences. In some jurisdictions the offences that constitute 'serious offences' are given a statutory definition for the purposes of the application of the indefinite or preventative sentencing regimes that they have introduced. For example, Victoria defines a number of offences as 'serious offences', including murder, manslaughter, child homicide, causing serious injury intentionally, armed robbery, rape, and assault with intent to rape and sexual offences against children, abduction and kidnapping[15].

2.7 However, the type of crime committed does not necessarily predict an offender's continued risk to the community either in terms of committing the same or any other crime. Jurisdictions that have adopted preventative detention models have generally recognised that this is the case by incorporating a mechanism to facilitate the assessment of the nature and degree of any on-going risk of an offender to the community[16]. So for example, in Victoria, there are a number of additional factors to which the court must have regard in order to determine whether the offender is a serious danger to the community, including his or her past history, age, health or mental condition and his or her character[17].

2.8 In NSW, the Violent Offenders Therapeutic Programme (**VOTP**), which is currently available in this context, defines 'serious violent offenders' for the purpose of acceptance into the program, as those offenders 'who can be characterised as persistent or repeat offenders and who have more frequent and more violent offending. These offenders are most usually assessed on actuarial measures as high risk of violent re-offending'.[18] This is irrespective of the type of violent offence or whether the violence was instrumental or expressive.[19]

2.9 Specifically, the eligibility criteria for VOTP state that to be eligible an offender must have:

- a current violent offence resulting in sentence of at least 2 years non parole period.

[13] Ibid at 96
[14] Department of Justice and Attorney General, Op. Cit., at 97
[15] *Sentencing Act 1991 (Vic),* s 3(1)
[16] Department of Justice and Attorney General, Op. Cit., at 83-94
[17] Ibid, s 18B(1)
[18] Ware, J. et al, The Violent Offenders Therapeutic Programme (VOTP) – Rationale and effectiveness, Australiasian Journal of Correctional Staff Development, [date, volume], at 2; also available at http://www.bfcsa.nsw.gov.au/journal/ajcsd
[19] Ibid at 2-3

- a history of committing one or more violent offences or a history of committing violence within custodial settings
- a medium-high or high risk of recidivism as measured by the Level of Service Inventory-Revised (LSI-R) actuarial tool; and
- sufficient sentence time remaining to complete the VOTP treatment program.

2.10 The actuarial methods of risk assessment which are commonly used as international best practice assess the offender against a range of risk factors that have a statistical association to a future event.[20] The literature indicates that actuarial risk assessments are significantly more accurate than clinical opinion alone[21]. Clinical opinion tends to have a predictive accuracy of around 0.5, meaning that the prediction of future offending based solely on clinical opinion has a 50% probability of being accurate, whilst actuarial tools consistently have a predictive validity of between 0.7 and 0.8, meaning that the actuarial predictions will be accurate in 7 to 8 cases out of 10.

2.11 However, the limitation of actuarial assessment is that it focuses on the risk posed by a group of offenders rather than that of individuals within that group. In the case of violent offenders, a thorough appraisal of more dynamic 'changeable' risk factors by multiple tools such as the *Violence Risk Appraisal Guide (VRAG), Violence Risk Scale (VRS),* and *Psychopathy Checklist (PCL-R)* is also required. These tools are widely used by CSNSW. [22]

2.12 Issues for consultation include the extent to which such risk-assessments can or do provide an appropriate basis for sentencing serious violent offenders; and if a preventative detention model is to be proposed, whether such assessments are appropriate for its application.

Complex needs offenders

2.13 A complicating factor in identifying the cohort of serious violent offenders is that offenders may present with a range of complex needs that, in some cases, may be capable of response under existing legislation. For example, there is the case of offenders who are due to be released from prison and who fall within the scope of the definition of 'mentally ill person'[23] or 'mentally disordered person'[24] under the *Mental Health Act 2007*. These people can be involuntarily detained in a mental health facility if they present a risk of serious harm to themselves or to others[25]. It is noted that offenders serving a sentence in a correctional facility, who are subsequently assessed as mentally ill, can be transferred to a mental health facility under the *Mental Health (Forensic Provisions) Act 1990*.[26] Other examples of violent offenders

[20] McSherry, B. *Risk Assessment by Mental Health Professionals and the Prevention of Future Violent Behaviour*, at 9
[21] Grove & Meehl (1996). Comparative efficiency of informal and formal prediction procedures. *Psychology, Public Policy and the Law*, 2, 293-323. Aegisdottir et al. 'The Meta-analysis of Clinical Judgment Project: 56 years of accumulated research on clinical versus statistical prediction', *The Counselling Psychologist*, 34, 3 (2006) 341-82
[22] Ibid, Terms of Reference at 6
[23] *Mental Health Act 2007*, s 14
[24] *Mental Health Act 2007*, s 15
[25] *Mental Health Act 2007*, ss 12 -16
[26] *Mental Health (Forensic Provisions) Act 1990,* s 55

with complex needs include those with acquired brain injuries, and those offenders with cognitive or developmental disabilities.

2.14 Issues for consultation include how best to identify and manage offenders with complex needs; and, whether the cohort of serious violent offenders, or a part of that cohort who have complex needs can be better identified and dealt with under a new sentencing and management regime.

Consultation Questions

Q1 Can serious violent offenders (*that is offenders who pose a significant high risk of violent re-offending following release from prison*) be identified as part of a single cohort?

If Yes:

Q2 What are the common characteristics of this single cohort?

Q3 What is the best method for assessing their risk of re-offending?

Q4 How should serious violent offenders be identified, if not as part of a single cohort?

Q5 Are actuarial risk assessment methods or clinical risk assessment methods, or a combination thereof, appropriate as a basis for

(i) use in sentencing; or

(ii) applying a preventative detention scheme.

Q6 How can serious violent offenders with complex needs

(a) best be identified?

(b) best be managed?

3. CURRENT SENTENCING AND MANAGEMENT OPTIONS IN NSW

GENERAL PRINCIPLES OF SENTENCING LAW

3.1 The Review drew attention to the several forms of sentencing which are or have been in place in relation to those offenders who are perceived as presenting an ongoing risk to the community. They include the imposition of:

- indefinite sentences;
- disproportionate sentences;
- extended supervision orders;
- continuing detention orders; and
- habitual offender declarations.

3.2 The availability and potential advantages and disadvantages of these options were considered by the Council in Volume 3 of its May 2009 Report '*Penalties Relating to Sexual Assault Offences in NSW*'[27].

3.3 As a basic principle, courts in NSW when sentencing an offender are required to have regard to s 3A of the *Crimes (Sentencing Procedure) Act 1989* which provides:

> ***3A Purposes of sentencing***
>
> *The purposes for which a court may impose a sentence on an offender are as follows:*
>
> *(a) to ensure that the offender is adequately punished for the offence,*
>
> *(b) to prevent crime by deterring the offender and other persons from committing similar offences,*
>
> *(c) to protect the community from the offender,*
>
> *(d) to promote the rehabilitation of the offender,*
>
> *(e) to make the offender accountable for his or her actions,*
>
> *(f) to denounce the conduct of the offender,*
>
> *(g) to recognise the harm done to the victim of the crime and the community.*

3.4 Of immediate relevance for the present context is the need to take into account the competing purposes contained in subparagraphs (c) and (d), and to observe the well known sentencing principles referable to:

- Proportionality – that is, the sentence must reflect the objective seriousness of the offence committed (and for which the offender is to be sentenced), and it must be reasonably proportionate to the circumstances of the offence and the offender[28];

[27] NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in NSW,* Volume 3*,* Chapters 2, 5 and 9-11.

- Double punishment – that is, no one is to be punished again for an offence in respect of which a sentence has been imposed and served;

- The prohibition on arbitrary detention – that is, a person is not to be detained other than for an offence or offences of which he has been convicted and sentenced (subject to permissible pre-trial detention where bail is refused).

3.5 Each of these principles has a relevance for any form of indefinite or disproportionate sentence, in that the imposition of sentence which is longer than that which is proportionate to the offence, or the making of a subsequent order for the continuation of a sentence beyond its originally set expiration date, can amount to a form of double punishment or of arbitrary detention.

3.6 The application of these general principles needs to be considered before any form of detention based on community protection is introduced that would apply to violent offenders. However, as was observed by the High Court in *Veen v The Queen (No 2)*[29] while purely preventative detention is impermissible, the protection of the community remains a relevant and material discretionary factor;

> *'It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.'*[30]
>
> and
>
> *'the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences: Director of Public Prosecutions v. Ottewell (1970) AC 642, at p 650. The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind.'*[31]

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[28] R v Scott [2005] NSWCCA 152 at [15]
[29] Veen v The Queen (No 2) (1998) 164 CLR 465
[30] Ibid at [473]
[31] Ibid at [477]

CURRENT SENTENCING OPTIONS

3.7 Apart from the legislation that applies to serious sex offenders, which permits the court to make extended supervision and continuing detention orders, there is only limited capacity under the existing laws of the State, to deal with the threat of reoffending that is posed by violent offenders. The position is complicated by the fact that some of these offenders may fall within the regimes already in place for sentencing and management of serious sex offenders, or who are dealt with under the laws concerned with mentally ill offenders[32].

Indeterminate sentences

3.8 The only 'indeterminate' sentence that otherwise exists in NSW is that of imprisonment for life, which is only indeterminate in the sense that the term of an offender's natural life cannot be pre-determined. In NSW, unlike every other Australia jurisdiction, there is no opportunity for release on parole, and no parole period is fixed. The position is otherwise if an offender is sentenced to life imprisonment for an offence under Commonwealth law. The only offences under NSW laws for which a life sentence is available are:

Murder	Crimes Act 1900 (NSW) s 18 and s 19A
Aggravated sexual assault in company	Crimes Act 1900 (NSW) s 61JA
Sexual intercourse with a child under 10 years in circumstances of aggravation	Crimes Act 1900 (NSW) s 66A(2)
Drug offences involving commercial quantities or for a commercial purpose	Drug Misuse and Trafficking Act 1985 (NSW) s 33(3)
Manufacture or production of drugs in the presence of children involving not less than large commercial quantities	Drug Misuse and Trafficking Act 1985 (NSW) s 33AC(4)
Piracy accompanied by assaults with intent to murder etc.	Piracy Punishment Act 1902 (NSW) s 4
Punishment in other cases	Piracy Punishment Act 1902 (NSW) s 5
Punishment of accessories before the fact	Piracy Punishment Act 1902 (NSW) s 6

3.9 A mandatory life sentence is available in relation to offences of murder and serious heroin or cocaine trafficking (as defined) but only where the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.[33]

3.10 It may be noted that the focus of this provision is on the level of culpability involved in the commission of the actual offence for which the offender is to be sentenced. It is not concerned with addressing the offender's risk of future re-offending, or of community protection, save so far as that might be achieved indirectly by denying the offender any opportunity of release in the future.

3.11 Some offenders, who commit a violent offence that falls within the reach of these provisions, may as a result receive a life sentence. However, as appears from the decision in

[32] See *Mental Health Act 2007*
[33] *Crimes (Sentencing Procedure) Act 1999,* s 61

Aslett v R[34], the fact that an offender who was convicted of murder had an extensive history of violent offences, would not of itself justify the imposition of the mandatory life sentence (for which provision is made in s 61 of the *Crimes (Sentencing Procedure) Act 1999),* unless the circumstances of the murder, for which the offender is to be sentenced, meet the requirements of this section.

3.12 Formerly it was the case that those sentenced to life imprisonment were eligible for release on licence. When that system for administrative release was abolished, it was replaced by legislation permitting the courts to redetermine a life sentence by replacing it with a determinate sentence and by fixing a non-parole period.

3.13 It would be theoretically possible to increase the maximum sentences for any offence that is likely to involve serious violence (other than those included in the above table) so as to allow the imposition of a life sentence with a non-parole period, in respect of any offender who is assessed as presenting a high risk of reoffending. However the principle of proportionality would still apply, as would that which reserves the maximum sentence for any offence for cases that fall within the worst category of case, for which that penalty is prescribed[35].

3.14 An issue for consideration in this review is whether extension of the list of offences which provide for a life sentence, could be a useful mechanism for managing serious violent offenders, and if so in respect of which offences, and subject to what conditions, should it be available.

Reliance on habitual offender legislation

3.15 The *Habitual Criminals Act 1957* (NSW) permits a judge to pronounce a person to be a habitual criminal, and to pass an additional sentence upon that person, in addition to passing a sentence in relation to the immediate offence before the Court, where:

- that person is of or above the age of 25 years and is convicted on indictment of an offence, and has on at least two occasions previously served separate terms of imprisonment as a consequence of convictions for indictable offences (not having been dealt with summarily without his or her consent); and

- the judge is satisfied that it is expedient, with a view to the person's reformation or the prevention of crime, that such person should be detained in prison for a substantial time.

3.16 The sentence of imprisonment to be imposed is to be for a term of not less than five years, and not more than 14 years[36] and it is to be regarded as separate and distinct from the sentence imposed for the immediate offence.[37] Any sentence being served at the time of the habitual criminal proclamation is to be served concurrently with the sentence imposed in consequence of that proclamation.[38]

[34] (2006) NSWCCA 360
[35] Ibbs v The Queen (1987) 163 CLR 447, 451-2; and see R v Kalazich (1997) 94 A Crim R 41, 50-51.
[36] Habitual Criminals Act 1957 (NSW) s 6(1).
[37] R v Roberts (1961) SR (NSW) 681.
[38] Habitual Criminals Act 1957 (NSW) s 6(2).

3.17 An argument that the Act was obsolete was rejected in 1973.[39] The NSWLRC however recommended its repeal along with the *Inebriates Act 1912* (NSW) in 1996 for the following reasons:[40]

> *They may take a sentence beyond that which is proportional to the criminality of the offence for which the offender is being sentenced. We particularly note, with respect to the Inebriates Act 1912 (NSW), that in cases where the principle of proportionality is not offended, the options available to the court would most likely be available to a sentencing court in any case.*
>
> *In so far as these pieces of legislation seek to have an effect on an established pattern of behavior, the Commission considers that such matters should be more appropriately dealt with in ways other than by extending a particular term of imprisonment. This is perhaps most obvious with respect to the Inebriates Act 1912 (NSW), where proper medical treatment outside the criminal justice system would be more appropriate.*
>
> *More generally, the beliefs which underpin the Acts in question are no longer appropriate or are provided for in other ways. For example, the Habitual Criminals Act 1957 (NSW) was passed in the belief that there was a class of habitual criminals who possessed, 'criminal qualities inherent or latent in their mental constitution'; The procedures under the Acts are archaic and do not correspond with current practice. For example, the Inebriates Act 1912 (NSW) and the Habitual Criminals Act 1957 (NSW) both allow for a system of, "release on license" for persons declared under their provisions.*
>
> *There has, in recent years, been little use of the provisions under the Habitual Criminals Act 1957 (NSW), the Crimes Act 1900 (NSW) and the Inebriates Act 1912 (NSW). The last reported case to deal with a sentence under the Habitual Criminals Act 1957 (NSW) was in 1973 when it was noted that the courts in New South Wales had been unwilling to make pronouncements under the Act.*

3.18 That recommendation has not been acted upon, even though the Australian Law Reform Commission (ALRC) had similarly recommended repeal of the equivalent provision contained in the *Crimes Act 1914 (Cth*),[41] as a provision out of keeping with the modern approach to sentencing, and as amounting to an unfair means of preventive detention.[42]

3.19 In its earlier Discussion Paper[43] the ALRC had suggested that legislation of this kind was objectionable as providing for punishment in advance of crimes that might never be committed.

3.20 The NSW Act was most recently considered in *Strong v The Queen*,[44] having been invoked in proceedings in the District Court following the conviction of an offender with a lengthy

[39] R v Riley (1973) 2 NSWLR 107.
[40] New South Wales Law Reform Commission, Sentencing, Report No 79 (1996) [10.19]-[10.20].
[41] Crimes Act 1914 (Cth) s 17.
[42] Australian Law Reform Commission, Sentencing, Report No 44 (1988) [230].
[43] Australian Law Reform Commission, Sentencing, Discussion Paper No 30 (1987).
[44] Strong v The Queen (2005) 224 CLR 1.

criminal history, who pleaded guilty to a number of offences including stalking and intimidating a young woman.[45]

3.21 This form of legislation has rarely been used in recent times and the authorities show that the power which it confers is not to be exercised lightly and only where it can be predicted, with reasonable confidence that, at the expiration of any term of imprisonment appropriate for the offence for which the offender is being sentenced, he or she will resume criminal activity.[46] It faces, accordingly, the problem of predicting risk at the time of sentencing, rather than at a time proximate to release, when an offender's likelihood of reoffending can be assessed by reference to any progress, or lack thereof, while in custody.

3.22 It would remain possible for a sentencing judge to rely on the *Habitual Criminals Act*, in the case of a violent offender who met the requirements of the Act. This would however only be available where the offender has committed a third indictable offence, and then only if the offender had served two separate terms of imprisonment as a consequence of convictions for indictable offences.

3.23 An issue for consideration in this review concerns whether the *Habitual Criminals Act 1957* should be used in the case of violent offenders who present as high risk of reoffending, or be amended to effectively deal with such offenders, and if so how.

Gradation in sentence for repeat offenders

3.24 There has been precedent in NSW for there to be an increase in the maximum available penalty, or for the imposition of a sentence in addition to the prescribed penalty, in the case of a repeat offender, which was noted in the Council's Report, '*Penalties Relating to Sexual Assault Offences in NSW*'[47].

[45] The appellant was given a head sentence of 8 years imprisonment in the District Court and pronounced an habitual criminal. The Court held he was "now and will continue to be a threat to the community, certainly for the foreseeable future". As a result of making the pronouncement, the District Court sentenced the appellant as an habitual criminal to fourteen years' imprisonment, a term that was to be served concurrently with the sentences for the intimidation and stalking offences. Although the length of sentences and term of imprisonment in relation to the habitual offender pronouncement were later reduced on appeal, the Court of Criminal Appeal dismissed an appeal against the pronouncement on the grounds that the primary judge's discretion to make the pronouncement had not miscarried. In making these orders, Sully J noted as to the District Court judge's decision to make an Habitual criminal order:

> *His Honour was convinced, plainly, that the applicant presented as a very dangerous man, whose antecedents suggested that he was a recidivist with, at best very slender prospects of future rehabilitation; and as such, a present and likely future threat to women. His Honour deduced, correctly as I respectfully think, that the Act having been invoked, the statutory pre-conditions had been established; and there was, thereupon, every good reason from the viewpoint of the protection of the public, to pronounce and sentence accordingly.*

On appeal to the High Court, the appellant contended that the Court of Criminal Appeal had erred by failing to determine for itself whether appellant should be pronounced to be an habitual criminal. The majority held that, having set aside the sentences that led to the appellant being pronounced, an habitual criminal, the Court of Criminal Appeal was obliged to determine the pronouncement afresh: *Strong and The Queen* (Qld) [2004] HCA 46; (2004) 223 CLR 575; (2004) 223 CLR 575; (2004) 210 ALR 50; (2004) 78 ALJR 1519 (1 October 2004).

[46] R v Riley (1973) 2 NSWLR 107.

[47] Sentencing Council, *Penalties Relating to Sexual Assault Offences in NSW,* Volume 3 at 206-215

3.25 One prior example was the case where an offender was convicted of repeat indictable offences[48]. It continues to be the case in relation to some areas of offending. For example s 115 of the *Crimes Act 1900 (NSW)* is invoked when an offender having been convicted of an indictable offence, afterward commits any of the offences mentioned in s 114 of the Act.[49] The s 114 offence attracts a maximum penalty of imprisonment for seven years, yet s 115 potentially attracts a sentence of imprisonment for up to 10 years.

3.26 Other illustrations can be seen in the *Road Transport (Safety and Traffic Management) Act 1999 (NSW)* where the level of the maximum penalties for drink driving offences increases for second or subsequent offences, in the *Drug (Misuse and Trafficking) Act 1985 (NSW)* in relation to offences involving drug premises[50], and it may also be noted that the *Crimes Act 1900* (NSW)[51] makes provision for a potentially larger maximum penalty, for conduct involving the persistent sexual abuse of a child[52] than that which would be available for a single offence. A similar approach applies in the case of offenders involved in the ongoing supply of prohibited drugs[53].

3.27 A system involving gradation of sentences for repeat offenders might provide a response to serious violent offenders, either in enlarging the maximum sentence available or in being perceived as having a deterrent value. However, it would remain necessary for a sentencing court to have regard to the proportionality principle and a question does arise whether the existing sentencing principles do not independently cater for the repeat offender.[54]

3.28 In addition, depending on how such a provision is framed, a question arises as to whether this amounts to a form of grid sentencing, which does not have much support in this country.

Continuing detention or extended supervision orders

3.29 The use of these orders was considered in the Statutory Review and in the Council's Report '*Penalties Relating to Sexual Assault Offences in NSW*', and some of the concerns that arise are discussed later in this Consultation Paper.[55] However, an issue arises for consultation as to whether similar orders should be available in relation to serious violent offenders, with or without any modifications.

Violent offender restriction orders

3.30 An alternative model that might be invoked, in order to provide a measure of community protection, would replicate the violent offender orders that are available in the United Kingdom, and for which there is some limited precedent in NSW in relation to the Place and Non-Association orders that are available under the *Crimes (Sentencing Procedure) Act 1999* [s

[48] *Crimes Act 1900*, s 443 (since repealed)
[49] Being armed with intent to commit an indictable offence (s 114(a)), possession of implement (s114(b)), blackening or disguising face with intent to commit an indictable ofence (s114(c)), entering or remaining on building or land with intent to commit an indictable offence (s 114(d))
[50] *Drug (Misuse and Trafficking) Act 1985 (NSW)* pt 2B, ss36X-36Z.
[51] *Crimes Act 1900 (NSW)* s 66EA
[52] That is, engaging in conduct relation to a particular child that constitutes a sexual offence as defined for the purposes of the section.
[53] *Drug (Misuse and Trafficking) Act 1985 (NSW)* s 25A
[54] See R v McNaughton (2006) 66 NSWLR 566 [24] – [33] and [63]
[55] Chapter 4

17A], and the child protection prohibition orders that are available under the *Child Protection (Offenders Prohibition Orders) Act 2000*.

3.31 An issue for consideration accordingly arises in relation to whether legislation could be introduced along the lines of the UK model or the provisions that currently exist in NSW, that would supplement parole release conditions and extend beyond the existing date of the sentence.

Violent Offender Therapeutic Program

3.32 The system by which violent offenders are identified and managed in NSW is based on a 'whole of sentence' approach and focuses resources on offenders with the highest level of assessed risk and need. The Serious Offenders Assessment Unit (SOAU) consisting of a number of specialist psychologists completes comprehensive risk and needs assessments of identified violent offenders soon after sentencing. These offenders are then potentially able to access a range of criminogenic programs throughout their sentence, before completing the more intensive Violent Offenders Therapeutic Program (VOTP) which is usually completed towards the offender's non-parole period.

3.33 The VOTP also has a pre-treatment assessment phase which builds upon the initial assessment and may use information from the offender's institutional behaviour to develop specific goals for treatment.

3.34 The Violent Offender Therapeutic Program (**VOTP**) is the specific therapeutic program in NSW for medium and high risk violent offenders. It is available in custody and after completion of treatment a post release maintenance service is available in the community (normally as a parole condition). Its purpose is to focus on the individual needs of the offender according to that offender's risk of violent recidivism and other issues or needs. The VOTP may be completed as a high intensity residential program or a moderate intensity suite of programs.

VOTP – High Intensity

3.35 This is a prison based residential therapy program for men who have a history of committing serious violent offences. It is offered to men who are considered medium-high risk violent offenders. It is available at the Parklea Correctional Centre within a 64-bed unit. The program is approximately 12-14 months long with three treatment sessions per week, and targets core issues common to violent offenders. It is made up of 'treatment' groups, which address treatment issues relating to offending behavior and 'focus' groups, which provide offenders with skills and knowledge to complete treatment groups. The program is staffed by a multi-disciplinary team, which includes specialist psychologists, custodial staff, and Offenders Services and Programs staff.[56] The VOTP-high intensity is also offered as a non-residential program at Lithgow and South Coast Correctional Centres.

3.36 VOTP for female offenders is anticipated to commence at South Coast Correctional Centre in 2011.

Programs for moderate risk violent offenders

3.37 In NSW, custody-based intervention for moderate risk/needs violent offenders is provided as a 'composite pathway' utilising currently existing compendium programs to meet individual criminogenic needs.

[56] Corrective Services NSW, *Information V1, Violent Offenders Therapeutic Programmes*, June 2010

3.38 Consistent with findings about the level of program intensity required to provide lasting effects, male violent offenders with a risk rating indicating moderate risk/need level are required to complete a minimum 100 hours of program intervention. The program intervention follows the established Readiness – Intervention – Maintenance framework, and includes programs on Controlling Anger and Learning to Manage it (CALM) and Domestic Abuse.

3.39 CSNSW does not offer VOTP high intensity treatment in the community because of community safety factors. As such all VOTP programs need to be completed within custody.

VOTP Maintenance & Outreach

3.40 VOTP maintenance and Outreach services are available to violent offenders who have successfully completed the VOTP. It is available in group therapy or individually, both in custody and community settings. The program is intended to assist offenders to manage their risk of violent re-offending, to reinforce knowledge and skills learnt in VOTP High intensity programs, and to further develop and implement their relapse prevention management plans and support networks upon release to the community. VOTP is delivered by VOTP staff who liaise with the offender's case management team, the SORC and parole and probation staff.[57]

3.41 However, there are eligibility and suitability criteria that an offender must meet in order to be able to participate in the programs. The offender must be in custody for a violent offence which resulted in a sentence of at least 2 years (non-parole period), must have a history of committing one or more violent offences or a history of violence in custody, and must have sufficient time remaining before completing the sentence to complete the program. Additionally, violent offenders will not be eligible if they are appealing against their convictions, have committed a serious violent offence against a child, or if they have been assessed as unable to successfully complete the program on the basis of cognitive or intellectual functioning or physical abilities[58].

3.42 It is anticipated that a specific program for violent offenders with cognitive impairments will be available from 2012.

3.43 Issues for consideration in this review include whether the scope of the VOTP is adequate to cover the cohort of serious violent offenders who pose a significant high risk of reoffending and if not what changes are needed. In particular, consideration may need be given to whether this program is working effectively in conjunction with parole and whether the maintenance and outreach aspect of the program requires extension.

Crimes (Administration of Sentences) Act 1999 – Parole Scheme

3.44 A key purpose of parole is to reduce the risk of recidivism by transitioning the prisoner back into the community under supervision.[59]

3.45 Under the current parole scheme, those offenders who are assessed as continuing to present a high risk of violent reoffending, are unlikely to be granted parole, on the basis that their release is unlikely to be 'appropriate in the public interest'[60].

[57] ibid
[58] ibid
[59] Part 6, *Crimes (Administration of Sentences) Act 1999*, See also for example, NSW Parliament Library Research Service, Parole: An overview, Briefing Paper No 20/99

3.46 In the last few years CSNSW has introduced Community Compliance and Monitoring Groups (CCMGs) consisting of Compliance and Monitoring Officers, Intelligence Officers, Surveillance Officers, and representatives of Inmate Employment teams, Serious Sex Offender Review Group and Psychologists as required. The CCMGs provide a high level of monitoring and surveillance including electronic monitoring for serious violent offenders, as well as other high risk and./or high profile offenders on parole.

3.47 This raises for consideration the question of whether there are effective ways to meet the needs of serious violent offenders and the community at large, through the parole scheme, which would be preferable to extending the sentence of a high-risk offender and denying to that offender the opportunity to transition back into the community with supervision. For example, the Statutory Review at page 99 suggested that the increased use of electronic monitoring in relation to the high-risk offenders might decrease the risk they pose to a level that is acceptable, and permit their conditional release. Whether this approach might be acceptable depends at least in part on the availability to a prisoner, while in custody, of access to appropriate rehabilitation programs of the kind next considered and on the extent to which post release support and supervision are available.

3.48 An issue in this review is whether the parole scheme provides or has the potential to provide an effective mechanism by which serious violent offenders can be transitioned back into the community through supervision, in a way that the risk of recidivism of such offenders is reduced.

[60] *Crimes (Administration of Sentences) Act 1999,* s 135 (1)

Consultation questions

Q7 Is the current legislative framework in NSW sufficiently equipped to deal with serious violent offenders?

If Yes: Is the framework being effectively used? Are there any issues with the current framework?

If No: How can the current framework be amended to better deal with serious violent offenders?

Q8 Does the *Habitual Criminals Act* have the potential to be useful in dealing with serious violent offenders?

Q9 If the legislation does have the potential to be useful in dealing with serious violent offenders, should it be amended in any way to ensure that its provisions are effectively used?

Q10 Should there be an extension of the availability of life sentences, in limited circumstances, to cope with the sentencing of serious violent offenders? If so, how should such a mechanism work? Which offences should be included? Should any such system allow for release on parole in relation to those offences?

Q11 Should there be some extension of gradated sentencing laws or should more use be made of those that currently exist? Should legislation be introduced to allow for continuing detention or extended supervision orders in relation to serious violent offenders, similar to the model applicable to serious sex offenders?

Q 12 If the answer to Q11 is yes, what form should such legislation take?

Q13 Is there scope for the Parole Authority to effectively supervise serious violent offenders within the current parole provisions?

If yes: Should the provisions of the *Crimes (Administration of Sentences) Act 1999* be amended in any way to enable the Parole Authority to effectively supervise serious violent offenders?

Q14 Should the Violent Offender Therapeutic Program be expanded and if so in what respects?

Q15 Should legislation be introduced that would permit the making of Personal Restriction orders in relation to serious violent offenders that would be directed to ensuring community safety to supplement Parole Release conditions or that would endure the expiry of the sentence.

If yes: What should be provided in this respect?

4. MODELS FOR PREVENTATIVE DETENTION

4.1 In this chapter the Council reviews, in a summary way, the concept of sentencing legislation that allows for a preventative element, in order to deal with offenders who present a danger to the community, and notes the models that exist in other jurisdictions, to which reference is made in greater detail in the Statutory Review, and in Volume 3 of the Council's *Report 'Penalties relating to Sexual Assault Offences in NSW'*.

TO WHAT EXTENT IS A 'PREVENTATIVE' ELEMENT ACCEPTABLE?

4.2 As noted above, the focus of the Court when sentencing an offender must be on the current offence, the seriousness of which is not 'aggravated' by the fact that the offender has a prior criminal record. However that does not preclude the prior record being taken into account when considering the objects of retribution, deterrence and the protection of society (in accordance with *Veen (No 2)*), which may together, or in combination, warrant a more severe sentence than that which would otherwise have been imposed[61].

4.3 Professor Williams has observed that few would dispute the proposition that the community should be able to protect itself from those people who are suffering from an extreme personality disorder and pose a serious threat to community safety, including by depriving them of their liberty.[62]

4.4 It also has been suggested that the preventive detention of dangerous individuals is morally indistinguishable from the civil commitment of people with a mental illness[63] or the quarantine of individuals suspected of carrying certain life-threatening diseases.[64]

4.5 Other advocates of preventive detention legislation contend that such legislation strikes an appropriate balance between community protection and the rights of the offender. They argue that, while a decision to subject an offender to preventive detention is necessarily subjective, it is appropriate that the decision is weighted in favour of potential victims of predicted crimes over those who might be mistakenly detained.[65]

4.6 While the main aim of preventive detention is to protect the community by limiting the capacity of an offender to commit further crimes, preventative detention laws commonly include

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[61] R v McNaughten (2006) 66 NSWLR 566, [24]-[33].

62 Williams, C.R., 'Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the David Case' (1990) 16 Monash University Law Review 161, 168.

63 Neal, D., 'Personality Disorder, the Criminal Justice System and the Mental Health System' in Gerull, S. and Lucas, W. (eds) Serious Violent Offenders: Sentencing, Psychiatry and Law Reform: Proceedings of a Conference held on 2931 October 1991 (1993) 1, 8-9.

64 Floud, J. and Young, W., Dangerousness and Criminal Justice (1981) 39.

65 Floud, J. and Young, W., Dangerousness and Criminal Justice (1981) 49; Williams, C.R., 'Coping with the Highly Dangerous: Issues of Principle Raised by Preventive Detention' in Gerull, S. and Lucas, W. (eds) Serious Violent Offenders: Sentencing, Psychiatry and Law Reform: Proceedings of a Conference held on 29–31 October 1991 (1993) 11, 18; Williams, C.R., 'Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the David Case' (1990) 16 Monash University Law Review 161, 180. See also New South Wales, Parliamentary Debates, Legislative Assembly, 21735 (Matt Brown, Member for Kiama, Parliamentary Secretary).

rehabilitation as another stated object.[66] Rehabilitation involves providing treatment or other assistance to offenders to address the psychiatric, psychological, social and other factors that cause their criminal conduct.[67] It has been argued that, ultimately, community protection can only be enhanced by lessening the dangerousness of the offender, when that cannot be achieved through detention without rehabilitation.[68]

4.7 Supporters of preventative detention have acknowledged that rehabilitation of offenders is integral to the management of high risk offenders. In its recent review of the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* and other public protection legislation, the Queensland Government maintained its support for the use of continuing detention or supervision of high risk offenders, but recognised that 'strategies directed at treatment, rehabilitation and reintegration provide the best long-term solution to managing the risk posed by high risk offenders'.[69]

4.8 The validity of preventive detention legislation for the purposes mentioned above has been accepted by the courts, for example, in *Buckley v The Queen*,[70] *Fardon v Attorney General (Qld)*,[71] *Chester v The Queen*[72] and *R v Moffatt*.[73]

4.9 Whether it is exercised in the form of an indefinite or disproportionate sentence, or by way of extension of detention or of supervision orders at the conclusion of a sentence, the authorities, however, recognise that it involves a power that can only be used sparingly. In the context of legislation permitting indefinite detention, the High Court observed in *Buckley*:

> *"Such a sentence involves a departure from the fundamental principle of proportionality. The statute assumes that there may be cases in which such a departure is justified by the need to protect society against serious physical harm; but a judge who takes that step must act upon cogent evidence, with a clear apprehension of the exceptional nature of the course that is being taken[74]. An indefinite sentence is not merely another sentencing option. Much less is it a default option. It is exceptional, and the necessity for its application is to be considered in the light of the protective effect of a finite sentence.[75]"*

In the context of continuing detention orders, Callinan and Heydon JJ observed in *Fardon*:

66 See, eg, Crimes (Serious Sex Offenders) Act 2006 (NSW) s 3(2); Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) s 3(b); Dangerous Sexual Offenders Act 2006 (WA) s 3(b). Cf Serious Sex Offenders Monitoring Act 2005 (Vic) s 1(1).
67 See New South Wales Law Reform Commission, Sentencing, Discussion Paper 33 (1996) [3.14]; New South Wales Law Reform Commission, Sentencing, Report 79 (1996) [14.12]. See also Australian Law Reform Commission, Same Time, Same Crime: Sentencing of Federal Offenders, Report 103 (2006) [4.12].
68 Social Development Committee, Parliament of Victoria, Interim Report upon Inquiry into Mental Disturbance and Community Safety: Strategies to Deal with Persons with Severe Personality Disorder who Present a Threat to Public Safety (1990) xi–xii.
69 Queensland Government, A New Public Protection Model for the Management of High Risk Sexual and Violent Offenders (2008) 7.
70 Buckley v The Queen (2006) 224 ALR 416.
71 Fardon v AG (Qld) (2004) 223 CLR 575.
72 Chester v The Queen (1988) 165 CLR 611.
73 R v Moffatt (1997) VSC 10.
74 Buckley v The Queen (2006) 224 ALR 416, [6].
75 Buckley v The Queen (2006) 224 ALR 416, [7].

"To determine whether detention is punitive, the question, whether the impugned law provides for detention as punishment or for some legitimate non-punitive purpose, has to be answered. As Gummow J said in Kruger v The Commonwealth [296]:

'The question whether a power to detain persons or to take them into custody is to be characterised as punitive in nature, so as to attract the operation of Ch III, depends upon whether those activities are reasonably capable of being seen as necessary for a legitimate non-punitive objective. The categories of non-punitive, involuntary detention are not closed.' (footnotes omitted)

Several features of the Act indicate that the purpose of the detention in question is to protect the community and not to punish. Its objects are stated to be to ensure protection of the community and to facilitate rehabilitation [297]. The focus of the inquiry in determining whether to make an order under ss 8 or 13 is on whether the prisoner is a serious danger, or an unacceptable risk to the community. Annual reviews of continuing detention orders are obligatory [298].

In our opinion, the Act, as the respondent submits, is intended to protect the community from predatory sexual offenders. It is a protective law authorising involuntary detention in the interests of public safety. Its proper characterisation is as a protective rather than a punitive enactment. It is not unique in this respect. Other categories of non-punitive, involuntary detention include: by reason of mental infirmity; public safety concerning chemical, biological and radiological emergencies; migration; indefinite sentencing; contagious diseases and drug treatment [299]. This is not to say however that this Court should not be vigilant in ensuring that the occasions for non-punitive detention are not abused or extended for illegitimate purposes."[76]

4.10 On the other hand, there have been a number of objections to any form of preventive detention, which as noted in the Council's Report, '*Penalties Relating to Sexual Assault Offences in NSW*', include the following arguments:

- it rests upon prediction of future criminal conduct and upon assumptions as to dangerousness that cannot be predicted with any degree of certainty;

- it breaches the principles of parsimony, proportionality and finality, and is inconsistent with the use of imprisonment as a last resort;

- it has the practical effect of punishing a person who has been identified as having offended in the past, for what he or she might do rather than what he or she has done; and to the extent that the person is detained for a longer period than that which is proportional to the offence, it amounts to a civil judicial commitment of that person to a prison in circumstances that do not conform with the like commitment of those with mental illness to an institution focused on their care;

- incarceration on the sole basis of risk of future offending breaks the link between crime and punishment that underpins the criminal justice system;

76 Fardon v AG (Qld) (2004) 223 CLR 575, [215]–[217].

- extended detention or supervision may in fact diminish community safety by placing offenders in an environment and exposing them to associations with delinquent peers that might worsen their behaviour and increase their ill feelings towards the community;

- it amounts to the infliction of double punishment or retrospective punishment on a person who has completed a sentence proportional to the offence of which he or she has been convicted, by reference to the criterion of his or her past criminal conduct which has been the subject of judicial orders that have been spent;

- whether it takes the form of indefinite detention, or continuing detention or extended supervision, its potential duration is uncertain, contrary to truth in sentencing principles which call for precision as to the term of the sentence and specification of a parole release eligibility date;

- it has a potentially discriminating effect, since the difficulties in diagnosing the risk of re-offending will tend to focus its application on marginalised members of the community or those with particular types of personality disorders and hence risk amounting to punishment on the basis of status;

- since it is impossible to guarantee a crime-free society, extreme measures such as preventive detention cannot be justified;

- the State is not entitled to force a person to undergo therapy to stop him or her from choosing to be 'bad' and suffer the punishment; especially when the person already has been punished for his or her past offending, and that forced therapy can be counter productive;

- it destroys the function of the maximum penalty which the legislature has selected to mark the limits of judicial sentencing discretion for specific offences and to that extent it undermines the community consensus as to the limits on the State's power to deal with offenders;

- its acceptance for one form of offending may lead to its eventual widening to other forms of offending with a relaxation of the preconditions for its use.

4.11 Apart from the domestic law considerations which have made it clear that preventative detention in the form of indefinite detention is a 'serious and extraordinary step'[77]; and 'a significant departure from the principles of sentencing ordinarily observed in Australian Courts'[78]; the kinds of orders which are currently available have not found favour within the Human Rights Committee.

4.12 This has occurred in relation to an order for indefinite detention made under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld)[79]; and in relation to an order for continuing detention made under the *Crimes (Serious Sex Offenders) Act 2006* (NSW)[80]; In each case (by majority in the application of *Fardon*), the Human Rights Committee came to the

[77] Lowndes v the Queen (1999) 195 CLR 665, [39]
[78] McGarry v The Queen (2001) 207 CLR 121, [59]
[79] Communication No 1629/2007, on the application of Robert John Fardon.
[80] Communication No 1635/2007, on the application of Kenneth Davidson Tillman.

view that the orders and detention constituted a violation of Paragraph 1 of Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR), in that they amounted to arbitrary detention.

4.13 In the case of *Fardon*, the Committee noted that the legislation had been upheld by the High Court, but observed in relation to the application:

> *the "detention" of the author as a "prisoner" under the DPSOA was ordered because it was feared that he might be a danger to the community in the future and for purposes of his rehabilitation. The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science. The DPSOA, on the one hand, requires the Court to have regard to the opinion of psychiatric experts on future dangerousness but, on the other hand, requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available relevant evidence, the reality is that the Courts must make a finding of fact on the suspected future behaviour of the past offender which may or may not materialize. To avoid arbitrariness, in these circumstances, the State Party should have demonstrated that the author's rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention, particularly as the State Party had a continuing obligation under Article 10 paragraph 3 of the Covenant to adopt meaningful measures for the reformation, if indeed it was needed, of the author throughout the 14 years during which he was in prison.*

4.14 A similar observation was made in Tillman's case. In each case reference was also made to the possibility that the order may have contravened the prohibitions against lawful punishment under Article 14(7) of the ICCPR and against retroactive punishment under Article 15(1) of the ICCPR.

MODELS IN OTHER JURISDICTIONS

4.15 As was noted in the Statutory Review and the Council's Report, '*Penalties Relating to Sexual Assault Offences in NSW',* there are several models for indefinite or disproportionate sentencing which provide for a preventative or protective element in relation to the sentencing, and subsequent eligibility for release, of an offender who is perceived as presenting a significant risk of reoffending. In summary, they comprise:

Indeterminate sentencing[81]

4.16 This model involves the imposition of a sentence for an indefinite period (ie one without a predetermined final date), under which the offender remains in custody subject to continuing review, until such time as that review leads to the sentence being converted to a determinate

[81] See *Review of the Crimes (Serious Sex offenders) Act 2006*; Part 3: Serious Violent Offenders, Department of Justice and Attorney General (Criminal Law Review), November 2010 at 83-85 and NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in NSW,* Volume 3*,* at 65-88, 195 – 196, and 219-220.

sentence, or to the conditional release of the offender into the community. Provision is made for its use in the other States and Territories.[82]

4.17 In addition this model exists in Canada, where a 'dangerous offender declaration' resulting in an indefinite sentence is available; as is a 'long term offender declaration' which results in a form of disproportionate sentencing[83]; in England and Wales[84] where imprisonment for public protection is available; in Scotland[85] where an order for lifelong restriction can be made; and in New Zealand[86].

4.18 It is worth noting that the UK model has been widely criticised on a number of grounds. The Statutory Review highlights the issues that have arisen with the UK model and notes the criticisms made by the Prison Reform Trust in its June 2010 Report[87], relating to the scheme's limited ability to predict risk accurately, its limited ability to reduce risk, limited resources available to achieve those reductions in risk that are possible, and limited Parole Board capacity and risk averse decision making[88]. The Prison Reform Trust noted that "the benefits of the IPP sentence are outweighed by the very considerable costs – taking account not only the additional costs borne by the over-stretched Prison Service, but also the costs of injustice"[89]. If an indeterminate sentencing model is adopted in NSW, consideration will need to be given to how these issues can be avoided in NSW.

Disproportionate sentencing[90]

4.19 Under this model an end date is specified in the sentence, but it is extended beyond that which would otherwise be proportionate to the objective criminality of the offence(s) for which the offender is to be sentenced. It is available in relation to repeat offenders where it is justified in terms of protection of the community. It is available in South Australia[91], Victoria[92] and Western Australia[93] and is also utilised in England and Wales[94], Scotland[95] and Canada[96].

4.20 Their merits and the potential objections to their use, are examined in more detail in the Statutory Review and in the Council's earlier Report *'Penalties Relating to Sexual Assault Offences in NSW'*, and are not repeated here.

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[82] See: Queensland – *Penalties and Sentences act 1992* Part 10 and *Dangerous Prisoners (Sexual Offenders) Act 2003*; Victoria – *Sentencing Act 1991* Part 3 Division 2 Sub-Division 1A; South Australia – *Criminal Law (Sentencing) Act 1988* Part 3 Division 3; Western Australia – *Sentencing Act 1995* Part 14; Tasmania – *Sentencing Act 1997* Part 3 Division 3; and Northern Territory – *Sentencing Act 1995* Part 3 Division 5 Sub-division 4.

[83] NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in NSW,* Volume 3*,* at 134

[84] Ibid at 79-83

[85] Ibid at 83-85

[86] Ibid at 85-88

[87] Prison Reform Trust: *Unjust Deserts: Imprisonment for public protection, 2010* at 47. See also, the Statutory Review at 90-92.

[88] See the Statutory Review at 92

[89] Prison Reform Trust, Op. Cit. at 3.

[90] NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in NSW,* Volume 3*,* at 57-59.

[91] Ibid at 58-59

[92] Ibid at 59-60

[93] Ibid at 60-61

[94] Ibid at 63-65

[95] Ibid at 65

[96] Ibid at 61-63

4.21 **A key issue in relation to this Consultation Paper is whether there are sufficient violent offenders who fall within the relevant cohort, to justify the imposition of a specific sentencing regime applicable to the cohort. A second key issue is whether any such reform should be so framed as to operate at the time when the initial sentence is imposed, or at some later time, either during the sentence or near to its expiration date, by which stage more may be known in relation to the offender's ongoing propensity for violence and response to rehabilitation.**

Time for the Determination of the Risk of Further Violent Offending

4.22 The serious sex offender legislation comes into play at the end of the determinate sentence, whereas the disproportionate and indeterminate sentencing provisions apply at the time when the sentence is initially imposed. The advantage of the former approach turns on the fact that, those who have the propensity for reoffending, and the court when determining whether to make an order for continuing detention, have the benefit of knowledge as to the progress of the offender while in custody, and in particular will have information as to whether there has been a favorable response to rehabilitation programs. In addition the offender will have aged, and may have developed a greater maturity and insight. In the latter case, the Court may have little more than the insight that is available by reference to the offender's prior record, the circumstances of the immediate offence, and such psychiatric or other evidence as is presented to the Court at the time of sentencing. Whether this can provide a sufficient basis for a determination of that offender's level of risk, some years later, is an issue on which the Council seeks assistance by way of submissions.

Consultation questions

Q16 Should a form of preventative detention be adopted in NSW for serious violent offenders?

If Yes:

(a) What should be the key elements of such a scheme? In particular, should it follow the indefinite sentence or disproportionate sentence model available in other jurisdictions; or the continuing detention/extended supervision model?

(b) If such a scheme is to be implemented in NSW, what precautions should be taken to avoid the issues that have arisen in relation to the UK legislation?

(c) Should the question of violence be addressed by the Court at the time of the initial sentencing, or be subject of separate consideration by the Court towards the end of the sentence that is initially imposed?

(d) In whatever form such detention is provided for, what should be required by way of review and subsequent modification of any portion of the sentence that constitutes a preventative element?

Q17 Are there programs that should be considered in this review, for the management of serious violent offenders that are not presently available

a) post-sentence?

b) post-custody?

If Yes:

c) What are these program(s) and what should they comprise?

Q 18 Should models of indeterminate sentencing as practiced in other jurisdictions be considered for serious violent offenders?