

**PENALTIES RELATING TO
SEXUAL ASSAULT OFFENCES
IN NEW SOUTH WALES**

Volume 3

NSW SENTENCING COUNCIL

May 2009

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s 61(1) [5.43];

s 98 [9.138].

Crimes (Serious Sex Offenders) Act 2006 [2.6], [4.26], [4.45], [6.34], [6.36], [7.66]–[7.67], [8.6], [8.8]–[8.32], [9.3], [9.5], [9.16], [9.17], [9.20]–[9.23], [9.25]–[9.27], [9.32], [9.123], [9.136], [10.7], , [11.1], [11.47], Appendix A;

pt 2 [11.57];

pt 3 [11.57];

s 3 [8.8], [8.28]; s 3(1) [2.6], [9.49]; s 3(2) [2.6], [2.17];

s 4 [8.12], [8.28], [9.145], [11.1];

s 5 [8.12], [11.1]; s 5(1) Appendix A Table A(a); s 5(2) [9.135], Appendix A Table B(a);

s 6(1) [8.10]; s 6(2) [9.5], [9.20];

s 7(1) [9.3]; s 7(2) [9.3]; s 7(3) [8.18]; s 7(4) [8.19], [9.3]; s 7(5) [8.18];

s 8(1) [8.17]; s 8(1)(b) [8.21];

s 9(2) [8.15]; s 9(3) [8.20], [9.41]; s 9(3)(b) [9.3]; ss 9(3)(f) [9.134];

s 10 [8.25];

s 11 [8.25];

s 12 [8.26], [9.75], [9.84], [9.123], [9.136], [9.139], Appendix A Table B(h);

s 13 [8.31], [9.3], [10.86]; s 13(1) [8.27]; s 13(2) [9.3];

s 14(1) [8.11]; s 14(2) [9.5], [9.20]; s 14(4) [8.31]; s 14A [8.26], [8.31], [9.81], [9.123];

s 15(1) [9.3]; s 15(2) [9.3], [9.29]; s 15(3) [8.18]; s 15(4) [8.19], [9.3]; s 15(5) [8.18];

s 16(1) [8.17]; s 16(1)(b) [8.21];

s 17(2) [8.16]; s 17(3) [8.16], [8.31], [10.48]; s 17(4) [8.20], [9.41]; s 17(4)(b) [9.3]; s 17(4)(f) [9.134]; s 17(4A) [8.26];

s 17A [7.6];

s 18(1) [8.29]; s 18(3) [8.29];

s 19 [8.31], [9.3]; s 19(1) [8.29]; s 19(2) [9.3];
s 20(1) [8.28]; s 21 [8.9], [9.32]; s 22 [9.3];
s 25 [9.30], [10.93]; s 25(1) [9.86], [9.133]; s 25(2) [9.86], [9.140]; s 25(3) [9.86], [10.93];
s 32 [9.3].

Criminal Procedure Act 1986 s 348(2)(b) [3.27].

Drug Misuse and Trafficking Act 1985 [11.16]; pt 2B [11.16];
s 25A [11.18];
s 33 [5.43]; s 33A [5.43]; s 33AC [5.43];
s 36X [11.16]; s 36Y [11.16]; s 36Z [11.16].

Guardianship Act 1987 [6.66], [9.65]; pt 3 [6.66]; s 3(2) [6.66].

Habitual Criminals Act 1957 [5.16]–[5.17], [11.38], [11.39], [11.40];
s 4 [5.16]; s 4(1) [11.38];
s 6 [5.16]; s 6(1) [11.39]; s 6(2) [11.39].

Inebriates Act 1912 [11.40].

Pre-Trial Diversion of Offenders Act 1985 [3.2], [3.23]; s 2A [3.2]; s 10 [3.3].

Pre-Trial Diversion of Offenders Regulation 2005 cl 5 [3.3].

Road Transport (General) Act 2005 div 3 [11.38];
s 199 [11.38];
s 201 [11.38]; s 201(3) [11.38];
s 202 [11.38].

Road Transport (Safety and Traffic Management) Act 1999 [11.16]; s 9 [11.16]; s 12 [11.16].

Summary Offences Act 1988 [11.64];
s 11G Appendix A Table B(d); s 11G(1) Appendix A Table B(d);
s 21G Appendix A Table B(e); s 21G(1) [7.9], Appendix A Table B(e);
s 21H Appendix A Table B(e).

Young Offenders Act 1997 [3.24]; s 4 [3.24]; s 8 [3.24]; s 8(2)(d) [10.6].

Commonwealth

Crimes Act 1914 [11.41];

Penalties relating to sexual assault offences in New South Wales

s 17 [11.41];

s 50BA [7.9]; s 50BB [7.9]; s 50BC [7.9]; s 50BD [7.9];

s 50DA [7.9]; s 50DB [7.9].

Criminal Code 1995 s 270.6 [7.9]; s 270.7 [7.9].

Customs Act 1901 s 233BAB [7.9].

Public Service Act 1999 pt 9 [7.23].

Australian Capital Territory

Crimes Act 1900 [11.12]; s 66(1) [11.12].

Crimes (Child Sex Offenders) Act 2005 [7.22]; s 15(1) [10.36]; s 16(1) [10.36].

Northern Territory

Child Protection (Offender Reporting and Registration) Act 2004 [7.22];

s 13(1) [10.36]; s 13(3) [10.36]; sch 1 item 5 [10.36].

Juvenile Justice Act 1993 (repealed) [11.10].

Sentencing Act 1995 [5.49];

pt 3 div 5 sub-div 4 [5.42], [11.51];

s 65(1) [5.44]; s 65(5) [5.60]; s 65(8) [5.52], [5.56]; s 65(9) [5.52], [5.56]; s 65(9)(c) [5.59];

s 66 [5.56]; s 68 [5.56], [5.58];

s 71 [5.49]; s 72 [5.60]; s 73 [5.60]; s 74 [5.61], [5.62]; s 75 [5.62];

s 76 [5.61]; s 76(5) [5.61];

s 77 [5.62]; s 78 [5.56], [5.58], [5.61];

former s 78A [11.10]; former s 78B [11.10];

sch 1 (repealed) [11.10].

Victoria

Community Protection Act 1990 (repealed) [8.3], [8.4]; s 1(a) [8.4]; s 3 [8.5]; s 8(1) [8.4].

Crimes Act 1958 s 47A(1) [11.18].

Sentencing Act 1991 [5.11];

pt 2A [5.22]; pt 3 div 2 sub-div 1A [5.42], [11.51];

s 3(1) [5.44], [5.46];

s 6B(1) [5.22]; s 6B(2) [5.23], [5.25];

s 6C(1) [5.24]; s 6C(3) [5.23];

s 6D [5.22], [11.46]; s 6E [5.22]; s 6F(1) [5.22];

s 18A(1) [5.46]; s 18A(3) [5.60]; s 18A(4) [5.60]; s 18A(6) [5.44]; s 18A(7) [5.57];

s 18B(1) [5.44], [5.49], [4.52], [5.56]; s 18B(2) [4.52], [5.56], [5.59];

s 18C [5.56]; s 18E [5.57]; s 18F [5.56]–[5.58], [5.56];

s 18H [5.60]; s 18H(2) [5.60];

s 18I [5.61]; s 18J [5.61]; s 18K [5.61];

s 18M [5.61], [5.62]; s 18O [5.62]; s 18P [5.56]–[5.58], [5.61];

s 90 [5.57]; s 91 [5.57].

Serious Sex Offenders Monitoring Act 2005

pt 2 [11.59]; pt 2A [5.22], [8.6]; s 1(1) [2.17]; s 26 [8.9]; s 40(1) [9.136];

Sex Offenders Registration Act 2004 [6.22];

s 7 [9.35]; s 8 [9.35]; s 11(1) [9.35];

sch 3 [9.35]; sch 4 [9.35].

Queensland

Child Protection (Offender Reporting) Act 2004 [6.22];

sch 1 cl 1(a) [9.35]; sch 2 cl 1(a) [9.35].

Criminal Code Act 1899

s 218 [9.35]; s 221 [9.35];

s 229B(1) [11.18]; s 229G [10.36]; s 229H [10.36]; s 229I [10.36];

s 300 [10.36].

Criminal Law Amendment Act 1945 pt 3 [5.45], [5.56];

s 2A [5.44]; s 8(6)(a) [5.70];

s 18 [5.44]; s 18(1)(a) [5.59];

s 18(3) [5.45], [5.54], [5.59], [5.70]; s 18(3A) [5.54], [5.59];

s 18(5)(b) [5.70]; s 18(6) [5.45], [5.70]; s 18(6A)(b) [5.70].

Dangerous Prisoners (Sexual Offenders) Act 2003 [2.7], [2.8], [2.18], [2.21], [2.27], [5.42], [5.45], [8.6], [8.7], [8.9], [11.53], [11.59];

pt 2 [11.57];

s 3(a) [2.7]; s 3(b) [2.7], [2.17];

s 9AA [9.52];

s 21A [9.42];

s 43B(1) [9.136].

Mental Health Act 2000 ch 7 pt 6 [5.57].

Penalties and Sentences Act 1992 [5.45], [5.49], [4.52], [5.60];

pt 10 [5.42], [5.56], [11.51];

s 162 [5.44];

s 163 [5.44], [5.60]; s 163(3) [4.52], [5.56]; s 163(3)(a) [5.57]; s 163(4) [4.52], [5.56], [5.59];

s 164(2) [5.56]; s 166 [5.56];

s 167(1) [5.56]–[5.58]; s 167(2) [5.56]; s 167(3) [5.56];

s 170 [5.49]; s 171 [5.60]; s 171(1) [5.60];

s 172 [5.60]; s 172A [5.61]; s 172B [5.61]; s 172C [5.61];

s 173 [5.61], [5.62]; s 174 [5.62];

s 176 [5.61]; s 176(5) [5.61];

s 177 [5.62]; s 178 [5.62]; s 179 [5.56]–[5.58], [5.61].

South Australia

Child Sex Offenders Registration Act 2006 [7.22].

Criminal Law Consolidation Act 1935 pt 3 [5.18]; s 50 [11.18].

Criminal Law (Sentencing) Act 1988 [5.18]–[5.21], [5.45], [5.53];

pt 2 div 2A [5.18]; pt 3 div 3 [5.42], [5.45], [11.51];

s 3(1) [5.21], [5.46];

s 20A(1) [5.18]; s 20A(2)(a) [5.21]; s 20A(2)(b) [5.44];

s 20B [5.18], [11.46]; s 20B(3) [5.19]; s 20B(3)(b) [5.19]; s 20B(4) [5.20]; s 21 [5.46];

s 23 [11.57]; s 23(1) [5.44]; s 23(2) [5.44]; s 23(3) [5.59]; s 23(4) [5.59]; s 23(5) [5.59]; s 23(9) [5.65];

s 23(10) [5.65]; s 23(11) [5.65], [5.67]; s 23(12)(a) [5.66]; s 23(12)(b) [5.66];

s 24 [5.67]; s 24(1) [5.65]; s 25 [5.66]; s 27A [5.67].

Young Offenders Act 1993 pt 5 div 3 [5.65]; s 4 [5.21], [5.46], [5.65].

Tasmania

Community Protection (Offender Reporting) Act 2005 [7.22]; sch 1 [10.36]; sch 3 [10.36].

Criminal Code Act 1924 s 125A(2) [11.18].

Police Offences Act 1935 s 8(1A)(a) [10.36].

Sentencing Act 1997 pt 3 div 3 [5.42], [11.51];

s 19 [5.44], [5.46]; s 19(2) [5.53], [5.59]; s 19(3) [5.64];

s 20 [5.63]; s 20(3) [5.64]; s 20(7) [5.64];

s 21(5) [5.63]; s 21(10) [5.64].

Western Australia

Community Protection (Offender Reporting) Act 2004 [7.22]; s 13(2) [10.36]; sch 1 [10.36].

Criminal Code Act Compilation Act 1913 [11.21]; s 279 [10.36]; s 279(5) [5.46]; s 330 [10.36].

Dangerous Sexual Offenders Act 2006 [2.9], [8.6];

pt 2 [11.57];

s 3(b) [2.17]; s 4(a) [2.9]; s 4(b) [2.9];

s 40 [8.9].

Sentence Administration Act 2003

s 5A [5.68]; s 5B [5.69];

s 12 [5.69]; s 12(2) [5.68]; s 12(3) [5.68]; s 12(4) [5.69]; s 12(5) [5.69]; s 12(6) [5.68];

s 12A [5.68], [5.69]; s 12A(3) [5.68]; s 12A(4) [5.69]; s 12A(5) [5.69];

s 27 [5.69].

Sentencing Act 1995 pt 14 [5.42], [11.51];

s 98(1) [5.44]; s 98(2) [5.44], [5.49], [5.53], [5.59]; s 98(3)(b) [5.58];

s 100 [5.68]; s 101 [5.69].

Young Offenders Act 1994 [5.14], [5.26];

pt 7 div 9 [5.26]; pt 8 [5.27];

s 46 [5.27];

s 124(1)(a) [5.26]; s 124(1)(b) [5.26]; s 124(1)(c) [5.26]; s 124(1)(d) [5.26]; s 124(3) [5.26];
s 125 [5.27]; s 126 [5.27]; s 126(3) [5.27].

Canada

Corrections and Conditional Release Act, SC 1992, c 20 [6.105],

Appendix C [2.63];

s 119(1)(b) [5.76]; s 120(1) [5.76];

s 133 [5.76]; s 133(2) [5.76]; s 133(3) [5.76]; s 133(4) [5.76]; s 133(4.1) [5.76]; s 133(5) [5.76];
s 133(6) [5.76];

s 134 [5.76]; s 134.1 [5.76]; s 134.1(1) [5.32]; s 134.1(2) [5.32]; s 134.2 [5.32];

s 135(1) [5.77]; s 135(3) [5.77]; s 135(4) [5.77]; s 135(5) [5.77]; s 135(6) [5.77]; s 135(7) [5.77];

s 135.1(1) [5.33]; s 135.1(5) [5.33]; s 135.1(6) [5.33]; s 135.1(7) [5.33]; s 135.1(8) [5.33];
s 135.1(9) [5.33].

Corrections and Conditional Release Regulations SOR/92-620 reg 161(1) [5.32], [5.76].

Criminal Code, RSC 1985, c. C-46 [5.28];

pt 24 [5.28], [5.71];

s 151 [5.28]; s 152 [5.28]; s 153 [5.28];

s 163.1(2) [5.28]; s 163.1(3) [5.28]; s 163.1(4) [5.28]; s 163.1(4.1) [5.28];

s 172.1 [5.28]; s 173(2) [5.28];

s 271 [5.28], [5.73]; s 272 [5.28], [5.73]; s 273 [5.28], [5.73];

s 490.011(1) [7.33]; s 490.012(2) [7.33]; s 490.022 [7.33];

s 752 [5.73]; s 752.1 [5.30], [5.71];

s 753(1) [5.30], [5.71], [5.73]; s 753(1)(b) [5.73]; s 753(2)(a) [5.28]; s 753(4) [5.74];

s 753.1(1) [5.29], [5.30]; s 753.1(2) [5.29]; s 753.1(3) [5.31]; s 753.3 [5.33];

s 757 [5.30]; s 758 [5.30]; s 760 [5.31], [5.72]; s 761(1) [5.76].

National Defence Act 1985 s 227 [7.33].

Sex Offender Information Registration Act 2004 [7.33]–[7.34];

s 2(1) [7.33]; s 2(2)(c) [7.33];

s 4 [7.33]; s 4.1 [7.33];

s 5 [7.33]; s 6 [7.33].

New Zealand

Criminal Procedure (Mentally Impaired Persons) Act 2003 [5.95]; s 38 [5.95].

District Courts Act 1947 s 28G [5.95].

Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 [5.95].

New Zealand Bill of Rights Act 1990 s 25 [5.95]; s 25(g) [5.97].

Parole Act 2002 [8.6];

s 6(4)(d) [5.99]; s 14 [5.99], [8.92];

s 16 [5.99];

s 20 [5.99]; s 21 [5.99]; s 27 [5.99];

s 29 [5.99]; s 29(3)(b) [5.99];

s 31 [5.99];

s 56 [5.99]; s 58 [5.99];

s 84(2) [5.99];

Sentencing Act 2002

s 4(1) [5.95];

s 87 [5.95];

s 87(1) [5.96];

s 87(2) [5.95]; s 87(2)(b) [5.95];

s 87(3) [5.95];

s 87(4) [5.97]; s 87(4)(a) [5.95]; s 87(4)(c) [5.95], [5.97];

s 87(5) [5.95];

s 88 [5.95]; s 88(1) [5.95]; s 88(1)(b) [5.95]; s 88(2) [5.95];

s 89 [5.95], [11.46]; s 89(1) [5.99]; s 89(2) [5.99];

s 90 [5.95]; s 144 [5.99].

Summary Proceedings Act 1957 s 44 [5.95].

United Kingdom

Crime (Sentences) Act 1997 pt 2 c 2 [5.78];

s 28(5) [5.84]; s 28(6)(b) [5.84]; s 28(7)(a) [5.84];

s 31(1) [5.85]; s 31(1A) [5.85]; s 31(2) [5.85]; s 31(2A) [5.85]; s 31(3) [5.85];

s 31A [5.86]; s 32 [5.86];

s 38(7)(b) [5.84]; s 38(7)(c) [5.84].

Criminal Justice Act 2003 [5.14], [5.34]–[5.38];

pt 12 c 5 [5.78];

s 143(2) [5.79]; s 143(3) [5.79];

s 145 [5.79]; s 146 [5.79];

s 153(2) [5.35]; s 156 [5.38]; s 157 [5.38];

s 225 [5.78], [5.79], [5.80], [5.87]; s 225(1) [5.36], [5.79]; s 225(2) [5.79], [5.80]; s 225(3) [5.81], [5.87];

s 226 [5.87]; s 226(3) [5.87];

s 227 [5.34], [5.87]; s 227(1); [5.36]; s 227(2) [11.48]; s 227(2)(b) [5.35];

s 227(3) [5.35]; s 227(4) [5.35]; s 227(5) [5.35];

s 228 [5.87]; s 228(1) [5.36]; s 228(2) [11.48];

s 229 [5.36]; s 229(2) [5.36], [5.87]; s 229(3) [5.36], [5.37];. s 229(4) [5.37];

sch 15 [5.80]; sch 16 [5.37]; sch 17 [5.37].

Criminal Justice (Scotland) Act 2003

s 3 [5.94]; s 5 [5.94];

s 6(3) [5.93]; s 6(5) [5.94]; s 6(6) [5.94];

s 8 [5.94]; s 8(1) [5.93]; s 8(2) [5.93]; s 8(4) [5.94]; s 8(6) [5.94];

s 9(1) [5.94]; s 9(2) [5.94]; s 9(4) [5.94]; s 9(5) [5.94]; s 9(6) [5.94]; s 9(6)(b) [5.94];

s 11 [5.94].

Criminal Procedure (Scotland) Act 1995 [5.90];

s 57A [5.92];

s 210A [5.39]; s 210A(10) [5.39], [5.88];

s 210B [5.91]; s 210B(1)(a) [5.88]; s 210B(1)(b) [5.88];

s 210C(3) [5.91]; s 210C(5) [5.91]; s 210C(7) [5.91];

s 210D [5.91]; s 210E [5.90];

s 210F [5.93]; s 210F(1) [5.92]; s 210F(2) [5.88].

Offender Management Act 2007 s 28 [7.32].

Powers of Criminal Courts (Sentencing) Act 2000

s 82A(2) [5.84]; s 82A(3) [5.84];. s 82A(4) [5.84]; s 82A(4A) [5.84];

s 91 [5.87]; s 93 [5.87]; s 94 [5.87].

Sexual Offences Act 2003 [5.87], [7.31]–[7.32];
s 1 [5.79]; s 2 [5.79]; s 4 [5.79]; s 5 [5.79];
s 6 [5.79]; s 8 [5.79];
s 80 [7.31];
s 82(1) [7.31]; s 82(2) [7.31]; s 82(6) [7.31];
s 83 [7.31]; s 84 [7.31]; s 85 [7.31]; s 86 [7.31];
s 104 [7.32]; s 105 [7.32]; s 106 [7.32]; s 107 [7.32]; s 108 [7.32]; s 109 [7.32]; s 110 [7.32];
s 111 [7.32]; s 112 [7.32]; s 113 [7.32]; s 114 [7.32]; s 115 [7.32];
s 116 [7.32]; s 117 [7.32]; s 118 [7.32]; s 119 [7.32]; s 120 [7.32];
s 121 [7.32]; s 122 [7.32]; s 123 [7.32]; s 123(3) [7.32]; s 124 [7.32]; s 125 [7.32];
s 126 [7.32]; s 127 [7.32]; s 128 [7.32]; s 129 [7.32].

United States

Adam Walsh Child Protection and Safety Act of 2006 [7.28].

Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994 [7.26].

Pam Lychner Sexual Offender Tracking and Identification Act of 1996 [7.26].

Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 [7.29].

United States Code 18 USC 227 § 3563(a)(5) [7.29]; 18 USC 227 § 3563(b)(23) [7.29].

RECOMMENDATIONS

1. That preventive detention legislation remain an option to be used in respect of a very small class of offenders, and that it be tempered by suitable safeguards, as set out at 2.29.
2. That Restorative justice programs remain in place, and be subject to continuing monitoring and evaluation.
3. That restorative justice programs be expanded so as to make them available to those living in remote and regional communities.
4. That, initially on a trial basis, the eligibility restrictions currently placed on circle sentencing and youth justice conferencing be relaxed so as to include some of the less serious sex offences that are presently excluded.
5. That DCS engage in ongoing evaluation of the tools which it employs for risk assessment, over an extended time frame, and with a larger population group, so as to determine their degree of accuracy.
6. That, as a necessary precondition for any long term use, or extended application, of preventive detention, DCS be sensitive to the academic debate concerning sex offender assessment tools with a view to identifying any superior models that may emerge.
7. That DCS publish material in relation to sex offender treatment programs and their evaluations.
8. That ongoing evaluation of sex offender treatment programs be conducted, on a long term basis and with an extended population base.
9. That any move to privatise corrections facilities be accompanied by the provision of sex offender treatment programs in those facilities, and if necessary, delivery of those programs by DCS or otherwise funded by it.
10. That consideration be given to the feasibility of extending the registration requirements for sex offenders whose offences have been committed against adults.
11. That any extension of the registration requirements be adopted uniformly by other jurisdictions, particularly in the light of the national registration system.
12. That in the case of first time offenders who are aged under 18 years, the Court have a discretion, at the time of imposing sentence, to excuse the requirement for registration.

13. That as a matter of practice, applications for a CDO or ESO (or interim orders) pursuant to the *Crimes (Serious Sex Offenders) Act 2006* (NSW) should normally be made no later than three months before expiry of a respondent's current custody or supervision.
14. That the *Crimes (Serious Sex Offenders) Act 2006* (NSW) be amended so as to add to the matters to be taken into account for an application under s9(3) and s17(4), the views of the original sentencing judge, based on the material presented at the time of sentence.
15. That if non-participation in a program while in custody is to be used as a ground for a CDO, that it is necessary that the State ensure that such programs are available and accessible for offenders, prior to expiry of the non-parole period.
16. That such programs be sufficiently flexible to accommodate those offenders who have practical difficulties in participation in those programs, subject always to their being capable of leading to gains equivalent to those deliverable under CUBIT.
17. That if sex offender programs are only to be provided in certain correctional centres, whether run by DCS or by private operators, potential candidates for a CDO or ESO be transferred to such centres within a time frame that will permit their participation in a program, prior to expiry of their non-parole period.
18. That the *Crimes (Serious Sex Offenders) Act 2006* (NSW) be amended so as to permit the views of victims to be taken into account on an optional basis (as is the practice in relation to life sentence re-determinations).
19. That DCS, Justice Health, the Mental Health Review Tribunal and the Guardianship Tribunal consult with the aim of achieving coordinated interagency arrangements for the more effective management of sex offenders with cognitive or mental health impairments.
20. That the *Crimes (Serious Sex Offenders) Act 2006* (NSW) be amended so as to allow the Supreme Court, in appropriate cases, to make an additional order for extended supervision when it makes a CDO, to operate at the expiry of the CDO, and so as to include:
 - a) a power to revoke the ESO before expiry of the CDO; and
 - b) a power to vary the conditions of the ESO if considered appropriate prior to the expiry of the CDO.
21. That the *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 13 be extended in relation to ESOs, to allow the Court, upon application, to substitute a CDO.¹

1. The criterion for intervention would rest upon the Court being satisfied that, by reason of altered circumstances, adequate supervision would not be provided by allowing the offender to remain in the community subject to the ESO.

22. That *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 19 be extended in relation to CDOs, to allow the Court, upon application, to substitute an ESO.
23. That a breach of an interim supervision order or of an ESO be addressed by a return of the matter to the Supreme Court which could deal with it as a breach of one of its orders, rather than by way of a prosecution for a s 12 offence in the Local Court, preserving however the power of the State to prosecute the offender separately for any offence that might constitute a breach of the relevant order.
24. That following the impending 2009 review of the *Crimes (Serious Sex Offenders) Act 2006* (NSW), the Act be reviewed again in 3 years.

EXECUTIVE SUMMARY

The Council is of the view that the scheme for the making of continuing detention orders and extended supervision orders in NSW, in relation to serious sex offenders, provides an appropriate structure, in principle, for responding to the need to protect the community from such offenders.

It has however, recommended certain amendments to the *Crimes (Serious Sex Offenders) Act 2006* (NSW) to address procedural issues brought to its attention during the course of this reference.

In coming to this view the Council has examined and assessed the viability of other sentencing options, as follows:

- Restorative Justice programs/models have limited relevance for high-risk offenders. They are, however, of value in providing an early intervention for that group of young, or cognitively impaired persons, displaying inappropriate sexual behaviour, who might otherwise progress to more serious forms of offending. The Council is of the view that this kind of intervention is one that should be encouraged and favours the expansion of these programs.
- The Council does not support the introduction of disproportionate or indefinite sentencing, either as an additional sentencing option or as a replacement for post sentence orders of the kind permitted under the *Crimes (Serious Sex Offenders) Act 2006* (NSW).
- In relation to indefinite sentencing, the Council recognises the incentives to prisoners that this regime provides, but is of the view that a similar incentive to comply with sex offender treatment can be provided under the post sentence order regime, at least for those high risk offenders who are likely to become eligible for an order, by making it clear to them at the commencement of their sentence of the existence of that regime, and of its likely application to them.
- Likewise, the Council does not consider that the introduction of a power to impose a disproportionate sentence would materially add anything of value to the regime currently in place in New South Wales, which permits some allowance to be made for community protection at the time of the initial sentence being imposed, and then effectively allows for the position of the offender to

be reviewed proximate to the end of the sentence, and for continuing detention or extended supervision to be ordered. If disproportionate sentences are to be justified on community protection grounds, then the Council considers that the current New South Wales regime is more likely to achieve that outcome. In particular it allows for an assessment of the risk of reoffending to be made at a time proximate to the offender's possible release.

- The Council is also not attracted to the 'uncontrollable sexual instincts' legislation, which essentially rest upon psychiatric assessment as to the existence of some mental condition that materially affects or limits the offender's power to control his or her conduct. Sentencing in such a case can be a complicated exercise, depending on the nature and degree of the mental condition.

In essence, the Council considers that the *Crimes (Serious Sex Offences) Act 2006* (NSW) provides a preferable model to indefinite or disproportionate sentencing, and that it occupies a proper place within the range of available strategies for protecting the community from serious sex offenders, which have been surveyed. While the Council accordingly supports its continuation, it is mindful that the Act was designed to provide additional community safeguards in relation to an extremely small group of serious sex offenders. The mechanisms of CDOs and ESOs are intended to apply to a very limited category of people, and should be imposed only in exceptional circumstances. Any departure from the normal application of human rights instruments and procedural safeguards is a step that should not be taken lightly. The Council cautions against broadening the scope of the Act beyond the limited range of offenders to whom it applies.

The Council accordingly supports its continuation, but considers it important that that the Acts' effectiveness be monitored on a longer term basis, to determine whether it does reduce the recidivism of those offenders who are subject to its application and later release to the community. For this reason it is of the view that there should be a subsequent review in three (3) years to that which is required to be carried out in 2009.

The Council has also considered various sentencing approaches, that might be utilised in response to repeat sex offenders. These include:

- Providing for a gradation in the maximum available penalty;
- Legislating for a repeat offence to be a circumstance of aggravation in relation to specific sexual acts;

- Reliance on habitual offender legislation;
- Legislative authority for disproportionate sentencing;
- Introduction of indeterminate sentences; and
- Post sentence orders.

The Council has concluded that, subject to attention being given to the procedural and practical problems identified in chapters 8 and 9 of this Report, the possibility of repeat serious offending can be appropriately addressed through post sentence orders (option 6).

1. Introduction and Overview

TERMS OF REFERENCE

1.1 In October 2007 the Attorney General requested that the New South Wales Sentencing Council, pursuant to s 100J of the *Crimes (Sentencing Procedure) Act 1999*, examine whether the penalties currently attaching to sexual offences in New South Wales are appropriate, in accordance with the following terms of reference:

1. Whether or not there are any anomalies or gaps in the current framework of sexual offences and their respective penalties;
2. If so, advise how any perceived anomaly or gap might be addressed;
3. Advise on the use and operation of statutory maximum penalties and standard minimum sentences when sentences are imposed for sexual offences and whether or not statutory maximum penalties and standard minimum sentences are set at appropriate levels;
4. Consider the use of alternative sentence regimes incorporating community protection, such as the schemes used in Canada, the United Kingdom and New Zealand;
5. Consider possible responses to address repeat offending committed by serious sexual offenders; and in particular, whether second and subsequent serious sex offences should attract higher standard minimum and maximum penalties in order to help protect the community. If so, advise what these penalties could be;
6. Advise whether or not 'good character' as a mitigating factor has an impact on sentences and sentence length and if so whether there needs to be a legislative response to the operation of this factor;
7. Advise on whether it is appropriate that the 'special circumstance' of sex offenders serving their sentence in protective custody may form the basis of reduced sentences.

1.2 An Interim Report examining terms 1–3 and 6–7 (Volume 1), as well as an analysis of sentencing statistics and trends (Volume 2) which provided a basis for that Report and a platform against which terms 4 and 5 were to be addressed, was provided to the Attorney General in late August 2008 and released publicly in October 2008.

1.3 The current Report, (Volume 3), addresses the remaining terms of reference, focussing on the use of alternative sentence regimes incorporating community protection (term 4) and possible responses to address repeat offending by serious sex offenders, and in particular, considers whether higher standard minimum and maximum penalties are required in those cases (term 5).

1.4 For the purpose of term 4, the Council has given consideration in this Report to a number of preventive detention schemes applicable to serious sex offenders and to the arguments in support of and against the use of preventive detention generally.

1.5 Particular attention has been paid to the *Crimes (Serious Sex Offenders) Act 2006* (NSW), and to issues arising in relation to its implementation and operation. A table setting out the offences that could potentially give rise to an application for a continued detention order or for an extended supervision order under the Act is contained at Appendix A. The Council has also reviewed a significant body of individual decisions arising under the Act. These cases are listed in Appendix B. An analysis of the operation of post sentence preventive restriction models in other jurisdiction is contained at Appendix C.

1.6 The Report also contains an analysis of indeterminate (indefinite) or disproportionate sentencing schemes operating in Australia and in other comparable jurisdictions, as well as a limited analysis of restorative justice, sex offender registration and community notification schemes that operate in several jurisdictions.

1.7 Finally, the Council has included a description of sex offender treatment programs operating in New South Wales and has given consideration to the risk assessment tools used for those programs. An outline of treatment programs available in other jurisdictions is contained in Appendix D.

METHODOLOGY

1.8 For the purpose of this Reference the Council has invited and received a number of submissions, the details of which are included in Appendix E.

1.9 It has conducted a review of the relevant legislation, comprised within the *Child Protection (Offenders Registration) Act 2000* (NSW), the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW), the *Crimes (Serious Sex Offenders) Act 2006* (NSW), and comparable legislation in force in other jurisdictions.

1.10 Meetings and consultations were held with the Department of Corrective Services, the Department of Juvenile Justice, the Office of

the Director of Public Prosecutions, the Attorney General's Department Aboriginal Programs Unit, and representatives of the Legal Aid Commission, among others. Details are provided in Appendix F.

1.11 Finally, a review of peer-reviewed psychology journals, assessed through the University of New South Wales Library and the University of Wollongong Library sites over the last eight years, was undertaken. Information was also obtained from several Departments or service providers through their websites (such as the NSW Department of Corrective Services, Queensland Corrections, the NSW Department of Ageing, Disability and Home Care, Youth Off The Streets, NSW Department of Juvenile Justice; New Zealand Department of Corrections and the New Zealand Ministry of Justice), and from their online annual reports.

2. Community protection and sentencing

INTRODUCTION

2.1 The focus of Term 4 is on the sentencing options available in relation to those offenders who are convicted of sexual offences, and who may be considered to present an ongoing risk to the community. By definition the concern is with the way in which a sentence can be framed, or administered, that will limit the risk of recidivism on the part of the offenders.

2.2 In summary, the options available include:

- Early intervention and diversionary programs;
- The imposition of indeterminate sentences;
- Participation in sex offender programs either in custody or in the community;
- Supervision while on parole, or after release pursuant to the sex offender registration regime; and
- Post-sentence orders for continuing detention or extended supervision.

2.3 At issue in relation to each option is the question of risk assessment, and the need for a balance between the public interest in securing the protection of the community, and the individual interest of the offender in working toward his or her rehabilitation, and in being released back to the community after completing a court-imposed sentence.

2.4 Among the purpose for which a court may impose a sentence on an offender is that of protecting the community from that offender.¹ The statement of this purpose, as a separate purpose, underlines its relevance as a matter requiring specific consideration, in addition to the other purposes that may have a role in protecting the community, that is through general and specific deterrence and rehabilitation of the offender.

2.5 The significance of the promotion of an offender's rehabilitation in the sentencing process continues to be recognised in New South Wales both at common law and by legislation.² The link between an offender's rehabilitation and the concept of community protection was recognised by Howie J in *R v Zamagias* in which he said:

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(c).

2. *R v Cimone* (2001) 121 A Crim R 433, [19] (Beazley JA); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(d).

although the purpose of punishment is the protection of the community, that purpose can be achieved in an appropriate case by a sentence designed to assist in the rehabilitation of the offender...³

2.6 That link is also reflected in the existing legislation. For example, the *Crimes (Serious Sex Offenders) Act 2006* (NSW) states as its objects:

- (1) The primary object of this Act is to provide for the extended supervision and continuing detention of serious sex offenders so as to ensure the safety and protection of the community.
- (2) Another object of this Act is to encourage serious sex offenders to undertake rehabilitation.⁴

2.7 In Queensland, the stated purposes of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) are:

- (a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and
- (b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation.⁵

2.8 The Queensland Court of Appeal has indicated that the phrase 'continuing control, care *or* treatment' in the Queensland Act should be read 'disjunctively' hence providing 'three alternative purposes for which an order may be made: control of the dangerous prisoner, care for the dangerous prisoner, or treatment of the dangerous prisoner'.⁶

2.9 The Western Australian Act provides that the objects of its comparable legislation are:

- (a) to provide for the detention in custody or the supervision of persons of a particular class to ensure adequate protection of the community; and
- (b) to provide for continuing control, care, or treatment, of persons of a particular class.⁷

2.10 The Victorian Sentencing Advisory Council has observed in relation to post-sentence supervision and detention that

3. *R v Zamagias* [2002] NSWCCA 17, [32].

4. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 3(1), (2).

5. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 3(a), (b).

6. *AG (Qld) v Francis* [2006] QCA 324, [28].

7. *Dangerous Sexual Offenders Act 2006* (WA) s 4 (a), (b).

the state has a responsibility to manage offenders under these orders in a way that provides opportunities for offenders to access appropriate treatment during their time on the order, rather than simply detaining them or monitoring them for public protection.⁸

2.11 In achieving the necessary balance, consideration needs also to be given to the constitutionality of any relevant sentencing regime, as well as to fundamental principles concerning, for example, arbitrary detention, retrospective or double punishment and proportionality, and to the principles established in *Veen v The Queen (No 2)* where Mason CJ, Brennan, Dawson and Toohey JJ observed

It is one thing to say that a 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.⁹

2.12 The Council has kept these separate considerations in mind when addressing this term of reference. It has also taken into account the difficulties associated with risk assessment, and the several evaluations which has been made of sentencing options and treatment programs, in terms of their effectiveness in reducing recidivism.

2.13 At the heart of the two terms of reference dealt with in this report is the objective of protecting the community from the risk of a serious sex offender re-offending. It is that factor which provides the justification for preventive detention, whose focus is generally on incapacitation and rehabilitation, rather than on punishment and denunciation. An incidental outcome, however, is that such laws have a punitive effect in so far as they extend the detention of the offender, or his supervision, longer than might otherwise be the case.

8. Victoria, Sentencing Advisory Council, *High Risk Offenders: Post-Sentence Supervision and Detention: Discussion and Options Paper* (2007) 7.

9. *Veen v The Queen (No 2)* (1988) 164 CLR 465, 473.

PART A: SUPPORT FOR PREVENTIVE DETENTION

2.14 In summary, such detention is supported on the basis of the need to protect the community from a perceived danger, rather than addressing the moral culpability of the offender.¹⁰

2.15 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 poses a serious threat to community safety, including by depriving them of their liberty. He argues, therefore, that a government that fails to take action would be considered to have failed to protect its citizens.¹¹ It also has been suggested that the preventive detention of dangerous individuals is morally indistinguishable from the civil commitment of people with a mental illness¹² or the quarantine of individuals suspected of carrying certain life-threatening diseases.¹³

2.16 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.¹⁴

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

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10. Figgis, H. and Simpson, R., 'Dangerous Offenders Legislation: An Overview' (Briefing Paper No 14/97, NSW Parliamentary Library Research Services, 1997) 13.
 11. Williams, C.R., 'Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the David Case' (1990) 16 *Monash University Law Review* 161, 168.
 12. 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 29-31 October 1991* (1993) 1, 8-9.
 13. Floud, J. and Young, W., *Dangerousness and Criminal Justice* (1981) 39.
 14. 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).

another stated object.¹⁵ Rehabilitation involves providing treatment or other assistance to offenders to address the psychiatric, psychological, social and other factors that cause their criminal conduct.¹⁶ It has been argued that, ultimately, community protection can only be enhanced by lessening the dangerousness of the offender, which cannot be achieved through detention without rehabilitation.¹⁷

2.18 Supporters of preventive 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’.¹⁸

2.19 The validity of preventive detention legislation for the purposes mentioned above has in any event been accepted by the courts, for example, in *Buckley v The Queen*,¹⁹ *Fardon v Attorney General (Qld)*,²⁰ *Chester v The Queen*²¹ and *R v Moffatt*.²²

2.20 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 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

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15. 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).
 16. 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].
 17. 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.
 18. Queensland Government, *A New Public Protection Model for the Management of High Risk Sexual and Violent Offenders* (2008) 7.
 19. *Buckley v The Queen* (2006) 224 ALR 416.
 20. *Fardon v AG (Qld)* (2004) 223 CLR 575.
 21. *Chester v The Queen* (1988) 165 CLR 611.
 22. *R v Moffatt* (1997) VSC 10.

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.²³

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.²⁴

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

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 authorizing involuntary detention in the interests of public safety. Its proper characterization 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.²⁵

23. *Buckley v The Queen* (2006) 224 ALR 416, [6].

24. *Buckley v The Queen* (2006) 224 ALR 416, [7].

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

PART B: CRITICISMS OF PREVENTIVE DETENTION

2.22 There is a significant body of academic and other literature offering criticisms in principle to the concept of preventive detention. The Council does not consider that the several objections raised, either individually or collectively, justify the abandonment or repeal of preventive detention legislation. It is however appropriate that they be recognised and taken into account when framing relevant legislation, and that safeguards be introduced to prevent it exceeding its legitimate reach.

2.23 In summary the objections which are raised include the following:

- 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;²⁶
- 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;²⁷, and to the

26. See, eg, Keyzer, P., Pereira, C. and Southwood, S., 'Pre-emptive Imprisonment for Dangerousness in Queensland under the *Dangerous Prisoners (Sexual Offenders) Act 2003*: The Constitutional Issues' (2004) 11(2) *Psychiatry, Psychology and Law* 244, 250–1; Fairall, P., 'Violent Offenders and Protection in Victoria—The Gary David Experience' (1993) 17 *Criminal Law Journal* 40, 52; Warner, K., *Sentencing Review 2002–2003* (2003) 27(6) *Criminal Law Journal* 325, 338; McSherry, B., *Doing Time for the Risk of a Crime?* (2005) Monash University <<http://www.monash.edu.au/pubs/monmag/issue16-2005/opinion/opinioncrime.html>> at 22 August 2008; New South Wales, Legislative Council, *Parliamentary Debates*, 30 March 2006, 21807 (Correspondence from the Law Society of New South Wales); New South Wales Legislative Council, *Parliamentary Debates*, 30 March 2006, 21807 (Reverend the Hon Dr Gordon Moyes, Christian Democratic Party); New South Wales Legislative Council, *Parliamentary Debates*, 30 March 2006, 21810 (Ms Sylvia Hale, Greens).

27. McSherry, B., 'Sex, Drugs and "Evil" Souls: The Growing Reliance on Preventive Detention Regimes' (2006) 32(2) *Monash University Law Review* 237, 271; Keyzer, P., Pereira, C. and Southwood, S., 'Pre-emptive Imprisonment for Dangerousness in Queensland under the *Dangerous Prisoners (Sexual Offenders) Act 2003*: The Constitutional Issues' (2004) 11(2) *Psychiatry, Psychology and Law* 244, 248, 250; Figgis, H. and Simpson, R., 'Dangerous Offenders Legislation: An Overview' (Briefing Paper No 14/97, NSW Parliamentary Library Research Services, 1997) 4, 10; Fairall, P., 'Violent Offenders and Protection in Victoria—The Gary David Experience' (1993) 17 *Criminal Law Journal* 40, 50; Greig, D., 'The Politics of

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;²⁸

- incarceration on the sole basis of risk of future offending breaks the link between crime and punishment that underpins the criminal justice system;²⁹
- 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;³⁰
- 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

Dangerousness' 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) 47, 55; von Hirsch, A., 'Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons (1971–1972) 21 *Buffalo Law Review* 717, 742; 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; 179.; Legislative Assembly Legislation Review Committee, Parliament of New South Wales, *Legislation Review Digest No 5 of 2006* (2006) 8; Australian Law Reform Commission, *Sentencing: Penalties*, Discussion Paper No 30 (1987) [351]; Australian Law Reform Commission, *Sentencing*, Report No 44 (1988) [230]; New South Wales, Legislative Council, *Parliamentary Debates*, 30 March 2006, 21810 (Ms Sylvia Hale, Greens).

28. *Fardon v AG (Qld)* (2004) 223 CLR 575, 631 (Kirby J).

29. Keyzer, P., Pereira, C. and Southwood, S., 'Pre-emptive Imprisonment for Dangerousness in Queensland under the *Dangerous Prisoners (Sexual Offenders) Act 2003*: The Constitutional Issues' (2004) 11(2) *Psychiatry, Psychology and Law* 244, 247–8.

30. Birgden, A., 'Serious Sex Offenders Monitoring Act 2005 (Vic): A Therapeutic Jurisprudence Analysis' (2007) 14(1) *Psychiatry, Psychology and Law* 78, 90; Thomson, D., Birgden, A. and Morison, M., 'The Release of Serious Violent Offenders and Community Safety' 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) 255, 259. See also Fairall, P., 'Violent Offenders and Protection in Victoria—The Gary David Experience' (1993) 17 *Criminal Law Journal* 40, 52–3.

- 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;³¹
 - 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;³²
 - since it is impossible to guarantee a crime-free society, extreme measures such as preventive detention cannot be justified;³³
 - 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,³⁴ and that forced therapy can be counter productive;³⁵
 - 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

31. Fairall P., 'Violent Offenders and Protection in Victoria—The Gary David Experience' (1993) 17 *Criminal Law Journal* 40, 52.

32. McSherry, B., 'Sex, Drugs and "Evil" Souls: The Growing Reliance on Preventive Detention Regimes' (2006) 32(2) *Monash University Law Review* 237, 269–71, referring to *Fardon v AG* (Qld) (2004) 210 ALR 50, 72; Potas, I., 'The Principles of Sentencing Violent Offenders: Towards a More Structured Approach' 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) 97, 109; Greig, D., 'The Politics of Dangerousness' 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) 47, 49, 55. See also New South Wales, *Parliamentary Debates*, Legislative Council, 30 March 2006, 21817 (The Hon Peter Breen, Reform the Legal System).

33. Zdenkowski, G., 'Community Protection through Imprisonment without Conviction: Pragmatism versus Justice' [1997] *Australian Journal of Human Rights* (online version) 1, 12–3.

34. Greig, D., 'The Politics of Dangerousness' 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) 47, 62.

35. Birgden, A., 'Serious Sex Offenders Monitoring Act 2005 (Vic): A Therapeutic Jurisprudence Analysis' (2007) 14(1) *Psychiatry, Psychology and Law* 78, 88.

undermines the community consensus as to the limits on the State's power to deal with offenders;³⁶

- the application of preventive detention in relation to one class of offenders is discriminatory; or alternatively, 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, to respond, for example, to nuisance type offences, or even to its misuse for purposes other than community protection;³⁷
- specifically in relation to sexual offenders, there is an absence of evidentiary support for the underlying assumption that they are typified by a different set of risk factors than those seen in other offenders, or as a class have higher rates of recidivism;³⁸ that there is an insufficiently large group to justify the existence of a preventive detention regime;³⁹ and that preventive detention is a time consuming, ad hoc and administratively cumbersome way of dealing with this group,

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36. See Social Development Committee, Parliament of Victoria, *Third Report upon the Inquiry into Mental Disturbance and Community Safety—Response to the Community Protection (Violent Offenders) Bill* (1992) 48–9; Victoria, Sentencing Task Force, *Review of Statutory Maximum Penalties in Victoria* (1989).
37. Figgis, H. and Simpson, R., 'Dangerous Offenders Legislation: An Overview' (Briefing Paper No 14/97, NSW Parliamentary Library Research Services, 1997) 16; Sir Radzinowicz, L. and Hood, R., 'Dangerousness and Criminal Justice: A few Reflections' [1981] *Criminal Law Review* 756, 759–60; von Hirsch, A., 'Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons (1971–1972)' 21 *Buffalo Law Review* 717, 748; Greig, D., 'The Politics of Dangerousness' 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) 47, 52, referring to Gusfield, J.R., *The Symbolic Crusade* (1963); McSherry, B., *Doing Time for the Risk of a Crime?* (2005) Monash University <<http://www.monash.edu.au/pubs/monmag/issue16-2005/opinion/opinion-crime.html>> at 22 August 2008.
38. See, eg, Wood, M. and Ogloff, J., 'Victoria's *Serious Sex Offenders Monitoring Act 2005*: Implications for the Accuracy of Sex Offender Risk Assessment' (2006) 13(2) *Psychiatry, Psychology and Law* 182, 184; Potas, I., 'The Principles of Sentencing Violent Offenders: Towards a More Structured Approach' 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) 97, 108–9; New South Wales, *Parliamentary Debates*, Legislative Council, 30 March 2006, 21815 (The Hon Peter Breen, Reform the Legal System); Submission 8: NSW Council for Civil Liberties.
39. Figgis, H. and Simpson, R., 'Dangerous Offenders Legislation: An Overview' (Briefing Paper No 14/97, NSW Parliamentary Library Research Services, 1997) 14–5.

the cost of which would be better directed to rehabilitation and post-release support;⁴⁰

- legislation of this kind is a short term politically expedient response to a group of offenders for whom the criminal justice, corrections and mental health systems have failed, rather than a considered response to the problem of a small number of dangerous individuals.⁴¹

2.24 Some critics have contended that preventive legislation infringes international human rights standards, including the *International Covenant on Civil and Political Rights 1966* (ICCPR),⁴² concerning the prohibition of arbitrary detention, detention without conviction, retrospective punishment, and double punishment.⁴³

2.25 The United Nations (UN) Human Rights Committee has however recognised its validity, subject to compliance with suitable

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40. Figgis, H. and Simpson, R., 'Dangerous Offenders Legislation: An Overview' (Briefing Paper No 14/97, NSW Parliamentary Library Research Services, 1997) 40; Fairall, P., 'Violent Offenders and Protection in Victoria—The Gary David Experience' (1993) 17 *Criminal Law Journal* 40, 52.
41. Figgis, H. and Simpson, R., 'Dangerous Offenders Legislation: An Overview' (Briefing Paper No 14/97, NSW Parliamentary Library Research Services, 1997) 40; Fairall, P., 'Violent Offenders and Protection in Victoria—The Gary David Experience' (1993) 17 *Criminal Law Journal* 40, 54; Greig, D., 'The Politics of Dangerousness' 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) 47, 52, 54; Merkel, R., 'Dangerous Persons: To be Gaoled for What They Are, or What They May Do, Not for What They Have Done' 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) 39, 44; von Hirsch, A., 'Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons (1971–1972)' 21 *Buffalo Law Review* 717, 739.
42. *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
43. See, eg, Keyzer, P. and Blay, S., 'Double Punishment? Preventive Detention Schemes under Australian Legislation and Their Consistency with International Law: The Fardon Communication' (2006) 7 *Melbourne Journal of International Law* 407; Macken, C., 'Preventive Detention and the Right of Personal Liberty and Security under the *International Covenant on Civil and Political Rights, 1966*' (2005) 26 *Adelaide Law Review* 1; Keyzer, P., Pereira, C. and Southwood, S., 'Pre-emptive Imprisonment for Dangerousness in Queensland under the *Dangerous Prisoners (Sexual Offenders) Act 2003*: The Constitutional Issues' (2004) 11(2) *Psychiatry, Psychology and Law* 244, 250; McSherry, B., *Doing Time for the Risk of a Crime?* (2005) Monash University <<http://www.monash.edu.au/pubs/monmag/issue16-2005/opinion/opinioncrime.html>> at 22 August 2008; Birgden, A., 'Serious Sex Offenders Monitoring Act 2005 (Vic): A Therapeutic Jurisprudence Analysis' (2007) 14(1) *Psychiatry, Psychology and Law* 78, 86; Legislation Review Committee, Parliament of New South Wales, *Legislation Review Digest No 13 of 2006* (2006) 11.

safeguards. In its General Comments on art 9 of the ICCPR, the UN Human Rights Committee stated that:

...if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.⁴⁴

2.26 In the context of New Zealand's preventive detention legislation, the UN Human Rights Committee observed:

...detention for preventive purposes, that is, protection of the public, once a punitive term of imprisonment has been served, must be justified by compelling reasons, reviewable by a judicial authority, that are and remain applicable as long as detention for these purposes continues. The requirement that such continued detention be free from arbitrariness must thus be assured by regular periodic reviews of the individual case by an independent body, in order to determine the continued justification of detention for purposes of protection of the public.⁴⁵

2.27 It may be observed, additionally, that a majority of the bench in *Fardon* found that a continuing detention order under the Queensland Act was not punitive⁴⁶ and that Gummow J also found that it does not constitute double punishment.⁴⁷

PART C: COUNCIL POSITION

2.28 By reason of in principle criticisms of preventive detention noted, which are of varying weight, it is important that it be confined to the exceptional case where the offender's criminal history and personal characteristics and disposition satisfy the Court that he or she poses a serious risk to the community.

44. United Nations Human Rights Committee, *General Comment 8, Article 9* (Sixteenth session, 1982), UN Doc No HRI\GEN\1\Rev.1 at 8 (1994) [4].

45. *Rameka v New Zealand Communication No 1090/2002*. New Zealand (15 December 2003) CCPR/C/79/D/1090/2002, [7.3]. Similarly, the European Court of Human Rights has held that review of lawfulness under art 5(4) should be available at reasonable intervals: *Winterwerp v The Netherlands* (1979) 2 EHRR 387, [55].

46. *Fardon v AG (Qld)* (2004) 223 CLR 575, 597 (McHugh J), 610 (Gummow J), 647 (Hayne J, agreeing with Gummow J subject to one exception), 654 (Callinan and Heydon JJ).

47. *Fardon v AG (Qld)* (2004) 223 CLR 575, 610.

2.29 It is also important that the effects of the legislation be tempered by suitable safeguards, for example:

- allowing the offender a proper opportunity to meet the case for the imposition of any preventive remedy;
- ensuring that the power is exercised judicially upon cogent evidence including expert evidence, and independently from the legislative and executive government;
- imposing the onus of proving the necessary degree of risk or dangerousness on the state (to a high degree of probability);
- preserving a discretion to the Court as to the making of an order and as to the type of order;
- requiring reasons for the decision to be made;
- providing for an adequate right of appeal and ongoing review;
- establishing with clarity the preconditions for any exercise of the power to impose a sentence or to make an order for preventive purposes; and
- linking incapacitation to rehabilitation.

**3. Restorative justice and
diversionary programs**

INTRODUCTION

3.1 In New South Wales there are diversionary programs for specific groups of sex offenders, one of which is applicable to adults, and the others of which apply to children, or young people.

PART A: EARLY INTERVENTION

Cedar Cottage

3.2 Cedar Cottage is administered by the Department of Health pursuant to the provisions of the *Pre-Trial Diversion of Offenders Act 1985* (NSW). Its purpose is to provide for the protection of children who have been victims of sexual assault by a parent or by a parent's spouse or de facto partner.¹

3.3 Regulations made pursuant to the Act restrict the type of offender who can be referred to the program by the Director of Public Prosecutions.² Excluded are offenders under the age of 18 years, offenders whose victim was over the age of 18 years, offenders with a prior conviction for a sexual offence and offenders charged with a sexual offence where the offence is alleged to have been accompanied by an act of violence either towards the victim or towards another person.³ The program is open to both male and female sex offenders, although to date no female offender has been referred to the program.⁴

3.4 In order to participate, it is a requirement for the offender to enter a guilty plea.⁵ Treatment at Cedar Cottage uses evocative therapy, cognitive behaviour therapy and psycho-education⁶ that draws on the belief that “abusive behaviour is most likely to cease if the perpetrator

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1. *Pre-Trial Diversion of Offenders Act 1985* (NSW) s 2A.
 2. *Pre-Trial Diversion of Offenders Act 1985* (NSW) s 10; *Pre-Trial Diversion of Offenders Regulation 2005* (NSW) cl 5.
 3. *Pre-Trial Diversion of Offenders Regulation 2005* (NSW) cl 5.
 4. Sydney West Area Health Service, NSW Health, *The New South Wales Pre-Trial Diversion of Offenders Program (Child Sexual Assault)—Cedar Cottage* <http://www.wsahs.nsw.gov.au/services/cedarcottage/who_we_are.htm> at 27 November 2008.
 5. Sydney West Area Health Service, NSW Health, *The New South Wales Pre-Trial Diversion of Offenders Program (Child Sexual Assault)—Cedar Cottage* <http://www.wsahs.nsw.gov.au/services/cedarcottage/who_we_are.htm> at 27 November 2008.
 6. Goodman-Delahunty, J. Tolliday, D. and Krix, A., *Evaluation of the NSW Pre-Trial Diversion of Offenders Programme (Cedar Cottage)* (2008) (pending publication) 35.

accepts full responsibility for his actions”.⁷ Treatment, therefore, focuses not only on the safety and protection of the child victim but also on increasing the acceptance of responsibility and respectful behaviour on the part of the offender. The offender is required to undergo individual and group therapy, workshops on stages of change, face-ups to primary and extended victims, meetings with audience and participation in MASS (Maintenance and Support System). A relapse prevention plan must also be devised. Satisfactory completion of the program means that a sentence will not be imposed, although the conviction will stand and appear on the offender’s record.⁸

3.5 Evaluation based on treatment outcomes has revealed that the Cedar Cottage program is effective in reducing general and sexual recidivism by those who completed it compared with those who declined or breached treatment. The value of this finding is however limited by the fact that a non-random sample was obtained from a relatively new database, and by the lack of re-offence data outside New South Wales.⁹

3.6 NSW Police are required to notify potentially eligible offenders of the program’s availability. The Office of the Director of Public Prosecutions (ODPP) and its lawyers are supportive of Cedar Cottage.¹⁰ The Central and Eastern Sydney Sexual Assault Service and Northern Sydney Sexual Assault Service are also supporters of Cedar Cottage because of its educative component.¹¹

New Street Adolescent Service

3.7 The New Street Adolescent Service program, provided by the Sydney West Area Health Service, is a highly structured program that involves a combination of individual, group and family/conjoint work and that focuses on relapse prevention, restitution, empathy development, and other issues related to the specific needs of individuals who have engaged in sexually abusive behaviour.

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7. Jenkins, A., ‘Intervention with Violence and Abuse in Families: The Inadvertent Perpetration of Irresponsible Behaviour’ (1991) 12 *Australian and New Zealand Journal of Family Therapy* 186, 187.
 8. Sydney West Area Health Service, NSW Health, *The New South Wales Pre-Trial Diversion of Offenders Program (Child Sexual Assault)—Cedar Cottage* <http://www.wsahs.nsw.gov.au/services/cedarcottage/who_we_are.htm> at 27 November 2008.
 9. Goodman-Delahunty, J., Tolliday, D. and Krix, A., *Evaluation of the NSW Pre-Trial Diversion of Offenders Programme (Cedar Cottage)* (2008) (pending publication).
 10. Email from Nicholas Cowdery, Director of Public Prosecutions New South Wales, to Katherine McFarlane, Executive Officer, NSW Sentencing Council, 22 April 2008.
 11. Submission 11: Central and Eastern Sydney Sexual Assault Service and Northern Sydney Sexual Assault Service, 3.

3.8 A major difference between New Street and other treatment programs for adults (e.g., Cedar Cottage) is that young people in New Street are not referred to or regarded as ‘sex offenders’ as this is deemed detrimental to their self-identity.¹² Involvement of parents/caregivers is encouraged and deemed essential to help promote responsible and appropriate behaviours and lifestyles.¹³ Services for parents include individual, couple and group work as well as family/conjoint work.

3.9 Participants attend New Street for approximately two years. It is available for young people aged between 10 and 17 years, although priority is given to those aged between 10 and 14 years.

3.10 An evaluation study, involving 34 participants, provided strong evidence that New Street was effective in reducing reoffending and in protecting young people from being victims of crime and/or abuse, with only one out of 34 treatment completers sexually reoffending.¹⁴ A cost benefit analysis undertaken in 2005 found that the total benefits of New Street per client (\$101,494) outweighs its per client cost of \$27,010, thus supporting the feasibility of the program.¹⁵

3.11 According to the Ministry of Police,¹⁶ NewStreet’s effectiveness lies in the fact that the young person is treated holistically, with matters in the young person’s background such as family violence or non-sexual offending conduct considered, and with families and other agencies involved in the management of the young person.¹⁷

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12. Flanagan, K., ‘Intervention with Sexually Abusive Young People in Australia and New Zealand’ (2003) 9 *Journal of Sexual Aggression* 135.
 13. Sydney West Area Health Service, NSW Health, *New Street Adolescent Service—An Early Intervention Program for Young People Who Have Sexually Abused* <<http://www.wsahs.nsw.gov.au/services/newstreet/>> at 27 November 2008.
 14. The quasi-experimental evaluation compared reoffending and child protection outcomes in three groups: treatment completers (N=34), referral only (N=50), and withdrawal (N=16). It found that the majority of offences that led young people’s referral to the program were committed against siblings or another close relative (N=60) and most victims were females. Reoffending was defined as both criminal reoffending (receiving a criminal charge or juvenile caution) and in a broader definition, as receiving a criminal report: Laing, L., Mikulsky, J. and Kennaugh, C., ‘Valuation of the New Street Adolescent Service’ (Social Work & Policy Studies, Faculty of Education and Social Work, University of Sydney, 2006).
 15. Email from Jennifer Mason, Director General NSW Department of Community Services to Katherine McFarlane, Executive Officer NSW Sentencing Council, 20 August 2008.
 16. Submission 14: Ministry for Police, New South Wales, 3.
 17. Support for the New Street program was also expressed by the Central and Eastern and the Northern Sydney Sexual Assault Services: Submission 11: Central and Eastern and the Northern Sydney Sexual Assault Services, 3.

3.12 Based on the experience with New Street in the metropolitan region, NSW Health has delivered an extension of it, comprising the Rural New Street Service, which was designed to provide a comparable program for Aboriginal children in rural communities.

New Pathways

3.13 New Pathways is a residential treatment program established in August 2002 by Father Chris Riley of Youth Off The Streets (YOTS). The program caters for moderate to high-risk male adolescents normally within the age 13 to 16 age range, who have sexually abused.¹⁸ Entry to the program does not require contact with the criminal justice system or attendance mandated by a court.

3.14 Depending on individual progress, young people remain in the program for between one to two years before returning to the community.¹⁹ Since 2006, integrated post-placement support has been in place to monitor the progress of participants in the community and to link them to other community programs where necessary.²⁰

3.15 Providers of New Pathways claim that it is the only program in Australia to provide intensive supervision combined with individualized treatment in a highly structured residential setting. The program has recently been extended so as to cater for young people with a cognitive impairment.²¹

3.16 The Department of Community Services has advised that it has recently commissioned an evaluation of New Pathways, which is to report by the end of 2009.²² The evaluation will examine the nature of program delivery, treatment efficacy and effectiveness (e.g., rates of sexual and nonsexual recidivism), outcomes barriers, the risk assessment process, and economic factors.

New South Wales Health

3.17 There is a group of children who are younger than the age for criminal responsibility (10 years) who have been found to be engaged

18. Father Chris Riley's Youth Off The Streets, *Youth Off The Streets 2006 Outcomes & Achievements Report*, 16.

19. Father Chris Riley's Youth Off The Streets, *Our Programs—Outreach Programs* <<http://www.youthoffthestreets.com.au/ourprograms/index.html#newpathways>> at 27 November 2008.

20. Father Chris Riley's Youth Off The Streets, *Youth Off The Streets 2006 Outcomes & Achievements Report*, 16.

21. Father Chris Riley's Youth Off The Streets, *Our Programs—Outreach Programs* <<http://www.youthoffthestreets.com.au/ourprograms/index.html#newpathways>> at 27 November 2008.

22. Email from Jennifer Mason, Director-General, NSW Department of Community Services, to Katherine McFarlane, Executive Officer NSW Sentencing Council, 20 August 2008.

in sexualised conduct, While they cannot be charged with any offence, there are programs available within the NSW Health system to address these problematic behaviours, which have now been accepted as involving more than developmental experimentation.

Therapeutic Treatment Order—Victoria

3.18 This form of order is designed to assist young people aged under 15 years who have displayed or engaged in problem or sexually abusive behaviours.²³ Under the order, the child who is the subject of the order is required to attend an appropriate treatment program to address their sexually abusive behaviours, and must abide by all other conditions (such as requiring the child's parent(s) or carer(s) to take any necessary steps to enable the child to attend the treatment).²⁴

3.19 Where a therapeutic treatment order is granted by the Court, Child Protection can also apply for a therapeutic treatment (placement) order. This order will allow the child to be placed away from home where this is necessary for the treatment. The criminal division of the Children's Court has the power to stand down criminal matters when a child is subject to a therapeutic treatment order and to dismiss charges where a child successfully completes a treatment program. If the child does not complete treatment, the treatment order and any related placement order can be revoked.

3.20 Juvenile justice staff are required to provide regular updates to the Court regarding the progress of the treatment and in some instances, provide a report back to Court regarding the outcome of the order. This is to ensure that the treatment goals are adequately monitored and that families and services are informed regarding whether progress is occurring within the required timeframes.

3.21 Treatment may consist of:

- supporting the child to become involved in positive social experiences;
- recruiting other services or individuals to support the child's positive social or emotional development;
- working with peers and the community; and

23. Submission 15: NSW Department of Juvenile Justice, 3.

24. Victoria, Department of Human Services, *Children in Need of Therapeutic Treatment: Therapeutic Treatment Orders* (2007) <http://www.cyf.vic.gov.au/data/assets/pdf_file/0019/79102/ecec_cntt_factsheet.pdf> at 27 November 2008.

- outreaching to the child's local environment.²⁵

PART B: CONFERENCING AND RESTORATIVE JUSTICE

Conferencing

3.22 In New South Wales, under the *Young Offenders Act 1997*, conferencing is available for young people aged between 10 and 17 who have committed summary offences or indictable offences which can be dealt with summarily.²⁶ These offences include: assault, robbery, break, enter and steal, motor vehicle theft, theft, receiving, property damage and disorderly conduct.²⁷ Offences excluded by the legislation are those involving serious violence, sexual offences including child pornography and child prostitution, firearm offences, stalking offences, and certain drug offences and traffic offences.²⁸

3.23 South Australia and New Zealand have moved to broaden the offences for which conferencing can be ordered to include juvenile sex offences, and these programs would appear to be unique in that respect.²⁹

3.24 In New Zealand, restorative justice processes are applicable to sexual violence cases (although not all service providers deliver this). In June 2006, the Ministry of Justice, through researchers from the Crime and Justice Research Centre at Victoria University, undertook a review of the delivery of restorative justice in family violence cases (including sexual violence).³⁰ Its findings were generally positive, although there was some difference of views in relation to its impact for serious sexual and family violence offences.

3.25 Currently the restorative justice processes encompassed by Forum Sentencing and Youth Justice Conferencing are not available in relation to sex offences. As a result there are some minor offences which need to be dealt with in the Local Court or Children's Court, although, depending on the circumstances of their commission, they

25. Submission 15: NSW Department of Juvenile Justice, 3.

26. *Young Offenders Act 1997* (NSW) s 4.

27. Strang, H., *Restorative Justice Programs in Australia: A Report to the Criminology Research Council* (2001) 7.

28. *Young Offenders Act 1997* (NSW) s 8.

29. Cossins, A., 'Restorative Justice and Child Sex Offences: The Theory and the Practice' (2008) 48 *British Journal of Criminology* 359; Daly, K., 'Restorative Justice And Sexual Assault: An Archival Study of Court and Conference Cases' (2006) 46 *British Journal of Criminology* 334.

30. Kingi, V., Paulin, J. and Porima, L., 'Review of the Delivery of Restorative Justice in Family Violence Cases by Providers Funded by the Ministry of Justice' (Crime and Justice Research Centre, Victoria University of Wellington, 2008).

might be better dealt with through early intervention restorative justice processes.

3.26 The Council does note that the Department of Corrective Services (DCS) has been providing, in a limited way, post-sentencing conferences for a range of serious criminal offences, with some reported positive results. While the nature of sexual offending is such that there could be problems in facilitating a supervised meeting between an offender and victim, there are cases, eg in the case of familial sex offending, where this approach could be productive in reducing the risk of re-offending.

Circle Sentencing

3.27 The New South Wales model of Circle Sentencing, which is available in relation to Aboriginal offenders and which actively engages the Aboriginal community in the process, also involves a form of restorative justice, although it is not available in relation to sexual offences,³¹ and is not a true diversionary program.³²

3.28 Circle Sentencing in Canada has been characterised by a tendency to resist any judicial imposition of firm eligibility criteria. Accordingly, some communities in Canada permit sexual offences to be dealt with by way of Circle Sentencing.³³

3.29 While the recent New South Wales evaluation published by the NSW Bureau of Crime Statistics and Research suggested that participation in Circle Sentencing has no effect on the frequency of offending by participants, the time taken to re-offend, or the seriousness of reoffending, it did note that there was nothing in the analysis to suggest that the process was not meeting its other objectives, such as strengthening the informal social contacts that exist in Aboriginal communities that may have a crime prevention value. The report suggested that consideration be given to combining Circle Sentencing with other programs (eg cognitive behavioural

31. *Criminal Procedure Act 1986* (NSW) s 348(2)(b): 'An intervention program may not be conducted in respect of any of the following offences: ... an offence under Division 10 (Offences in the nature of rape, offences relating to other acts of sexual assault etc) or 15 (Child prostitution and pornography) of Part 3 of the *Crimes Act 1900*'.

32. Potas, I. et al, 'Circle Sentencing in New South Wales: A Review and Evaluation' (Judicial Commission of New South Wales and Aboriginal Justice Advisory Council, 2003) 3.

33. Heino, L., 'Circle Sentencing: Part of the Restorative Justice Continuum' Plenary; and Spiteri, M., 'Sentencing Circles for Aboriginal Offenders in Canada: Furthering the Idea of Aboriginal Justice Within a Western Justice Framework' (Papers presented at the Dreaming of a New Reality, the Third International Conference on Conferencing, Circles and other Restorative Practices, Minneapolis, 9 August 2002).

therapy, drug and alcohol treatment, and remedial education) that have been shown to alter the risk factors for further offending.³⁴

3.30 It has been suggested, on the basis of the Canadian model, that Circle Sentencing with its healing and holistic approach could be a feasible and appropriate option to address the issue of child sexual abuse within Australian Aboriginal communities since the victims tend to be related to or know their offender.³⁵

3.31 It may be a means of encouraging a greater disclosure of such offences, and if combined with a therapeutic intervention, it could possibly reduce the risk of recidivism, inter alia, by focusing the offender's mind on the dynamics of sexual abuse and its unacceptability. Its benefits include the participation of the Aboriginal community in the process, introduction of cultural aspects, victim empowerment and ultimate acceptance of wrongdoing by the offender. This could potentially have a greater significance for sexual offending within the familial environment than for other forms of property or violence-related offending. However, a trial would need to be conducted to determine whether this is so.

PART C: COUNCIL POSITION

3.32 Critics have argued that the diversionary purpose of restorative justice may lead to sexual assault and domestic violence being treated less seriously and tend to reinforce the offending behaviour.³⁶ However, there is some evidence that victims may support the use of restorative justice to deal with more serious offences. A 2006 outcome study that compared 400 cases of youth sexual assault that were finalized in court, by family conference, or police formal caution in the South Australian jurisdiction over a six-and-a-half year period, found that from a victim's perspective, the conference process was deemed less victimising than the court process and can produce more effective outcomes.³⁷

34. Fitzgerald, J., 'Does Circle Sentencing Reduce Aboriginal Offending?' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 115, NSW Bureau of Crime and Statistics and Research, 2008).

35. Young, M., *Aboriginal Circle Healing Models Addressing Child Sexual Assault: An Examination of Community Based Healing Circles Used to Address Child Sexual Assault within Aboriginal Communities in Canada* (2006) (unpublished) 72.

36. Levrant, S. et al, 'Reconsidering Restorative Justice: The Corruption of Benevolence Revisited' (1999) 45(1) *Crime and Delinquency* 3; Submission 11: Central and Eastern Sydney Sexual Assault Service and Northern Sydney Sexual Assault Service, 3.

37. Daly, K., 'Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases' (2006) 46 *British Journal of Criminology* 334, 334.

3.33 Generally, the aims of programs of the kind considered, which are focused on restoring the offender-victim relationship and reintegrating the offender into his or her community, will be inappropriate for the more serious forms of sexual offending. Their use is more likely to be beneficial in relation to familial offenders where the family wish to maintain that relationship, to juvenile offenders where early intervention can have a particular impact on recidivism and to offending within closely related Aboriginal communities where the strong cultural element and local community involvement are thought to have particular significance.

3.34 The Council however considers it important that the programs remain in place, and they be subject to continuing monitoring and evaluation. They have a legitimate place in addressing deviant sexual behaviours in young and first time offenders before it escalates into conduct that may pose a risk to the community.

3.35 It is also of the view that consideration should be given to relaxing the bar on entry to diversionary/restorative justice programs for first offenders facing potential charges for less serious sexual offences, with each case being considered on its own merits by reference to the subjective circumstances of the offender, his or her acceptance of guilt, and prospects of rehabilitation.

4. Recidivism and risk
assessment

INTRODUCTION

4.1 Of importance for any sentencing regime that provides for preventive detention, or extended supervision, or for specialised treatment programs, for any class of offenders, are the twin issues of recidivism, and the reliability of the risk assessment tools that are used to underpin the sentencing response which is adopted for that group.

4.2 Each is briefly addressed in this chapter, as is the linkage between them.

PART A: RECIDIVISM OF SEX OFFENDERS

Introduction

4.3 Sex offenders are often regarded by the community as being amongst the most dangerous class of offenders. The seriousness of sexual offences and the impact of these crimes on victims is irrefutable. However much of the community concern is based on misconceptions about the rates of recidivism for convicted sex offenders.

4.4 The base rate of sexual recidivism has commonly been found to be relatively low with a 1998 meta-analysis of 61 studies and 28,972 sex offenders reporting an average recidivism rate for sexual offences of 13.4% for a follow-up period of four to five years.¹

Methodology Issues

4.5 An analysis of the research reveals that the way in which recidivism is defined has significant implications. The most common measure of recidivism is based on a conviction for a subsequent criminal offence (sexual or non-sexual) during a specified follow-up period.² While this is perhaps a convenient and verifiable measure it is potentially conservative at least in relation to the commission of further sexual offences. Given that the rates of reporting, detection, arrest and successful prosecution in relation to sexual offences are all low, the proportion of all sex offenders who are reconvicted represents

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1. Hanson, R., and Bussiere, M. 'Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies' (1998) 66 *Journal of Consulting and Clinical Psychology* 348.
 2. Lievore, D., 'Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy' (2004) (Australian Institute of Criminology, 2004), 26.

a small minority of all sex offenders.³ On the other hand, it can also be misleading as a guide to the likelihood of re-offending unless convictions for non-sexual related offences are excluded from the data.

4.6 When recidivism is measured on the basis of re-arrest, the rates are more than twice those indicated by reconviction data.⁴ This data will erroneously include people who are acquitted or against whom proceedings are discontinued. It has also been suggested that this form of analysis can overstate the magnitude of age, sex and race differentials.⁵

4.7 Self-reporting data collected by interviewing offenders is said to provide a useful complement to research based on official sources of data.⁶ However as self-reporting relies on the offender's memory and honesty, the offending behaviour may be underestimated.

4.8 A further significant issue in relation to the methodology of research into rates of recidivism is the small sample size of incarcerated sex offenders used which are often insufficient to yield reliable statistical estimates. This is further complicated by the heterogeneity of sex offenders and variable probabilities of re-offending for different sex offender groups.⁷

Australian and New Zealand research into rates of recidivism

4.9 A recent publication by Dr Karen Gelb of the Victorian Sentencing Advisory Council provides a comprehensive and valuable review of the recidivism research conducted to date in Australia and New Zealand. As noted by Dr Gelb, these studies frequently have small sample sizes and accordingly their results should be approached with caution. Nonetheless, the results are consistent with the body of research literature. A summary of the major studies identified by this review is set out below:

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3. Gelb, K., 'Recidivism of Sex Offenders Research Paper' (Sentencing Advisory Council, State of Victoria, 2007), 21.
 4. Gelb, K., 'Recidivism of Sex Offenders Research Paper' (Sentencing Advisory Council, State of Victoria, 2007), 21.
 5. Lievore, D., 'Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy' (2004) (Australian Institute of Criminology, 2004), 27.
 6. Gelb, K., 'Recidivism of Sex Offenders Research Paper' (Sentencing Advisory Council, State of Victoria, 2007), 21.
 7. Lievore, D., 'Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy' (2004) (Australian Institute of Criminology, 2004), 27.

Broadhurst and Maller (1992)⁸

This study examined the recidivism rates of 560 sex offenders who were released from Western Australian prisons during the period 1975–87 and who were followed for up to 12 years. It was reported that overall, 8.4% had returned to prison after committing another sexual offence. Indigenous prisoners reported higher prison return rates (11.6%) compared with non-Indigenous offenders (5.5%).

Thompson (1995)⁹

This NSW Department of Corrective Services study examined data for all inmates discharged from prison in 1990 or 1991, with a follow-up period of two years.

Offenders who had been imprisoned for a sexual offence reported the lowest recidivism rate for any offence on all offender types (11%). The highest recidivism rates were found for property offenders (47%) and those initially imprisoned for assault (35%). The most serious offence of the subsequent offences was breach of parole (for at least half of the sex offenders).

For all offence types, this study showed that offenders with previous prison sentences (for any offence) had substantially higher rates of recidivism for any offence than those without a previous sentence of imprisonment.

For sex offenders, those with no previous periods of imprisonment had a recidivism rate for any offence of 6%, while those with at least one prior imprisonment for any offence type had a recidivism rate of 26%. Sex offenders whose victims were adults had higher rates of recidivism for any offence:

- for those with no prior imprisonment, the recidivism rate for sex offenders whose offences were against adults was 9% compared with 4% for offenders whose offences were against children;
- for those with at least one prior imprisonment, the recidivism rate for those committing sexual offences against adults was 33% compared with 19% for those offending against children; and

8. Broadhurst, R. and Maller, R., 'The Recidivism of Sex Offenders in the Western Australian Prison Population' (1992) 32(1) *British Journal of Criminology* 54.

9. Thompson, B., 'Recidivism in New South Wales: A General Study' (Research Publication No 31, NSW Department of Corrective Services, 1995).

- overall, the recidivism rate for any offence for sex offenders whose victims were adults was 16%, compared with 7% for those whose victims were children.¹⁰

As Gelb noted, this finding is consistent with more recent research from around the world that shows that those who offend against adults tend to have higher rates of recidivism than do child molesters.

Broadhurst and Loh (1997)¹¹

This study relied upon apprehension data from the Western Australian Police Service for the period 1984 to 1994. It reported that of the 2,425 non-Indigenous offenders arrested for a sex offence:

- 883 (36.4%) had been rearrested for any criminal offence;
- 391 (16.1%) had been arrested for an offence against the person (which included a sex offence); and
- 228 (9.4%) had been arrested for another sex offence.

Smallbone and Wortley (2000)¹²

This study involved a self-report questionnaire issued to 182 adult male child sex offenders incarcerated in a Queensland prison. The questionnaire asked offenders about their characteristics and offending modus operandi. In response to questions about previous convictions, respondents reported having had:

- at least one prior conviction for any kind of offence (61.6%);
- a prior conviction for a sexual offence (21.3%);
- a prior conviction for a violent offence (22.8%); and
- a prior conviction for a property offence (39%).

Of the respondents who identified as having had at least one prior conviction for a sexual offence;

- 10.8% were intra-familial offenders,

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10. Thompson, B., 'Recidivism in New South Wales: A General Study' (Research Publication No 31, NSW Department of Corrective Services, 1995).
 11. Broadhurst, R. and Loh, N., 'Careers of Sex Offenders: The Probabilities of Re-Arrest' (Paper presented to the Australian Institute of Criminology Second National Outlook Symposium: Violent Crime, Property Crime and Public Policy, Canberra, 3-4 March 1997).
 12. Smallbone, S. and Wortley, R., 'Child Sexual Abuse in Queensland: Offender Characteristics and Modus Operandi' (Research Paper No 93, Australian Institute of Criminology, 2001).

- 30.5% were extra-familial offenders,
- 41.1% were mixed-type offenders and
- 25% were deniers.

These differences were statistically significant. Of those offenders with previous convictions, their first conviction was four times more likely to be non-sexual (82%) than sexual (18%).

The authors concluded from these analyses that child sex offenders are not specialist offenders—instead, there appears to be ‘considerable versatility’ in their criminal careers.

Spier (2002)¹³

This New Zealand study examined reconviction and reimprisonment rates for prisoners released between 1995 and 1998. It found similar results to the Australian studies: namely, that violent offenders released from a prison sentence for homicide or sex offences had lower violent offence reconviction rates than inmates released from prison for all other violent offences.

Sex offenders released from prison were far less likely (30%) to be reconvicted for any offence within two years than was the case for the sample as a whole (73%). For the minority of sex offenders who were reconvicted within two years, the most common offence for which they were convicted was a traffic offence (17% were reconvicted for a traffic offence within two years, compared with 9.4% reconvicted for a violent offence). Only 3.5% of all sex offenders were reconvicted for a sex offence within two years, rising to 6.7% within five years.

Greenberg et al (2002)¹⁴

This Western Australian study examined data concerning 2,165 convicted male sex offenders who had been referred to the Sex Offender Treatment Unit between 1987 and 2000. The authors reported that after 7 years of follow-up:

- 10.7% of sex offenders had been arrested for a sexual offence as their first arrest after release;
- 16.8% had been arrested for a violent offence; and

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13. Spier, P., ‘Reconviction and Reimprisonment Rates for Released Prisoners’ (Research Findings No 1, Department of Justice New Zealand, 2002).
 14. Greenberg, D., Da Silva, J., and Loh, N., ‘Evaluation of the Western Australian Sex Offender Treatment Unit (1987–1999): A Quantitative Analysis’ (University of Western Australia, 2002).

- 49.7% had been arrested for any criminal offence.

While most offenders re-offended within the first two years of release from prison, the longer follow-up period used in this study allows for a more accurate measure of re-offending behaviour.

Leviore (2004) ¹⁵

As part of the National Initiative to Combat Sexual Assault, the Commonwealth Office of the Status of Women commissioned the Australian Institute of Criminology to provide an overview of Australian and international research on sexual, violent and general recidivism among sex offenders.

The study examined the rates of recidivism and the key characteristics of male offenders who sexually assault adult women. Examining the findings of 17 studies both in Australia and internationally, the report noted that they indicated a low base rate for sexual recidivism: a number of studies reported rates below 10%, with few studies reporting rates higher than 20%.

Jones et. al. (2006) ¹⁶

This New South Wales study examined the recidivism rate among parolees. A total of 2,747 offenders whose parole orders had been registered in 2001–02 were included in the study. Overall, 68% of all offenders had a finalised court appearance for committing at least one further offence while on parole.

Offenders whose most serious index (initial) offence was a sex offence were less likely than average (than the group as a whole) to re-offend at any point—of all offence types, sex offenders were the least likely to re-offend (breach and property offenders were the most likely to re-offend).

Observations

4.10 What emerges from the research is that sex offenders should not be considered as a homogeneous, specialist group, but instead as a group similar to general criminal offenders, with a diversity of pathways to offending. They may however be opportunity takers who have generalised difficulties with self-control, especially within their interpersonal domain.

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15. Lievore, D., 'Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy' (Australian Institute of Criminology, 2004).
 16. Jones, C. et al, 'Risk of Re-Offending Among Parolees' (Crime and Justice Bulletin No 91, NSW Bureau of Crime Statistics and Research, 2006).

4.11 What also emerges is that while there are variances in the way in which different studies define and measure recidivism, the overall findings are consistent across jurisdictions, namely that rates of re-offending amongst sex offenders are relatively low.

4.12 There are however substantial differences in recidivism rates, as well as in patterns and precursors of offending for different kinds of sex offender. This variation has implications for risk assessment and treatment, and highlights the danger in seeing sex offenders as a homogeneous and coherent group.

PART B: RISK ASSESSMENT

4.13 The assessment of the risk of any offender re-offending, and the nature of any such further offence, are of considerable importance for sentencing purposes, as is the prediction of their potential to be rehabilitated. Yet the issues surrounding the ability to obtain sufficiently accurate predictions remain 'practically and ethically troublesome.'¹⁷

4.14 The key problem in risk assessment is accuracy. Either under or over-prediction of an offender's risk of reoffending can have dire consequences for the community or for the individual.¹⁸ Accurate assessment of an offender's risk of re-offending and of his offence-related psychological and social needs is fundamental to rehabilitation and to public safety, and while the offender is in custody, to security.

Methodology

4.15 Considerable divergence and disagreement exists within the literature as to the choice and efficacy of the methodologies currently employed to assess potential risk. In general terms, the methods utilised have involved clinical assessment, actuarial instruments or a combination of both.¹⁹

17. Hart, S., Michie, C. and Cooke, D., 'Precision of Actuarial Risk Assessment Instruments' (2007) 190*British Journal of Psychiatry* 60, 60.

18. Kemshall, H., 'Risk Assessment and Management of Known Sexual and Violent Offenders: A Review of Current Issues' (Police Research Series, Paper 140, Home Office, 2001).

19. Edgely, M., 'Preventing Crime or Punishing Propensities? A Purposive Examination of the Preventive Detention of Sex Offenders in Queensland and Western Australia' (2007) 33(2) *University of Western Australia Law Review* 351.

Clinical assessment

4.16 The clinical assessment or ‘unstructured clinical judgement’ is based upon detailed interviewing and observation of the offender to gather information regarding the social, environmental, personality, and behavioural factors that are associated with past offending. Clinical assessments are aimed at providing diagnoses for any psychological concerns that are present, establishing treatment plans, goals, and prognosis and to predict risk of future offending.²⁰

4.17 This method of risk assessment relies almost solely for its accuracy on the professional expertise of the clinician conducting the assessment. Unsurprisingly, such assessments have attracted criticism as being ‘subjective’, ‘idiosyncratic’ and lacking consistency in outcomes.²¹ The clinical assessment method alone has been described as a ‘very poor way of predicting recidivism’²² with an accuracy level ‘only slightly above chance.’²³

Actuarial risk assessment instruments

4.18 Actuarial risk assessment instruments are statistically based and founded predominantly on probabilities calculated by reference to the static risk factors that have been identified by recent meta-analyses to be associated with recidivism. Typically, such instruments assess a particular offender against a range of risk factors to obtain a risk score.²⁴ This risk score is then used to place the offender into a ‘general band of risk’ (typically low, medium or high) with the offender, for all intents and purposes, ‘inheriting’ the probability of risk calculated in relation to the class of offenders to which their risk score equates. An example of this approach, commonly relied on in Australia is Static-99.

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20. Kemshall, H., ‘Risk Assessment and Management of Known Sexual and Violent Offenders: A Review of Current Issues’ (Police Research Series, Paper 140, Home Office, 2001).
21. Beech, A., Fisher, D. and Thornton, D., ‘Risk Assessment of Sex Offenders’ (2003) 34(4) *Professional Psychology: Research and Practice* 339, 339; Edgely, M., ‘Preventing Crime or Punishing Propensities? A Purposive Examination of the Preventive Detention of Sex Offenders in Queensland and Western Australia’ (2007) 33(2) *University of Western Australia Law Review* 351; Sentencing Advisory Council, ‘High Risk Offender: Post-Sentence Supervision and Detention’ (State Government of Victoria, Discussion and Options Paper, 2007) 18.
22. *G (No 3) v Commission for Children and Young People* [2002] NSWADT 73.
23. Hanson, R. and Thornton, D., ‘Static-99: Improving Actuarial Risk Assessments for Sex Offenders’ (Corrections Research, Department of the Solicitor General of Canada, 2002).
24. Beech, A., Fisher, D. and Thornton, D., ‘Risk Assessment of Sex Offenders’ (2003) 34(4) *Professional Psychology: Research and Practice* 339.

Clinical assessment and actuarial models

4.19 A third model of risk assessment combines an actuarial and a clinical approach.²⁵ Generally described as either an ‘adjusted actuarial assessment’²⁶ or a ‘structured clinical judgment,’²⁷ there is evidence to suggest that such an approach may assist in increasing predictive accuracy.²⁸ However there is a conflicting view that combining an actuarial and a clinical approach remains ‘open to subjective interpretation’²⁹ and provides ‘no empirical evidence that the accuracy of predictions is improved.’³⁰

4.20 There is no link between the total score obtained on these assessments with a probability of recidivism. Rather, the score is used to guide the clinician to develop a judgement of an offender’s risk.

NSW Department of Corrective Services

4.21 The Department of Corrective Services (DCS) has advised that it assesses sex offenders throughout their sentence, including undertaking assessments for pre-release programs and for parole consideration. Such assessments focus on the ‘risk of recidivism’ and involve consideration of both static (historical; non-changeable) factors and dynamic (changeable) risk factors.³¹ It is used for the effective

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25. Beech, A., Fisher, D. and Thornton, D., ‘Risk Assessment of Sex Offenders’ (2003) 34(4) *Professional Psychology: Research and Practice* 339, 339. Edgely, M., ‘Preventing Crime or Punishing Propensities? A Purposive Examination of the Preventive Detention of Sex Offenders in Queensland and Western Australia’ (2007) 33(2) *University of Western Australia Law Review* 351.
26. Sentencing Advisory Council, ‘High Risk Offender: Post-Sentence Supervision and Detention’ (State Government of Victoria, Discussion and Options Paper, 2007) 18.
27. Edgely, M., ‘Preventing Crime or Punishing Propensities? A Purposive Examination of the Preventive Detention of Sex Offenders in Queensland and Western Australia’ (2007) 33(2) *University of Western Australia Law Review* 351.
28. Hanson, R., ‘Who is Dangerous and When Are They Safe? Risk Assessment With Sex Offenders’ in Winck, B. and La Fond, J. (eds) *Protecting Society from Sexually Dangerous Offenders* (2003) 67.
29. Edgely, M., ‘Preventing Crime or Punishing Propensities? A Purposive Examination of the Preventive Detention of Sex Offenders in Queensland and Western Australia’ (2007) 33(2) *University of Western Australia Law Review* 351.
30. Hart, S., Michie, C. and Cooke, D., ‘Precision of Actuarial Risk Assessment Instruments’ (2007) 190 *British Journal of Psychiatry* 60, 64.
31. Offender Programs Unit, *Sex Offender Programs* (2005) NSW Department of Corrective Services
<http://www.dcs.nsw.gov.au/offender_management/offender_services_and_programs/strategic%20summary%20sex%20offender%20program%20nov%202005.pdf> at 3 December 2008.

targeting of programs and services, by providing the right interventions for the right offenders at the right degree of intensity.³²

4.22 The Offender Assessment Unit (OAU) is responsible for the specialist training and supervision of assessors.

4.23 Assessments include those related to:

- General risk of re-offending (Level of Service Inventory Revised LSI-R);
- Educational assessment (Basic Skills Assessment);
- Assessment of issues concerning alcohol and other drug (AOD) use;
- Psych-social assessments including risk of self harm;
- Specific assessment based on need including assessments of cognitive impairment, neuropsychological assessments;
- Psychological assessments related to need and suitability for programs. These include assessments of risk of sexual recidivism as well as assessment of possible axis I (neuroses) and axis II (psychoses) psychological disorders and other disorders.

4.24 Assessments inform all aspects of case management, programs and services in both custody and community and contribute to the development of a case plan which guides the passage of an offender through custodial and community supervision and interventions by DCS. Assessments also form the basis of reports to courts and other releasing agencies by Probation and Parole Officers. These reports provide a guide as to the range of sentencing options suitable for the offender, and include a consideration of the potential impact of a sentence or order on the offender's risk of re-offending.

Assessments of sex offenders

4.25 The Department has advised that while in the case of sex offenders, assessments of the possibility of sexual recidivism are important contributors to the case plan and will usually determine the type of specific sex offender treatment program into which the offender enters, they are by no means the only relevant assessments.³³ For example, an educational assessment might indicate that an

32. Submission 22: NSW Department of Corrective Services, Supplementary Submission, 1.

33. Submission 22: NSW Department of Corrective Services, Supplementary Submission, 1.

offender requires substantial literacy improvements to assist in the successful completion of a program, or an AOD assessment might indicate that these issues require more immediate attention.

4.26 Following the implementation of the *Crimes (Serious Sex Offender) Act 2006*, the Department has established two new assessment programs to facilitate a 'front end' comprehensive assessment of serious offenders. The Serious Offender Review Council (SORC) Assessment Unit, which has been operating for approximately eighteen months, assesses SORC inmates upon reception and develops a whole of sentence case plan to ensure adequate planning and timely delivery of programs to these offenders.

4.27 A separate Sex Offender Assessment Unit has recently been created following the recruitment of two psychologists. It is proposed that the Unit will operate out of the Metropolitan Special Programs Unit (MSPU). Staff are currently conducting state-wide risk assessments of sex offenders prior to facilities being established to house newly received sex offenders in one location.

4.28 The purpose of these units is to ensure that serious offenders and sex offenders will be fully assessed at the beginning of their sentences and that case plans will encompass a whole of sentence perspective.

Specific sex offender assessment instruments

4.29 Specific sex offender assessment in NSW is multi-faceted, combining the use of actuarial approaches and an assessment of the relative presence of individual dynamic (changeable) factors that may have contributed to a pattern of sexual offending behaviour. The identification of dynamic risk factors assists in treatment planning and in the development of risk management strategies.

4.30 The actuarial risk assessment instruments used by DCS are Static-99 and, if it is believed necessary, the Hare Psychopathy Checklist-Revised.³⁴

Static 99

4.31 This is an actuarial risk prediction instrument designed to predict the probability of sexual reconviction in adult male sex offenders over a period of five to fifteen years.³⁵ It has been utilised in

34. Submission 22: NSW Department of Corrective Services, Supplementary Submission, 3.

35. Hart, S., Michie, C. and Cooke, D., 'Precision of Actuarial Risk Assessment Instruments' (2007) 190 *British Journal of Psychiatry* 60, 61.

a number of cases in New South Wales,³⁶ as well as other Australian and overseas jurisdictions, in the context of determining risk for the purposes of preventive detention legislation.³⁷ Static-99 assesses an individual offender against ten static risk factors including prior sex offences, prior sentencing occasions, unrelated victims, stranger victims, male victims and lack of a long-term intimate relationship.³⁸

4.32 The recidivism estimates provided are group estimates based on individuals with the relevant characteristics. They do not correspond directly with the recidivism probability of a given offender. The particular offender's dynamic risk factors are not assessed in the STATIC 99.³⁹

PCL-R

4.33 The PCL-R enables the clinician to determine an individual's psychopathy ratings on the basis of a semi-structured interview and a review of collateral information. The assessment yields a dimensional total score, which can be used to help assess the degree to which an individual matches the prototypical psychopath, or to help identify and diagnose psychopaths.

Dynamic risk factors

4.34 Dynamic risk factors involve the use of a structured professional judgment tool whereby an offender is rated on a specific list of established risk factors or through a less structured consideration of a larger number of dynamic factors that have been shown to predict risk of recidivism, or by a combination of both approaches. Several dynamic risk factors have been consistently found to be related to sexual re-offending, including: intimacy deficits, social influences, attitudes tolerant of sexual abuse, and poor general and sexual self-regulation.

4.35 The structured professional judgments used by DCS include:

- *SVR-20*
This is a clinical guideline designed for the assessment of risk for sexual violence in adult sex offenders. The instrument was developed from a consideration of the empirical literature and

36. See *AG (NSW) v Winters* [2007] NSWSC 1071, [60]; *AG (NSW) v Tillman* [2007] NSWSC 605, [64]; *AG (NSW) v Wilde* [2007] NSWSC 1490, [46].

37. See *AG (NSW) v Winters* [2007] NSWSC 1071; *AG (NSW) v Tillman* [2007] NSWSC 605; *AG (NSW) v Wilde* [2007] NSWSC 1490.

38. Beech, A., Fisher, D. and Thornton, D., 'Risk Assessment of Sex Offenders' (2003) 34(4) *Professional Psychology: Research and Practice* 339, 341.

39. Submission 22: NSW Department of Corrective Services, Supplementary Submission, 3.

input from a number of clinicians. The SVR-20 consists of 20 items, divided into three domains, namely psychosocial adjustment; sexual offences; and future plans. The items are coded by a forensic clinician. The SVR-20 also allows the inclusion of 'other considerations', that is, case-specific risk factors that do not fit within the descriptions of the 20 items.

The Department has advised that the SVR-20 has been evaluated in prison settings and high-security treatment settings and has been shown in several studies, to better predict sexually violent recidivism than other tools such as the RRASOR, SORAG, and the STATIC-99 tools.

- *RSVP*
This is a structured professional judgement guideline that is used, not as a predictor of recidivism, but as a system for managing immediate risk. It considers similar information as the SVR 20 but highlights case formulation, the presence and relevance of risk factors to past and possible future behaviour, and the formulation of possible risk scenarios and risk management strategies. According to the Department, it appears to be reliable, but it is yet to be empirically validated.⁴⁰

4.36 As part of a risk assessment, the relevance and incidence of the dynamic risk factors specific to the sex offender are reviewed. Current risk is then assessed relevant to the patterns of behaviours evident at the time of the offender's sexual offending and with consideration to his current circumstances.

4.37 Offenders are allocated into treatment groups and accordingly prioritised based on risk, needs, readiness and responsivity—not just risk alone. DCS⁴¹ has advised that:

Readiness issues include motivation, literacy levels and ability to work in a group process whilst responsivity issues include cultural factors or cognitive and intellectual or other factors that might require program modifications. The readiness principle for example, asserts that for maximum benefits, offenders should be ready to participate and to engage in a treatment program. Readiness is more than motivation. It is about having the range of skills and attitudes needed to benefit as well as having the motivation to undergo an offence-related program. Readiness to benefit from an intervention program has been described as 'the

40. Submission 22: NSW Department of Corrective Services, Supplementary Submission, 4.

41. Submission 22: NSW Department of Corrective Services, Supplementary Submission, 4, citing Ward, Howells, Day and Birgden, (2004).

offender being motivated (has the will to engage), responding appropriately (perceives he or she can engage), finding it relevant and meaningful (can engage) and having the capacity (is able to engage).’

General risk assessment tools

4.38 DCS⁴² has advised ongoing sex offender assessments may also take into account:

- *Pre sentence reports*
Pre Sentence reports which have been completed by Community Offender Services, and which may include the completion of the Level of Service Inventory—Revised (LSI-R).
- *LSI-R*
While this has not been validated as a predictor of the risk of re-offending by sex offenders it is said to be useful as a general risk predictor and in pointing to criminogenic factors which if addressed are known to reduce the risk of re-offending.⁴³ These include: antisocial attitudes and beliefs; impulsivity and poor self control; identification with criminal models and weak ties to pro-social models; difficulties with self management such as poor decision-making skills; heavy or problematic drug or alcohol use; lack of certain interpersonal skills; and problems with literacy, employment, leisure/recreation.

Criticisms of risk assessment instruments

4.39 Various issues with the use of actuarial assessment tools in general have been identified. They include the following:

Low base rates

4.40 Actuarial risk assessment tools in the context of sex offenders are limited by low base rates where the base rate is defined as the “known frequency of a behaviour occurring within the population as a whole.”⁴⁴ This is an important limitation as the base rate has been described as the “key to accurate predictions of behaviour in similar

42. Submission 22: NSW Department of Corrective Services, Supplementary Submission, 2.

43. Submission 22: NSW Department of Corrective Services, Supplementary Submission, 2.

44. Kemshall, H., *Understanding Risk in Criminal Justice* (1st ed, 2003).

cases”.⁴⁵ As the Victorian Sentencing Advisory Council recently noted “low observed prevalence makes accurate prediction difficult”.⁴⁶

Predictive accuracy

4.41 Although there is considerable acceptance in the literature that, in relation to sex offenders at least, risk assessments based within an actuarial paradigm, show higher levels of accuracy, such predictions still generally only fall within the moderate range of accuracy.⁴⁷ As earlier noted, the under- or over-estimation of an offender’s risk can have serious consequences.

4.42 The possible outcomes for any risk assessment are:

- True Positive
- False Negative
- False Positive
- True Negative

4.43 A true positive outcome occurs when an offender is correctly predicted to reoffend. A true negative occurs when an offender is correctly predicted to *not* reoffend. A false negative occurs when an offender is not predicted to reoffend, but does do so, and a false positive occurs when the assessment predicts that an offender will reoffend, but does not do so.

4.44 False negative outcomes are problematic for the community; false positives are problematic for the offender and underlie the criticisms that are made regarding preventive detention and indeterminate sentences.⁴⁸

4.45 For example, Static-99 has been critiqued for its limitations in the context of predicting the likely recidivism of an individual sex

45. Kemshall, H., *Understanding Risk in Criminal Justice* (1st ed, 2003).

46. Sentencing Advisory Council, ‘High Risk Offender: Post-Sentence Supervision and Detention’ (State Government of Victoria, Discussion and Options Paper, 2007) 20.

47. Beech, A., Fisher, D. and Thornton, D., ‘Risk Assessment of Sex Offenders’ (2003) 34(4) *Professional Psychology: Research and Practice* 339; Wood, M. and Ogloff, J., ‘Victoria’s *Serious Sex Offenders Monitoring Act 2005*: Implications for the Accuracy of Sex Offender Risk Assessment’ (2006) 13(2) *Psychiatry, Psychology and Law* 182, 187.

48. Kemshall, H., ‘Risk Assessment and Management of Known Sexual and Violent Offenders: A Review of Current Issues’ (Police Research Series, Paper 140, Home Office, 2001).

offender. In *Tillman*, Bell J (as she was then) described it as ‘a predictive tool of moderate value.’⁴⁹ Additionally, Static 99 is based on re-offending for sexual offenders in general rather than serious sex offenders within the meaning of the Act.⁵⁰

Statistical fallacy

4.46 One of the limitations in assessing risk within an actuarial risk assessment paradigm is the problem of ‘statistical fallacy’, or the difficulty in accurately attributing group characteristics to an individual member of that group.⁵¹ Although an individual offender is placed within a class of offenders with similar risk, there is no way of accurately predicting the likelihood of that particular offender re-offending.

4.47 Recent research into the predictive accuracy of two actuarial risk assessment instruments, including Static-99, has suggested that they have ‘poor precision’ with the margins for error at the group level described as ‘substantial’, and at the individual level as ‘so high as to render the test results virtually meaningless’.⁵² Findings such as these suggest that reliance on such tools is ethically problematic, especially when an individual’s liberty is at stake.⁵³

Reliance on static factors alone

4.48 Actuarial risk assessment instruments which rely solely or heavily on static factors (those factors which cannot change in an offender’s life, for example the age at which the offender first offends) to the exclusion of dynamic factors (for example, ‘pro-offending attitudes and self-management issues’) have attracted criticism in the literature on a number of grounds.⁵⁴ For example, such assessments by their very nature generally exclude the specific characteristics of an

49. *AG (NSW) v Tillman* [2007] NSWSC 605, [90], and see [76]; *AG (NSW) v Winters* [2007] NSWSC 1071, [115]; *AG (NSW) v Wilde* [2007] NSWSC 149, [63].

50. *Crimes (Serious Sex offenders) Act 2006* (NSW).

51. Kemshall, H., *Understanding Risk in Criminal Justice* (1st ed, 2003).

52. Hart, S., Michie, C. and Cooke, D., ‘Precision of Actuarial Risk Assessment Instruments’ (2007) 190 *British Journal of Psychiatry* 60, 63.

53. Mullen, P., ‘Dangerous and Severe Personality Disorder and in Need of Treatment’ 190 *British Journal of Psychiatry* 3 cited in Sentencing Advisory Council, ‘High-Risk Offenders: Post-Sentence Supervision and Detention (Discussion and Options Paper, State Government of Victoria, 2007) [3.27].

54. Edgely, M., ‘Preventing Crime or Punishing Propensities? A Purposive Examination of the Preventive Detention of Sex Offenders in Queensland and Western Australia’ (2007) 33(2) *University of Western Australia Law Review* 351; Beech, A., Fisher, D. and Thornton, D., ‘Risk Assessment of Sex Offenders’ (2003) 34(4) *Professional Psychology: Research and Practice* 339, 339.

individual offender, that may have a significant influence in any given case.⁵⁵ The absence of dynamic risk factors in such assessments also has the consequence that factors that may be amenable or responsive to treatment are ignored.⁵⁶ Further, reliance on static factors alone cannot provide assistance in determining when a risk no longer exists or has been substantially reduced, for instance through appropriate and successful treatment.⁵⁷

Use with specific populations

4.49 Also of importance in the context of risk prediction is the fact that the overwhelming majority of research in the area of sexual offending relates to adult males⁵⁸ and is predominantly derived from research undertaken in North America.⁵⁹ This raises potential issues, for example in relation to the assessment of risk in relation to populations such as Indigenous offenders, juvenile offenders and female offenders.

Aboriginal offenders

4.50 In a report published in 2004, Allan and Dawson raised a number of potential issues surrounding the practice of generalising research conducted on specific populations in North America to Indigenous offenders in Australia, a practice they describe as 'inappropriate'.⁶⁰ Specifically, they argue that the available actuarial instruments have not been validated in the Australian Indigenous population and cite a number of possible limitations.⁶¹

4.51 In response to these concerns, an instrument known as the 3-Predictor model was developed and trialled among Indigenous sex offenders in Western Australia. While initial trials indicate that this

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55. Beech, A., Fisher, D. and Thornton, D., 'Risk Assessment of Sex Offenders' (2003) 34(4) *Professional Psychology: Research and Practice* 339, 342.
56. Beech, A., Fisher, D. and Thornton, D., 'Risk Assessment of Sex Offenders' (2003) 34(4) *Professional Psychology: Research and Practice* 339, 340.
57. Beech, A., Fisher, D. and Thornton, D., 'Risk Assessment of Sex Offenders' (2003) 34(4) *Professional Psychology: Research and Practice* 339, 339.
58. Beech, A., Fisher, D. and Thornton, D., 'Risk Assessment of Sex Offenders' (2003) 34(4) *Professional Psychology: Research and Practice* 339, 347.
59. Allan, A. and Dawson, D., 'Assessment of the Risk of Reoffending by Indigenous Male Violent and Sexual Offenders' (Trends and Issues in Criminal Justice, Australian Institute of Criminology, 2004).
60. Allan, A. and Dawson, D., 'Assessment of the Risk of Reoffending by Indigenous Male Violent and Sexual Offenders' (Trends and Issues in Criminal Justice, Australian Institute of Criminology, 2004).
61. Allan, A. and Dawson, D., 'Assessment of the Risk of Reoffending by Indigenous Male Violent and Sexual Offenders' (Trends and Issues in Criminal Justice, Australian Institute of Criminology, 2004). See also, *Director of Public Prosecutions (WA) v GTR* [2007] WASC 318, [76].

instrument may be more reliable than those developed for non-Indigenous offenders, the authors have identified limitations arising from the fact that the study was retrospective and used a relatively small sample, and observed that ‘the instrument cannot necessarily be used in other areas in Australia’.⁶²

Female offenders

4.52 The major concern with the assessment of risk in female sex offenders is that invariably the samples are small. In a recent study, for example, the sample comprised only eleven women.⁶³ While some development work has been undertaken in this area, no instrument has yet been fully validated in the context of female offenders.⁶⁴

Juvenile offenders

4.53 Particular care is required in relation to the assessment of risk of juvenile sex offenders, as there are currently only two instruments available for this purpose and ‘neither has been properly cross-validated as yet’.⁶⁵ The current instruments are the Juvenile Sex Offender Assessment Protocol (JSOAP) and the Estimate of Risk of Adolescent Sexual Offender Recidivism (ERASOR).⁶⁶

4.54 Consultations and submissions to the Council expressed reservations about the use of risk assessments or predictions of future dangerousness as a basis for sentencing decisions in the case of juvenile offenders. Developmentally, adolescence is a time of change and maturation, a fact which sits uneasily with traditional risk assessment tools that are mostly predicated on unchangeable historical factors, such as prior convictions, pre-existing vulnerabilities, history of poor family functioning, etc. Accordingly, youth risk assessments may not fully take into account the developing nature of adolescent functioning and the corresponding changes that relate to risk. As one consultant advised:

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- 62. Allan, A. and Dawson, D., ‘Assessment of the Risk of Reoffending by Indigenous Male Violent and Sexual Offenders’ (Trends and Issues in Criminal Justice, Australian Institute of Criminology, 2004).
 - 63. Williams, S. and Nicholaichuk, T., ‘Assessing Static Risk Factors in Adult Female Sex Offenders under Federal Jurisdiction’ (Paper presented at the 21st Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, San Antonio, 3 November 2001) cited in Beech, A., Fisher, D. and Thornton, D., ‘Risk Assessment of Sex Offenders’ (2003) 34(4) *Professional Psychology: Research and Practice* 339, 347.
 - 64. Beech, A., Fisher, D. and Thornton, D., ‘Risk Assessment of Sex Offenders’ (2003) 34(4) *Professional Psychology: Research and Practice* 339, 347.
 - 65. Beech, A., Fisher, D. and Thornton, D., ‘Risk Assessment of Sex Offenders’ (2003) 34(4) *Professional Psychology: Research and Practice* 339, 347.
 - 66. Beech, A., Fisher, D. and Thornton, D., ‘Risk Assessment of Sex Offenders’ (2003) 34(4) *Professional Psychology: Research and Practice* 339, 347.

The value of what we know developmentally about youth and culpability is helpful for establishing policy and legislative limits. It is not helpful for making decisions in individual cases. We have no assessment methods with any known reliability for telling us that a particular youth is likely, or not likely, to change as a result of particular sentences.⁶⁷

Offenders with a cognitive impairment

4.55 The assessment of risk in relation to offenders with a cognitive impairment is also problematic for a number of reasons. Firstly, the reduced capacity of these offenders to understand and comprehend questions put to them can affect the assessment.⁶⁸ Secondly, the suitability of using established actuarial risk assessment tools designed for general sex offenders for those with a cognitive impairment has been questioned.

4.56 The fundamental concern is whether the static and dynamic factors that predict sexual recidivism for general sex offenders are the same for those with a cognitive impairment.

4.57 To date, there is no validated risk assessment tool developed specifically for sex offenders with a cognitive impairment. Research investigating the validity of using standard risk assessment tools such as the Static-99 on such sex offenders found that an overestimation of risk commonly occur as these offenders are more likely to possess more static risk factors. Further, even if a risk score is obtained for an offender in this category, it cannot be used to place the individual into a mainstream program designed for sex offenders given the special criminogenic needs of this cohort.⁶⁹

4.58 It has been suggested that actuarial tools should be used to provide a 'risk baseline' that can help determine the treatment intensity and level of supervision needed by sex offenders with a cognitive impairment.⁷⁰ A convergent approach, whereby static and dynamic factors are used in the formation of a risk assessment

67. Grisso, Dr Thomas, Director Law and Psychiatry Program, University of Massachusetts Medical School, United States, Submission, NSW Sentencing Council's Provisional Sentencing for Young Offenders, 17 July 2007.

68. Beech, A., Fisher, D. and Thornton, D., 'Risk Assessment of Sex Offenders' (2003) 34(4) *Professional Psychology: Research and Practice* 339, 347.

69. Harris, A., and Tough, S., 'Should Actuarial Risk Assessments be used with Sex Offenders who are Intellectually Disabled' (2004) 17(4) *Journal of Applied Research in Intellectual Disabilities* 235.

70. Boer, D., Tough, S. and Haaven, J., 'Assessment of Risk Manageability of Intellectually Disabled Sex Offenders' (2004) 17(4) *Journal of Applied Research in Intellectual Disabilities* 275.

strategy, has been proposed. The dynamic factors that they address include the offender's functional ability.⁷¹

4.59 Although there is no specific risk assessment tool for such sex offenders, the Violence Risk Appraisal Guide (VRAG)⁷² is an assessment tool that assesses the risk of violent recidivism, including sexual offences that involve physical contact, among both juvenile and adult mentally disordered offenders.

Conflicting roles of clinicians

4.60 A problem with reliance on risk assessment tools to formulate sentencing decisions is the ultimate shift in responsibility from the courts to clinicians.⁷³ Risk assessments are generally carried out by psychologists who have expertise in providing an estimate of an offender's risk and treatability, and recommendations for suitable treatment. However, psychologists work in a medical rather than a jurisdictional model and are aware of the limitations in the accuracy of their predictions.⁷⁴

4.61 A lack of resources and short staffing can oblige psychologists to play both the role of the therapist and risk assessor for the same client.⁷⁵ Ethical dilemmas can arise from the existence of a dual-relationship of this kind. Apart from possibly giving rise to a breach of the psychologists' professional code of conduct,⁷⁶ a dual-relationship of this nature carries with it issues that may undermine the effectiveness of any treatment that is delivered and the legitimacy of risk assessment conducted. For example, an offender may be reluctant

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71. Boer, D., Tough, S. and Haaven, J., 'Assessment of Risk Manageability of Intellectually Disabled Sex Offenders' (2004) 17(4) *Journal of Applied Research in Intellectual Disabilities* 275.
72. Harris, G., Rice, M. and Quinsey, V., 'Violent Recidivism of Mentally Disordered Offenders: The Development of a Statistical Prediction Instrument' (1993) 20 *Criminal Justice and Behavior* 315.
73. McSherry, B., Keyzer, P. and Freiberg, A., 'Preventive Detention for 'Dangerous' Offenders in Australia: A Critical Analysis and Proposals for Policy Development' (Monash University, Criminology Research Council, 2006).
74. McSherry, B., Keyzer, P. and Freiberg, A., 'Preventive Detention for 'Dangerous' Offenders in Australia: A Critical Analysis and Proposals for Policy Development' (Monash University, Criminology Research Council, 2006), 14.
75. McSherry, B., Keyzer, P. and Freiberg, A., 'Preventive Detention for 'Dangerous' Offenders in Australia: A Critical Analysis and Proposals for Policy Development' (Monash University, Criminology Research Council, 2006).
76. Psychologists Registration Board of New South Wales, *Code of Professional Conduct* (2004) <http://www.psychreg.health.nsw.gov.au/psy_code.htm> at 5 December 2008.

to disclose information critical to the development of a suitable treatment plan if they are aware that the same clinician will be providing a report to authorities regarding their level of risk. For the clinician, a question can arise whether they take into consideration the success or failure of their therapeutic sessions with the offender when writing the risk assessment report.

PART C: COUNCIL POSITION

4.62 The limitations of STATIC 99, as indicated earlier in this chapter, are that:

- the ‘risk’ estimate is based on the percentage of the class of men with a similar score to that of the offender, who, at the time of the research, had committed a further sex offence; and
- the risk measured is that of engaging in a further sex offence of any kind.⁷⁷

4.63 It follows that it would be wrong to equate the percentage of risk, measured for that group, with a percentage probability of any individual offender committing a further serious sex offence.

4.64 Despite the several shortcomings noted, the Council recognises that the methods of risk assessment summarised in this chapter and used by DCS accord with those generally available within the justice system and that DCS is moving towards conducting risk assessment at the beginning of the offender’s sentence along the lines of the model in Scotland. In light of the acknowledged difficulties in prediction, effective communication of the accuracy levels of risk assessment to judges is necessary⁷⁸ to ensure that the limitations of the methods employed are taken into account.

4.65 The Council considers it important that there be ongoing evaluation of the tools which DCS employs for risk assessment, over an extended time frame, and with a larger population group, so as to determine their degree of accuracy; and for it to be sensitive to the academic debate concerning sex offender assessment tools with a view to identifying any superior models that may emerge. This, it regards, as a necessary precondition for any long term use, or extended application, of preventive detention.

77. See *New South Wales v Thomas* [2008] NSWSC 1340 (Adams J).

78. Campbell, T., ‘Sex Offenders and Actuarial Risk Assessments: Ethical Considerations’ (2003) 21 *Behavioural Sciences and the Law* 269, 269.

4.66 It is also of the view that it would be desirable for DCS to publish material in relation to sex offender treatment programs and their evaluations.

**5. Indeterminate and
disproportionate
sentences**

INTRODUCTION

5.1 This chapter contains an overview of the legislation in other jurisdictions which permits the imposition of a sentence upon an offender, following conviction of a sex offence, which might take the form of:

- an indeterminate or indefinite sentence which has no end date even though it may exceed the maximum sentence otherwise available for the offence, but which is subject to periodic review, or
- a disproportionate sentence which specifies an end date, but which is extended beyond that which would otherwise be proportionate to the objective criminality of the specific offence,

in either case to protect the community from that offender.

5.2 The purposes for which a court may impose a sentence in New South Wales on an offender are:¹

- (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.

5.3 As was noted in *Veen v The Queen (No 2)*² the purposes of criminal punishment ‘overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case’.

5.4 In New South Wales further guidance is given by s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (‘the Sentencing Act’)

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.
2. *Veen v The Queen (No 2)* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ).

in relation to the factors which a sentencing court must take into account, some of which are aggravating factors and some of which are mitigating factors. Additional guidance in relation to setting a non-parole period is given in relation to those offences that fall within the standard non-parole period regime, which includes a number of sex offences, by reason of the provisions contained in Part 4 Division 1A of the Sentencing Act.

5.5 Of central relevance for the application of these provisions is the determination of the objective seriousness of the offence. As was observed in *R v Scott*:³

There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed and the circumstances of the crime committed. This principle arose under the common law: *R v Geddes* (1936) SR (NSW) 554 and *R v Dodd* (1991) 57 A Crim R 349’.

5.6 In *R v Dodd*⁴ the Court stated:

As Jordan CJ pointed out in *R v Geddes* (36 SR at 556), making due allowance for all relevant considerations, there ought to be a reasonable proportionality between a sentence and the circumstances of the crime, and we consider that it is always important in seeking to determine the sentence appropriate to a particular crime to have regard to the gravity of the offence viewed objectively, for without this assessment the other factors requiring consideration in order to arrive at the proper sentence to be imposed cannot properly be given their place.

Each crime, as *Veen v The Queen No 2* (1987–88) 164 CLR 465 at 472 stresses, has its own objective gravity meriting at the most a sentence proportionate to that gravity, the maximum sentence fixed by the legislature defining the limits of sentence for cases in the most grave category.

5.7 As noted earlier, in *Veen v The Queen (No 2)*⁵ the High Court held that while the protection of the community is a relevant sentencing consideration, the sentence which is imposed for a particular offence should not be increased beyond what is proportionate to that offence merely for the purpose of protecting the community from the risk of further offending by that offender⁶.

3. *R v Scott* [2005] NSWCCA 152, [15] (Howie J, Grove and Barr JJ agreeing).

4. *R v Dodd* (1991) 57 A Crim R 349, 354.

5. *Veen v The Queen (No 2)* (1988) 164 CLR 465.

6. *Chester v The Queen* (1988) 165 CLR 611, 618–9; *Baumer v The Queen* (1988) 166 CLR 51.

5.8 In *R v Aslett*⁷ Barr J (with whom Spigelman CJ and Howie J agreed) observed:

I do not understand that in enacting s 3A(c) *Crimes (Sentencing Procedure) Act* the Parliament had any intention of introducing a system of preventive detention contrary to the principles expressed by the High Court of Australia in *Veen v The Queen (No 2)*.

5.9 Indefinite and disproportionate sentences and orders by the court which extend the detention of an offender, or his supervision, at the expiration of a determinate sentence beyond that which would otherwise be proportionate to the objective seriousness of the offence, in order to protect the community from that offender, do not sit comfortably with these long standing common law principles. Indefinite sentences similarly do not sit comfortably with the fact that they give rise to sentences whose duration exceeds the statutory maximum for the relevant offence. Their legitimacy accordingly depends on specific legislative power, which would allow a departure from common law principles and from any relevant maximum sentence specified for the current offence.

5.10 As the High Court observed in *Buckley v The Queen* the imposition of an indefinite 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 appreciation of the exceptional nature of the course that is being taken.⁸

5.11 In *R v Moffatt*,⁹ consideration was given to the constitutional validity of the indefinite sentencing provisions contained in the *Sentencing Act 1991* (Vic). In that case, in which Hayne JA reviewed the lengthy history of comparable legislation permitting preventive detention,¹⁰ a distinction was drawn between the *Sentencing Act 1991* (Vic) and the *Community Protection Act 1994* (NSW) which was struck down in *Kable v The Queen*.¹¹ As Winneke P observed:

In the light of the background of settled fundamental legal principle, the power to direct or sentence to detention contained in s662 should be confined to very exceptional cases where the

7. *R v Aslett* [2006] NSWCCA 49, [137].

8. *Buckley v The Queen* (2006) 80 AJLR 605, [6].

9. *R v Moffatt* (1998) 2 VR 229.

10. *R v Moffatt* (1998) 2 VR 229, [87]–[92].

11. *Kable v DPP (NSW)* (1996) 189 CLR 51.

exercise of the power is demonstrably necessary to protect society from physical harm. The extension of a sentence of imprisonment which would violate the principle of proportionality can scarcely be justified on the ground that it is necessary to protect society from crime which is serious but non violent. Larceny, obtaining money by false pretences and the infliction of malicious damage to property may be serious crimes from which society needs to be protected. But the indeterminate detention of offenders who have a propensity to commit crimes of this kind involving financial loss and property damage is a disproportionate response to that need for protection.¹²

5.12 Similar challenges to comparable legislation in other states have also failed. As noted later, preventive detention provisions, accordingly, have a legitimate place in the sentencing regime, so long as they do not present the unacceptable features which were present in Kable's case. Of more importance for their adoption are the safeguards which are included limiting their use to exceptional cases and permitting ongoing review.

PART A: DISPROPORTIONATE SENTENCING

5.13 In Australia, disproportionate sentencing is available in South Australia, Victoria and Western Australia, and is also utilised in England and Wales, Scotland, and Canada.

5.14 Disproportionate sentencing can be regarded as a sub-species of indeterminate sentencing, in the sense that the trigger is repeat or serious offending, although to a lesser degree than indeterminate sentencing warrants. In most jurisdictions the use of indeterminate sentencing is restricted to adults, save for the Western Australia legislation which applies only to juveniles and the UK's extended sentence, which applies to young prisoners in some circumstances.

5.15 This form of sentencing has some attractions in that it involves a sentence for a set period, and does not attract the same judicial/administrative consequences that apply under an indeterminate sentencing regime that require ongoing assessment and review. Moreover, where post-sentence preventive orders are available, a sentence of this kind can operate as an intermediate step, allowing the offender an opportunity to demonstrate rehabilitation. If he or she fails to respond to the opportunity then a post-sentence preventive detention order can be sought.

12. *R v Moffatt* (1998) 2 VR 229, [24]. See also, [81]–[84] (Hayne JA)

Examples of disproportionate sentences - Australia

New South Wales

5.16 In New South Wales a form of disproportionate sentencing is available through reliance on the *Habitual Criminals Act 1957* (NSW), which provides that the District or Supreme Court, when sentencing an offender, may declare him or her to be ‘an habitual criminal’ and impose an additional sentence of imprisonment of between five and 14 years. The Act applies if the offender is at least 25 years of age; has been convicted on indictment; has previously served at least two separate terms of imprisonment following convictions for indictable offences; and the court is satisfied that ‘it would be expedient with a view to [the] person’s reformation or the prevention of crime that [the] person should be detained in prison for a substantial time.’¹³

5.17 The provisions are rarely utilised¹⁴ and have been described as ‘archaic’ by the New South Wales Law Reform Commission, which recommended in 1996 that the Act be repealed.¹⁵

South Australia

5.18 In South Australia, the *Criminal Law (Sentencing) Act 1988* (SA) provides that a court may declare an offender to be a ‘serious repeat offender’.¹⁶ Such a declaration may be made if:

- the person has, on at least three occasions, committed a ‘serious offence’ in respect of which a sentence of imprisonment was imposed, or if not yet imposed ought to be imposed, or
- has, on at least two separate occasions, committed a ‘serious sexual offence’ against a person(s) under the age of 14 years (whether or not the same offence on each occasion); and in each case
- has been convicted of those offences.¹⁷

13. *Habitual Criminals Act 1957* (NSW) ss 4, 6.

14. Cf *R v Strong* (2003) 141 A Crim R 56; *Strong v The Queen* (2005) 224 CLR 1.

15. New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996) [10.28]–[10.31].

16. *Criminal Law (Sentencing) Act 1988* (SA) pt 2 div 2A.

17. *Criminal Law (Sentencing) Act 1988* (SA) s 20B. ‘Serious offence’ and ‘serious sexual offence’ are defined and include offences committed in other jurisdictions: see ss 20A(1), 20B (2). ‘Serious offence’ includes several sexual offences: see *Criminal Law (Sentencing) Act 1988* (SA) s 20A(1) and *Criminal Law Consolidation Act 1935* (SA) pt 3. The section appears to contemplate that a person might be declared a ‘serious repeat offender’ if convicted of multiple offences in the same proceedings, provided that those offences were committed on ‘separate occasions’.

5.19 If a court convicts a person of a serious offence and the person is liable, or becomes liable as a result of the conviction, to be declared a serious repeat offender, the court must consider whether to make such a declaration.¹⁸ The Act provides that the court ‘should’ make that declaration if it is ‘of the opinion that the person’s history of offending warrants a particularly severe sentence in order to protect the community’.¹⁹ This provision has been interpreted as follows:

[A] declaration should only be made when the court is satisfied that the person is *such an habitual offender that a lengthier term of imprisonment and non-parole period is justified for the protection of the community*. Factors to be considered include the number of prior offences, the seriousness of the offences, the age of the defendant and his or her prospects of rehabilitation, the time which has elapsed between the repeat offences, the likelihood of further reoffending and the nature of offending, having regard to the protection of the community.²⁰

5.20 If a court convicts a person of a serious offence, and the person is declared, or has previously been declared to be a serious repeat offender then the court ‘is not bound to ensure that the sentence it imposes for the offence is proportional to the offence’ and ‘any non parole period fixed in relation to the offence must be at least four-fifths the length of the sentence’.²¹

5.21 The provisions do not ‘apply to, or in relation to, an offence committed by a youth’.²²

Victoria

5.22 In Victoria, Part 2A of the *Sentencing Act 1991* (Vic) provides that the County or Supreme Court, when sentencing a ‘serious sexual offender’ to a term of imprisonment for a sex offence or violent offence, ‘must regard the protection of the community from the offender as the principal purpose for which the sentence is imposed’ and may, in order to achieve that purpose, ‘impose a sentence longer than that which is proportional to the gravity of the offence considered in the light of its objective circumstances’.²³

18. *Criminal Law (Sentencing) Act 1988* (SA) s 20B(3).

19. *Criminal Law (Sentencing) Act 1988* (SA) s 20B(3)(b).

20. *R v Williams* (2006) 96 SASR 226, [71] (emphasis added).

21. *Criminal Law (Sentencing) Act 1988* (SA) s 20B(4).

22. *Criminal Law (Sentencing) Act 1988* (SA) s 20A(2)(a). ‘Youth’ is defined and means a person who is older than 10 but younger than 18 years of age, and includes a person who was under 18 years of age at the time of commission of the offence: s 3(1), *Young Offenders Act 1993* (SA) s 4.

23. *Sentencing Act 1991* (Vic) pt 2A s 6D. ‘Sexual offence’ and ‘violent offence’ are defined: s 6B(1). The court must record that the person was sentenced as a

5.23 'Serious sexual offender' means an adult offender who has either:

- been convicted of at least two sexual offences; or
- been convicted of at least one sexual offence and at least one violent offence arising out of the same course of conduct; and
- has been sentenced in respect of each offence to a term of imprisonment or juvenile detention.²⁴

5.24 The first and second convictions may occur in the same proceedings; in different proceedings held at different times; or in separate trials of different counts in the same presentment.²⁵

5.25 Young offenders are excluded from the definition of 'serious sexual offender'. However, convictions incurred as a young offender count as relevant convictions for the purposes of the definition.²⁶

Western Australia

5.26 In Western Australia, the *Young Offenders Act 1994* (WA) provides for limited disproportionate sentencing of repeat young offenders for the purpose of protecting the community.²⁷ The power arises if a court is sentencing a young person for a 'serious offence', including a serious sexual offence.²⁸ The court must be satisfied that:

- the young person has previously committed and been found guilty of an offence in respect of which a custodial sentence was imposed;
- after release from custody, the young person committed and was found guilty of a second offence in respect of which another custodial sentence was imposed; and
- the instant offence was committed after the young person was released from custody having served all or part of the sentence for the second offence;²⁹ and that

serious offender: s 6F(1). There is a presumption that a sentence imposed under those provisions will be served cumulatively on any other sentence or sentences imposed: s 6E.

24. *Sentencing Act 1991* (Vic) s 6B(2). The court must have regard to certain offences committed in other jurisdictions: see s 6C(3).

25. *Sentencing Act 1991* (Vic) s 6C(1).

26. *Sentencing Act 1991* (Vic) s 6B(2).

27. *Young Offenders Act 1994* (WA) pt 7 div 9.

28. *Young Offenders Act 1994* (WA) s 124(3).

29. *Young Offenders Act 1994* (WA) s 124(1)(a)–(c).

- having taken into account the offender's history of re-offending after release from custody, there is 'a high probability that the offender would commit further offences of a kind for which custodial sentences could be imposed'.³⁰

5.27 If those conditions are met and if the court imposes a custodial sentence in respect of the instant offence, it may make a special order the effect of which will require the offender to serve an additional sentence of 18 months' imprisonment or detention, with the possibility of supervised release after 12 months.³¹ The court must 'give primary consideration to the protection of the community'.³²

Examples of disproportionate sentences - other jurisdictions

Canada—Long term offender declaration

5.28 The *Criminal Code 1985* (Can) provides for disproportionate sentencing in the form of a 'long-term offender' declaration.³³ The declaration is available if a person is convicted of certain sex offences or if the offender 'has engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted'.³⁴

5.29 Before a declaration can be made, the court must be satisfied that (i) a sentence of at least two years' imprisonment would be appropriate for the instant offence; (ii) there is a 'substantial risk' that the person will reoffend; and (iii) there is a 'reasonable possibility of eventual control of the risk in the community'.³⁵ The court 'shall be satisfied' that a 'substantial risk' exists if the offender:

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30. *Young Offenders Act 1994* (WA) s 124(1)(d).
31. *Young Offenders Act 1994* (WA) s 126. A special order can only be made if the Director of Public Prosecutions submits that it should be made, having given notice to the offender that it proposes to make such a submission: s 126(3). As to supervised release orders, see *Young Offenders Act 1994* (WA) pt 8.
32. *Young Offenders Act 1994* (WA) s 125. Protection of the community is to be prioritised over the legislative statement of principles (s 46) regarding the exercise of criminal jurisdiction in respect of a young offender.
33. *Criminal Code*, RSC 1985, c. C-46, pt 24.
34. *Criminal Code*, RSC 1985, c. C-46, s 753(2)(a). The section provides the following list of offences: 'an offence under section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), subsection 163.1(2) (making child pornography), subsection 163.1(3) (distribution, etc., of child pornography), subsection 163.1(4) (possession of child pornography), subsection 163.1(4.1) (accessing child pornography), section 172.1 (luring a child), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault)'.³⁵
35. *Criminal Code*, RSC 1985, c. C-46, s 753.1(1).

- (i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or
- (ii) by conduct in any sexual matter including that involved in the commission of the offence for which the offender has been convicted, has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offences...³⁶

5.30 An expert assessment must be conducted, and a report based on the assessment filed with the court, before the prosecution can apply for the declaration.³⁷ The offender has a right to be present at the hearing of the application³⁸ and character evidence is admissible at the discretion of the court.³⁹

5.31 If the person is declared to be a long-term offender, the court must impose a sentence of at least two years' imprisonment and must order 'long-term supervision' in the community for up to 10 years following completion of the determinate sentence.⁴⁰ The court must also order that 'a copy of all reports and testimony given by psychiatrists, psychologists, criminologists and other experts and any observations of the court with respect to the reasons for the finding, together with a transcript of the trial of the offender be forwarded to the Correctional Service of Canada for information'.⁴¹

5.32 If and when an offender is released under long-term supervision, standard parole conditions apply⁴² in addition to any additional conditions that the Parole Board considers 'reasonable and

36. *Criminal Code*, RSC 1985, c. C-46, s 753.1(2) (emphasis added).

37. *Criminal Code*, RSC 1985, c. C-46, s 753(1) and 753.1(1). The court, on application by the prosecution or of its own initiative, may remand the person for up to 60 days for the purposes of an expert assessment if there are reasonable grounds to believe that the person might be found to be a 'long-term' or 'dangerous offender': s 752.1.

38. *Criminal Code*, RSC 1985, c. C-46, s 758.

39. *Criminal Code*, RSC 1985, c. C-46, s 757.

40. *Criminal Code*, RSC 1985, c. C-46, s 753.1(3).

41. *Criminal Code*, RSC 1985, c. C-46, s 760.

42. *Corrections and Conditional Release Act*, SC 1992, c. 20, s 134.1(1); *Corrections and Conditional Release Regulations* SOR/92-620, reg 161(1). The standard conditions include requirements as to reporting and notification (change of address, employment, domestic circumstances or other relevant circumstances) to parole supervisor, weapons restrictions, restrictions on movement and a requirement to 'obey the law and keep the peace'. None of the conditions relates specifically to offenders with cognitive and mental health impairments.

necessary in order to protect society and to facilitate the successful reintegration into society of the offender'.⁴³

5.33 In the event of an actual or apprehended breach of a condition of release, or to protect society, a long-term offender's supervision may be suspended and the offender recalled to a community-based residential facility, a mental health facility or to custody.⁴⁴ Breach of a long-term supervision order is an indictable offence punishable by up to 10 years' imprisonment.⁴⁵

England and Wales—Extended sentence

5.34 If a person is convicted of a 'specified offence' for which the maximum penalty is a sentence of imprisonment of between two and ten years, the court may, at the time of the imposition of the sentence for that offence, order that an additional, determinate period of imprisonment be served at the end of an offender's sentence (an 'extended sentence').⁴⁶

5.35 In such a case, the court sets the 'appropriate term' of imprisonment, being the shortest period that is commensurate with the seriousness of the offence (and other associated offences committed by the person, where relevant).⁴⁷ The court must also set an 'extension period' of up to eight years during which the offender will be subject to release on licence.⁴⁸

5.36 The court must be satisfied of the existence of a 'significant risk to members of the public of serious harm occasioned by the

43. *Corrections and Conditional Release Act*, SC 1992, c. 20, s 134.1(2). The Board may also designate a person 'by name or by position' who, in addition to the parole supervisor, may give the offender instructions: s 134.2.

44. *Corrections and Conditional Release Act*, SC 1992, c. 20, s 135.1(1). If the offender is not re-released within 30 days, his or her case must be referred to the Parole Board for review: s 135.1(5)–(9). On a review, the Board may cancel the suspension and re-release the offender (with or without modifying the supervision conditions), or may recommend that the offender be charged with breaching the long-term supervision order. The Board must recommend that the offender be charged if it is 'satisfied that no appropriate program of supervision can be established that would adequately protect society from the risk of the offender re-offending, and that it appears that a breach has occurred': s 135.1(6).

45. *Criminal Code*, RSC 1985, c. C-46, s 753.3.

46. *Criminal Justice Act 2003* (UK) s 227.

47. *Criminal Justice Act 2003* (UK) ss 153(2), 227(3). The appropriate term must be at least 12 months: s 227(3).

48. *Criminal Justice Act 2003* (UK) s 227(2)(b), (4). For a specified violent offence, the extension period is up to 5 years; for a specified sexual offence, up to 8 years. However, the extension period must not exceed the maximum penalty for the offence: s 227(5).

commission by [the offender] of further specified offences'.⁴⁹ In determining whether a 'significant risk' exists, the court must take into account 'all such information as is available to it about the nature and circumstances of the offence, may take into account any information which is before it about any pattern of behaviour of which the offence forms part, and may take into account any information about the offender which is before it'.⁵⁰ The court is concerned with future, not past, offending.⁵¹

5.37 However, if the offender has a prior conviction for a specified offence,⁵² the legislation provides that the court 'must assume' that there is a significant risk unless, after taking into account the relevant information, the court considers that it would be 'unreasonable to conclude that there is such a risk'.⁵³

5.38 This provision has been read down.⁵⁴ 'Information' in this context has a broader meaning than 'evidence'.⁵⁵ In particular, it may

49. *Criminal Justice Act 2003* (UK) ss 225(1), 227(1), 228(1), 229. This is a two-stage test—the court must be satisfied both of a significant risk that the person will commit further 'specified offences' and that the harm thus occasioned would be 'serious harm': see *R v Lang* [2006] 2 All ER 410, 414, 417–9. A 'significant risk' is one that is 'noteworthy, of considerable amount or importance'. More than merely a high risk of reoffending is required: 417, 424. See also *R v Johnson* [2007] 1 Cr App R (S) 112, 679.

50. *Criminal Justice Act 2003* (UK) s 229(2), (3).

51. The absence of any prior convictions does not necessarily rule out a finding that the offender poses a 'significant risk' as defined: *Criminal Justice Act 2003* (UK) s 229(2); *R v Johnson* [2007] 1 Cr App R (S) 112, 680. Repetitive low level offending can support a finding that the offender poses a 'significant risk', for example, if the offending appears to be escalating: *R v Lang* [2006] 2 All ER 410, 431, cf 418–9, 425–6; *R v Johnson* [2007] 1 Cr App R (S) 112, 680. The fact that the victim of the instant offence occasioned no (serious) harm can weigh for or against the offender, depending on whether the absence of harm was due to the low level of risk inherent in the offender's behaviour or was merely fortuitous: *R v Johnson* [2007] 1 Cr App R (S) 112, 680–1; *R v Farrar* [2007] 2 Cr App R (S) 35, 209–10. Cf *R v Lang* [2006] 2 All ER 410, 422, 429.

52. *Criminal Justice Act 2003* (UK) c 44, s 229(3) refers to a 'relevant offence', which means a 'specified offence' or certain offences against the law of Scotland (listed in sch 16) and Northern Ireland (listed in sch 17): s 229(4). It does not include convictions incurred as a young offender: s 229(3).

53. *Criminal Justice Act 2003* (UK) s 229(3).

54. The legislative provision creates a rebuttable assumption, which it will 'usually' be unreasonable to apply 'unless the information about offences, pattern of behaviour and the offender ... show[s] a significant risk of serious harm ... from further offences': *R v Lang* [2006] 2 All ER 410, [15]. '[I]n the end, the question whether it is unreasonable to make the assumption of dangerousness on the basis of previous convictions for specified offences is left to [the sentencer's] judgment. The sentencer is entitled to conclude that, notwithstanding the statutory assumption, the offender with previous

include information regarding conduct of a criminal nature for which the offender has not been convicted.⁵⁶ A pre-sentence report is not mandatory but one should ordinarily be obtained.⁵⁷

Scotland—Release subject to licence

5.39 In Scotland, if the Sheriff's Court or the High Court is considering imposing a determinate sentence of imprisonment in respect of certain sex offences,⁵⁸ and considers that the licence period 'would not be adequate for the purpose of protecting the public from serious harm from the offender', the court may impose an extension period of up to 10 years in addition to the term of imprisonment that it would otherwise have imposed. During the extension period the offender is subject to a release on licence.⁵⁹

5.40 The Scottish model thus differs from disproportionate sentences in Australian jurisdictions in two respects. First, the reference to a licence suggests that the extension period is presumptively to be served in the community. Secondly, the court is required to nominate the determinate sentence that it would otherwise have imposed.

PART B: INDETERMINATE SENTENCES

5.41 In contrast to disproportionate sentences, which are for a determinate period, if an indeterminate (or indefinite) sentence is imposed the offender remains subject to the relevant order until a determination is made, following review, that the sentence should be converted to a determinate sentence, or that the offender can be conditionally released into the community.

Examples of indeterminate sentences - Australia

5.42 The power to impose an indeterminate sentence currently exists in all Australian jurisdictions except New South Wales and the

convictions, even for specified offences, does not necessarily satisfy the requirements of dangerousness': *R v Johnson* [2007] 1 Cr App R (S) 112, [8].

55. *R v Considine; R v Davis* [2007] 3 All ER 621, 627.

56. *R v Considine; R v Davis* [2007] 3 All ER 621, 627–30. Cf. *R v Farrar* [2007] 2 Cr App R (S) 35.

57. *Criminal Justice Act 2003* (UK) c 44, ss 156, 157; *R v Considine; R v Davis* [2007] 3 All ER 621, 631–2.

58. *Criminal Procedure (Scotland) Act 1995* (UK) s 210A(10) lists the sexual offences to which the provision applies. The Scottish Sheriff's Court and High Court have criminal jurisdictions similar to the New South Wales District Court and Supreme Court respectively: see <www.justis.com/support/faq-courts.html#scotland> at 10 December 2008.

59. *Criminal Procedure (Scotland) Act 1995* (UK) s 210A.

Australian Capital Territory in accordance with the following statutory provisions:

- 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.

5.43 The only indeterminate sentence that exists in New South Wales is a natural life sentence, which is available only in respect of murder, aggravated sexual assault against a child under 10, aggravated sexual assault in company and certain serious drug offences.⁶⁰ Unlike indeterminate sentencing schemes as here defined, a natural life sentence in New South Wales has no provision for periodic review or parole.

5.44 The set of offences in respect of which an indeterminate sentence may be imposed is different in each jurisdiction, but in each case they include some sex offences.⁶¹ In most jurisdictions, the

60. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(1); *Crimes Act 1900* (NSW) ss 19A, 61JA, 66A(2), 431A (sentences of life imprisonment); *Drug Misuse and Trafficking Act 1985* ss 33A, 33AC, 33.

61. *Sentencing Act 1995* (NT) s 65(1) (includes offence of sexual intercourse or gross indecency where committed against child under 16 years of age, against child over 16 years of age who is under special care, or without consent against an adult); *Sentencing Act 1991* (Vic) ss 3(1), 18B(A)(6) ('serious offence', includes rape and certain related offences, incest and certain sexual offences against children); *Penalties and Sentences Act 1992* (Qld) s 162 ('violent offence', includes rape, sexual assault, unlawful sodomy, carnal knowledge of a child under 16 years of age, abuse of an intellectually impaired person and any indictable offence involving the use of violence against a person to which a sentence of life imprisonment applies); *Criminal Law Amendment Act 1945* (Qld) ss 2A, 18 ('offence of a sexual nature', includes any offence where the offender 'has exhibited a failure to exercise proper control over the offender's sexual instincts' and includes 'an assault of a sexual nature'); *Criminal Law (Sentencing) Act 1988* (SA) ss 20A(2)(b), 23(1)–(2) ('relevant offence', includes rape and related offences, child pornography offences, bestiality, incest, persistent sexual abuse of a child and

imposition of an indeterminate sentence requires the court first to find that the offender is 'a serious danger to the community',⁶² a 'danger to society'⁶³ or a 'dangerous criminal'.⁶⁴

5.45 In Queensland, indeterminate sentences are additionally available in respect of an offender who is 'incapable of exercising proper control over [his or her] sexual instincts' or who is not so incapable but whose 'mental condition is subnormal to such a degree that he or she requires care, supervision and control in an institution either in his or her own interests or for the protection of others'.⁶⁵ A similar but more limited scheme exists in South Australia.⁶⁶ In substance these Acts provide for detention either during Her Majesty's pleasure (Qld) or until further order of the Court (SA).

5.46 Indeterminate sentences for sex offences are not available in respect of young offenders except to a limited extent in Tasmania and South Australia.⁶⁷ However, offences committed as a young offender may be taken into account.

indecent behaviour; maximum penalty must be at least 5 years' imprisonment); *Sentencing Act 1995* (WA) s 98(1) (offender convicted of an indictable offence in respect of which a sentence of imprisonment is imposed); *Sentencing Act 1997* (Tas) s 19 (offender convicted on at least two separate occasions of 'a crime involving violence or an element of violence'; this includes indecent and sexual assaults: *R v Evans* (1999) 8 Tas R 325, *R v Minney* (2003) 12 Tas R 46 and threats of violence: *R v McCrossen* [1991] Tas R 1).

62. *Sentencing Act 1995* (NT) s 65; *Sentencing Act 1991* (Vic) s 18B(1); *Penalties and Sentences Act 1992* (Qld) s 163.

63. *Sentencing Act 1995* (WA) s 98(2).

64. *Sentencing Act 1997* (Tas) s 19.

65. *Criminal Law Amendment Act 1945* (Qld) s 18(3), (6) and see generally pt 3.

66. *Criminal Law (Sentencing) Act 1988* (SA) pt 3 div 3 (offender 'incapable of controlling, or unwilling to control, his or her sexual instincts').

67. *Sentencing Act 1991* (Vic) s 18A(1) provides that indeterminate sentencing provisions do not apply to a 'young person' (not defined; Cf s 3(1) which defines 'young offender' as a person who, at the time of sentencing, is under 21 years of age). *Sentencing Act 1997* (Tas) s 19 provides that a 'dangerous criminal' declaration can be made in respect of an offender who 'has apparently attained the age of 17 years' and see for example *R v McCrossen* [1991] Tas R 1 (19 year-old offender). *Criminal Law (Sentencing) Act 1988* (SA) s 21 provides an indeterminate sentence cannot be imposed on a 'youth' unless he or she is being sentenced as an adult. 'Youth' means 'a person of or above the age of 10 years but under the age of 18 years and, in relation to proceedings for an offence or detention in a training centre, includes a person who was under the age of 18 years on the date of the alleged offence': s 3(1) and *Young Offenders Act 1993* (SA) s 4. See also *Criminal Code Act 1913* (WA) s 282, which provides for indeterminate detention of a child who commits murder or wilful murder.

Issues for consideration

Exercising the discretion whether or not to order indeterminate detention

5.47 The courts have consistently emphasised that the power to impose an indeterminate sentence is an extraordinary power, to be used only in rare cases.⁶⁸ Before imposing an indefinite sentence, the court should consider whether the purpose of protecting the community can be achieved by other, determinate, sentencing options.⁶⁹ Thus, even where statutory criteria for imposing an indefinite sentence are met, the court ordinarily retains a discretion *not* to impose such a sentence.⁷⁰

5.48 Where the legislation uses a phrase such as a ‘serious danger to the community’, that requires more than merely a risk that the person will re-offend.⁷¹ The power to sentence an offender to indefinite detention ‘should be confined to very exceptional cases where the exercise of the power is *demonstrably necessary to protect society from serious physical harm*’.⁷² It requires that ‘the convicted person is ... *so likely to commit further crimes of violence (including sexual offences) that he constitutes a constant danger to the community*’.⁷³ Where the legislation requires, for example, a risk that the person will commit another ‘serious sexual offence’, the court must be satisfied of that

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68. *Buckley v The Queen* (2006) 224 ALR 416, 418, 425–6; *McGarry v The Queen* (2001) 207 CLR 121, 132 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 140–4, 146–7 (Kirby J), 160 (Callinan J); *Chester v The Queen* (1988) 165 CLR 611, 617–8; *R v Davies* (2005) 11 VR 314, 334. See convenient summary of the caselaw in *Yarran v The Queen* (2003) 27 WAR 427, [11]–[12].
69. *Buckley v The Queen* (2006) 224 ALR 416, 418–9, 425–7 (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ); *McGarry v The Queen* (2001) 207 CLR 121, 130 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 14–5, 149 (Kirby J); *Chester v The Queen* (1988) 165 CLR 611, 618–9 (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ) (alternatives available included an ‘habitual criminal’ declaration or civil detention under mental health legislation).
70. *Buckley v The Queen* (2006) 224 ALR 416, 426–7 (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ); *McGarry v The Queen* (2001) 207 CLR 121, 144–5 (Kirby J).
71. *McGarry v The Queen* (2001) 207 CLR 121, 126–7 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
72. *Chester v The Queen* (1988) 165 CLR 611, 618–9 (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ) (emphasis added). See also *McGarry v The Queen* (2001) 207 CLR 121, 131 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ): ‘The material did not permit a court to conclude that, more probably than not, two years after sentencing there was a risk that the appellant would engage in conduct, the consequences of which could properly be called grave or serious for society, or a part of it’ (emphasis added).
73. *Chester v The Queen* (1988) 165 CLR 611, 618–9 (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ) (emphasis added).

particular risk and not merely a risk of re-offending in general terms.⁷⁴

Standard of proof

5.49 A court may make a finding that an offender is a serious danger to the community, for the purpose of the Queensland and Northern Territory Sentencing Acts, only if it is satisfied ‘by *acceptable, cogent evidence* and ... *to a high degree of probability* that the evidence is *of sufficient weight* to justify the finding’.⁷⁵ A similar provision applies in Victoria.⁷⁶ In Western Australia, the lower ‘balance of probabilities’ standard of satisfaction that the offender would be a danger to society or a part of it because of the circumstances specified applies.⁷⁷

5.50 The South Australian and Queensland ‘sexual instincts’ provisions do not specify the applicable standard of proof. In South Australia, the Supreme Court has held that the court must be satisfied beyond a reasonable doubt as to the ‘primary facts’ on which the medical assessments are based; and a finding that the offender is incapable of or unwilling to control his or her sexual instincts must be based on ‘cogent and acceptable evidence’ and to a standard of ‘reasonable satisfaction’.⁷⁸

5.51 The High Court has emphasised that an indefinite sentence should not be imposed except on the basis of ‘sufficient material’ and after careful, unhurried consideration by the court.⁷⁹ Where ‘expert’ reports are received in evidence, they must be of a standard commensurate with the seriousness of the task for which they are being used.⁸⁰ Finally, the court must give sufficiently detailed reasons,

74. *McGarry v The Queen* (2001) 207 CLR 121, 131 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

75. *Penalties and Sentences Act 1992* (Qld) s 170 (emphasis added); *Sentencing Act 1995* (NT) s 71.

76. *Sentencing Act 1991* (Vic) s 18B(1) provides that ‘a court may only impose an indefinite sentence on an *offender* in respect of a serious offence if it is satisfied, to a high degree of probability, that the offender is a serious danger to the community...’.

77. *Sentencing Act 1995* (WA) s 98(2).

78. See discussion in *R v England* (2004) 87 SASR 411, [30]–[59]; approved in *R v Williams* (2006) 96 SASR 226, [15].

79. *McGarry v The Queen* (2001) 207 CLR 121, 132 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 142–3 (Kirby J), Cf 160 (Callinan J, dissenting); *Thompson v The Queen* (1999) 165 ALR 219, 220 (Gaudron and Hayne JJ), 221–4 (Kirby J).

80. See *McGarry v The Queen* (2001) 207 CLR 121, 128, 131–2 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 142–4 (Kirby J), cf 156–8 (Callinan J, dissenting). Kirby J suggested that the independence of the author of the report is a valid consideration: ‘[the social worker who prepared

which should demonstrate that the sentencing court has properly considered all relevant material and has given full weight to the principle that ‘the power to impose an indefinite sentence is one ‘to be sparingly exercised, and then only in clear cases’’.⁸¹

Relevant considerations

5.52 In determining, for the purpose of Queensland⁸², Victorian and Northern Territory legislation, whether an offender is a ‘serious danger to the community’, the court is required to consider a number of specific factors including:

- the offender’s character, antecedents, age, health or mental condition;
- the nature and gravity of the serious offence;
- whether the nature of the serious offence is exceptional;
- psychiatric and other relevant reports;
- the risk of serious danger to members of the community if an indefinite sentence were not imposed; and
- the need to protect the community from that risk.⁸³

5.53 Similar criteria are provided in Western Australia⁸⁴ and Tasmania⁸⁵ in relation to the assessment required as to the dangerousness of the offender. In South Australia, the Supreme Court has read into the sexual instincts legislation a requirement that, even if satisfied that the offender is incapable of or unwilling to control his or her sexual instincts, the court must also determine that the

the sex offender treatment report] is an officer in the Executive government of the state, and she is apparently employed in the Corrections Department, so that complete independence of the outlook would not necessarily be manifest... For such a serious order to be made, one would think that, ordinarily at least, the opinion of an independent expert of appropriate qualifications would be afforded to the judge asked to make it’ (emphasis added). See also *Thompson v The Queen* (1999) 165 ALR 219, 220 (Gaudron and Hayne JJ), 221–4 (Kirby J).

81. *Buckley v The Queen* (2006) 224 ALR 416, 427 (citations omitted) and see 425–6; see also *McGarry v The Queen* (2001) 207 CLR 121, 146–7 (Kirby J); *Murray v The Queen* (2006) 200 FLR 89, 99–102 (Martin (BR) CJ) (dissenting in result) (emphasis added).

82. *Penalties and Sentences Act 1992* (Qld).

83. *Sentencing Act 1995* (NT) s 65(8)–(9); *Sentencing Act 1991* (Vic) s 18B(1)–(2); *Penalties and Sentences Act 1992* (Qld) s 163(3)–(4).

84. *Sentencing Act 1995* (WA) s 98(2).

85. *Sentencing Act 1997* (Tas) s 19(2) and see *Read v The Queen* [1994] 3 Tas R 387, [3].

offender poses a 'danger to the community' before an order for indeterminate detention can be made under that Act.⁸⁶

5.54 For the purposes of the Queensland sexual instincts provisions, the power to order indeterminate detention arises if the court-ordered medical reports state that the offender is incapable of exercising proper control over his or her sexual instincts. However, the offender is entitled to cross-examine the authors of these reports and/or lead evidence in rebuttal, and the court cannot make an order unless the court considers the matters reported to be proved.⁸⁷

5.55 In most jurisdictions, the courts have held that the relevant time for assessing risk is at the time of sentencing, and at the time of possible release on parole or at the end of a determinate sentence, were one to be imposed.⁸⁸ However, in Victoria, the Court of Appeal has held that, since the indefinite sentence is required to be reviewed on expiry of the nominal sentence, and discharged if the court is not then satisfied that the offender remains a danger to the community, the sentencing court is not required to consider whether the offender will be dangerous at the end of the nominal term, but only at the time when he or she is being sentenced.⁸⁹ A similar approach has been taken in South Australia.⁹⁰

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86. *R v Williams* (2006) 96 SASR 226, [8]–[16]. It appears that his Honour meant 'danger to the community' in the sense in which that phrase was used in *Chester v The Queen* (1988) 165 CLR 611. In that case, the High Court held that indefinite detention should be reserved for those cases where the exercise of the power to detain the person 'is demonstrably necessary to protect society from serious physical harm' because 'the convicted person is ... so likely to commit further crimes of violence (including sexual offences) that he constitutes a constant danger to the community': 618–9. See also *McGarry v The Queen* (2001) 207 CLR 121, 131: 'The material did not permit a court to conclude that, more probably than not, two years after sentencing there was a risk that the appellant would engage in conduct, the consequences of which could properly be called grave or serious for society, or a part of it' (emphasis added).
87. *Criminal Law Amendment Act 1945* (Qld) s 18(3)–(3A) and see *R v Waghorn* [1993] 1 Qd R 563.
88. *Buckley v The Queen* (2006) 224 ALR 416, 425–7; *McGarry v The Queen* (2001) 207 CLR 121, 130–1; *Green v The Queen* (2000) 133 NTR 1, 5–8, 13–4; *Murray v The Queen* (2006) 200 FLR 89, 98–9, 115.
89. *Carr v The Queen* (1995) 84 A Crim R 409, 416–7; *R v Moffatt* [1998] 2 VR 229, 247–8 (Hayne JA).
90. *R v England* (2004) 87 SASR 411, 429–30.

Procedure for imposing an indeterminate sentence

5.56 Indeterminate sentencing provisions in Queensland,⁹¹ Victoria and the Northern Territory provide the following procedural safeguards for defendants:

- the offender must be given notice that the prosecution intends to apply for, or that the court is considering an indeterminate sentence, and the court must adjourn for at least four weeks to allow the parties time to gather evidence;⁹²
- the court is required to hear evidence from both the prosecution and the defence, and the offender has a right to be present during the hearing of evidence;⁹³
- the rules of evidence apply, subject to limited exceptions;⁹⁴ and
- specific criteria are provided to which the court must have regard, in addition to any other matters it considers relevant, in determining whether or not to make an order for indeterminate detention.⁹⁵

5.57 In Queensland and Victoria, the court, before imposing an indeterminate sentence, must also consider whether the offender is

91. The following discussion refers to *Penalties and Sentences Act 1992* (Qld) pt 10. The indeterminate sentencing provisions of the *Criminal Law Amendment Act 1945* (Qld) are discussed below and are referred to as the 'sexual instincts provisions'.

92. *Sentencing Act 1995* (NT) s 66 (notify within 14 days of conviction; must adjourn for at least 28 days); *Sentencing Act 1991* (Vic) s 18C (notify within 5 working days of conviction; must adjourn for at least 25 working days); *Penalties and Sentences Act 1992* (Qld) ss 164(2), 166 (application must be made within 15 working days of conviction; must adjourn for at least 20 working days from date of conviction).

93. *Sentencing Act 1995* (NT) ss 68, 78; *Sentencing Act 1991* (Vic) ss 18F, 18P; *Penalties and Sentences Act 1992* (Qld) ss 167(1), 179. However, evidence may be heard in the absence of the offender if his or her conduct is so disruptive that it makes the hearing of the evidence impracticable, or if the offender is unable to attend because of illness or another reason and the court considers that it is in the interests of justice, and will not prejudice the offender's interests, to continue in the offender's absence.

94. *Sentencing Act 1995* (NT) s 68 (transcript and sentencing submissions also admissible to prove severity of offence); *Sentencing Act 1991* (Vic) s 18F (court must consider 'admissible evidence' as well as victim impact statement, pre-sentence report and sentencing submissions); *Penalties and Sentences Act 1992* (Qld) s 167(2)–(3) (any medical or other report tendered in, and transcript of other proceedings for violence offence also admissible).

95. *Sentencing Act 1995* (NT) s 65(8)–(9); *Sentencing Act 1991* (Vic) s 18B(1)–(2); *Penalties and Sentences Act 1992* (Qld) s 163(3)–(4).

eligible to be dealt with under the provisions applicable to mentally ill offenders and, if so, it must apply those provisions.⁹⁶

5.58 The indeterminate sentencing provisions in the other states, and the Queensland legislation for offenders incapable of controlling their ‘sexual instincts’, do not include all of these safeguards. None requires notice of the application, or an adjournment to allow the offender to prepare. A question arises in Western Australia as to whether the rules of evidence apply.⁹⁷

Psychiatric, psychological and other assessments

5.59 In every jurisdiction, the court must consider the reports of any psychiatric, psychological or other assessments or reports regarding the offender and the likelihood that he or she will re-offend.⁹⁸ In Queensland (sexual instincts provisions) and South Australia, the court is required to appoint at least two medical practitioners who must examine the offender to assess, and report to the court on whether he or she is incapable of controlling, or, in South Australia, unwilling to control, his or her sexual instincts.⁹⁹

Review and discharge of orders

Mandatory structured judicial review after expiry of nominal sentence

5.60 In Queensland¹⁰⁰ (dangerous offender provisions), Victoria and the Northern Territory, if a court imposes an indeterminate sentence it must identify the ‘nominal sentence’, being the determinate sentence that would otherwise have been imposed.¹⁰¹ In Queensland

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96. *Sentencing Act 1991* (Vic) s 18A(7) and see ss 18E, 90, 91; *Penalties and Sentences Act 1992* (Qld) s 163(3)(a) and see *Mental Health Act 2000* (Qld) ch 7 pt 6.
97. *Sentencing Act 1995* (WA) s 98(3)(b) provides that the court ‘may have regard to such evidence as it thinks fit’. But cf *McGarry v The Queen* (2001) 207 CLR 121, [125] where Callinan J (dissenting in result) interpreted the provision as meaning ‘such admissible evidence as it thinks fit’ (emphasis added). The majority did not consider the question, but see [30]–[31] (Gleeson CJ, Gaudron, McHugh, Gummow and HayneJJ), [62]–[67] (Kirby J).
98. *Sentencing Act 1991* (Vic) s 18B(2); *Penalties and Sentences Act 1992* (Qld) s 163(4); *Sentencing Act 1995* (NT) s 65(9)(c); *Sentencing Act 1995* (WA) s 98(2); *Sentencing Act 1997* (Tas) s 19(2); *Criminal Law Amendment Act 1945* (Qld) s 18(3)–(3A) and see *R v Waghorn* [1993] 1 Qd R 563; *Criminal Law (Sentencing) Act 1988* (SA) s 23(5).
99. *Criminal Law Amendment Act 1945* (Qld) s 18(1)(a); *Criminal Law (Sentencing) Act 1988* (SA) s 23(3)–(5).
100. *Penalties and Sentences Act 1992* (Qld).
101. *Sentencing Act 1995* (NT) s 65(5) (total sentence: *Murray v The Queen* (2006) 200 FLR 89); *Sentencing Act 1991* (Vic) s 18A(3)–(4) (non-parole period); *Penalties and Sentences Act 1992* (Qld) s 163 (apparently the total sentence: see *Buckley v The Queen* (2006) 224 ALR 416, [26]–[27]). In Queensland, a

and the Northern Territory, the Supreme Court must review the indeterminate sentence once the offender has served half the nominal sentence, and thereafter every two years or, if the court gives leave, on the application of the offender.¹⁰² In Victoria, the Supreme Court must review the sentence after the whole of the nominal sentence has been served, and thereafter at intervals of not less than three years on application by the offender.¹⁰³

5.61 On a review, the Supreme Court *must* discharge the indeterminate sentence unless it is satisfied to a high degree of probability in Victoria and in the Northern Territory, that the offender is still a ‘serious danger to the community’.¹⁰⁴ The Supreme Court may order a report about the offender, which must relate to the period since the previous review, from correctional services, other government departments and, in Victoria, from ‘any other person or body’.¹⁰⁵ The contents of the reports may be placed in issue by cross-examination and/or contrary evidence.¹⁰⁶ Other procedural safeguards, similar to those that apply to proceedings for imposition of an indeterminate sentence, also apply.¹⁰⁷

5.62 In Queensland and the Northern Territory the court must, on discharging an indeterminate sentence, impose a determinate sentence which must be no less than the nominal sentence, while in Victoria, the court must order that the offender be subject to a five-year reintegration program.¹⁰⁸ In each jurisdiction, an appeal lies

statutory nominal sentence of 15 or 20 years applies if the offender would otherwise have been sentenced to life imprisonment: s 171(1).

102. *Sentencing Act 1995* (NT) ss 72, 73; *Penalties and Sentences Act 1992* (Qld) ss 171, 172. ‘Special circumstances’ are required for the granting of leave.
103. *Sentencing Act 1991* (Vic) s 18H. The Director of Public Prosecutions must apply to the Supreme Court to initiate the first review: s 18H(2).
104. *Sentencing Act 1991* (Vic) s 18M; *Penalties and Sentences Act 1992* (Qld) s 173; *Sentencing Act 1995* (NT) s 74.
105. *Sentencing Act 1991* (Vic) s 18I (court may order person or agency to prepare and file report); *Penalties and Sentences Act 1992* (Qld) s 176 (court may order production of reports, which must relate to the period since the last review); *Sentencing Act 1995* (NT) s 76 (court may order production of reports, which must relate to the period since the last review).
106. *Sentencing Act 1991* (Vic) ss 18I, 18J, 18K; *Penalties and Sentences Act 1992* (Qld) ss 172A, 172B, 176(5); *Sentencing Act 1995* (NT) s 76(5).
107. *Sentencing Act 1991* (Vic) s 18P; *Penalties and Sentences Act 1992* (Qld) ss 172C, 179; *Sentencing Act 1995* (NT) s 78.
108. *Sentencing Act 1991* (Vic) s 18M; *Penalties and Sentences Act 1992* (Qld) s 173 (offender may apply for parole or a resettlement leave program: s 174); *Sentencing Act 1995* (NT) s 74 (offender may apply to *participate* in a five-year reintegration program: s 75).

against a decision by the Supreme Court to discharge, or not discharge an indeterminate sentence.¹⁰⁹

Judicial review on application by the offender or by the Director of Public Prosecutions

5.63 In Tasmania, an offender who has been declared a ‘dangerous criminal’ may apply to the Supreme Court for the declaration to be discharged when the non-parole period expires and thereafter at intervals of two years.¹¹⁰ For the purposes of the review, the court may order the Department of Corrective Services or any other person or body to prepare a report addressing the matters specified by the court, a copy of which must be provided to the offender and to the Director of Public Prosecutions.¹¹¹

5.64 The court must discharge the declaration if it is ‘satisfied that [the declaration] *is no longer warranted* for the protection of the public’.¹¹² If the declaration is discharged, the offender remains subject to any current sentence of imprisonment.¹¹³ Alternatively, ‘if the discharge would result in the immediate release of the applicant from custody, the court may order that the discharge is not to take effect for such time as it considers necessary for the purpose of enabling the applicant to undergo a pre-release program under the supervision of the Department of Corrective Services’.¹¹⁴

5.65 In South Australia, the Parole Board must review and report to the Minister for Correctional Services every six months on the ‘progress and circumstances’ of an offender who has been detained indefinitely due to incapacity or unwillingness to control his or her sexual instincts.¹¹⁵ The offender or the Director of Public Prosecutions may apply to the Supreme Court for the offender to be released on licence, or for the order to be discharged.¹¹⁶

5.66 On an application for discharge, the Supreme Court must obtain and consider the report of at least two medical practitioners who have independently examined the person, and may require the Parole Board or another person or body to provide a report, a copy of

109. *Sentencing Act 1991* (Vic) s 180; *Penalties and Sentences Act 1992* (Qld) ss 177–178; *Sentencing Act 1995* (NT) s 77.

110. *Sentencing Act 1997* (Tas) s 20.

111. *Sentencing Act 1997* (Tas) s 21(5).

112. *Sentencing Act 1997* (Tas) s 20(3) (emphasis added).

113. *Sentencing Act 1997* (Tas) ss 20(7), 19(3).

114. *Sentencing Act 1997* (Tas) s 21(10).

115. *Criminal Law (Sentencing) Act 1988* (SA) s 23(9)–(10). As to young offenders see s 23(9) and see *Young Offenders Act 1993* (SA) s 4 and pt 5 div 3.

116. *Criminal Law (Sentencing) Act 1988* (SA) ss 23(11), 24(1). The Director of Public Prosecutions may also apply for the order to be discharged: s 23(11).

which must be provided to the parties.¹¹⁷ The applicant must be afforded the opportunity to cross-examine on the material contained in such reports.¹¹⁸ The court cannot discharge the order unless, 'having taken into account both the interests of the person and of the community, it is of the opinion that the order for detention should be discharged'.¹¹⁹ The onus is on the applicant. The Director of Public Prosecutions is not required to establish that the offender remains incapable of controlling or unwilling to control his or her sexual instincts.¹²⁰

5.67 If an offender remains at liberty on licence for a continuous period of three years, the order is automatically discharged unless the court otherwise orders.¹²¹ An appeal lies to the Full Court of the Supreme Court against a decision on an application to discharge an order, to release the person on licence or to extend the three year licence period, within 10 days of the decision being made.¹²²

Review and discharge by the Executive

5.68 In Western Australia, the Prisoners Review Board must report to the Minister one year after the order for indeterminate detention commences,¹²³ every three years thereafter, and whenever the Minister requests a report or the Board considers that there are 'special circumstances' which justify making a report.¹²⁴ The Board's report must address the 'release considerations', specified by the legislation, namely:¹²⁵

- the degree of risk that the release of the prisoner would pose to the personal safety of the people in the community or of an individual;
- the circumstances and seriousness of an offence for which the offender is in custody;
- any remarks by the sentencing court; issues for any victim if the offender were to be released;

117. *Criminal Law (Sentencing) Act 1988* (SA) ss 23(12)(a), 25.

118. *Re O'Shea* (1997) 94 A Crim R 560, 567–9.

119. *Criminal Law (Sentencing) Act 1988* (SA) s 23(12)(b).

120. *Re O'Shea* (1997) 94 A Crim R 560, 563–6, 569.

121. *Criminal Law (Sentencing) Act 1988* (SA) ss 23(11), 24 (licence provisions).

122. *Criminal Law (Sentencing) Act 1988* (SA) s 27A.

123. See *Sentencing Act 1995* (WA) s 100 which provides that such sentence commences on the day when the offender would, but for the sentence, be eligible to be released from custody.

124. *Sentence Administration Act 2003* (WA) ss 12(2), 12A. As to the meaning of Minister, see s 12(6).

125. *Sentence Administration Act 2003* (WA) ss 5A, 12(3), 12A(3).

- the offender's behaviour in custody;
- whether and to what extent the offender has participated in programs while in custody;
- the offender's behaviour when subject to any previous release order; and
- the likelihood of compliance with a release order.

5.69 Protection of the community is the paramount consideration.¹²⁶ The Board may make recommendations as to the release of the offender on parole, the duration of parole and any conditions or requirements to which he or she should be subject if released.¹²⁷ The power to order the offender's release on parole is vested in the Governor¹²⁸ and not in the court.

5.70 Under the Queensland sexual instincts provisions, detention is at Her Majesty's pleasure.¹²⁹ An offender detained indeterminately due to incapacity to control his or her sexual instincts cannot be released until the Governor in Council 'is satisfied on the report of two medical practitioners that it is expedient to release the offender'.¹³⁰ If the offender has been detained not for incapacity to control sexual instincts but on the basis of 'subnormal' mental condition¹³¹, the criterion is whether the offender is 'fit to be at liberty'.¹³²

Examples of indeterminate sentencing—other jurisdictions

Canada—Dangerous offender declaration

5.71 The *Criminal Code 1985* (Can) provides for indeterminate sentences in the form of a 'dangerous offender' declaration.¹³³ An expert assessment must be conducted, and the report filed with the court, before the prosecution can apply for a declaration.¹³⁴

126. *Sentence Administration Act 2003* (WA) s 5B.

127. *Sentence Administration Act 2003* (WA) ss 12(4)–(5), 12A(4)–(5).

128. *Sentencing Act 1995* (WA) s 101; *Sentence Administration Act 2003* (WA) s 27. The Governor cannot make such an order unless the Prisoners Review Board has given a report on the prisoner to the Minister: *Sentence Administration Act 2003* (WA) s 27 and see ss 12, 12A (reports).

129. *Criminal Law Amendment Act 1945* (Qld) ss 18(3), (6)(a).

130. *Criminal Law Amendment Act 1945* (Qld) s 18(5)(b).

131. *Criminal Law Amendment Act 1945* (Qld) s 18(6).

132. *Criminal Law Amendment Act 1945* (Qld) s 18(6A)(b).

133. *Criminal Code*, RSC 1985, c. C-46, pt 24.

134. *Criminal Code*, RSC 1985, c. C-46, ss 753(1), 753.1(1). The court, on application by the prosecution or of its own initiative, may remand the person for up to 60 days for the purposes of an expert assessment if there are

5.72 If an offender is declared to be a 'dangerous offender' the court must order that 'a copy of all reports and testimony given by psychiatrists, psychologists, criminologists and other experts and any observations of the court with respect to the reasons for the finding, together with a transcript of the trial of the offender be forwarded to the Correctional Service of Canada for information'.¹³⁵

5.73 The 'dangerous offender' declaration is available if a person is convicted of a 'serious personal injury offence', the definition of which includes offences of a sexual nature and of a violent nature.¹³⁶ It is necessary to show that the offender has demonstrated the necessary degree of dangerous by reference to a pattern of persistent aggressive or repetitive or brutal behaviour. If the offence in respect of which a declaration is sought is one of a sexual nature, the court must be satisfied that:

the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.¹³⁷

5.74 If a 'dangerous offender' declaration is made, the court must impose a sentence of indeterminate detention.¹³⁸ This form of declaration is a step up from the 'long term offender' declaration previously mentioned.

5.75 The Supreme Court of Canada has held that general sentencing principles, including the principles of proportionality and parsimony, apply. Even where the statutory criteria for a 'dangerous offender' declaration are met, the court has a discretion not to make

reasonable grounds to believe that the person might be found to be a 'long-term' or 'dangerous offender': s 752.1.

135. *Criminal Code*, RSC 1985, c. C-46, s 760.

136. *Criminal Code*, RSC 1985, c. C-46, s 752 defines 'serious personal injury offence' as '(a) an indictable offence, other than high treason, first degree murder or second degree murder, involving (i) the use or attempted use of violence against another person, or (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person, and for which the offender may be sentenced to imprisonment for ten years or more, or (b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault)'. Offences listed in paragraph (b) are offences of a sexual nature, whereas offences listed in paragraph (a) are offences of a violent nature: s 753(1).

137. *Criminal Code*, RSC 1985, c. C-46, s 753(1)(b).

138. *Criminal Code*, RSC 1985, c. C-46, s 753(4).

the declaration. Indeterminate sentences are reserved for those cases where the protection of the public cannot be achieved by other means.¹³⁹

5.76 If a declaration is made, the offender becomes eligible for day parole once he or she has served four years, and for full parole after seven years.¹⁴⁰ The Parole Board must review the dangerous offender's case once he or she has served seven years in prison and at two-yearly intervals thereafter.¹⁴¹ If released on parole, the same standard and optional parole conditions apply as for long-term offenders.¹⁴² The Board may impose a requirement that the offender reside at a 'community-based residential facility' or in a 'psychiatric facility', if satisfied that, in the absence of such a condition, the offender will 'present an undue risk to society' by committing certain offences.¹⁴³

5.77 If a dangerous offender breaches a condition of parole, he or she may be recalled to custody.¹⁴⁴ If not re-released within 30 days, his or her case must be referred to the Parole Board for review.¹⁴⁵ The Board may re-release the offender (with or without modifying the parole conditions), or may terminate or revoke parole.¹⁴⁶ The Board may at any time terminate or revoke parole if it is satisfied that the continued parole of the offender 'would constitute an undue risk to society by reason of the offender re-offending'.¹⁴⁷ There does not appear to be any provision for discharge of the declaration.

England and Wales—Life imprisonment or imprisonment for public protection

5.78 In addition to the imposition of a disproportionate sentence, as discussed above, the court may, if a person is convicted of a 'specified offence, impose a sentence of either life imprisonment or

139. *R v Johnson* [2003] 2 SCR 357, [15]–[32].

140. *Corrections and Conditional Release Act*, SC 1992, c. 20, ss 119(1)(b), 120(1); *Criminal Code*, RSC 1985, c. C-46 s 761(1).

141. *Criminal Code*, RSC 1985, c. C-46 s 761(1).

142. *Corrections and Conditional Release Act*, SC 1992, c. 20, ss 133(2)–(6), 134; *Corrections and Conditional Release Regulations* SOR/92-620, reg 161(1).

143. *Corrections and Conditional Release Act*, SC 1992, c 20 ss 133(4), (4.1). The offences to which the provision refers are 'Schedule 1 offences' which include some sexual offences and other offences against the person, as well as other violent offences. It is not clear, on the face of the legislation, whether the Board could attach a similar condition to a long-term supervision order: cf s 133 (parole) with s 134.1 (long-term supervision).

144. *Corrections and Conditional Release Act*, SC 1992, c. 20, s 135(1).

145. *Corrections and Conditional Release Act*, SC 1992, c. 20, s 135(3)–(6) (referral to Board within 30 days)

146. *Corrections and Conditional Release Act*, SC 1992, c. 20, s 135(5)–(6).

147. *Corrections and Conditional Release Act*, SC 1992, c 20, s 135(7).

‘imprisonment for public protection’ (an IPP), both of which are indeterminate sentences.¹⁴⁸

5.79 If a person aged at least 18 is convicted of a ‘serious offence’ and the court is satisfied that the person poses a ‘significant risk’, the court has only two options: a sentence of life imprisonment or a sentence of ‘imprisonment for public protection’. A life sentence must be imposed if the offence is one to which a maximum penalty of life imprisonment applies and ‘the seriousness of the offence is such as to justify’ a life sentence.¹⁴⁹ For a life sentence to be warranted, it is essential that ‘the offence or offences are in themselves grave enough to require a very long sentence’.¹⁵⁰

5.80 If an offender has been assessed as dangerous and has been convicted of a sexual or violent trigger offence¹⁵¹ whose maximum sentence length is 10 years or more, he will receive either a sentence of imprisonment for public protection¹⁵² or a discretionary life sentence. In cases where the offender has been assessed as dangerous and has been convicted of a trigger offence carrying a maximum sentence of life imprisonment the court must consider the seriousness of the offence when deciding upon which of the two possible sentences to impose.¹⁵³

5.81 If an offender has been convicted of a serious offence and poses a ‘significant risk’, but the criteria for a life sentence are not met, the

148. *Criminal Justice Act 2003* (UK) pt 12 c 5; *Crime (Sentences) Act 1997* (UK) pt 2 c 2. *Criminal Justice Act 2003* (UK) s 225. Life sentences in this context are not natural life sentences but have the possibility of release on licence: see *Crime (Sentences) Act 1997* (UK) pt 2 c 2. Cf *Crimes Act 1900* (NSW) s 61JA(2).

149. *Criminal Justice Act 2003* (UK) s 225(1), (2). In assessing seriousness, the court must have regard to the offender’s culpability, and to the harm that was caused, intended to be caused or might foreseeably have been caused: s 143(1). The court is, in some circumstances, required to ‘treat each previous conviction as an aggravating factor’: s 143(2). See also ss 143(3), 145, 146. *Sexual Offences Act 2003* (UK) provides a maximum penalty of life imprisonment following conviction on indictment in respect of a number of offences, including rape (s 1), assault by penetration (s 2), causing a person to engage in sexual activity without consent (s 4), rape of a child under the age of 13 (s 5), assault of a child under the age of 13 by penetration (s 6) and causing or inciting a child under the age of 13 to engage in sexual activity (s 8).

150. *R v Chapman* [2000] 1 Cr App R 77, 83. The principles enunciated in *Chapman* apply to determining, for the purposes of *Criminal Justice Act 2003* (UK) s 225, whether a life sentence is justified: *R v Lang* [2006] 2 All ER 410, 415, 421.

151. *Criminal Justice Act 2003* (UK) sch 15.

152. *Criminal Justice Act 2003* (UK) s 225.

153. *Criminal Justice Act 2003* (UK) s 225(2).

court *must* impose a sentence of imprisonment for public protection ('IPP').¹⁵⁴

5.82 IPP sentences are administratively structured into three stages, with progressive reduction of restrictions as rehabilitation (in the sense of reduction of risk) is demonstrated to have occurred. The intention was that, with the provision of appropriate interventions, most offenders would not need to be imprisoned much beyond the minimum term.¹⁵⁵ As a consequence of these arrangements and of the mandatory provision in the relevant legislation, the courts have readily imposed sentences of IPP.

5.83 This is in contrast to the Australian jurisprudence where indeterminate sentences have been limited to exceptional cases. However, inadequate resources have stalled implementation of the intended administrative arrangements, leaving large numbers of IPP prisoners at the first, assessment stage of the sentence, where no rehabilitation opportunities are available.¹⁵⁶

5.84 Whether the court imposes a life sentence or an IPP it must set a minimum term, commensurate with the seriousness of the offence.¹⁵⁷ The minimum term can be relatively short.¹⁵⁸ At the end of the minimum term, the offender is entitled to a hearing before the Parole Board.¹⁵⁹ The Board has the power to release the offender on licence, if satisfied that 'it is no longer necessary for public protection that the prisoner should be confined'.¹⁶⁰

154. *Criminal Justice Act 2003* (UK) s 225(3).

155. *Wells v Parole Board and Secretary of State for Justice; Walker v Secretary of State for the Home Department* [2007] EWHC 1835, [20]–[26].

156. See *Wells v Parole Board and Secretary of State for Justice; Walker v Secretary of State for the Home Department* [2007] EWHC 1835, [28]–[30]; *Secretary of State for Justice v Walker; Secretary of State for Justice v James* [2008] EWCA Civ 30, [16]–[20].

157. *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 82A(2), (3). However, if the offender was at least 21 years of age at the time the offence was committed and the court is imposing a life sentence, it may decline to set a minimum period: s 82A(4). The court cannot decline to set a minimum period in relation to a sentence of imprisonment for public protection: s 82A (4A).

158. See comments in *R v Lang* [2006] 2 All ER 410, 413; *R v Considine; R v Davis* [2007] 3 All ER 621, 631.

159. *Crime (Sentences) Act 1997* (UK) s 28(7)(a) provides that the offender can require the Secretary of State to refer his or her case to the Parole Board. Such an entitlement also arises if it is at least two years since the last referral, or if the offender is serving a concurrent determinate sentence and half of it has been served: s 38(7)(b), (c).

160. *Crime (Sentences) Act 1997* (UK) s 28(5), (6)(b). The Secretary of State must give effect to that direction: subs (5).

5.85 If an offender serving a sentence of IPP is released on licence, the licence remains in force until the offender dies, unless the licence is sooner revoked (recalling the offender to prison) or terminated (releasing the offender unconditionally).¹⁶¹ The offender is required to comply with such conditions as may be specified in the licence, including a mandatory requirement that the offender accept supervision by a probation officer or social worker.¹⁶²

5.86 The Secretary of State may revoke an offender's licence if the Parole Board so recommends, or without a recommendation if it appears to be 'expedient in the public interest to recall that person before a recommendation is practicable'.¹⁶³ An IPP sentence may be discharged if, 10 years after the offender's release on licence, the Parole Board is satisfied that 'it is no longer necessary for the protection of the public that the licence should remain in force'.¹⁶⁴ Offenders serving a life sentence under this legislation remain on parole for the remainder of their lives.

Young offenders

5.87 Provisions for IPP sentences apply to young offenders, with minor modifications.¹⁶⁵ The rebuttable presumption that applies to adult offenders who have prior convictions for specified offences that a 'significant risk' exists, does not apply.¹⁶⁶ Additionally, discretionary

161. *Crime (Sentences) Act 1997* (UK) s 31(1), (1A).

162. *Crime (Sentences) Act 1997* (UK) s 31(2), (2A). Subs (3) provides that '[t]he Secretary of State shall not include on *release*, or subsequently insert, a condition in the licence ... or vary or cancel any such condition, except in accordance with recommendations of the Parole Board'.

163. *Crime (Sentences) Act 1997* (UK) s 32. The offender is entitled to reasons for the revocation, and to make written representations regarding the revocation. The Secretary of State must *refer* to the Parole Board any offender who makes a written representation or who is recalled to prison by the Secretary of State without a recommendation by the Board. The Board may, on such a review, direct the offender's immediate release on licence, and the Secretary of State must give effect to that direction.

164. *Crime (Sentences) Act 1997* (UK) s 31A.

165. *Criminal Justice Act 2003* (UK) s 226 (adult equivalent: s 225) provides that if a court is sentencing a person under 18 years of age who has been convicted of a serious offence, in respect of whom there is a 'significant risk to members of the public of serious harm occasioned by the commission [by the young person] of further specified offences', but whose offence is not so serious as to justify life imprisonment, the court may impose an extended sentence or a sentence of IPP. Section 226(3) requires the court to first consider whether an extended sentence is adequate to protect the public from serious harm. If not, the court must order IPP. In contrast, the adult provision does not have the option of an extended sentence: see s 225(3). See also s 228 (adult equivalent: s 227).

166. *Criminal Justice Act 2003* (UK) s 229(2).

life sentences apply to young people who commit serious crimes, including some sexual offences.¹⁶⁷

Scotland—Order for lifelong restriction

5.88 An indeterminate sentence, called an ‘order for lifelong restriction’, is available if the High Court is sentencing a person convicted of certain categories of offences, including ‘sexual offences’,¹⁶⁸ or if a person is convicted of ‘an offence the nature of which, or circumstances of the commission of which, are such that it appears to the court that the person has a propensity to commit’ any offence falling within the defined categories.¹⁶⁹

5.89 The order for lifelong restriction is based on the recommendations of the *Report of the Committee on Serious Violent and Sexual Offenders* (2000). It reflects a risk management approach to sentencing, in contrast to the traditional punitive model.¹⁷⁰ The scheme has four features of particular note, namely:

- (i) a formal, structured mechanism for assessing the risks posed by an individual offender;
- (ii) mandatory comprehensive risk management planning at the commencement of the sentence;
- (iii) a mechanism for coordinating the responses of multiple agencies, both in custody and in the community, to manage the identified risks throughout the offender’s sentence; and
- (iv) oversight and enforceability of that mechanism.

5.90 The *Criminal Procedure (Scotland) Act 1995* (UK) provides the following ‘risk criteria’:

[T]he risk criteria are that the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he [or she], if at liberty, will seriously endanger the lives, or

167. *Powers of Criminal Courts (Sentencing) Act 2000* (UK) ss 91, 93, 94. The range of offences to which the provisions apply is defined by reference to the maximum penalty. For penalties applicable to sexual offences, see *Sexual Offences Act 2003* (UK).

168. *Criminal Procedure (Scotland) Act 1995* (UK) ss 210A(10), 210B(1)(a). Most of the listed ‘sexual offences’ are against children but some sexual offences against adults, such as rape and indecent assault, are also included.

169. *Criminal Procedure (Scotland) Act 1995* (UK) ss 210B(1)(b), 210F(2).

170. Scottish Executive, Parliament of Scotland, ‘Report of the Committee on Serious Violent and Sexual Offenders’ (Report SE/2000/68, MacLean Committee on Serious Violent and Sexual Offenders, 2000).

physical or psychological well-being, of members of the public at large.¹⁷¹

5.91 If the court considers that the risk criteria may be met, it must order a 'risk assessment report', as to 'the risk [the offender's] being at liberty presents to the safety of the public at large', which is prepared by an accredited assessor.¹⁷² The offender is entitled to have an independent risk assessment conducted, and to challenge the contents or findings of the court-appointed assessor's report.¹⁷³

5.92 The court must determine whether the risk criteria are established, having regard to the risk assessment report(s), any contrary evidence and any other information before the court. The standard of proof is on the balance of probabilities.¹⁷⁴ The court must make an order for lifelong restriction if the risk criteria are established, unless the court orders that the offender be detained in a hospital for treatment of a 'mental disorder'.¹⁷⁵

5.93 A Risk Management Plan is mandatory in respect of an offender who is subject to an order for lifelong restriction.¹⁷⁶ The plan must be prepared within nine months of the offender being sentenced or detained¹⁷⁷ and must set out the risk assessment, measures to minimise that risk and how the implementation of those measures by the relevant agencies is to be coordinated.¹⁷⁸

5.94 The *Criminal Justice (Scotland) Act 2003* (UK) establishes a Risk Management Authority which is responsible for overseeing the implementation of risk management plans for high-risk offenders who

171. *Criminal Procedure (Scotland) Act 1995* (UK) s 210E.

172. *Criminal Procedure (Scotland) Act 1995* (UK) ss 210B, 210C(3), 210D. The report must be prepared in accordance with the standards and guidelines developed by the Risk Management Authority (see below). The offender may be remanded in custody or detained in a hospital (if the offender has a 'mental disorder' that requires treatment: see s 53) for the purpose of preparing the report. The report must be prepared in accordance with the standards and guidelines developed by the Risk Management Authority.

173. *Criminal Procedure (Scotland) Act 1995* (UK) s 210C(5), (7).

174. *Criminal Procedure (Scotland) Act 1995* (UK) s 210F(1).

175. *Criminal Procedure (Scotland) Act 1995* (UK) ss 57A, 210F(1).

176. *Criminal Procedure (Scotland) Act 1995* (UK) s 210F. See below.

177. *Criminal Justice (Scotland) Act 2003* (UK) s 8(1). The plan is prepared by the 'lead authority', which is the Scottish Ministers if the offender is detained in a prison or young offenders institution, or by the hospital managers if the offender is detained in a hospital: s 7. The lead authority must consult with 'any person on whom ... the lead authority is considering conferring functions, and such other persons as it considers appropriate: s 8(2).

178. *Criminal Justice (Scotland) Act 2003* (UK) s 6(3). It must be in the form specified by the Risk Management Authority.

are subject to an 'order for lifelong restriction'.¹⁷⁹ Once the plan has been approved by the Risk Management Authority, the lead authority and other persons on whom functions have been conferred by the plan have a duty to implement it.¹⁸⁰ The lead authority must report annually to the Risk Management Authority on implementation and must review and amend the plan if there is, or is likely to be, a significant change in the offender's circumstances such that the existing plan is, or is likely to become, unsuitable.¹⁸¹ In some circumstances, for example on transition from custody to the community, a different lead authority becomes responsible for developing the amended plan.¹⁸²

New Zealand

5.95 In New Zealand, the High Court¹⁸³ can impose an indeterminate sentence if an adult is found guilty of a 'qualifying sexual or violent offence' and the Court is 'satisfied' that the person is 'likely' to commit another such offence if released at the end of a determinate sentence.¹⁸⁴ This has been interpreted as requiring the

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179. *Criminal Justice (Scotland) Act 2003* (UK) ss 3–5, 6(5)–(6), 8, 9(2), 9(4). The risk management plan must be approved by the Risk Management Authority prior to implementation: s 8(4). In some circumstances the Authority may give a mandatory direction to the lead authority regarding the preparation of a revised plan: s 8(6). The Authority may reject a plan if it is not in the correct form, does not cover all of the required information or is not formulated in accordance with the guidelines or standards. Other duties of the Risk Management Authority include developing policy, standards and guidelines for risk assessment and risk minimisation: *Criminal Justice (Scotland) Act 2003* (UK) ss 3–5, 6(5)–(6). The Act also provides for a scheme for accreditation in risk assessment and risk minimisation, to be implemented by the Risk Management Authority: s 11.
180. *Criminal Justice (Scotland) Act 2003* (UK) s 9(1). If the lead authority or a person fails, without reasonable excuse, to implement the plan, the Risk Management Authority may give directions regarding the implementation of the plan. The person or lead authority must comply with those directions: s 9(2).
181. *Criminal Justice (Scotland) Act 2003* (UK) s 9(4)–(6).
182. *Criminal Justice (Scotland) Act 2003* (UK) s 9(6)(b); and see Risk Management Authority (Scotland), Standards and Guidelines: Risk Management of Offenders Subject to an Order for Lifelong Restriction (2007), 12.
183. If the person is convicted in the District Court and it appears that a sentence of preventive detention may be appropriate, the District Court may decline jurisdiction over the offender, with the result that his or her case is referred to the High Court: *Summary Proceedings Act 1957* (NZ) s 44, *District Courts Act 1947* (NZ) s 28G, *Sentencing Act 2002* (NZ) s 90. As to the hierarchy of courts in New Zealand, see <www.justice.govt.nz/courts/hierarchy.html> at 10 December 2008.
184. *Sentencing Act 2002* (NZ) ss 87(2), (3) and ss 87–90 generally. The Act refers to indeterminate sentences as comprising life sentences and sentences of preventive detention: *Sentencing Act 2002* (NZ) s 4(1). 'Qualifying sexual or

Court to be satisfied of a 'significant, ongoing risk of serious harm'.¹⁸⁵ The offender must be notified that such a sentence is under consideration and be afforded 'sufficient time' to prepare submissions.¹⁸⁶ The Court must receive and consider reports from at least two 'health assessors'¹⁸⁷ about the likelihood of the offender committing a further qualifying sexual or violent offence.¹⁸⁸ The provisions apply only to offences committed when the offender was 18 years of age or over.¹⁸⁹

5.96 The New Zealand Court of Appeal has emphasised that, although indeterminate sentencing is aimed at protecting the community,¹⁹⁰ it is still a sentencing exercise. Consequently, the offender's level of culpability, the nature and extent of harm caused and the level of criminality must be considered. Proportionality remains a relevant consideration in that lower level offending, even if it is repeated, should not ordinarily attract the most severe sentence that can be imposed.¹⁹¹

violent offences' include certain sexual offences punishable by seven or more years' imprisonment and some other offences: see *Sentencing Act 2002* (NZ) s 87(5). As to the meaning of 'satisfied' see *R v Leitch* [1998] 1 NZLR 420, 428. The provisions apply only when the court is sentencing an offender for offences committed when he or she was at least 18 years of age: *Sentencing Act 2002* (NZ) s 87(2)(b). However, the court is not prohibited from taking into account earlier offences when determining the likelihood of reoffending: see s 87(4)(a), (c).

185. *R v Parahi* [2005] 3 NZLR 356, [85].

186. *Sentencing Act 2002* (NZ) s 88(1). See also *New Zealand Bill of Rights Act 1990* (NZ) s 25.

187. *Sentencing Act 2002* (NZ) s 4(1) defines 'health assessor' to mean a psychiatrist, psychologist or a specialist assessor under the *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003* (NZ).

188. *Sentencing Act 2002* (NZ) s 88(1)(b). Additionally, the court's power to order an assessment under the *Criminal Procedure (Mentally Impaired Persons) Act 2003* (NZ) is preserved: s 88(2); and see *Criminal Procedure (Mentally Impaired Persons) Act 2003* (NZ) s 38. The court may order such an assessment (also by a health assessor) on the application of the prosecution or defence or on its own initiative, to determine a range of matters including 'the type and length of sentence that might be imposed on the person' and/or 'the nature of a requirement that the court may impose on the person as part of, or as a condition of, a sentence or order'.

189. *Sentencing Act 2002* (NZ) s 87(2)(b).

190. *Sentencing Act 2002* (NZ) s 87(1).

191. *R v Parahi* [2005] 3 NZLR 356, [78]–[82] and see [69]–[74], [86]–[87] (low level offending). However, an indeterminate sentence of 'preventive detention' is not a sentence of last resort: *R v C* [2003] 1 NZLR 30, 34. For a case where an indeterminate sentence was imposed in respect of low-level offending, see *R v Dean* [2005] 2 NZLR 323; special leave to appeal refused: [2005] NZSC 15.

5.97 The *Sentencing Act 2002* (NZ) expressly requires the court, in deciding whether or not to impose an indeterminate sentence to take into account:

- any pattern of serious offending disclosed by the offender’s history;
- the seriousness of the harm to the community caused by the offending;
- ‘information’¹⁹² indicating a tendency to commit serious offences in future;
- the absence of, or failure of, efforts by the offender to address the cause or causes of the offending; and
- ‘the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society’.¹⁹³

5.98 In a finely balanced case, the court should have regard to the possibility that, if the offender continues to pose a risk of reoffending on release, a post-sentence ‘extended supervision order’ (below) can be sought at that time.¹⁹⁴

5.99 If the court orders an indeterminate sentence, it must set a ‘minimum term’ of at least five years.¹⁹⁵ The offender may be released on parole after the minimum term has been served.¹⁹⁶ While the offender remains in prison, the Parole Board must review his or her case every 12 months, unless the Board orders that reviews are required only every three years.¹⁹⁷ If the offender is released on parole,

192. The Sentencing Council is not aware of any decision regarding the effect on the rules of evidence of the word ‘information’ in s 87(4)(c) of the *Sentencing Act 2002* (NZ).

193. *Sentencing Act 2002* (NZ) s 87(4). The latter principle reflects the requirements of the *New Zealand Bill of Rights Act 1990* (NZ) s 25(g). The Sentencing Council is not aware of any decision regarding the effect on the rules of evidence of the word ‘information’ in s 87(4)(c) of the *Sentencing Act 2002* (NZ).

194. *R v Parahi* [2005] 3 NZLR 356, [25]–[34], [87]. Nevertheless, if indeterminate detention is called for in the circumstances of the case, it should be imposed at the time of sentencing: [59]–[60].

195. *Sentencing Act 2002* (NZ) s 89(1). The minimum term must be the longer of (a) the minimum period required to reflect the gravity of the offence or (b) the minimum period required for the purposes of ensuring the safety of the community, having regard to the offender’s age and the risk posed by the offender at the time of sentencing: s 89(2).

196. *Parole Act 2002* (NZ) ss 20, 84(2).

197. *Parole Act 2002* (NZ) ss 21, 27. The Board can make a ‘postponement order’ if ‘satisfied that, in the absence of a significant change in the offender’s

the parole conditions and the possibility of recall to prison apply for life.¹⁹⁸ There is no provision for discharge of the order.¹⁹⁹

circumstances, an offender will not be suitable for release at the time when he or she is next due to be considered for parole’.

198. *Parole Act 2002* (NZ) ss 6(4)(d), 29(3)(b). As to parole conditions see ss 14–16, 29.

199. The provisions of the *Parole Act 2002* (NZ) regarding discharge from parole conditions (ss 56, 58) do not apply to offenders serving an indeterminate sentence: s 31. However, the Royal prerogative of mercy is preserved: *Sentencing Act 2002* (NZ) s 144.

6. Sex offender treatment programs in New South Wales

INTRODUCTION

6.1 In this chapter the Council reviews the extent and nature of sex offender programs currently available within the adult and juvenile correctional systems of New South Wales. Their availability and effectiveness are important considerations so far as the objective and possibility (or lack thereof) of rehabilitation underpins the justification for preventive detention.

6.2 For the purpose of the sex offender programs currently available in correctional facilities in New South Wales, the Department of Corrective Services (DCS) defines a sex offender as any convicted offender:

- whose current offences include one of sexual violence, or
- whose history of offences includes a conviction for sexual violence, or
- whose offences are determined to have a sexual motivation.¹

PART A: TREATMENT PROGRAMS IN CUSTODY

6.3 DCS² has advised that its Sex Offender programs do not operate in isolation from other programs offered in custody. They comprise the following components:³

Assessment

6.4 Psychologists throughout the State conduct assessments to assist in determining treatment pathways for sex offenders as well as pre sentence and pre release assessments.

Preparatory program / pre-treatment programs

6.5 The PREP program is aimed at increasing offender motivation and reducing resistance towards treatment. It is run in an open ended

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1. Offender Programs Unit, NSW Department of Corrective Services, *Sex Offender Programs* (2005) <http://www.dcs.nsw.gov.au/offender_management/offender_services_and_programs/strategic%20summary%20sex%20offender%20program%20nov%202005.pdf> at 28 November 2008.
 2. Submission 22: NSW Department of Corrective Services, Supplementary Submission, 5.
 3. Submission 22: NSW Department of Corrective Services, Supplementary Submission.

group format with 1–2 sessions per week, generally for 12 to 14 sessions.⁴ Currently, PREP has a waitlist of 120 people.⁵

Understanding Sexual Offending (USO) pre-treatment educational program

6.6 USO is an eight session psycho-educational program that ‘aims to challenge denial and minimisation about sexual offending and to increase offender’s readiness to participate in treatment’.⁶ Throughout 2006/07, 48 sex offenders were referred to, and completed the program at the Metropolitan Special Programs Centre.⁷

The CUBIT Outreach (CORE) Program

6.7 CORE is a moderate intensity treatment program that caters for low to low-moderate risk sex offenders and targets the ‘core issues common to sex offenders’.⁸ It requires offenders to take responsibility for their offence, to identify their offending cycle and to examine victim issues. It is undertaken in conjunction with regular institutional activities, such as education and work release,⁹ and operates under a non-residential group therapy model over ten months (one half day a week) or five months (two half days per week). Offenders who successfully complete the CORE program then move on to the custodial maintenance program. CORE has a current waiting list of 98 people.¹⁰

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4. Submission 22: NSW Department of Corrective Services, Supplementary Submission; General Purpose Standing Committee No 3, ‘Budget Estimates 2004–2005’ (Report No 15, New South Wales Legislative Council, 2005).
 5. Ware, J. ‘Sex Offender Programs: NSW Department of Corrective Services’ (Paper presented at the New South Wales Sentencing Council, Sydney, 4 June 2008).
 6. Ware, J. ‘Sex Offender Programs: NSW Department of Corrective Services’ (Paper presented at the New South Wales Sentencing Council, Sydney, 4 June 2008).
 7. NSW Department of Corrective Services, ‘Department of Corrective Services Annual Report 2006/07’ (NSW Department of Corrective Services, 2007), 31.
 8. Offender Programs Unit, NSW Department of Corrective Services, *Sex Offender Programs* (2005) <http://www.dcs.nsw.gov.au/offender_management/offender_services_and_programs/strategic%20summary%20sex%20offender%20program%20nov%202005.pdf> at 28 November 2008.
 9. Ware, J. ‘Sex Offender Programs: NSW Department of Corrective Services’ (Paper presented at the New South Wales Sentencing Council, Sydney, 4 June 2008).
 10. Ware, J. ‘Sex Offender Programs: NSW Department of Corrective Services’ (Paper presented at the New South Wales Sentencing Council, Sydney, 4 June 2008).

Custody Based Intensive Treatment Program (CUBIT)

6.8 CUBIT is a residential therapy treatment program designed to reduce sexual recidivism for male offenders who have sexually abused adults and/or children. It is offered towards the end of an offender's sentence.¹¹ Participation in the program is voluntary, although to be eligible for CUBIT, offenders need to be serving a sentence for a convicted sexual offence, have a previous conviction for a sexual offence, or have a current or prior conviction for a non-sexual offence where the underlying motivation is deemed to have been sexual.¹²

6.9 CUBIT is based at the Metropolitan Special Program Centre (MSPC) at Long Bay Correctional Centre and accommodates up to forty moderate to high risk offenders and operates within an open group therapy model using cognitive-behavioural (CBT) methods. The program runs for between 7–10 months, depending on the offender's risk level and treatment progress.

6.10 Currently an offender must be on 'C' classification to be eligible for CUBIT. With the expansion of sex offender treatment programs in Parklea and Cessnock, programs will be available for maximum security offenders (A+ and B+ classifications). Offenders held in rural prisons, for example Junee, need to be transferred to the metropolitan area to participate. Prisoners on protection have some capacity to participate, albeit with limitations.

6.11 From January 1999 to August 2005, CUBIT operated with closed format groups. An open-group format was introduced in September 2005¹³ to combat high attrition rates and to improve participant retention and outcomes. The open group format allows for greater flexibility, as participants can enter and leave at different times and it can cater for those who take different periods to complete the program. Currently, the program is delivered to groups of ten offenders (up to 40 offenders in total) with two psychologists acting as facilitators.¹⁴

11. Ware, J. 'Sex Offender Programs: NSW Department of Corrective Services' (Paper presented at the New South Wales Sentencing Council, Sydney, 4 June 2008).

12. Ware, J. and Bright, D., 'Evolution of a Treatment Programme for Sex Offenders: Changes to the NSW Custody Based Intensive Treatment (CUBIT)' (2008) 15(2) *Psychiatry, Psychology and Law* 340.

13. Ware, J. and Bright, D., 'Reducing Treatment Attrition: Recent Changes to the NSW Custody-Based Intensive Treatment Program for Sex Offenders' (NSW Department of Corrective Services, University of New South Wales, 2008) attachment to Submission 20: NSW Department of Corrective Services.

14. Ware, J. and Bright, D., 'Evolution of a Treatment Programme for Sex Offenders: Changes to the NSW Custody Based Intensive Treatment (CUBIT)' (2008) 15(2) *Psychiatry, Psychology and Law* 340.

6.12 The program requires inmates ‘to take responsibility for their offending behaviour; identify their offending cycle; examine victim issues; and develop a relapse-prevention plan’.¹⁵ The Department has advised that successful completion of CUBIT requires successful achievement of therapeutic goals, or at least achievement of sufficient goals to permit further meaningful development during maintenance programs.

6.13 Offenders who have successfully completed CUBIT are then moved on to a custodial maintenance program which ‘focuses on relapse prevention issues and reinforces the gains made in more intensive treatment programs’.¹⁶

6.14 DCS has advised that offering CUBIT towards the end of an offender’s sentence allows issues such as readiness, motivation, mental health and AOD issues to be dealt with.¹⁷ In particular it:

- avoids potential erosion of treatment gains;
- enhances the transition from therapeutic community to the community;
- allows readiness issues such as literacy and mental illness to be dealt with first;
- allows for the fact that appeals against conviction are finalised in the earlier stages of the sentence; and
- facilitates preparation for release through rehearsals for release and development and strengthening of family support networks.

6.15 DCS has also advised¹⁸ that it had previously provided a maintenance/treatment program at Goulburn Correctional Centre. The program was specially developed for a small group of high-risk sex offenders who had been discharged from CUBIT and were not eligible or suitable to return to complete the program. As described in

15. Offender Programs Unit, NSW Department of Corrective Services, *Sex Offender Programs* (2005) <http://www.dcs.nsw.gov.au/offender_management/offender_services_and_programs/strategic%20summary%20sex%20offender%20program%20nov%202005.pdf> at 28 November 2008.

16. Offender Programs Unit, NSW Department of Corrective Services, *Sex Offender Programs* (2005) <http://www.dcs.nsw.gov.au/offender_management/offender_services_and_programs/strategic%20summary%20sex%20offender%20program%20nov%202005.pdf> at 28 November 2008; *AG (NSW) v Tillman* [2007] NSWSC 605, [120].

17. Submission 22: NSW Department of Corrective Services, Supplementary Submission, 5.

18. Submission 22: NSW Department of Corrective Services, Supplementary Submission, 9.

Wilde,¹⁹ the Goulburn program featured individual sessions with psychologists.

6.16 The modified program has now ceased however the Council understands that there is the possibility, if necessary, for further individualised adjustment to CUBIT for certain high-risk offenders, including some individual sessions and same-sex offending groups.

Effectiveness of CUBIT

6.17 DCS has advised that the CUBIT program was developed in 2000 with the assistance of a Canadian expert—Dr Franca Cortini. In 2005 it was accredited through the Department's Program Accreditation Strategic Framework (2003) as meeting internationally developed best practice principles. CUBIT practice and the manual that underpins it continue to be revised in line with current empirical research and through annual training strategies developed by Canadian expert Professor Bill Marshall.²⁰

6.18 In a recent outcome study,²¹ the effectiveness of CUBIT in reducing sexual recidivism (defined as re-incarceration rather than re-conviction) was determined using a risk-band analysis²² on a sample of 104 treated and released sex offenders who had been in the community for an average of 3.36 years. Results of this study showed that while the expected sexual recidivism rate as predicted by Static-99 was 26%, the actual observed rate was much lower at 6%.

6.19 The study is consistent with earlier research that found that CUBIT significantly reduces the dynamic risk factors associated with sexual reoffending. That research had shown that men who completed the program were found to have an increased use of effective coping

19. *New South Wales v Wilde* [2008] NSWSC 1211, [16].

20. Professor Marshall is Emeritus Professor of Psychology and Psychiatry and an Associate Professor in Urology at Queen's University in Ontario, Canada, and is the Director of Rockwood Psychological Services which provides the Sexual Offender Programs at Bath Institution (a medium security federal penitentiary). Professor Marshall has been instrumental in establishing several prison and community treatment programs for sex offenders in Canada and a number of other countries. He has received the Lifetime Achievement Award of the Association for the Treatment of Sexual Offenders and was the 1999 recipient of the Santiago Grisolia Prize for his worldwide contributions to the reduction of violence. In 2000 he was elected a Fellow of the Royal Society of Canada.

21. Bright, D. et al, 'Treatment Outcome: Risk Band Analysis of Custody Based Sex Offender Programs in NSW' (Paper presented at the ANZATSA Conference, Gold Coast, 31 October 2006).

22. A risk band analysis is a technique whereby observed or actual recidivism rates are compared with rates of recidivism predicted by validated risk assessment tools. The advantage of this technique is that comparison can be done retrospectively without the need for a comparison group.

strategies²³, to have less cognitive distortions that support sexual offending²⁴, and to have an improved ability to form close, meaningful personal relationships and friendships.²⁵ A widely cited meta-analysis study involving more than 9000 offenders placed CUBIT on par with other well-regarded international sex offender treatment programs in reducing sexual recidivism.²⁶

Custodial maintenance groups

6.20 These groups are conducted for CUBIT and CORE graduates and are aimed at retaining and re-enforcing treatment outcomes. They include:

Categorical Deniers program

6.21 Categorical Deniers is a specialist treatment program currently being developed by DCS for sex offenders who categorically deny their offence and refuse to participate in sex offender treatment programs. Deniers fall into two main categories: those who are in fact innocent and those who committed the offences but claim that they did not do it or that the act was consensual or not wrongful.

6.22 For the first group there is little point in participation in a program, yet as they stand convicted, unless they do become involved they risk having their release delayed. For the second group there can be benefit, and it is important that a strategy has been developed to deal with them.

6.23 Categorical deniers are generally excluded from standard treatment programs because their denial of responsibility is seen to impede treatment progress.²⁷ This is the case even though denial and minimization of offending have not been reliably linked to sexual

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- 23. Feelgood, S. et al, 'Treatment Changes in the Dynamic Risk Factor of Coping Style in Sexual Offenders' (Paper presented at the APS Forensic Conference, Sydney, 7–11 February 2001).
 - 24. Mamone, N. et al, 'A Preliminary Evaluation of the Impact of an Intensive Treatment Programme on the Cognitive Distortions of Sexual Offenders' (Paper presented at the ANZATSA Biennial International Conference, Sydney, 4–6 April 2002).
 - 25. Kaw, A. et al (2001) 'Self-reported Changes in Intimacy and Loneliness Scores of Treated Sexual Offenders with respect to Their Attachment Style: An Update' (Paper presented at the 1st Forensic Psychology Conference, Sydney, 7–11 February 2001), cited in Submission 20: NSW Department of Corrective Services, 7.
 - 26. Hanson, K. et al, 'First Report on the Collaborative Outcome Data Project on the Effectiveness of Psychological Treatment for Sex Offenders' (2002) 14 *Sexual Abuse: A Journal of Research and Treatment* 194.
 - 27. Ware, J., 'Treating a Sexual Offender Who Categorically Denies Committing the Offence' (Paper presented at the Victorian Offender Treatment Organisation Conference, Sydney, 29 November 2007).

recidivism.²⁸ If they do participate in conventional treatment, these offenders are often discharged before completion due to poor performance. They also face delayed release prospects, potentially resulting in longer terms of incarceration,²⁹ due to the belief that they have failed to address their offending behaviour.

6.24 The proposed program is an adaptation of conventional sex offender treatment programs. Rather than requiring a person to admit guilt, it focuses on the problem in terms of behaviours, attitudes, thoughts and feelings that led the offender to be in a position where he could be accused of an offence.

6.25 The Categorical Deniers program seeks to develop similar insights and skills to those addressed by conventional sex offender programs. The goal of treatment is to help the offender prevent any further 'allegations' although by doing so, it also relevantly addresses the underlying criminogenic needs and risk factors associated with sexual offending.³⁰

6.26 On the whole, few programs exist to treat sex offenders who deny their offences and there is limited evidence on the effectiveness of these treatments.³¹ A 2007 evaluation of the Deniers program in Canada has however, shown promising results, with only 2% of a sample of 58 participants released into the community for an average of 3.3 years, having recidivated.³²

6.27 DCS has recently advised that while planning for the program is underway, its implementation is dependent on resources being available.³³

28. Hanson, R. and Bussiere, M., 'Predicting Relapse: a Meta-Analysis of Sexual Offender Recidivism Studies' (1998) 66 *Journal of Consulting and Clinical Psychology* 348.

29. Ware, J., 'Treating a Sexual Offender Who Categorically Denies Committing the Offence' (Paper presented at the Victorian Offender Treatment Organisation Conference, Sydney, 29 November 2007).

30. Ware, J., 'Treating a Sexual Offender Who Categorically Denies Committing the Offence' (Paper presented at the Victorian Offender Treatment Organisation Conference, Sydney, 29 November 2007).

31. Ware, J., 'Treating a Sexual Offender Who Categorically Denies Committing the Offence' (Paper presented at the Victorian Offender Treatment Organisation Conference, Sydney, 29 November 2007).

32. Ware, J., 'Treating a Sexual Offender Who Categorically Denies Committing the Offence' (Paper presented at the Victorian Offender Treatment Organisation Conference, Sydney, 29 November 2007).

33. Submission 22: NSW Department of Corrective Services, Supplementary Submission, 9.

PART B: POST CUSTODY MAINTENANCE PROGRAMS IN THE COMMUNITY

6.28 The post-custodial maintenance program aims to ease the transition of treated moderate to high-risk sex offenders from the prison to the community.³⁴ Attendance at group is generally a condition of parole.³⁵ These programs are based on CORE.³⁶ An integral part is their multidisciplinary approach in which psychologists and probation and parole officers work together to supervise the offender.³⁷ The programs aim to maintain treatment gains as well as to assist offenders to implement relapse prevention strategies in a community context.³⁸

6.29 Treatment groups for low risk sex offenders on parole or probation are offered through Forensic Psychology Services (FPS)—City branch. The group program runs for approximately one year with offenders attending one group per week. There are 4 treatment programs (groups) operating at any one time—three are run weekly at FPS at its Sydney office and one is run at the Wollongong Probation and Parole office. Additionally, the two Regional Supervisor Sex Offender positions provide individual follow up for offenders on parole in the north and west of the State. The FPS provides a consultancy service to Probation and Parole Officers.

PART C: MEDICAL INTERVENTION (CHEMICAL CASTRATION)

6.30 Chemical castration is a treatment approach that aims to reduce sexual desire and aggression in high-risk sex offenders through the use of antiandrogen drugs which serve to reduce testosterone levels. There are two licensed drugs that perform this purpose,³⁹ and that are used

34. Ware, J. and Bright, D., 'Reducing Treatment Attrition: Recent Changes to the NSW Custody-Based Intensive Treatment Program for Sex Offenders' (NSW Department of Corrective Services, University of New South Wales, 2008) attachment to Submission 20: NSW Department of Corrective Services.

35. Submission 22: NSW Department of Corrective Services, Supplementary Submission, 8.

36. General Purpose Standing Committee No 3, 'Budget Estimates 2004–2005' (Report No 15, New South Wales Legislative Council, 2005).

37. General Purpose Standing Committee No 3, 'Budget Estimates 2004–2005' (Report No 15, New South Wales Legislative Council, 2005).

38. Offender Programs Unit, NSW Department of Corrective Services, *Sex Offender Programs* (2005) <http://www.dcs.nsw.gov.au/offender_management/offender_services_and_programs/strategic%20summary%20sex%20offender%20program%20nov%202005.pdf> at 28 November 2008.

39. Medroxyprogesterone acetate (MPA) is used in the United States and is a drug that suppresses the production of testosterone. It is commonly used by women as

in several countries including the United Kingdom and the United States. Queensland has also recently introduced voluntary chemical castration for sex offenders.⁴⁰

6.31 Arguments in favour of the use of these drugs rest on the assumption that the reduction of testosterone levels will increase the effectiveness of psychological treatment used in conjunction with them⁴¹, and on the fact their effects are reversible once the treatment has ceased.

6.32 A meta-analysis of recidivism rates across different forms of medical intervention⁴² (in conjunction with psychological therapy) has shown promising results.⁴³

6.33 There are however, concerns regarding the side-effects of the medication. Furthermore, antiandrogen drugs do not affect cognitive distortions and maladaptive thinking patterns, and as a result chemical castration cannot replace psychological therapy.⁴⁴ As motivation from the offender is critical for treatment to work effectively, the weight of opinion is that the administration of chemical castration should be on a voluntary basis.⁴⁵

6.34 The use of chemical castration has been the subject of judicial comment in matters brought under the *Crimes (Serious Sex*

a contraceptive or for the treatment of hormonally related diseases. When given to men, MPA reduces testosterone levels to below normal and this results in lowered sexual arousal and desire. Cyproterone Acetate (CPA) is used in England and Wales to block the uptake of testosterone by androgen receptors, disallowing the functions of testosterone and hence reducing levels in the body. It is reported to have less side-effects than MPA.

40. Queensland Government, *A New Public Protection Model for the Management of High Risk Sexual and Violent Offenders* (2008) <http://www.correctiveservices.qld.gov.au/Publications/News_and_Events/News/HighRiskoffendersReportJune08.pdf> at 12 September 2008.
41. Weiss, P., 'Assessment and Treatment of Sex Offenders in the Czech Republic and in Eastern Europe' (1999) 14 *Journal of Interpersonal Violence* 411; Harrison, K., 'The High-Risk Sex Offender Strategy in England and Wales: is Chemical Castration an Option?' (2007) 46 *The Howard Journal* 16.
42. Schmucker, M. and Losel, F., 'Does Sexual Offender Treatment Work? A Systematic Review of Outcome Evaluations' (2008) 20 *Psicothema* 10.
43. It should be noted that the analysis of chemical castration was based on only six studies, which may not have been a big enough sample to find true effects of the treatment.
44. Queensland Government, *A New Public Protection Model for the Management of High Risk Sexual and Violent Offenders* (2008) <http://www.correctiveservices.qld.gov.au/Publications/News_and_Events/News/HighRiskoffendersReportJune08.pdf> at 12 September 2008.
45. Harrison, K., 'The High-Risk Sex Offender Strategy in England and Wales: is Chemical Castration an Option?' (2007) 46 *The Howard Journal* 16.

Offenders) Act 2006 (NSW).⁴⁶ The primary issue of concern to the Supreme Court appears to have been the willingness of the offender to accept anti-libidinal medication and its relevance for the assessment of the offender's suitability for an extended supervision order as opposed to a continuing detention order rather than with the use of the medication per se.

6.35 The Council understands that the DCS has developed guidelines for the use of anti-libidinal treatment in New South Wales.⁴⁷ The guidelines have recommended that medical intervention of this nature only be considered when recommended by clinicians, and consented to by offenders. The National Working Party for Sex Offenders (which involves Australian and New Zealand Corrective Services) is also considering the issue.

6.36 DCS has advised that anti-libidinal treatment has not been used on any regular basis in custody because of its limited benefit in such a setting. It is now, however, being used for some offenders while in custody who are being considered for an order under the *Crimes (Serious Sex Offenders) Act*. A condition as to its use can become a condition of an ESO although to be effective it would seem to require combination with psychiatric supervision and psychological counselling.⁴⁸

PART D: PROGRAMS TARGETING SPECIFIC NEED POPULATIONS

6.37 The Council notes that there is continuing debate about the desirability of developing separate programs for individual subgroups of offenders, or of adding specific modules to existing programs to prepare potential participants for the mainstream program. DCS has advised the Council that it is moving generally towards the latter approach, in recognition of the fact that different cultural factors and criminogenic needs may require longer and different forms of work with some groups.

46. *AG (NSW) v Tillman* [2007] NSWSC 605; *AG (NSW) v Hayter* [2007] NSWSC 1146; *Cornwall v AG (NSW)* [2007] NSWCCA 374; *Winters v AG (NSW)* [2008] NSWCCA 33; *AG (NSW) v Hadson* [2008] NSWSC 140; *AG (NSW) v Thomas* [2008] NSWSC 640; *AG (NSW) v Brookes* [2008] NSWSC 150.

47. Queensland Government, *A New Public Protection Model for the Management of High Risk Sexual and Violent Offenders* (2008) <http://www.correctiveservices.qld.gov.au/Publications/News_and_Events/News/HighRiskoffendersReportJune08.pdf> at 12 September 2008.

48. An illustration of such a case can be seen in *New South Wales v Wilde* [2008] NSWSC 1211.

Aboriginal offenders

Custodial programs

6.38 Aboriginal prisoners convicted of sexual assault and related offences comprise 10% of the Aboriginal prisoner population Australia-wide.⁴⁹ Sexual assault was the most serious offence for 8% of Aboriginal prisoners, compared with 20% for non-Aboriginal prisoners.⁵⁰

6.39 There are currently no Aboriginal-specific sex offender treatment programs in correctional facilities in New South Wales.⁵¹ DCS has advised that its CUBIT program has an identified Aboriginal Special Projects Officer, whose role includes motivating high risk Aboriginal sex offenders, supporting the delivery of treatment at CUBIT, and assisting in the reintegration of offenders into Aboriginal communities.⁵²

6.40 DCS has advised that Aboriginal offenders are currently commencing, and more importantly completing, CUBIT at an increasing rate in recent years.

6.41 The effectiveness of sex offender programs targeting Aboriginal offenders in Australia is currently unknown, there having been no relevant evaluation. The international literature, however, suggests that different treatment outcomes will arise for Aboriginal and non-Aboriginal offenders unless Aboriginal specific programs are provided.⁵³ The involvement of Aboriginal staff and local community

49. Willis, M. and Moore, J., 'Reintegration of Indigenous Prisoners' (Research Paper No 90, Australian Institute of Criminology, 2008), 13.

50. Willis, M. and Moore, J., 'Reintegration of Indigenous Prisoners' (Research Paper No 90, Australian Institute of Criminology, 2008), 21.

51. Submission 22: NSW Department of Corrective Services, Supplementary Submission 17. See also Aboriginal Child Sexual Assault Taskforce, 'Breaking the Silence: Creating the Future: Addressing Child Sexual Assault in Aboriginal Communities in NSW' (NSW Attorney Generals' Department, 2006), 10–11.

52. Submission 22: NSW Department of Corrective Services, Supplementary Submission, 17.

53. A Western Australia study found that following custody-based treatment, Aboriginal juvenile offenders (15.8%) were more likely to sexually recidivate than non-Aboriginal juveniles (5%) although the authors noted that the longer follow-up period on Aboriginal offenders may have inflated recidivism rates in this group. See Allan, A. et al, 'Recidivism Among Male Juvenile Sexual Offenders in Western Australia' (2003) 10 *Psychiatry, Psychology, and Law* 359. Aboriginal offenders rehabilitated through the Canadian criminal justice system also had higher rates of reoffending than non-Aboriginal offenders. See Bonta, J., La Prairies, C. and Wallace-Capretta, S., 'Risk Prediction and Re-offending: Aboriginal and Non-Aboriginal Offenders' (1997) 39 *Canadian Journal of Criminology* 127.

members in program development and delivery has been reported as being an important element.⁵⁴

6.42 DCS has stated that while cultural factors are known to affect offenders' readiness for programs and while it is acknowledged in the literature that Aboriginality can affect the extent to which an offender engages in a program, there are mixed opinions as to whether specific offence related programs should be designed for Aboriginals or whether readiness and responsivity issues should be separately addressed whilst allowing the Aboriginal offenders to attend generic programs.⁵⁵

6.43 DCS has an extensive list of programs and services that address Aboriginal offenders and rehabilitation generally. It also created a range of Aboriginal-identified positions whose role is to motivate, work with and assist the re-integration of Aboriginal offenders.

6.44 A recent report by the Australian Institute of Criminology cited the planned development of the Categorical Deniers Program, and the 'use of open groups which offenders can leave or join depending on their individual therapy needs', as examples of Departmental practice which had:

improved the participation and treatment outcomes for Indigenous sex offenders ... (by overcoming) some of the difficulties (they) often face with the level of disclosure typically required by offending programs.⁵⁶

6.45 The Council notes that the Aboriginal Child Sexual Assault Taskforce (ACSAT) thought that 'voluntary participation (in sex offender treatment programs) coupled with a culturally irrelevant program' would mean 'that most Aboriginal people would choose not to take part'.⁵⁷ Accordingly, it recommended 'an Aboriginal-specific sex offender treatment program be developed'.⁵⁸

54. Macgregor, S., *Sex Offender Treatment Programs: Effectiveness of Prison and Community Based Programs in Australia and New Zealand*. (2008) Indigenous Justice Clearinghouse <<http://indigenousjustice.gov.au/briefs/brief003.pdf>> at 27 November 2008; Willis, M. and Moore, J., 'Reintegration of Indigenous Prisoners' (Research Paper No 90, Australian Institute of Criminology, 2008).

55. Submission 22: NSW Department of Corrective Services, Supplementary Submission, 15.

56. Willis, M. and Moore, J., 'Reintegration of Indigenous Prisoners' (Research Paper No 90, Australian Institute of Criminology, 2008), 70.

57. Aboriginal Child Sexual Assault Taskforce, 'Breaking the Silence: Creating the Future: Addressing Child Sexual Assault in Aboriginal Communities in NSW' (NSW Attorney Generals' Department, 2006), 227.

58. Aboriginal Child Sexual Assault Taskforce, 'Breaking the Silence: Creating the Future: Addressing Child Sexual Assault in Aboriginal Communities in NSW' (NSW Attorney Generals' Department, 2006), 228.

6.46 ACSAT also identified a lack of programs within correctional facilities that provided for Aboriginal adult survivors of child sexual assault.⁵⁹ The report found that while some services are offered to women who disclose a history of child sexual assault, men who make similar disclosures are offered no services or support, beyond being encouraged to work on the issue once released.⁶⁰ Although the literature has noted that victims of child sexual assault do not necessarily go on to become sex offenders, and that it is still unclear whether a history of child sexual abuse is a significant predictor of sexual recidivism in adulthood,⁶¹ ACSAT recommended that a model be developed and funded to provide sexual assault counsellors/program coordinators in both male and female correctional facilities for sex offenders who were themselves victims of child sexual assault.⁶²

6.47 DCS has advised that it does not support this proposal on the basis that 'the prison environment is not an appropriate setting for offenders to address their (own) experience of child sexual assault'.⁶³

Female offenders

Characteristics

6.48 Based on pooled data from the UK, USA, Canada, Australia, and New Zealand, it has been suggested that female sex offenders account for 4% to 5% of all sex offenders.⁶⁴ It has been suggested that it is likely that the official figures do not reflect the actual incidence of such offending and that there is a degree of under-reporting.⁶⁵

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59. Aboriginal Child Sexual Assault Taskforce, 'Breaking the Silence: Creating the Future: Addressing Child Sexual Assault in Aboriginal Communities in NSW' (NSW Attorney Generals' Department, 2006), 222–3.
 60. Aboriginal Child Sexual Assault Taskforce, 'Breaking the Silence: Creating the Future: Addressing Child Sexual Assault in Aboriginal Communities in NSW' (NSW Attorney Generals' Department, 2006), 224.
 61. Hanson, R. and Morton-Bourgon, K., 'The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies' (2005) 73 *Journal of Consulting and Clinical Psychology* 1154; Proeve, M. and Reilly, E., 'Personal and Offending Characteristics of Child Sexual Offenders Who Have Been Sexually Abused' (2007) 14 *Psychiatry, Psychology and Law* 251.
 62. Aboriginal Child Sexual Assault Taskforce, 'Breaking the Silence: Creating the Future: Addressing Child Sexual Assault in Aboriginal Communities in NSW' (NSW Attorney Generals' Department, 2006), 229.
 63. Aboriginal Child Sexual Assault Taskforce, 'Breaking the Silence: Creating the Future: Addressing Child Sexual Assault in Aboriginal Communities in NSW' (NSW Attorney Generals' Department, 2006), 228.
 64. Hanson, K. and Cortoni, F., 'A Review of the Recidivism Rates of Adult Female Sexual Offenders' (Report No 169, Correctional Service of Canada, 2005).
 65. Mathews, R., Hunter, J. and Vuz, J., 'Juvenile Female Sexual Offenders: Clinical Characteristics and Treatment Issues' (1997) 9 *Sexual Abuse: A Journal of Research and Treatment* 187 cited in Nathan, P. and Ward, T., 'Females Who

6.49 DCS advised that in October 2008 there were 43 female sex offenders in custody or subject to community orders, under Departmental supervision. Their offences included indecent assault, sexual intercourse and child pornography. All had offended against children under 16 years of age, and their ages ranged from 32–62 years, with an average age of 47 years. None identified as being of Aboriginal or Torres Strait Islander descent.⁶⁶

What is known about female sex offenders

6.50 Female sex offenders represent a comparatively unknown and under-researched group due to their small sample size and low base rate of offending.⁶⁷ The general consensus is that treatment needs to address not only their offending behaviour but also a cohort of commonly exhibited psychiatric and psychological disturbances, including personality disorders, mood disorders, substance abuse and dependency issues, suicidal ideation, cognitive impairments, and poor coping skills.⁶⁸

6.51 Although there appear to be some overlapping characteristics with male sex offenders,⁶⁹ it is recognized that female offenders belong to a heterogeneous group with varying motivations, psychological and offence-specific characteristics.⁷⁰ There are also treatment targets that are unique to female offenders⁷¹ and there is evidence that the extent of childhood maltreatment, sexual victimization and family

Sexually Abuse Children: Assessment and Treatment Issues' (2001) 8 *Psychiatry, Psychology and Law* 44.

66. Hart, R., 'From Issues to Implementation: Developing a Treatment Program for Females Convicted of a Sexual Offence' (NSW Department of Corrective Services, 2008), 4 attachment to Submission 20: NSW Department of Corrective Services.
67. Mathews, R., Hunter, J. and Vuz, J., 'Juvenile Female Sexual Offenders: Clinical Characteristics and Treatment Issues' (1997) 9 *Sexual Abuse: A Journal of Research and Treatment* 187 cited in Nathan, P. and Ward, T., 'Females Who Sexually Abuse Children: Assessment and Treatment Issues' (2001) 8 *Psychiatry, Psychology and Law* 44.
68. Grayston, A. and De Luca, R., 'Female Perpetrators of Child Sexual Abuse: a Review of the Clinical and Empirical Literature' (1999) 4 *Aggression and Violent Behavior* 93.
69. Common characteristics of both male and female sex offenders included: a history of childhood maltreatment; a history of sexual abuse; dysfunctional family relationships; interpersonal deficits and poor adult intimate relationships; denial of the offence and lack of victim empathy, substance abuse issues, and distorted beliefs regarding children. Nathan, P. and Ward, T., 'Females Who Sexually Abuse Children: Assessment and Treatment Issues' (2001) 8 *Psychiatry, Psychology and Law* 44.
70. Nathan, P. and Ward, T., 'Female Sex Offenders: Clinical and Demographic Features' (2002) 8(1) *Journal of Sexual Aggression* 5.
71. Nathan, P. and Ward, T., 'Females Who Sexually Abuse Children: Assessment and Treatment Issues' (2001) 8 *Psychiatry, Psychology and Law* 44; Nathan, P. and Ward, T., 'Female Sex Offenders: Clinical and Demographic Features' (2002) 8(1) *Journal of Sexual Aggression* 5.

dysfunction is more extensive and severe for females than for males, especially juveniles.⁷² Female offending also appears to be associated more with relationship and dependency issues than with deviant sexual arousal.⁷³

Female-specific programs

6.52 Due to the paucity of research, few treatment programs have been developed to specifically address the needs of this group.⁷⁴ The differences between female and male sex offenders suggest that standard treatment programs developed for males may not be appropriate.⁷⁵ Consequently, research into whether there is a case for gender-specific programs, that address the offence-related factors of female offenders is urgently needed.

6.53 There are no specialized female offender programs for incarcerated female sex offenders in Australia or for such offenders in the community. DCS advised that it 'remains committed to developing a sex offender program for women but has currently prioritised the development of the program for sex offenders with intellectual disabilities and the Deniers program'.⁷⁶

6.54 There are similarly, no female juvenile sex offender programs available in Australia. The Department of Juvenile Justice⁷⁷ has advised that any intervention is individually-based and adapted to the female offender involved where a SOP Counsellor is involved.

72. Mathews, R., Hunter, J. and Vuz, J., 'Juvenile Female Sexual Offenders: Clinical Characteristics and Treatment Issues' (1997) 9 *Sexual Abuse: A Journal of Research and Treatment* 187; Nathan, P. and Ward, T., 'Females Who Sexually Abuse Children: Assessment and Treatment Issues' (2001) 8 *Psychiatry, Psychology and Law* 44.

73. Other differences between male and female offenders include: the majority of female offending involves younger children, occurs in the context of carer or sitter, use of less coercive measures (although in minority of cases, violence or force was involved), greater attachment to their victims, and the offences commonly co-occur in the presence of a male associate. See, Nathan, P. and Ward, T., 'Females Who Sexually Abuse Children: Assessment and Treatment Issues' (2001) 8 *Psychiatry, Psychology and Law* 44.

74. Deering, R. and Mellor, D., 'Female-Perpetrated Child Sex Abuse: Definitional and Categorisational Analysis' (2007) 14(2) *Psychiatry, Psychology and Law* 218, 218.

75. Hart, R., 'From Issues to Implementation: Developing a Treatment Program for Females Convicted of a Sexual Offence' (NSW Department of Corrective Services, 2008), 4 attachment to Submission 20: NSW Department of Corrective Services.

76. Submission 22: NSW Department of Corrective Services, Supplementary Submission, 14.

77. Submission 23: NSW Department of Juvenile Justice, Supplementary Submission, 8.

Offenders with cognitive impairment⁷⁸

6.55 The lack of effective options for dealing with people with cognitive impairment who come into contact with the criminal justice system is a major concern. Such offenders are significantly disadvantaged and over-represented in the criminal justice system generally.

6.56 Little is known regarding people with cognitive impairments who demonstrate sexually abusive behaviours.⁷⁹ UK research has suggested that such offenders constitute approximately 10% of the total sex offender population.⁸⁰ However, the paucity of research, methodological limitations and lack of control groups have frustrated efforts to ascertain prevalence rates or the extent and nature of sexual offending among such offenders.

Treatment and management

6.57 In general, the literature recognizes that sex offenders with cognitive impairments require highly specialized interventions that can cater for their unique needs and capabilities and also divert them so far as practicable from the prison system, and into the community. Unfortunately, treatment programs and services for such offenders are lacking and few of the available programs have been systematically evaluated or validated.

6.58 Further complicating their assessment, treatment and management are the common psychological and social issues which they confront including: higher incidences of family dysfunction and childhood trauma (e.g., sexual victimization), schooling difficulties, poor problem-solving skills and social skills, interpersonal deficits, poor impulse control and impaired judgment, poor language skills and learning difficulties. Co-existing psychiatric illnesses and substance abuse problems (i.e., dual diagnosis) and other socioeconomic issues such as homelessness and unemployment are also major problems

78. The phrase 'cognitive impairment' has been used in this paper as a common term to refer to intellectual disability, learning disabilities, and acquired-brain injury. The Sentencing Council has not specifically examined the situation for people with mental health impairments or those in the forensic mental health system as it is conscious that the NSW Law Reform Commission is currently reviewing this area cf. People with cognitive and mental health impairment in the criminal justice system).

79. Craig, L. and Hutchinson, R., 'Sexual Offenders with Learning Disabilities: Risk, Recidivism and Treatment' (2005) 11(3) *Journal of Sexual Aggression* 289.

80. O'Connor, W., 'Towards an Environmental Perspective on Intervention for Problem Sexual Behaviour in People with an Intellectual Disability' (1997) 10 *Journal of Applied Research in Intellectual Disabilities* 159 cited in Wilcox, D., 'Treatment of Intellectually Disabled Individuals Who Have Committed Sexual Offences: a Review of the Literature' 10(1) *Journal of Sexual Aggression* 85.

that need to be addressed concurrently with any response to their most recent offending behaviour.⁸¹

6.59 It has been argued that offenders with cognitive impairment may not need treatment per se, but rather a range of structured support services such as education, supported housing⁸² and supported employment to keep them out of the criminal justice system.⁸³

Programs

6.60 The Law Society of New South Wales⁸⁴ has expressed its concern regarding the appropriateness of the CUBIT program for offenders with cognitive impairment and citing *Winters v Attorney General (NSW)*,⁸⁵ has suggested that such offenders risk being incarcerated indefinitely if they are unable to complete CUBIT. It recommended that staff be specifically trained to increase their understanding of the complex thought processes inmates with a cognitive impairment, and that until CUBIT is appropriately designed to meet their needs, they should be exempt from the program.

6.61 Cognitive impairment is an exclusion criteria for many sex offender treatment programs in Australia and internationally.⁸⁶ Existing treatment programs tend to cater for higher functioning individuals (i.e., mild and borderline IQ) since lower functioning individuals are not thought to have the basic level of cognitive, verbal reasoning and writing skills associated with the use of cognitive behaviour therapy methods. Traditional behavioural approaches based on operant conditioning⁸⁷ principles are deemed more appropriate for such offenders.⁸⁸

81. Craig, L. and Hutchinson, R., 'Sexual Offenders with Learning Disabilities: Risk, Recidivism and Treatment' 11(3) *Journal of Sexual Aggression* 289.

82. Holland, S. et al, 'Intellectual Disability in the Victorian Prison System: Characteristics of Prisoners with an Intellectual Disability Released from Prison in 2003–2006' (Research Paper No 2, Department of Justice, State Government of Victoria, 2007).

83. Coalition on Intellectual Disability and Criminal Justice, 'Gaoil as Community Housing?' (Forum Notes recorded at the Law Society of New South Wales Forum, Sydney, 9 November 2004), 4.

84. Submission 24: Law Society of New South Wales, 2.

85. *Winters v AG (NSW)* [2008] NSWCCA 33.

86. Lambrick, F. and Glaser, W., 'Sex Offenders with Intellectual Disability' (2004) 16 *Sexual Abuse: A Journal of Research and Treatment* 381; Grunseit, A., Forell, S. and McCarron, E., 'Taking Justice into Custody: The Legal Needs of Prisoners' (Law and Justice Foundation of New South Wales, 2008).

87. Operant conditioning refers to the process of behaviour modification that involves the use of reward and punishment.

88. O'Connor, W., 'Towards an Environmental Perspective on Intervention for Problem Sexual Behaviour in People with an Intellectual Disability' (1997) 10 *Journal of Applied Research in Intellectual Disabilities* 159 cited in Wilcox, D.,

6.62 Individuals with borderline IQ present a unique challenge to practitioners as they fall between the criteria of specialist services for mainstream offenders and individuals with intellectual disability.⁸⁹

6.63 DCS⁹⁰ has advised that it now provides a modified CUBIT program for people with cognitive impairment. The program features a new rolling group format which allows greater flexibility of delivery as not all offenders are required to move through the program at the same time. This enables allowances to be made for a person who, because of a disability, takes longer to complete an element of the program.⁹¹

6.64 DCS stated that it has a range of generic initiatives or programs that are designed to address the needs of offenders with disabilities. These include:

- The Additional Support Unit at the MSPC which is designed to meet the needs of male offenders with intellectual and physical disabilities;
- The Offenders with Co-existing Disorders Project which provides a multi agency coordination of services;
- The Parolee Support Initiative that assists parolees with disabilities;
- The Community Grants program; and
- The Integrated Services Project, which is a three-year joint pilot project of DADHC, the Department of Health and the Department of Housing.

6.65 The Department of Ageing, Disability and Home Care (DADHC), in partnership with DCS, the Department of Juvenile Justice (DJJ)

‘Treatment of Intellectually Disabled Individuals Who Have Committed Sexual Offences: a Review of the Literature’ 10(1) *Journal of Sexual Aggression* 85.

89. Tudway, J. and Tarmood, M., ‘Clinical Assessment of Adult Sexual Offenders with Learning Disabilities’ (2005) 11(3) *Journal of Sexual Aggression* 277.

90. Submission 22: NSW Department of Corrective Services, Supplementary Submission.

91. Most of the existing treatment programs for sex offenders with an intellectual disability or cognitive impairment have been adapted from mainstream sex offender treatment programs, and involve group-based CBT approach with the simplification of concepts and use of creative methods such as visual imagery, art and psychodrama. Victim empathy work (integral component in mainstream treatment) is often excluded, however, because of specific empathic deficits noted in intellectually disabled sex offenders compared with the general offender population. See, Wilcox, D., ‘Treatment of Intellectually Disabled Individuals Who Have Committed Sexual Offences: a Review of the Literature’ 10(1) *Journal of Sexual Aggression* 85.

and other relevant organisations, has established a Criminal Justice Program (CJP) to support people with a cognitive impairment who are exiting correctional centres and juvenile justice facilities.⁹² The CJP is a predominantly accommodation-based service that caters for those offenders whose support needs cannot be met by regular disability services. The service is designed to assist offenders who have committed a serious offence, including sexual assault, where there is a demonstrated significant risk of the person re-offending so as to result in serious harm being done to others.⁹³ Specific accommodation units are allocated for sex offenders, and conditions placed on residents may, depending on an individuals' risk assessment, include 24 hour a day supervision and other stringent conditions.⁹⁴

6.66 An offender over the age of 16 years who has a cognitive impairment may be subject to a guardianship order under the *Guardianship Act 1987* (NSW), if it is determined that, because of the disability, he or she is 'totally or partially incapable of managing his or her person and is 'restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation'.⁹⁵

6.67 The Tribunal may, in a case involving serious or violent offending, authorise certain restrictive practices, such as physical restraint and the use of medication, to assist in managing the behaviour of individuals who lack the capacity to consent to the use of such interventions. The Council notes that guardianship orders containing restrictive practices have been made in at least one matter involving a serious sex offender who would otherwise have been the subject of an application for a continuing detention order or of an extended supervision order pursuant to the *Crimes (Serious Sex Offenders) Act 2006* (NSW).⁹⁶

Culturally and linguistically diverse offenders

6.68 Almost 17% of inmates in New South Wales correctional centres were born in a non-English speaking country.⁹⁷ At least some of these

92. Submission 22: NSW Department of Corrective Services, Supplementary Submission.

93. Criminal Justice Program Access and Eligibility Guidelines, NSW Department of Ageing, Disability and Home Care, March 2007.

94. Advice from Kelly Fishburn, Criminal Justice Project, NSW Department of Ageing, Disability and Home Care (Telephone interview, 18 December 2008).

95. *Guardianship Act 1987* (NSW) s 3(2) and see pt 3 (guardianship orders). Note however that the term used in the Act is 'intellectual disability' rather than the phrase cognitive impairment which has been used throughout this paper.

96. Email from Bernhard Ripperger, Legal Services Branch, NSW Attorney Generals' Department, to Katherine McFarlane, NSW Sentencing Council, 16 December 2008.

97. Corben, S., 'NSW Inmate Census 2006: Summary of Characteristics' (Statistical Publication No 28, NSW Department of Corrective Services, 2006), 19.

inmates will possess limited or non-existent competency in written or spoken English, a circumstance that is likely to have a negative impact on participation in, and successful completion of, treatment programs in custody.⁹⁸

6.69 The Law Society of New South Wales⁹⁹ also expressed its concern regarding the appropriateness of the CUBIT program for sex offenders from this group. Unless suitable translation services are available, it suggests that these offenders should be exempt from the program.

6.70 It would seem that their successful inclusion in sex offender programs, would be dependent upon those programs accommodating and addressing any relevant cultural or social factors that may have been behind their offending, that may be relevant to an understanding of the sexual mores acceptable to the broader Australian community, and that may allow them to work with those delivering the programs. For example it needs to be recognised that some offenders may have difficulty working with female psychologists on sexual issues.

Juvenile offenders

Characteristics of juvenile sex offenders

6.71 Adolescents are increasingly recognised as being perpetrators of a significant proportion of sexual offences,¹⁰⁰ with studies estimating that approximately one third of child sexual abuse cases that come to the attention of authorities are committed by adolescent offenders.¹⁰¹ The relationship between adolescent and adult sexual offending, however, is not one of direct 'cause and effect'. In fact, although *some* adolescents sexually reoffend as adults, *most* young people who sexually offend do not go on to become adult sex offenders.¹⁰²

98. Grunseit, A., Forell, S. and McCarron, E., 'Taking Justice into Custody: The Legal Needs of Prisoners' (Law and Justice Foundation of New South Wales, 2008).

99. Submission 24: Law Society of New South Wales, 2.

100. Veneziano, C. and LeGrand, S., 'The Relationship Between Adolescent Sexual Offender Behaviours and Victim Characteristics with Prior Victimization' 15 *Journal of Interpersonal Violence* 363; Worling, J. and Curwen, T., 'Adolescent Sexual Offender Recidivism: Success of Specialized Treatment and Implications for Risk Prediction' (2000) 24 *Child Abuse & Neglect* 965.

101. Cawson, P., Wattam, C., Brooker, S., and Kelly, G. (2000), cited in Varker, T. et al, 'Empathy and Adolescent Sexual Offenders: A Review of the Literature' (2008) 13 *Aggression and Violent Behaviour* 251; Glasgow, D. et al, 'Evidence, Incidence, Gender and Age in Sexual Abuse of Children Perpetrated by Children' (1994) 3 *Child Abuse Review* 196.

102. Hanson, R., 'Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies' (1998) 66 *Journal of Consulting and Clinical Psychology* 348; Hunter, J. et al, 'Juvenile Sex Offenders: Toward the Development of a Typology' (2003) 15

6.72 The Department of Juvenile Justice noted in its submission to the Council¹⁰³ that studies have identified that the characteristics of young sex offenders include:

- (a) difficulties with judgment and impulse control;
- (b) high rates of learning disabilities and a lack of academic achievement;
- (c) psychiatric disorder of some description (80%) including conduct disorders and substance abuse; and
- (d) high rate of physical, sexual and other abuse, neglect and family dysfunction.

6.73 Young sex offenders tend to be more socially isolated, lacking in social skills, self-esteem and in the capacity to develop and maintain healthy relationships.¹⁰⁴ Those that specifically offend as children are more likely to have been sexually abused, and to be depressed.¹⁰⁵

6.74 According to the Department of Juvenile Justice, 'overall, juveniles who commit sex offences usually do so within the context of their non-sex offending behaviour and have a relatively low risk of continuing to commit sex offences into adulthood'.¹⁰⁶ Nevertheless, the fact that adolescents do commit sexual offences does warrant early detection and specialized treatment in order to prevent them from becoming perpetrators in adulthood.¹⁰⁷ As the Department of Community Services noted, 'contemporary research demonstrates that early intervention with children and young people who sexually offend

Sexual Abuse: A Journal of Research and Treatment 27; Nisbet, I., Wilson, P. and Smallbone, S., 'A Prospective Longitudinal Study of Sexual Recidivism Among Adolescent Sexual Offenders' (2004) 16 *Sexual Abuse: A Journal of Research And Treatment* 223; Vizard, E., 'Adolescent Sexual Offenders' (2007) 6 *Psychiatry* 433; Worling, J. and Curwen, T., 'Adolescent Sexual Offender Recidivism: Success of Specialized Treatment and Implications for Risk Prediction' (2000) 24 *Child Abuse & Neglect* 965.

103. Submission 15: NSW Department of Juvenile Justice, 1.

104. Hunter, J., 'Understanding Juvenile Sexual Offending Behaviour: Emerging Research, Treatment Approaches and Management Practices' (Center for Sex Offender Management, United States Department of Justice) cited in Submission 15: NSW Department of Juvenile Justice, 1.

105. van Wijk, A. et al, 'Juvenile Sex Offenders Compared to Non Sex Offenders: A Review of the Literature 1995–2005' (2006) 7(4) *Trauma Violence and Abuse* 227 cited in Submission 15: NSW Department of Juvenile Justice, 1.

106. Submission 15: NSW Department of Juvenile Justice, 1.

107. Fanniff, A. and Becker, J., 'Specialized Assessment and Treatment of Adolescent Sex Offenders' (2006) 11 *Aggression and Violent Behavior* 265; Varker, T. et al, 'Empathy and Adolescent Sexual Offenders: A Review of The Literature' (2008) 13 *Aggression and Violent Behavior* 251.

has a significant positive impact on reducing recidivism rates to as low as 10%.¹⁰⁸

The Department of Juvenile Justice

6.75 The Department of Juvenile Justice is responsible for the provision of programs for young people in both custodial and community settings. Essentially, each juvenile detention centre provides case management and generic evidence-based interventions that aim to reduce the risk of any future reoffending and to promote community integration.

6.76 Based on current research that suggests that the most effective interventions for such offenders are delivered in a community setting,¹⁰⁹ its Sex Offender Program comprises a specialised community-based intervention. Ten specialist Sex Offender Counsellors are employed across the state.¹¹⁰ While these counsellors are primarily community-based, there is continuity of intervention by a counsellor if the young person enters a detention centre. Fee for service counsellors are occasionally engaged in regional locations where a DJJ Sex Offender Counsellor is not available.

6.77 A recent review of the Sex Offender Program made several recommendations to improve treatment effectiveness, including placing greater emphasis on working with the families of sex offenders, adopting a systemic approach for case management and incorporating interventions in the treatment model that have been shown to reduce recidivism with generalist offenders.¹¹¹

6.78 Additionally, a risk assessment tool (the Juvenile Sex Offender Assessment Protocol – II (JSOAP-II)) has been specifically developed for sex offending juveniles, and provides ‘a guided approach to the risks of re-offending and a suggested risk management strategy’ which can be considered in sentencing decisions.¹¹²

108. Nisbet, I., Rombouts, S. and Smallbone, S., ‘Literature Review: Impacts of Programs for Adolescents Who Sexually Offend’ (NSW Department of Community Services, 2005), iv; cited in Submission 15: NSW Department of Community Services, 3.

109. Submission 15: NSW Department of Juvenile Justice.

110. SOP Counsellors are based at Stanmore, Blacktown, Fairfield, Campbelltown, Wollongong, Grafton, Newcastle, Dubbo, Wagga Wagga and Frank Baxter Juvenile Justice Centre.

111. Submission 15: NSW Department of Juvenile Justice.

112. Submission 15: NSW Department of Juvenile Justice, 3.

What Works with young offenders

6.79 There is 'little agreement on the key components of treatment programmes for young sexual abusers'.¹¹³ The literature on adolescent sexual offending is scarce. Treatment programs and recidivism studies emerged only in the 1980s and were originally based on programs for adult sex offenders.¹¹⁴ Only recently has it been recognised that adolescent offenders constitute a heterogeneous group and have different developmental needs and deficits from those of adults.

6.80 The evidence thus far suggests that 'what works' with young sex offenders are treatments that are multi-modal, multisystemic and holistic in nature.¹¹⁵ Interventions should involve an intensive multifaceted, systemic approach involving the young person, their family and other support systems, together with a range of strategies including cognitive-behavioural methods, family systems approach, and relapse prevention techniques.¹¹⁶ As most young offenders experience a range of psychosocial, educational, substance abuse and comorbid mental health issues, treatment must also attempt to address these challenges.¹¹⁷

6.81 Cognitive behavioural treatment (CBT) and multisystemic therapy (MST) are two evidence-based approaches that have yielded promising results.¹¹⁸ The increasing reliance on MST is underpinned by the recognition that the families of sex offenders should be involved

113. Submission to the New South Wales Sentencing Council Reference, *Provisional Sentencing of Young Offenders*, NSW Department of Health, 19 October 2007, 5.

114. Submission to the New South Wales Sentencing Council Reference, *Provisional Sentencing of Young Offenders*, NSW Department of Health, 19 October 2007, 5. See also, Fortune, C. and Lambie, I., 'Sexually Abusive Youth: A Review of Recidivism Studies and Methodological Issues for Future Research' (2006) 26 *Clinical Psychology Review* 1078; Smallbone, S., Marshall, W. and Wortley, R., *Preventing Sexual Abuse: Evidence, Policy and Practice*. (1st ed, 2008), 112–32.

115. Submission 15: NSW Department of Juvenile Justice. See also, NSW Department of Juvenile Justice, 'Clinical Characteristics of Australian Juvenile Sex Offenders: Implications for Treatment' (Collaborative Research Unit, 1999); Lievore, D., 'Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy' (2004) (Australian Institute of Criminology, 2004), 101.

116. Submission 15: NSW Department of Juvenile Justice.

117. Submission to the New South Wales Sentencing Council Reference, *Provisional Sentencing of Young Offenders*, NSW Department of Health, 19 October 2007, 5. See also Kenny, D. and Lennings, C. 'Cultural Group Differences in Social Disadvantage, Offence Characteristics, and Experience of Childhood Trauma and Psychopathology in Incarcerated Juvenile Offenders in NSW, Australia: Implications for Service Delivery' (2007) 14 *Psychiatry, Psychology and Law* 294; NSW Department of Juvenile Justice, 'Clinical Characteristics of Australian Juvenile Sex Offenders: Implications for Treatment' (Collaborative Research Unit, 1999); Varker, T. et al, 'Empathy and Adolescent Sexual Offenders: A Review of The Literature' (2008) 13 *Aggression and Violent Behavior* 251.

118. Fanniff, A. and Becker, J., 'Specialized Assessment and Treatment of Adolescent Sex Offenders' (2006) 11 *Aggression and Violent Behavior* 265.

in the treatment process. Limitations with its use however arise when the young offender does not have a family or support system.¹¹⁹

6.82 The Department of Juvenile Justice¹²⁰ has recently implemented an Intensive Supervision Program (ISP), based on the MST approach, to be trialled in the western Sydney and Hunter region. Currently, 18 families are engaged with 11 of these being Aboriginal. The program will target serious, persistent high-risk young offenders who have a history of violence offences. Sex offenders are accepted but this cannot be the primary offence. The ISP will involve specially trained juvenile justice case workers who will work with the young offender and their family 24 hours per day, seven days a week to address issues that have contributed to the offending behaviour.

6.83 There are a number of practical impediments to the deployment of offence-specific programs for juvenile sex offenders, including:

- The fact that the number of such offenders detained either at Kariiong¹²¹ or in a juvenile detention centre is quite limited, and not such as to justify the introduction of group programs or specialist programs of the kind available in adult institutions;¹²²
- The relatively short periods of time that these offenders remain under the supervision of DCS or Juvenile Justice—an average of five months and three to four months respectively,¹²³ are not sufficient for sex offender programs to achieve successful outcomes.¹²⁴

6.84 To overcome this problem, the Department of Juvenile Justice suggested that court orders for supervision of juvenile offenders be

119. Confidential Consultation 3, undertaken as part of the New South Wales Sentencing Council Reference, *Provisional Sentencing of Young Offenders*, July 2007.

120. Submission 23: NSW Department of Juvenile Justice, Supplementary Submission, 7.

121. Kariiong Detention Centre is the exception, in that it is managed by the NSW Department of Corrective Services following a transfer of responsibility in 2004. Kariiong is a specialist custodial facility for older male juveniles aged between 16–21 years, and those facing serious charges.

122. Submission 15: NSW Department of Juvenile Justice, 3.

123. Department of Corrective Services figures based on 26 inmates discharged from Kariiong to parole or with sentence expired in 2007/08.

124. Submission 15: NSW Department of Juvenile Justice; Confidential Consultation 3, undertaken as part of the New South Wales Sentencing Council Reference, *Provisional Sentencing of Young Offenders*, July 2007. See also, NSW Department of Juvenile Justice, 'Clinical Characteristics of Australian Juvenile Sex Offenders: Implications for Treatment' (Collaborative Research Unit, 1999).

made for longer than six months (and up to 12 months) so that effective treatment can be delivered.¹²⁵

PART E: ISSUES ARISING

Limited resources

6.85 The NSW Audit Office's recent performance audit of the New South Wales Department of Corrective Services highlighted a number of issues surrounding prisoner rehabilitation, specifically the limited resources available for key programs. The Office noted that 'the demand for intensive violence and sex-offender programs exceeds available places'.¹²⁶ In 2004–05 for instance, 900 sex offenders were incarcerated across New South Wales prisons, but only 10 were reported to have completed a treatment program.¹²⁷ In 2006–07, 48 sex offenders completed the treatment program while 143 remained on the waiting list.¹²⁸ In 2008, the Department acknowledged that the program had a waiting list of 110 people.¹²⁹

6.86 The NSW Ombudsman, reported his concerns about restricted access to sex offender programs in his *2007–2008 Annual Report*. Noting the specific concerns arising from the operation of the *Crimes (Serious Sex Offenders) Act 2006* the Ombudsman commented that:

- the waiting list for CUBIT is over 100 inmates at any one time;
- priorities are assessed on the inmate's earliest release date and not when they accept referral to the program, resulting in inmates being pushed down the waiting list;
- several senior psychological staff from the CUBIT and CORE programs had departed; and
- a series of 'lock-in' days at the MSPC had effectively prevented inmates attending treatment programs.¹³⁰

125. Submission 15: NSW Department of Juvenile Justice.

126. Woodham, R., *Performance Audit: Prisoner Rehabilitation* (2006) NSW Audit Office <<http://www.audit.nsw.gov.au/publications/reports/performance/2006/prisoner/execsum.htm>> at 1 December 2008.

127. Woodham, R., *Performance Audit: Prisoner Rehabilitation* (2006) NSW Audit Office <<http://www.audit.nsw.gov.au/publications/reports/performance/2006/prisoner/execsum.htm>> at 1 December 2008.

128. Baker, J. and Jacobsen, G., 'Abusers Free Without Treatment' *The Sydney Morning Herald* (Sydney) 4 April 2008.

129. Ware, J. and Bright, D., 'Evolution of a Treatment Programme for Sex Offenders: Changes to the NSW Custody Based Intensive Treatment (CUBIT)' (2008) 15(2) *Psychiatry, Psychology and Law* 340.

130. Barbour, B., 'Annual Report 2007–2008' (NSW Ombudsman, 2008), 126–7.

6.87 In response the Government has indicated that the answer lies in better program delivery¹³¹ and planned expansion of the sex offender program throughout New South Wales. It is anticipated that the Parklea Centre will be operational by early 2009 and will house 30 sex offenders. A third CUBIT is planned for the additional maximum security unit to be built at Cessnock Correctional Centre and it is anticipated that this 40 bed unit will be operational in late 2010.

6.88 The addition of these units will expand the availability of CUBIT and allow participation by inmates with a range of security classifications including those still classified as maximum security.¹³²

6.89 DCS has also pointed out that the term 'waiting list' can be a misnomer. The waiting list for CUBIT comprises those offenders who have been assessed as eligible for the program at some point in their sentence. It does not equate to the number of people actually ready at any given moment to commence a high risk sex offender treatment program. As the program is currently located at the end of the sentence it is expected that a large number of sex offenders will be identified as requiring eventual referral to CUBIT.

6.90 The Council does, however, have continuing concerns about waiting lists if the effect is to delay parole, particularly where non-participation in a program is not attributable to opposition on the part of the offender. Among other considerations this can be discriminatory of sex offenders. More importantly it dilutes the purposes of release on parole.

Lack of program evaluation

6.91 Essentially, custody-based treatment programs for adult sex offenders exist in every Australian state and territory.¹³³ However very few programs have been evaluated.

6.92 Accreditation panels have been established in the U.K. and Canada to monitor and evaluate offender treatment programs within their jurisdictions. These panels play a valuable role in the

131. Baker, J. and Jacobsen, G., 'Abusers Free Without Treatment' *The Sydney Morning Herald* (Sydney) 4 April 2008.

132. Submission 22: NSW Department of Corrective Services, Supplementary Submission.

133. For more details on custody-based treatment programs available for sex offenders in Australia, refer to Appendix C. See also, Macgregor, S., *Sex Offender Treatment Programs: Effectiveness of Prison and Community Based Programs in Australia and New Zealand*. (2008) Indigenous Justice Clearinghouse <<http://indigenousjustice.gov.au/briefs/brief003.pdf>> at 27 November 2008.

development of such programs and maintenance of program integrity.¹³⁴ According to the Home Office:

The purpose of accreditation is evidence-based practice—making sure that programmes for offenders actually work in reducing offending. To do so they must be based on the characteristics of programmes which do this, drawing on the best of world-wide research. Continuing evidence that they work is provided by rigorous evaluation.¹³⁵

6.93 Offender treatment programs are reviewed every five years and may risk having their accreditation revoked if evidence is not provided regarding their effectiveness.

6.94 It has been observed that measurable outcomes and evaluation methods should be integrated into the design of treatment programs at the planning stage and strictly adhered to. The cost of poor planning and implementation of treatment programs is enormous and can be more damaging for offenders than no treatment at all.¹³⁶

6.95 The Council notes that the DCS Offender Programs Unit oversees the provision of program activities pursuant to the Program Accreditation Strategic Framework (2003). According to the Departmental website, the Framework also provides for the review of all correctional ‘programs which are proven to be effective in reducing recidivism across community and custodial settings’ and ‘to improve offender motivation to participate in offence-related, transitional and resettlement programs’.

6.96 Independent evaluations of specialist sex offender programs (such as the CORE and PREP programs) and interventions for other populations are however rare. Without a plan to identify what works for specific populations, and independent evaluations, the risk is that sex offenders will remain untreated.

Prioritising treatment in custody

6.97 DCS¹³⁷ has responded to criticism that it does not provide programs for low-risk sex offenders by pointing to the research

134. Woodham, R., *Performance Audit: Prisoner Rehabilitation* (2006) NSW Audit Office <<http://www.audit.nsw.gov.au/publications/reports/performance/2006/prisoner/execsum.htm>> at 1 December 2008.

135. Crime Reduction, Home Office, *What works: Accreditation, A Summary* (2003) <<http://www.crimereduction.homeoffice.gov.uk/workingoffenders/workingoffenders13.htm>> at 25 August 2008.

136. Jones, P., ‘Quality Matters: For Program Development and Evaluative Research’ (2006) 5 *Criminology and Public Policy* 571.

137. Submission 22: NSW Department of Corrective Services, Supplementary Submission, 6, citing Andrews, D.A. and Bonta, J., *The Psychology of Criminal Conduct* (2006), 280.

literature which warns against providing intensive programs for this group by reason of the risk that delivery of such programs in custody while in custody increase the risk of recidivism.

6.98 Sex offenders categorized as high risk or moderate risk with high clinical needs are accordingly given the highest priority for treatment, with treatment consisting of combination of PREP and CUBIT programs. Treatment for those with moderate risk or low risk with high clinical needs consists of a combination of PREP and CORE-Mod programs.

6.99 Sex offenders categorized as low risk with low clinical needs are given the lowest priority for treatment, with treatment consisting of the CORE-Low program, or referral to community programs.¹³⁸ Low-risk offenders are however, catered for by the provision of educational and employment related programs such as alcohol and other drug programs, CUBIT Outreach (CORE) and community-based treatment programs.

PART F: SEX OFFENDER TREATMENT MODELS IN OTHER JURISDICTIONS

6.100 The Sentencing Council has identified a range of treatment programs offered to sex offenders in other jurisdictions. A summary of these programs is contained in Appendix D. What does emerge from a comparison between the programs available in New South Wales and in other jurisdictions is the greater reliance on restorative justice processes and community based treatments in some of those jurisdictions.

PART G: COUNCIL POSITION

6.101 As noted earlier, the availability and effectiveness of sex offender treatment is of considerable importance for sentencing. If long term evaluation demonstrates that for a group of serious repeat offenders, treatment does not reduce their risk of recidivism, then this provides a substantial reason for the detention of the person for extended periods, in order to protect the community from them.

6.102 If, on the other hand, such programs do reduce the risk of recidivism by sex offenders generally, then this is reason to frame sentences that will maximise this opportunity for participation in

138. Ware, J. 'Sex Offender Programs: NSW Department of Corrective Services' (Paper presented at the New South Wales Sentencing Council, Sydney, 4 June 2008).

those programs, and to confine extended sentences only so far as that is necessary to test their compliance, and to assess their risk of recidivism, after completion of the program.

6.103 For these reasons, as with the need for continuous evaluation of risk assessment tools, the Council considers that there is a need to ensure ongoing evaluation of the programs, on a long term basis and with an extended population base. It also considers it important that any move to privatisation of corrections facilities be accompanied by the provision of sex offender treatment programs in those facilities, and if necessary, delivery of those programs by DCS or funded by it.

7. Community supervision of sex offenders

INTRODUCTION

7.1 In this chapter the Council considers various schemes for the supervision of sex offenders in the community, which are available in New South Wales, and in other jurisdictions, and which are designed to protect the community from the risk of those offenders committing further offences. The discussion is confined to those cases involving a release following service of a standard sentence. Supervision in the community in accordance with an order for extended supervision is dealt with in the following chapter.

PART A: SUPERVISION OF SEX OFFENDERS ON PAROLE

7.2 There are no legislative provisions imposing parole conditions that apply specifically to sex offenders. Under s 128(1) of the *Crimes (Administration of Sentences) Act 1999* (NSW), a parole order generally is subject to the standard conditions imposed by the Act, and any additional conditions imposed by the sentencing court or by the Parole Authority. The Parole Authority may impose additional conditions, or vary or revoke any additional conditions which have been imposed, provided that they are not inconsistent with the standard conditions imposed by the Act.¹

7.3 The standard conditions of parole include the requirements that offenders released on parole must:

- be of good behaviour;
- not commit any offence; and
- adapt to normal lawful community life.²

7.4 Other conditions that may be imposed include counselling for drug or alcohol abuse, a requirement to attend for psychiatric treatment or groupwork programs, place and association restrictions³ and residential restrictions.⁴ Failure to abide by the conditions may

1. *Crimes (Administration of Sentences) Act 1999* (NSW) s 128(2), (4).
2. *Crimes (Administration of Sentences) Regulation 2008* (NSW) reg 224.
3. *Crimes (Administration of Sentences) Act 1999* (NSW) s 128A(1).
4. *Crimes (Administration of Sentences) Regulation 2008* (NSW) reg 225.

result in revocation of the parole order and return to gaol.⁵ Probation and Parole Officers monitor compliance with parole conditions and implement a case management plan which seeks to address offending behaviour and to reduce the potential for reoffending.⁶ In the earlier report of the Council relating to sex offences,⁷ consideration was given to the possible imposition of specific restrictions and requirements applicable to sex offenders in relation to their use of computers to access child pornography.

7.5 The DCS has advised that participation in community-based sex offender maintenance programs of the kind referred to earlier in this report is usually a condition of parole for sex offenders.⁸

Relationship of Parole Orders with the *Crimes (Serious Sex Offenders) Act 2006* (NSW)

7.6 If a continuing detention order is made against a person, any parole order to which the person is subject is revoked.⁹ An offender who is subject to a continuing detention order is not eligible for release on parole.¹⁰

7.7 An offender's obligations under a parole order are suspended while he or she is subject to an extended supervision order.¹¹

PART B: REGISTRATION OF SEX OFFENDERS

Registration scheme - New South Wales

7.8 The *Child Protection (Offenders Registration) Act 2000* (NSW) (CPOR Act) establishes an offender registration scheme in New South Wales. The scheme has been operational since October 2001. It is concerned with the registration of offenders whose offences relate to children or pose a risk to their lives or sexual safety. There is no

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5. *Crimes (Administration of Sentences) Act 1999* (NSW) s 170A. See also, Department of Corrective Services, *Offender Management in the Community* <http://www.dcs.nsw.gov.au/Offender_Management/Offender_Management_in_the_Community/index.asp> at 26 November 2008.
 6. NSW Department of Corrective Services, *Offender Management in the Community* <http://www.dcs.nsw.gov.au/Offender_Management/Offender_Management_in_the_Community/index.asp> at 26 November 2008.
 7. New South Wales Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales* (2008) 1, [4.11]–[4.15].
 8. Submission 22: NSW Department of Corrective Services.
 9. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 17A.
 10. *Crimes (Administration of Sentences) Act 1999* (NSW) s 126(4).
 11. *Crimes (Administration of Sentences) Act 1999* (NSW) s 160A.

comparable scheme for the registration of offenders whose offences are committed against adults.

Requirements

7.9 The CPOR Act requires the Commissioner of Police to establish and maintain a register containing information in respect of each ‘registrable person’ in New South Wales.¹² The term ‘registrable person’ includes a person who has been sentenced in respect of a ‘registrable offence’¹³—which includes a range of sexual or other serious offences against children, including murder.¹⁴ The Act also permits registration of ‘corresponding registrable persons’, that is, people who have existing reporting obligations under a foreign jurisdiction.¹⁵

7.10 The court also may make a child protection registration order if it finds a person guilty of an offence that is not otherwise a registrable offence, but only if it is satisfied that the person poses a risk to the lives or sexual safety of one or more children, or of children generally.¹⁶ If the court is so satisfied, it may order that the person comply with the reporting obligations specified in the Act. There is no power to excuse the registration of juvenile sex offenders.

7.11 The information required to be reported by a registrable person includes the following:

- the person’s names and aliases;
- date of birth;
- addresses;
- any tattoos or permanent distinguishing marks;

12. *Child Protection (Offenders Registration) Act 2000* (NSW) s 19.

13. *Child Protection (Offenders Registration) Act 2000* (NSW) s 3A.

14. Class 1 offences include: the murder of a child; sexual intercourse with a child and offences; offences under s 66EA of the *Crimes Act 1900* (NSW); offences under ss 50BA or 50BB of the *Crimes Act 1914* (Cth); and offences against s 80A of the *Crimes Act 1900* (NSW) committed against a child: *Child Protection (Offenders Registration) Act 2000* (NSW) s 3(1). Class 2 offences include: offences involving an act of indecency against or in respect of a child and punishable by imprisonment for 12 months or more; offences under ss 66EB, 86, 80D, 80E, 91D, 91E, 91F, 91G or 91H of the *Crimes Act 1900* (NSW) and s 21G(1) of the *Summary Offences Act 1988* (NSW) where the victim of the offence is a child as well as offences under ss 50BC, 50BD, 50DA or 50DB of the *Crimes Act 1914* (Cth), ss 270.6 or 270.7 of the *Criminal Code 1995* (Cth) and s 233BAB of the *Customs Act 1901* (Cth): *Child Protection (Offenders Registration) Act 2000* (NSW) s 3(1).

15. *Child Protection (Offenders Registration) Act 2000* (NSW) s 3C.

16. *Child Protection (Offenders Registration) Act 2000* (NSW) s 3D.

- employment details;
- details of any motor vehicle the person owns or generally drives;
- names and ages of children who generally reside in the same household or with whom the person has regular unsupervised contact;
- details of any carriage service and internet connection and electronic communication identifiers (such as email addresses, internet user names and chat room user names);¹⁷
- details concerning the person's previous registrable offences;
- details of places of government custody;
- details of any intended travel; and
- other prescribed information.¹⁸

7.12 A registrable person also may not change his or her name without the approval of the Commissioner of Police.¹⁹

7.13 A registrable person is under an ongoing obligation to report his or her relevant personal information annually and to report changes to that information within specified periods.²⁰

7.14 It is an offence to fail to comply with reporting obligations without reasonable excuse or to knowingly supply the police with false or misleading information.²¹ An offence is punishable by a fine of 100 penalty units and/or a maximum of imprisonment for two years.²²

7.15 A person will remain on the Register for either 8 years, 15 years or for the remainder of his/her life, depending on the number and types of offences committed, and their prior convictions for sexual

17. In its first report on *Penalties Relating to Sexual Assault Offences in New South Wales*, the Sentencing Council recommended that all registrable persons under the (then uncommenced) *Child Protection (Offenders Registration) Amendment Act 2007* (NSW) who are subject to parole supervision or extended supervision orders, should be required to provide these details to their supervising officers as well.

18. *Child Protection (Offenders Registration) Act 2000* (NSW) s 9. There also are detailed provisions concerning the reporting of interstate and overseas travelling arrangements: *Child Protection (Offenders Registration) Act 2000* (NSW) ss 11A–11E.

19. *Child Protection (Offenders Registration) Act 2000* (NSW) pt 3A.

20. *Child Protection (Offenders Registration) Act 2000* (NSW) ss 10, 11.

21. *Child Protection (Offenders Registration) Act 2000* (NSW) ss 17, 18.

22. *Child Protection (Offenders Registration) Act 2000* (NSW) ss 17, 18.

offences.²³ If the offender was a child at the time of the commission of the registrable offence, the reporting period is reduced by half, or to seven and a half years in the case of a life-long reporting obligation.²⁴

7.16 Where a registrable person has life-long reporting obligations, he or she may apply to the Administrative Decisions Tribunal for an order suspending those obligations 15 years after last being sentenced or released from government custody in respect of a registrable offence, whichever is the later.²⁵ The Tribunal may only make the order if it considers that the person does not pose a risk to the safety of children,²⁶ after taking into account certain specified matters.²⁷ The Commission for Children and Young People is a party to any proceedings for a suspension order, and may make submissions in those proceedings. A party to the proceedings may appeal to the Supreme Court from the decision of the Tribunal on a question of law.²⁸ An applicant who has been refused a suspension order cannot make a further application to the Tribunal until five years after the date of the refusal.²⁹

7.17 The police are empowered to take the fingerprints of a registrable person or to photograph the person or certain parts of the person's body, and may do so by using reasonable force if the registrable person refuses to provide his or her fingerprints or to be photographed.³⁰ The *Crimes (Forensic Procedures) Act 2000* (NSW) was recently amended to allow the police to take and retain the DNA samples of untested registrable persons.³¹ If a registered person refuses to provide a DNA sample, the police may use reasonable force or apply for a court order to ensure that the sample is taken.³² A

23. *Child Protection (Offenders Registration) Act 2000* (NSW) s 14A.

24. *Child Protection (Offenders Prohibition Orders) Act 2000* (NSW) s 14B.

25. *Child Protection (Offenders Registration) Act 2000* (NSW) s 16(1), (2).

26. *Child Protection (Offenders Registration) Act 2000* (NSW) s 16(4).

27. The Tribunal must consider: the seriousness of the registrable offences; the period of time since the commission of those offences; the age of the registrable person, the age of the victims and the difference in age between the person and the victims; the person's present age; his or her total criminal record; and any other matter the Tribunal considers appropriate: *Child Protection (Offenders Registration) Act 2000* (NSW) s 16(5).

28. *Child Protection (Offenders Registration) Act 2000* (NSW) s 16(10).

29. *Child Protection (Offenders Registration) Act 2000* (NSW) s 16(11).

30. *Child Protection (Offenders Registration) Act 2000* (NSW) ss 12F, 12G.

31. *Child Protection (Offenders Registration) Amendment Act 2007* (NSW) s 4.

32. *Crimes (Forensic Procedures) Act 2000* (NSW) ss 47(1), 75ZB.

refusal to provide such samples without reasonable excuse is punishable by fine and/or imprisonment.³³

7.18 Certain specified agencies are exempt from privacy legislation in the collection and use of personal information about a registrable person, and in the disclosure of such information to another specified agency.³⁴ A government agency may disclose information concerning a registrable person to the Commissioner of Police or a supervising authority.³⁵

Number of Registrable Persons

7.19 As at 15 November 2008, there were 3,201 people on the Child Protection Register.³⁶ Of this number, 2,042 are currently registered, living in the community and being supervised by either NSW Police or the NSW Department of Corrective Services. The remaining 1,159 offenders are in other classifications such as Suspended in Custody, Overseas or Interstate, and are not being supervised by NSW Police.

7.20 In July 2008, the Child Protection Register estimated that there would be 3,550 registered child sex offenders by 2010. NSW Police³⁷ has advised that this projection is currently being revised due to recent legislative changes which expanded the range of offences giving rise to registration under the Act.³⁸

Breaches

7.21 According to the NSW Bureau of Crime Statistics and Research (BOCSAR)³⁹, between 2002 and 2007, 186 people were found guilty of the principal offence of failing to comply with the reporting obligations of the Act.⁴⁰ They were dealt with as follows:

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33. The maximum penalty is a fine of 50 penalty units and/or 12 months imprisonment: *Crimes (Forensic Procedures) Act 2000* (NSW) s 75ZD.
 34. *Child Protection (Offenders Registration) Act 2000* (NSW) s 19BA.
 35. *Child Protection (Offenders Registration) Act 2000* (NSW) s 21D.
 36. Fax from Paul Carey, Assistant Commissioner NSW Police, to Katherine McFarlane, NSW Sentencing Council, 9 December 2008.
 37. Fax from Paul Carey, Assistant Commissioner NSW Police, to Katherine McFarlane, NSW Sentencing Council, 9 December 2008.
 38. The *Child Protection (Offenders Registration) Amendment Act 2007* (NSW) allows for the registration of a person convicted of the offence of sexual assault by forced manipulation where the victim is a child (sch 1 [2]) and of a person found guilty of a Class 2 offence where the sentence did not include a term of imprisonment or supervision (sch 1 [4]).
 39. Email from Jessie Holmes, NSW Bureau of Crime Statistics and Research, to Katherine McFarlane, NSW Sentencing Council, 12 December 2008, ref: jh08-7320 and jh08-6919.
 40. *Child Protection (Offender Registration) Act 2000* (NSW) s 17(1).

- imprisonment (annual average duration of 3–9 months)—20.4% (38);
- fine—32.3% (60);
- bond without supervision—18.8% (35); and
- other sentencing options—28.5% (53).

National registration scheme - Commonwealth

7.22 There is now equivalent legislation in all Australian states and territories that provides for the registration of persons convicted of sex offences and other serious offences against children, to assist the police in monitoring their movements.⁴¹

7.23 Information collected in relation to registrable persons under state and territory legislation is entered into the Australian National Child Offender Register (ANCOR), an electronic database maintained by the federal government agency CrimTrac.⁴² CrimTrac does not monitor the movement of individual offenders within a state or territory, as this remains the responsibility of the State or Territory government.⁴³

7.24 As at 8 September 2008, there were 7,968 registered offenders in Australia.⁴⁴ Information on ANCOR is not released to any external organisations except designated police officers.⁴⁵

41. *Sex Offenders Registration Act 2004* (Vic); *Child Protection (Offender Reporting) Act 2004* (Qld); *Community Protection (Offender Reporting) Act 2004* (WA); *Child Sex Offenders Registration Act 2006* (SA); *Community Protection (Offender Reporting) Act 2005* (Tas); *Child Protection (Offender Reporting and Registration) Act 2004* (NT); *Crimes (Child Sex Offenders) Act 2005* (ACT).

42. CrimTrac is an Executive Agency established under the Part 9 of the *Public Service Act 1999* (Cth). It is responsible for delivering and maintaining national policing information services, advanced national police investigation tools, and national criminal history record checks for accredited agencies; and providing Australian police services with other information and investigative tools: CrimTrac, *About Us* <http://www.crimtrac.gov.au/about_us/index.html> at 18 November 2008.

43. Johns, R., 'Child Sexual Offence: An Update on Initiatives in the Criminal Justice System' (Briefing Paper No 20/03, NSW Parliamentary Library Research Service, 2003) 36–7.

44. CrimTrac, *ANCOR—Australian National Child Offender Register* <http://www.crimtrac.gov.au/systems_projects/AustralianNationalChildOffenderRegisterANCOR.html> at 17 November 2008.

45. Ellison, C., 'National Register Launched to Track Child Sex Offenders' (Press Release, 1 September 2004).

Registration schemes - other jurisdictions

7.25 Sex offender registration schemes which require disclosure of personal details for tracking and monitoring purposes and which, in some instances, permits what might be seen as intrusive behavioural checks also operate in international jurisdictions, such as the United States (US), the United Kingdom (UK) and Canada.

7.26 In the US, all 50 states and the District of Columbia have sex offender registries. In 1994, the *Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994* (US) was enacted to require all states to maintain sex offender registers. The Act requires those who were convicted of child sexual abuse or other sexually violent crimes to register their current addresses with law enforcement for 10 years upon their release. Some individuals are now required to be on the register for life.⁴⁶

7.27 Following the rape and murder of seven-year old Megan Kanka by her neighbour who had two prior convictions for child sex offences, the US Congress was pressured by parents and others to pass Megan's Law, which expanded the sex offender registration law to include community notification. Megan's Laws have now been passed in all 50 states and the District of Columbia. All state sex offender registries in the US are available online. In addition, law enforcement officials have the discretion to notify the community directly if they consider that it is 'necessary to protect public safety'.⁴⁷

7.28 In 2006, the *Adam Walsh Child Protection and Safety Act of 2006* (US) expanded the categories of people required to register with the states, including certain juveniles, and increased the length of the registration periods. The Act set up three tiers of registrants, from those who were convicted of the least serious (Tier I) to the most serious of crimes (Tier III). The higher the tier, the lengthier the duration of the registration requirement. Different tiers of sex offenders are required to update their information at different intervals—yearly (Tier I), every six months (Tier II) or every three months (Tier III). State registration laws cannot have a less stringent requirement than those set up by the *Adam Walsh Act*. The legislation

46. Following the passing of the *Pam Lychner Sexual Offender Tracking and Identification Act of 1996* (US). See Human Rights Watch, *No Easy Answers: Sex Offender Laws in the US* (2007) 35-36. See also NSW Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 4, 172.

47. See Human Rights Watch, *No Easy Answers: Sex Offender Laws in the US* (2007) 36, 47-9. NSW Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 4, 172.

also provided for a national registry that incorporates information on all state registries. All online state registration information must be uploaded onto the online national registry by 2009.⁴⁸

7.29 In addition, the *PROTECT Act of 2003* (US)⁴⁹ allows the courts to sentence sex offenders to lifetime supervised release. Conditions of supervised release may require the offender to submit to searches of his or her person, home and vehicles;⁵⁰ and be subject to urine analysis and breath tests for drug and alcohol use, among other conditions.⁵¹ Offenders may also be required to wear a sensor device that indicates whether images of children cause arousal, and to undergo polygraph tests.⁵²

7.30 Moreover, parole conditions for convicted sex offenders may include the requirement to participate in invasive treatment. The US Court of Appeal has stated that parole conditions that require sex offenders to undergo intrusive treatment—including psychotherapy treatment, ‘interventions with psychopharmacological agents’, polygraph exams to determine sexual history, and use of penile plethysmographs to ‘modify deviant sexual arousal and enhance appropriate sexual arousal’—were acceptable. The Court held that, since sex offender treatment serves the government interest in protecting the community from future sex offences, it was not ‘conduct intended to injure in some way unjustifiable by any government interest’.⁵³

7.31 In the UK, the *Sexual Offences Act 2003* (UK) requires specified persons to notify the police of certain information⁵⁴ about themselves on a yearly basis and to report any changes to that information within

48. See Human Rights Watch, *No Easy Answers: Sex Offender Laws in the US* (2007) 37.

49. *Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003* (US).

50. 18 USC 227 § 3563(a)(5).

51. 18 USC 227 § 3563(b)(23).

52. See Shukovsky, P., ‘Sex Offenders Serving a Life Sentence of Probation’, *Seattle Post-Intelligencer* (online), 16 November 2008, <<http://seattlepi.nwsourc.com>>.

53. However, the Court upheld the appeal on the basis the sex offender conditions imposed on the appellant were unreasonable in the circumstances because the appellant has never been convicted of a sexual offence: *Coleman v. Dretke*, 395 F.3d 216, 223-24 (5th Cir.2005).

54. The information that must be provided to the police includes the person’s date of birth, national insurance number, names, home address, details of his or her passports, details of travel arrangements and other prescribed information: *Sexual Offences Act 2003* (UK) ss 83, 86.

three days.⁵⁵ Persons who are subject to the notification requirements include those who have been: convicted of, or cautioned for, a specified sexual offence; found not guilty of such an offence by reason of insanity; found to be under a disability and to have committed the act charged against him or her in respect of such an offence; or in England and Wales or Northern Ireland, cautioned in respect of such an offence.⁵⁶ The duration of the reporting obligation depends on the severity of the sentence or the type of order imposed on the offender, ranging from two years to an indefinite period.⁵⁷ The length of the reporting obligation for a young offender is half the period specified for an adult offender.⁵⁸

7.32 The *Sexual Offences Act* also provides for several types of prohibition orders aimed at protecting the public or children from serious sexual harm from certain individuals. These orders include: Sexual Offences Prevention Orders, which impose prohibitions on defendants who are dealt with by the court in respect of a specified sexual offence;⁵⁹ Foreign Travel Orders, which prohibit defendants from travelling outside the UK to protect children from serious sexual harm from the defendant outside the UK;⁶⁰ and Risk of Sexual Harm Orders, which impose prohibitions on persons aged 18 or over who appear to the police to have displayed certain sexual behaviour in relation to a child under the age of 16 on at least two occasions.⁶¹ In addition, certain sex offenders who are not aged under 18 at the time of their release may be required to undergo mandatory polygraph testing as one of the conditions of their release.⁶²

7.33 In Canada, the *Sex Offender Information Registration Act 2004* (Canada) was enacted to 'help police services investigate crimes of a sexual nature by requiring the registration of certain information

55. *Sexual Offences Act 2003* (UK) ss 80, 84, 85.

56. *Sexual Offences Act 2003* (UK) s 80.

57. *Sexual Offences Act 2003* (UK) s 82(1).

58. This applies to a person who is under 18 at the date of the relevant conviction, finding or caution: *Sexual Offences Act 2003* (UK) s 82(2), (6).

59. *Sexual Offences Act 2003* (UK) ss 104–113.

60. *Sexual Offences Act 2003* (UK) ss 114–122

61. *Sexual Offences Act 2003* (UK) ss 123–129. The relevant sexual behaviour include: '(a) engaging in sexual activity involving a child or in the presence of a child; (b) causing or inciting a child to watch a person engaging in sexual activity or to look at a moving or still image that is sexual; (c) giving a child anything that relates to sexual activity or contains a reference to such activity; (d) communicating with a child, where any part of the communication is sexual': *Sexual Offences Act 2003* (UK) s 123(3).

62. *Offender Management Act 2007* (UK) s 28.

relating to sex offenders'.⁶³ A person who was convicted of, or found not criminally responsible on account of mental disorder for, a designated offence⁶⁴ may be required to report to a registration centre and provide certain information—including his or her names and aliases, date of birth, gender, height and weight, physical distinguishing marks, addresses, telephone numbers, absences from his or her residence for 15 days or more, and other additional information.⁶⁵ He or she also is required to report to the registration centre annually and to report any changes to his or her name and/or residence within 15 days.⁶⁶ The length of the reporting obligation is either 10 years, 20 years or life, depending on the maximum term of imprisonment for the designated offence.⁶⁷ The legislation expressly provides that, access to, and the use and disclosure of, information on the register is restricted in the interest of the privacy of sex offenders and the public interest in their rehabilitation and reintegration into the community.⁶⁸

7.34 The information provided by sex offenders under the Canadian Act is collected and registered in a database maintained by the Royal Canadian Mounted Police.⁶⁹ Canadian police agencies at the provincial and territorial levels are able to access the national database directly or through their sex offender registries.⁷⁰

63. *Sex Offender Information Registration Act 2004* (Canada) s 2(1).

64. Designated offences include various sexual offences against children or adults, as well as certain non-sexual offences, such as murder in commission of offences, manslaughter, criminal harassment, kidnapping, and trafficking in persons: *Criminal Code 1985* (Canada) s 490.011(1); *National Defence Act 1985* (Canada) s 227. For non-sexual offences, a person is required to report to a registration centre only if it was proved beyond reasonable doubt that he or she had committed the offence with the intent to commit an offence of a sexual nature: *Criminal Code 1985* (Canada) s 490.012(2).

65. *Sex Offender Information Registration Act 2004* (Canada) ss 4-6.

66. *Sex Offender Information Registration Act 2004* (Canada) s 4.1.

67. *Criminal Code 1985* (Canada) s 490.022.

68. *Sex Offender Information Registration Act 2004* (Canada) s 2(2)(c).

69. *Sex Offender Information Registration Act 2004* (Canada) s 14. The database is called the 'National Sex Offender Registry': see Royal Canadian Mounted Police, *National Sex Offender Registry* <http://www.rcmp-grc.gc.ca/techops/nsor/index_e.htm> at 1 December 2008.

70. Royal Canadian Mounted Police, *National Sex Offender Registry* <http://www.rcmp-grc.gc.ca/techops/nsor/index_e.htm> at 1 December 2008. Certain provinces in Canada have their own sex offender registries, such as Manitoba and Ontario: see Manitoba Justice, *Safer Communities: Sex Offender Notifications* <<http://www.gov.mb.ca/justice/notification/>> at 1 December 2008; Ontario Ministry of Community Safety and Correctional Services, *Ontario Sex Offender Registry*

7.35 There is currently no official sex offender registration scheme in New Zealand. In 2003, a private member's Bill was introduced into the New Zealand Parliament to establish a sex offender register but the proposed legislation was withdrawn.⁷¹

Unofficial sex offender registration schemes

7.36 There are several commercial but unofficial sex offender registration schemes operating in Australia, such as *Australian-Records.com*⁷² and *The Australian Paedophile and Sex Offender Index*.⁷³ Information on these 'registers' is mainly collected from public sources, such as newspaper and other media reports, and is accessible by all and sundry.

7.37 A number of difficulties with such unofficial registers have been identified, including:

- the chance of error, particularly mistaken identity, because of limited access to accurate records or reliance on inaccurate records;
- the fact that in some court cases names of offenders are suppressed while in others they are not, with the result that some offenders are singled out for inclusion;
- convictions may have been overturned since publication of the 'registers', leaving some people wrongly included;
- they set a precedent for collecting information and making it publicly available for other classes of people who may be perceived as posing a threat to the community such as those convicted of stealing or drug offences;
- there is a likelihood that the term 'paedophile' will be used for all sex offenders without discrimination as to its technically correct use;
- unofficial publications available in the general domain may be used by sex offenders as a source of contacts;

<http://www.mcscs.jus.gov.on.ca/English/police_serv/sor/sor.html> at 1 December 2008.

71. See New Zealand Justice and Electoral Committee, *Sex Offenders Registry Bill—Report of the Justice and Electoral Committee* (2006).

72. *Australian-Records.com* <<http://www.australian-records.com>> at 20 November 2008.

73. Coddington, D., *The Australian Paedophile and Sex Offender Index* (1997).

- such publications can encourage vigilantism, causing members of the community to take the law into their own hands;⁷⁴ and
- additionally they can operate as a disincentive to rehabilitation.

Issues arising

Benefits of sex offender registration schemes

7.38 Sex offender registration schemes have been established on the basis that they:

- assist law enforcement agencies in the investigation and prevention of crime, including the identification of potential suspects—especially if coupled with DNA profiling;⁷⁵
- can deter sex offenders from committing new crimes because they are aware that they are being monitored, and can also deter potential first-time sex offenders who fear registration;⁷⁶
- give victims a sense of satisfaction arising from the fact that the offender has been named or from the knowledge that he or she is being monitored;⁷⁷
- provide an opportunity, where breach occurs, for the police to intervene before an offender commits another offence;⁷⁸
- promote cooperation between law enforcement agencies;⁷⁹

74. Swain, M., *Registration of Paedophiles* (Briefing Paper No 12/97, NSW Parliamentary Library Research Service, 1997) 12.

75. Swain, M., *Registration of Paedophiles* (Briefing Paper No 12/97, NSW Parliamentary Library Research Service, 1997) 17-18; Simpson, R., *'Megan's Law' and Other Forms of Sex-Offender Registration* (Briefing Paper No 22/99, NSW Parliamentary Library Research Service, 1999) 9.

76. Swain, M., *Registration of Paedophiles* (Briefing Paper No 12/97, NSW Parliamentary Library Research Service, 1997) 18; Simpson, R., *'Megan's Law' and Other Forms of Sex-Offender Registration* (Briefing Paper No 22/99, NSW Parliamentary Library Research Service, 1999) 9.

77. Swain, M., *Registration of Paedophiles* (Briefing Paper No 12/97, NSW Parliamentary Library Research Service, 1997) 18; Simpson, R., *'Megan's Law' and Other Forms of Sex-Offender Registration* (Briefing Paper No 22/99, NSW Parliamentary Library Research Service, 1999) 9.

78. Swain, M., *Registration of Paedophiles* (Briefing Paper No 12/97, NSW Parliamentary Library Research Service, 1997) 18; Simpson, R., *'Megan's Law' and Other Forms of Sex-Offender Registration* (Briefing Paper No 22/99, NSW Parliamentary Library Research Service, 1999) 10.

79. Hinds, L. and Daly, K., 'The War on Sex Offenders: Community Notification in Perspective', (2001) 34(3) *The Australian and New Zealand Journal of Criminology* 256, 267.

- promote better relations between law enforcement agencies and members of the community through educating the public about sex offenders.⁸⁰

Community notification

7.39 The extent of community notification that occurs when an offender is released into the community from detention, and is subject to child protection register requirements, has been the subject of debate. At issue is whether the information should be made available to the public at large, or whether disclosure should be confined to particular classes of individuals (eg, previous victims) or organisations (eg, employers, schools and law enforcement agencies).

7.40 There are also issues concerning the type of information that should be capable of disclosure, which may vary according to the category of recipient and concerning the identity of the person or organisation who should be responsible for disclosure.⁸¹

7.41 Those supportive of widespread community notification have argued that the public has a right to know that a sex offender is living in the neighbourhood, so that they can take measures to protect themselves and their children.⁸²

Disadvantages of community notification provisions

7.42 Arguments against the introduction of community notification provisions suggest that notification schemes:

- involve a double punishment where they lead to offenders being persecuted and subjected to violence.⁸³ The danger of vigilantism

80. Hinds, L. and Daly, K., 'The War on Sex Offenders: Community Notification in Perspective', (2001) 34(3) *The Australian and New Zealand Journal of Criminology* 256, 267.

81. Swain, M., *Registration of Paedophiles* (Briefing Paper No 12/97, NSW Parliamentary Library Research Service, 1997) 17; Simpson, R., *'Megan's Law' and Other Forms of Sex-Offender Registration* (Briefing Paper No 22/99, NSW Parliamentary Library Research Service, 1999) 6–8.

82. Swain, M., *Registration of Paedophiles* (Briefing Paper No 12/97, NSW Parliamentary Library Research Service, 1997) 17; Simpson, R., *'Megan's Law' and Other Forms of Sex-Offender Registration* (Briefing Paper No 22/99, NSW Parliamentary Library Research Service, 1999) 9; Freeland, J. and Wainwright, W., 'When is Community Protection Putting the Community at Risk? Questions Arising from International Community Notification Laws in Managing Sex Offenders in the Community' (Paper presented at Delivering Crime Prevention: Making the Evidence Work, Sydney 21–22 November 2005) 3, citing Hinds, L. and Daly, K., 'The War on Sex Offenders: Community Notification in Perspective' (2001) 34(3) *The Australian and New Zealand Journal of Criminology* 256, 267.

83. Swain, M., *Registration of Paedophiles* (Briefing Paper No 12/97, NSW Parliamentary Library Research Service, 1997) 19, 21–2. See also Waters, N.,

and harassment, has been evidenced in jurisdictions where 'Megan's Law' community notification exists.⁸⁴ Moreover, as vigilantism is not monitored, such acts risk being under-reported and under-recorded.⁸⁵ Vigilante actions also may be taken against the offenders' families;⁸⁶

- fail to take into account the important distinctions between different types of offenders who present different risks of recidivism,⁸⁷ divert attention from other types of offences that pose similar or greater risks,⁸⁸ and are problematic where the level of notification depends on the risk assessment of an offender, given the inaccuracy of risk assessment tools;⁸⁹

'Implications for Privacy Law' in James, M. (ed), *Paedophilia: Policy and Prevention*, Australian Institute of Criminology, Canberra (1997) 81, 82–3; Simpson, R., *'Megan's Law' and Other Forms of Sex-Offender Registration* (Briefing Paper No 22/99, NSW Parliamentary Library Research Service, 1999) 10.

84. Hinds, L. and Daly, K., 'The War on Sex Offenders: Community Notification in Perspective' (2001) 34(3) *The Australian and New Zealand Journal of Criminology* 256, 268; Freeland, J. and Wainwright, W., 'When is Community Protection Putting the Community at Risk? Questions Arising from International Community Notification Laws in Managing Sex Offenders in the Community' (Paper presented at Delivering Crime Prevention: Making the Evidence Work, Sydney, 21–22 November 2005) 6; Simpson, R., *'Megan's Law' and Other Forms of Sex-Offender Registration* (Briefing Paper No 22/99, NSW Parliamentary Library Research Service, 1999) 10; Waters, N., 'Implications for Privacy Law' in James, M. (ed), *Paedophilia: Policy and Prevention*, Australian Institute of Criminology, Canberra (1997) 81, 85; New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 June 2000, 6478 (Paul Whelan, Minister for Police).
85. Fitch, K., *Megan's Law: Does It Protect Children?* (2nd ed) NSPCC (2006), 38.
86. Swain, M., *Registration of Paedophiles* (Briefing Paper No 12/97, NSW Parliamentary Library Research Service, 1997) 21; Waters, N., 'Implications for Privacy Law' in James M. (ed), *Paedophilia: Policy and Prevention*, Australian Institute of Criminology, Canberra (1997) 81, 83.
87. Simpson, R., *'Megan's Law' and Other Forms of Sex-Offender Registration* (Briefing Paper No 22/99, NSW Parliamentary Library Research Service, 1999) 10.
88. Simpson, R., *'Megan's Law' and Other Forms of Sex-Offender Registration* (Briefing Paper No 22/99, NSW Parliamentary Library Research Service, 1999) 10; New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 June 2000, 6478–9 (Paul Whelan, Minister for Police).
89. Freeland, J. and Wainwright, W., 'When is Community Protection Putting the Community at Risk? Questions Arising from International Community Notification Laws in Managing Sex Offenders in the Community' (Paper presented at Delivering Crime Prevention: Making the Evidence Work, Sydney, 21–22 November 2005) 3.

- risk under-reporting of certain offences, such as intra-familial sexual violence, because of the consequences for the victim and family if the offender is identified;⁹⁰
- create a false sense of fear and conversely of security in the community, in that they risk overstating the level of recidivism while concealing the fact that a considerable number of sex offenders have not been in contact with the criminal justice system;⁹¹ and
- discourage offenders from entering into treatment voluntarily.⁹²

7.43 A number of practical problems have been raised in relation to notification schemes, including concerns that they may encourage offenders to change their identity and conceal their location, thus impeding the investigation of sexual offences and efforts to rehabilitate sex offenders.⁹³ It has also been suggested that they lead to a decrease in the charging of juveniles with sexual abuse because of

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90. Australian Institute of Criminology, 'Is Notification of Sex Offenders in Local Communities Effective?' (Crime Reduction Matters No 58, Australian Institute of Criminology, 2007), citing Fitch, K., *Megan's Law: Does It Protect Children?* (2nd ed) NSPCC (2006), 36–7; Hinds, L. and Daly, K., 'The War on Sex Offenders: Community Notification in Perspective', (2001) 34(3) *The Australian and New Zealand Journal of Criminology* 256, 266; Freeland, J. and Wainwright, W., 'When is Community Protection Putting the Community at Risk? Questions Arising from International Community Notification Laws in Managing Sex Offenders in the Community' (Paper presented at Delivering Crime Prevention: Making the Evidence Work, Sydney, 21–22 November 2005) 6, citing McKeen, S., 'A Place for Paedophiles in the Community' (2001) *Edmonton Journal* B5.
91. Swain, M., *Registration of Paedophiles* (Briefing Paper No 12/97, NSW Parliamentary Library Research Service, 1997) 20–1; Simpson, R., *Megan's Law' and Other Forms of Sex-Offender Registration* (Briefing Paper No 22/99, NSW Parliamentary Library Research Service, 1999) 10; Fitch, K., *Megan's Law: Does It Protect Children?* (2nd ed) NSPCC (2006), 40; Freeland, J. and Wainwright, W., 'When is Community Protection Putting the Community at Risk? Questions Arising from International Community Notification Laws in Managing Sex Offenders in the Community' (Paper presented at Delivering Crime Prevention: Making the Evidence Work, Sydney, 21–22 November 2005) 5.
92. Center for Sex Offender Management, *An Overview of Sex Offender Community Notification Practices: Policy Implications and Promising Approaches* (1997) 2.
93. Swain, M., *Registration of Paedophiles* (Briefing Paper No 12/97, NSW Parliamentary Library Research Service, 1997) 20; Fitch, K., *Megan's Law: Does It Protect Children?* (2nd ed) NSPCC (2006), 41; Waters, N., 'Implications for Privacy Law' in James, M. (ed), *Paedophilia: Policy and Prevention*, Australian Institute of Criminology, Canberra (1997) 81, 85.

the concern that to do so will expose them to the scrutiny of public notification.⁹⁴

Effectiveness of community notification

7.44 There is little evidence to date that notification schemes result in reduced sex offending,⁹⁵ although this may be due to difficulties in measuring their efficacy.⁹⁶ One recent study of US registration and notification laws indicated that while it appears that the existence of such laws may reduce the recidivism of registered offenders (as perhaps because police are better able to monitor them), registration laws do not necessarily deter individuals who have not yet committed registrable offences.⁹⁷ It is possible that if they have the effect of reducing the capacity of offenders to reintegrate into society, they may in fact encourage re-offending.⁹⁸

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94. Freeland, J. and Wainwright, W., 'When is Community Protection Putting the Community at Risk? Questions Arising from International Community Notification Laws in Managing Sex Offenders in the Community' (Paper presented at Delivering Crime Prevention: Making the Evidence Work, Sydney 21–22 November 2005) 6.
95. Centre for Sex Offender Management, *Community Notification and Education* (2001) 10; Australian Institute of Criminology, 'Is Notification of Sex Offenders in Local Communities Effective?' (Crime Reduction Matters No 58, Australian Institute of Criminology, 2007), citing Pawson, R., *Evidence Based Policy: A Realist Perspective* (2006) 105–21; Fitch, K., *Megan's Law: Does It Protect Children?* (2nd ed) NSPCC (2006) 35; New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 June 2000, 6478 (Paul Whelan, Minister for Police).
96. Fitch, K., *Megan's Law: Does It Protect Children?* (2nd ed) NSPCC (2006), 35–6; Centre for Sex Offender Management, *Community Notification and Education* (2001) 10; Australian Institute of Criminology, 'Is Notification of Sex Offenders in Local Communities Effective?' (Crime Reduction Matters No 58, Australian Institute of Criminology, 2007), citing Pawson, R., *Evidence Based Policy: A Realist Perspective* (2006) 105–21.
97. Email from J Prescott, University of Michigan to Katherine McFarlane, NSW Sentencing Council, and see Prescott, J. and Rockoff, J., 'Do Sex Offender Registration and Notification Laws Affect Criminal Behaviour?', University of Michigan Law School John M. Olin Center for Law & Economics Working Paper No 08-006 (Paper presented at *Third Annual Conference on Empirical Legal Studies 2008*, 12–13 September 2008) 4.
98. Swain, M., *Registration of Paedophiles* (Briefing Paper No 12/97, NSW Parliamentary Library Research Service, 1997) 19-20; Hinds, L. and Daly, K., 'The War on Sex Offenders: Community Notification in Perspective', (2001) 34(3) *The Australian and New Zealand Journal of Criminology* 256, 266–7; Freeland, J. and Wainwright, W., 'When is Community Protection Putting the Community at Risk? Questions Arising from International Community Notification Laws in Managing Sex Offenders in the Community' (Paper presented at Delivering Crime Prevention: Making the Evidence Work, Sydney, 21–22 November 2005) 5; New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 June 2000, 6478–9 (Paul Whelan, Minister for Police).

7.45 BraveHearts Inc noted that community notification laws do not appear to be effective in encouraging offenders not to re-offend. It considered that calls for such laws were based on community fear and a lack of public confidence in the legal and correctional systems to manage and monitor sex offenders effectively, and that community notification laws would be unnecessary if the community had confidence in the system. It suggested that community notification laws should be considered only if governments and their agencies fail to address the current failures of the system to detain, monitor and treat medium to high risk offenders.⁹⁹

7.46 Unlike some international jurisdictions, the New South Wales legislation does not contain provisions for the community to be informed of specific details of the child sex offenders who live in the local area. The Royal Commission into the NSW Police Service recommended against the introduction of such legislation that would permit community notification, advising that the release of warnings by the police in response to a genuine threat, in accordance with specific guidelines and on a case-by-case basis was a far better option.¹⁰⁰

7.47 In its submission, the NSW Council for Civil Liberties opposed the use of sex offender notification schemes,¹⁰¹ as did the Department of Juvenile Justice in relation to juvenile sex offenders. The Department also suggested that 'current offender registration provisions for juveniles [should] be reviewed to allow for flexibility in their application to take into account developmental issues and assessed risks for an individual offender'.¹⁰²

Council position

7.48 The Council does not consider it appropriate to incorporate community notification provisions into the New South Wales sex offender registration scheme.

99. BraveHearts Inc favoured the indefinite detention of medium to high risk offenders, and the completion of treatment and ongoing monitoring of low risk offenders as a prerequisite for their release: Submission 19: BraveHearts Inc, Supplementary Submission.

100. The Hon Justice JRT Wood, *Royal Commission into the New South Wales Police Service—Final Report Volume V: The Paedophile Inquiry* (1997) [18.151].

101. Submission 8: NSW Council for Civil Liberties.

102. Submission 15: Department of Juvenile Justice.

PART C: CHILD PROTECTION PROHIBITION ORDER

7.49 Under the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW), the Commissioner of Police may make an application to a Local Court for a child protection prohibition order. This order prohibits a registrable person from engaging in certain specified conduct,¹⁰³ including:

- associating with or having other contact with specified persons or kinds of persons;
- being in specified locations or kinds of location;
- engaging in specified behaviour; and
- being in specified employment or employment of a specified kind.¹⁰⁴

7.50 The Local Court may make a child protection prohibition order if it is satisfied that the person is a registrable person and that, on the balance of probabilities:

- (a) there is reasonable cause to believe, having regard to the nature and pattern of conduct of the person, that the person poses a risk to the lives or sexual safety of one or more children, or children generally; and
- (b) the making of the order will reduce that risk.¹⁰⁵

7.51 The Local Court also may make an order against a young registrable person under the age of 18 years, but only if in addition to the matters set out above it is satisfied that all other reasonably appropriate means of managing the conduct of the person have been considered before the order was sought.¹⁰⁶ The Court is not required to be satisfied that the person is likely to pose a risk to a particular child or children or a particular class of children.¹⁰⁷

7.52 Strict prohibitions have also been placed on the employment able to be entered into by certain high-risk offenders. Under the *Commission for Children and Young People Act 1998* (NSW), a 'prohibited person'—which includes a 'registrable person' within the

103. *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 4.

104. *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 8.

105. *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 5(1).

106. *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 5(2).

107. *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 5(4).

meaning of the CPOR Act¹⁰⁸—is prohibited from applying for, or otherwise attempting to obtain, child-related employment; and from undertaking or remaining in child-related employment.¹⁰⁹

7.53 The prohibitions also extend to current and prospective employers. For example, an employer:

- must not employ, or continue to employ, a prohibited person in child-related employment;¹¹⁰
- must require a person to disclose whether he or she is a prohibited person before commencing employing that person in child-related employment;¹¹¹ and
- must carry out background checks before employing a person in primary child-related employment.¹¹²

7.54 It is an offence for a person to knowingly make a false statement to an employer for this purpose.¹¹³

108. A 'prohibited person' also includes a person convicted of a serious sex offence, the murder of a child or a child-related personal violence offence: *Commission for Children and Young People Act 1998* (NSW) s 33B.

109. *Commission for Children and Young People Act 1998* (NSW) s 33C. 'Child-related employment' is defined as employment: involving the provision of child protection services; in pre-schools, kindergartens and child care centres; in schools or other educational institutions (not being universities); in detention centres; refuges used by children; in wards of public or private hospitals in which children are patients; clubs, associations, movements, societies, institutions or other bodies having a significant child membership or involvement; in any religious organisation; in entertainment venues where the clientele is primarily children; as a babysitter or childminder that is arranged by a commercial agency; involving fostering or other child care; involving regular provision of taxi services for the transport of children with a disability; involving the private tuition of children; involving the direct provision of child health services; involving the provision of counselling or other support services for children; on school buses; at overnight camps for children; and prescribed by regulation: *Commission for Children and Young People Act 1998* (NSW) s 33(1).

110. *Commission for Children and Young People Act 1998* (NSW) s 33E.

111. *Commission for Children and Young People Act 1998* (NSW) s 33D(1).

112. 'Primary child-related employment' means: paid child-related employment; child-related employment of a religious leader or spiritual official of a religion; child-related employment involving the fostering of children; or child-related employment prescribed by regulations: *Commission for Children and Young People Act 1998* (NSW) s 37(6).

113. *Commission for Children and Young People Act 1998* (NSW) s 33D(2).

PART D: CHILD PROTECTION WATCH TEAM (CPWT)

7.55 The CPWT is a multi-agency approach to the monitoring and management of high risk child sex offenders who have been released into the community.¹¹⁴ It was modelled on public protection panels established in the UK,¹¹⁵ and it has been trialled in New South Wales as part of the Government's Election commitment to reduce child sexual abuse.¹¹⁶

7.56 The CPWT trial commenced in South Western Sydney in September 2004.¹¹⁷ It was managed by the Ministry for Police and involved a number of government agencies, including the NSW Police Force; the Department of Community Services; the Department of Corrective Services, the Department of Juvenile Justice; the Department of Ageing, Disability and Home Care; the Department of Health; the Department of Housing; the Department of Education and Training.¹¹⁸

7.57 Following evaluation, legislative amendment occurred to facilitate the exchange of information between the participating agencies.¹¹⁹ It is understood that ongoing consultation is being given to extension of the trial and to its deployment in other areas of the State.¹²⁰

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114. New South Wales, *Parliamentary Debates*, Legislative Council, 22 October 2008, 10309 (Penny Sharpe, Parliamentary Secretary). See also NSW Department of Corrective Services, *Annual Report 2004/05* (2005) 30.
115. NSW Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 4, 133.
116. NSW Department of Community Services, *Annual Report 2005/06* (2006) 48; NSW Department of Corrective Services, *Annual Report 2004/05* (2005) 30.
117. New South Wales, *Parliamentary Debates*, Legislative Council, 22 October 2008, 10309 (Penny Sharpe, Parliamentary Secretary).
118. New South Wales, *Parliamentary Debates*, Legislative Council, 22 October 2008, 10309 (Penny Sharpe, Parliamentary Secretary). See also Dickie, J., *Privacy Direction On Child Protection Watch Team*, (2006) Privacy NSW
<http://www.lawlink.nsw.gov.au/lawlink/privacynsw/ll_pnsw.nsf/pages/PNSW_03_s41cpwt> at 12 September 2008.
119. *Child Protection (Offenders Registration) Amendment Act 2008* (NSW).
120. Email from Natasha Mann, Policy Manager NSW Attorney General's Department, to Katherine McFarlane, NSW Sentencing Council, 1 December 2008.

PART E: COUNCIL POSITION

7.58 The current structure for the supervision of sex offenders released into the community appears to be adequate, both in terms of providing a deterrent, and a means of tracing and detecting sex offenders who commit further offences. The Council has not identified any specific method of value in reinforcing the several components of this structure. It does not recommend any relaxation of the structure. In Chapter 9 the Council raises for consideration however, the possibility of widening the net for registration of offenders under the *Child Protection (Offenders Registration) Act 2000* (NSW).

8. Post sentence preventive restriction – the *Crimes (Serious Sex Offenders) Act 2006* (NSW)

INTRODUCTION

8.1 This chapter examines schemes for the continuing detention or extended supervision of an offender, that takes effect after expiry of an existing sentence, and that are designed to protect the community from that offender. As such they can be regarded as a form of preventive detention and constitute an exception to ordinary sentencing principles.

8.2 These schemes differ from those that permit the imposition of disproportionate or indefinite sentences in that the relevant order is not made at the time that the original sentence is imposed. Rather, it is made following an application made during or near the end of the offender's existing custodial sentence.

8.3 Early examples of legislation in Australia directed towards the preventive detention of a particular offender can be seen in the *Community Protection Act 1990* (Vic) ('the Victorian Act'); and the *Community Protection Act 1992* (NSW) ('the New South Wales Act').

8.4 The Victorian Act was enacted for the purpose of permitting the continuing detention of Gary David, an offender with a substantial history of violence and disordered behaviour, so as to allow for his care, treatment and management and so as to provide for the safety of the public.¹ Provision was made for the institution of proceedings in the Supreme Court for an order for such detention, which could be made, following application by the Attorney General, if the Court was satisfied on the balance of probabilities, that David posed a serious risk to the safety of any member of the public, and was likely to commit any act of personal violence to another person.² An order was duly made.³ Its validity was not challenged and the Act was repealed in 1993 following David's death in custody.

8.5 The New South Wales Act similarly had the stated objective of protecting the community by providing for the preventive detention, by order of the Supreme Court, made on the application of the Director of Public prosecutions, of a single person, Gregory Wayne Kable.⁴ The Act was held by a majority in the High Court, to be invalid because it was inconsistent with the provisions of Chapter III

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1. *Community Protection Act 1990* (Vic) s 1(a).
 2. *Community Protection Act 1990* (Vic) s 8(1).
 3. *AG (Vic) v David* (1992) 2 VR 46.
 4. *Community Protection Act 1994* (NSW) s 3.

of the Australian Constitution, and constituted an Act of attainder being directed at only one person.⁵

8.6 Subsequent legislative schemes providing for the continuing detention or extended supervised release of a particular class of prisoner, for the protection of the community, have been established in:

- Queensland—*Dangerous Prisoners (Sexual Offenders) Act 2003*;
- Western Australia—*Dangerous Sexual Offenders Act 2006*;
- New South Wales—*Crimes (Serious Sex Offenders) Act 2006*;
- Victoria—*Serious Sex Offender Monitoring Act 2005*,⁶ and
- New Zealand—*Parole Act 2002*.

8.7 The constitutional validity of the Queensland Act was challenged in the High Court in *Fardon v Attorney General (Qld)* on similar grounds to those raised in *Kable*. The challenge was unsuccessful, *Kable* being distinguished,⁷ and it would seem unlikely, as a result of the direction in *Fardon*, that any of the other Acts would be struck down on constitutional grounds.

PART A: THE *CRIMES (SERIOUS SEX OFFENDERS) ACT 2006* (NSW)

8.8 The *Crimes (Serious Sex Offenders) Act 2006* (NSW) specifies that its 'primary object' is 'to provide for the extended supervision and continuing detention of serious sex offenders so as to ensure the safety and protection of the community' and that 'another object' is 'to encourage serious sex offenders to undertake rehabilitation'.⁸ The Act applies to sex offenders who have committed 'sex offences' or 'serious sex offences', as defined in the Act, and as summarised in Appendix A.

8.9 Proceedings under the Act are civil proceedings and 'are to be conducted in accordance with the law (including the rules of evidence) relating to civil proceedings' except as otherwise provided.⁹

5. *Kable v DPP (NSW)* (1996) 189 CLR 51. For an outline of the decision see Wheeler, F., 'The *Kable* Doctrine and State Legislative Power State Courts' (2005) 20(2) *Australasian Parliamentary Review* 15.

6. Supervision is permitted, but not continuing detention.

7. *Fardon v AG (Qld)* (2004) 223 CLR 575.

8. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 3.

9. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 21. Preventive detention proceedings in other Australian states are criminal proceedings: *Serious Sex Offenders Monitoring Act 2005* (Vic) s 26; *Dangerous Sexual Offenders Act*

Applications for orders

8.10 The State may apply to the Supreme Court for an Extended Supervision Order (ESO) against a sex offender who is in custody or under supervision while serving a sentence of imprisonment for a serious sex offence or for an offence of a sexual nature (whether the sentence is being served by way of full-time, periodic or home detention, and whether the offender is in custody or on release on parole) or pursuant to an ESO or Continuing Detention Order (CDO).¹⁰

8.11 Alternatively, it may apply for a CDO against a sex offender who, when the application is made, is in custody in a correctional centre serving a sentence of imprisonment by way of full-time detention for a serious sex offence or for an offence of a sexual nature, or pursuant to an existing CDO.¹¹

8.12 A 'sex offender' is 'a person who has at any time been sentenced to imprisonment following his or her conviction of a "serious sex offence", as defined by the Act, other than an offence committed while the person was a child'.¹² The category of 'offences of a sexual nature' includes a broader range of offences than those encompassed by the expression 'serious sex offence', some of which have much lower maximum penalties. It also includes offences relating to failure to comply with reporting requirements under sex offender registration legislation.¹³

8.13 A summary of the offences falling within the purview of the Act is contained in Appendix A.

8.14 The definition of 'sex offender' means that an application can be made in respect of an offender whose current custody (or supervision in the case of an extended supervision order) relates to a relatively minor 'offence of a sexual nature', provided that he or she has a prior conviction for a 'serious sex offence' committed as an adult.¹⁴

8.15 The Act provides in relation to an application for an ESO that an order can only be made if the Court is satisfied to a high degree of

2006 (WA) s 40. But see *Fardon v AG (Qld)* (2004) 223 CLR 575, [34] (McHugh J), [74]–[85] (Gummow J), [216] (Callinan and Heydon JJ) regarding detention pursuant to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) as civil detention for a legitimate protective purpose.

10. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 6(1).

11. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 14(1).

12. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 4.

13. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 5.

14. See for example *AG (NSW) v Brookes* [2008] NSWSC 473, [5].

probability that the offender is likely to commit a further serious sex offence if he or she is not kept under supervision.¹⁵

8.16 In relation to an application for a CDO it provides that an order can only be made if the Court is satisfied to a high degree of probability that the offender is likely to commit a further serious sex offence if he or she is not kept under supervision¹⁶ and additionally that adequate supervision will not be provided by an extended supervision order.¹⁷

Interim orders

8.17 Provision exists for the making of interim supervision and interim detention orders where on the lodgement of an application for an ESO or CDO, the current custody or supervision of the offender will expire before the proceedings are determined and the matters alleged in the supporting documentation would, if proved, justify the making of an interim order.¹⁸

Pre-trial procedures

8.18 When an application is made, the Supreme Court must hold a preliminary hearing within 28 days or within such further time as the Court allows.¹⁹ If following the preliminary hearing, the Court is not satisfied that the matters alleged in the supporting documentation would, if proved, justify the making of an ESO or a CDO, it must dismiss the application.²⁰

8.19 If it is satisfied, then it must make orders appointing 2 persons with the qualifications specified in the Act to conduct separate psychiatric and psychological examinations of the offender and to furnish reports to the Court, and directing the offender to attend the necessary examinations.²¹

15. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 9(2).

16. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 17(2).

17. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 17(3).

18. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 8(1), 16(1). Interim orders may be made if the offender's current period of custody or supervision will expire before the preventative detention proceedings are determined. An interim order applies for up to 28 days, and may be renewed but not so as to exceed a total duration of three months: ss 8, 16 and see *AG (NSW) v Tillman* [2007] NSWCA 119, [29], [94]–[101]; cf *AG (NSW) v Gallagher* [2006] NSWSC 340, [40]–[41].

19. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 7(3), 15(3).

20. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 7(5), 15(5).

21. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 7(4), 15(4).

Final hearing

8.20 At the final hearing of any such application, the Court must have regard to the following matters, in addition to any other matter it considers relevant:²²

- (a) the safety of the community,
- (b) the reports received from the court-appointed experts and the level of the offender's participation in the examination,
- (c) the results of any other [psychiatric, psychological or medical] assessment ... as to the likelihood of the offender committing a further serious sex offence, the willingness of the offender to participate in any such assessment, and the level of the offender's participation in any such assessment,
- (d) the results of any statistical or other assessment as to the likelihood of persons with histories and characteristics similar to those of the offender committing a further serious sex offence,^[23]
- (e) any treatment or rehabilitation programs in which the offender has had an opportunity to participate, the willingness of the offender to participate in any such programs, and the level of the offender's participation in any such programs,^[24]
- (f) the level of the offender's compliance with any obligations to which he or she is or has been subject while on release on parole or while subject to an earlier extended supervision order,

22. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 9(3), 17(4). In *AG (NSW) v Davis* [2008] NSWSC 664, Price J took into account as a relevant consideration the fact that the offender would, by the making of a continuing detention order, be deprived of his liberty to which he is otherwise entitled, having served the whole term of his sentence: [26]. See also *AG (NSW) v Brookes* [2008] NSWSC 473, [81]–[83]; but cf *AG (NSW) v Tillman* [2007] NSWCA 119, [44]–[45].

23. As to the validity of actuarial tools for assessing the risk posed by individual offenders in this context, see discussion in *AG (NSW) v Winters* [2007] NSWSC 1071, [57], [113]–[123] and cf Western Australian cases *DPP (WA) v Mangolamara* (2007) 169 A Crim R 379, 385–6, 401–4, 406–7; *DPP (WA) v Williams* [2007] WASC 95, [35]–[36].

24. See, eg, *AG (NSW) v Thomas* [2008] NSWSC 640, [36]–[39] (refusal to participate); cf *AG (NSW) v Davis* [2008] NSWSC 490, [27], [31]–[32] (no opportunity to participate); *AG (NSW) v Winters* [2007] NSWSC 1071, [52], [64], [168] (withdrawn from treatment program due to suicide attempt); *AG (NSW) v Brookes* [2008] NSWSC 473, [65]–[66], [88] (unable to participate in group therapy due to psychiatric and cognitive impairments).

- (g) the level of the offender’s compliance with any obligations to which he or she is or has been subject under the child protection legislation^[25],
- (h) the offender’s criminal history (including prior convictions and findings of guilt in respect of offences committed in New South Wales or elsewhere), and any pattern of offending behaviour disclosed by that history,^[26]
- (i) any other information that is available as to the likelihood that the offender will in future commit offences of a sexual nature.²⁷

Evidentiary considerations

8.21 In *New South Wales v Thomas*,²⁸ Johnson J accepted the plaintiff’s submission in relation to the requirements for the making of an interim detention order that ‘the words ‘if proved’ in s 16(1)(b) of the Act indicate an evidentiary as opposed to a legal burden. That is, it must appear to the Court that there is a prima facie case.²⁹ His Honour noted that a similar approach had been taken by Price J in *Attorney-General (NSW) v Hayter*.³⁰ Similar considerations would apply to the making of an interim supervision order.³¹

8.22 In *Tillman v Attorney General (NSW)*³² Giles and Ipp JJA (Mason P dissenting on this point) held that the word ‘likely’ to commit a further serious sex offence where used in s 17(2) of the Act, concerning an ESO and in s 17(3) concerning a CDO:

denotes a degree of probability at the upper end of the scale, but not necessarily exceeding 50 per cent.³³

8.23 Their Honours applied the decision of the Victorian Supreme Court in *TSL v Secretary to the Department of Justice*³⁴ and held that this expression does not mean ‘more probable than not’. In this respect, they parted from the interpretation which had been adopted in *Attorney General (NSW) v Winters*.³⁵ Their Honours stated that:

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- 25. *Child Protection (Offenders Registration) Act 2000* (NSW); *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW).
 - 26. For an example involving an offender with cognitive and mental health impairments, see *AG (NSW) v Brookes* [2008] NSWSC 473, [68]–[70].
 - 27. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 9(3), 17(4).
 - 28. *AG (NSW) v Thomas* [2008] NSWSC 640.
 - 29. *AG (NSW) v Thomas* [2008] NSWSC 640, [8].
 - 30. *AG (NSW) v Hayter* [2007] NSWSC 983.
 - 31. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 8(1)(b) is in similar terms to s 16(1)(b).
 - 32. *Tillman v AG (NSW)* [2007] NSWCA 327.
 - 33. *Tillman v AG (NSW)* [2007] NSWCA 327, [89].
 - 34. *TSL v Secretary to the Department of Justice (2006)* 14 VR 109.
 - 35. *AG (NSW) v Winters* [2007] NSWSC 1071.

The difference between likelihood in the sense of a high probability but not necessarily more probable than not, and likelihood as something more probable than not, may not be great. Expressed as percentages, which is incorrect because it suggests a mathematical precision which is unattainable and is an unhelpful approach, transition from 49 per cent to 51 per cent is not the key to application of ss 17(2) and (3).³⁶

8.24 Mason P held that:

The expression 'a high degree of probability' indicates something 'beyond more probably than not'; so that the existence of the risk, that is the likelihood of the offender committing a further serious sex offence, does have to be proved to a higher degree than the normal civil standard of proof, though not to the criminal standard of beyond reasonable doubt. On the other hand, the risk or likelihood itself does not have to be a probability to the civil standard of proof, but rather a sufficiently substantial probability to satisfy the criterion 'likely' as explained in TSL.³⁷

and added on that approach,

when one comes to the second element of s.17(3), what is required is satisfaction to a high degree of probability (that is, beyond a mere balance of probabilities) that adequate supervision will not be provided by an extended supervision order; that is, that even if there is an extended supervision order, the offender will nevertheless still be likely to commit a further serious sex offence.³⁸

Extended supervision order

8.25 If an ESO is made, the court may impose 'such conditions as the Supreme Court considers appropriate', including conditions requiring the offender to participate in treatment and rehabilitation programs, to wear electronic monitoring equipment and to comply with non-association conditions as well as with restrictions concerning frequenting specified locations or engaging in specified forms of employment.³⁹ The order applies for the period specified in the order (up to five years), and may be renewed on application.⁴⁰

8.26 Non-compliance with the requirements of an ESO is an offence punishable by a fine and/or imprisonment for two years,⁴¹ and may lead to the making of a CDO.⁴²

36. *AG (NSW) v Winters* [2007] NSWSC 1071, [92].

37. *Tillman v AG (NSW)* [2007] NSWCA 327, [21].

38. *Tillman v AG (NSW)* [2007] NSWCA 327, [22].

39. See *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 11. The provision applies to interim and extended supervision orders.

40. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 10.

41. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 12.

8.27 The Supreme Court may, at any time on the application of the State or the offender, vary or revoke an ESO.⁴³

Continuing detention order

8.28 An offender who is subject to a CDO is detained in a correctional facility,⁴⁴ often in the same prison, and under the same conditions, as during his or her sentence.⁴⁵ Under a CDO, the court has no power to attach conditions.⁴⁶ It may make a recommendation, although experience in other jurisdictions suggests that there is a risk that recommendations may not be implemented.⁴⁷

8.29 A CDO applies for the period specified in the order (up to five years), commencing when the order is made or at the end of the offender's current custody (whichever is later).⁴⁸ Orders may be renewed.⁴⁹ The Supreme Court may, at any time on the application of the State or the offender, vary or revoke a CDO.⁵⁰

8.30 A question arose in *New South Wales v Davis*⁵¹ as to whether the Court has the power to make a CDO concurrently with an ESO. The parties agreed that the offender could be adequately supervised in the community. However as no suitable accommodation would be

42. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 14A, 17(4A).

43. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 13(1).

44. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 4 (definition of 'correctional centre'), 20(1).

45. See, eg, *AG (NSW) v Wilde* [2007] NSWSC 1490, [110]–[112] and *AG (NSW) v Wilde* [2008] NSWSC 14, [34]–[35] where a continuing detention order was made on the assumption that Wilde would undertake a sex offender treatment program available only at Goulburn Correctional Centre. He would there be subject to a higher security regime than during his sentence. See also Keyzer, P., 'Preserving Due Process or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth?' (2008) 30 *Sydney Law Review* 101, 107–14.

46. In *Crimes (Serious Sex Offenders) Act 2006* (NSW) pt 3; *AG (NSW) v Quinn* [2007] NSWSC 873, [172] (Hall J made a recommendation instead: [178]).

47. See for example *AG (Qld) v Francis* (2005) 158 A Crim R 399, 407–15, 429–30 (failure to implement recommendations of judge who made continuing detention order); *Western Australia v Alvisse* [2007] WASC 129, [32]–[49] (inadequate implementation of conditions of supervision order); see also McSherry, B., Keyzer, P. and Freiberg, A., 'Preventive Detention for 'Dangerous' Individuals in Australia: A Critical Analysis and Proposals for Policy Development' (CRC 03/04-05, Criminology Research Council, 2006) 66–8 (discussing Queensland cases).

48. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 18(1).

49. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 18(3) provides that the Supreme Court is not prevented from making a second or subsequent continuing detention order.

50. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 19(1).

51. *AG (NSW) v Davis* (submissions, hearing before Price J, Supreme Court of New South Wales, 23 June 2008).

available for at least four months, a question arose as to whether an interim CDO could be made, contemporaneously with an ESO to take effect once the accommodation was available.

8.31 The two types of order are expressed in the Act as alternatives.⁵² It is not clear however whether the court's power, on application by either party, to 'vary or revoke' a CDO would include varying it to an ESO (and vice versa).⁵³ Justice Price dealt with this question by making a CDO for four months and adjourning the remainder of the summons—an application for an ESO—for three months.⁵⁴

PART B: IMPLEMENTATION OF THE ACT

The Serious Sex Offenders Assessment Committee

8.32 The Serious Sex Offender Assessment Committee (SSOAC) was established in May 2007, with the primary, but not restricted, role of considering all serious sex offenders who may come within the ambit of the *Crimes (Serious Sex Offenders) Act*.⁵⁵

8.33 These offenders include those who are currently serving a sentence for a serious sex offence or an offence of a sexual nature and who are approaching the last six months of their current custody or supervision. The SSOAC determines whether to recommend to the Attorney General that an application under that Act be made for either a CDO or an ESO.

Composition of Committee

8.34 The SSOAC is chaired by the Commissioner of Corrective Services and consists of senior staff from the Department of Corrective Services (DCS) and the Attorney General's Department (AGD). DCS is represented by the Assistant Commissioner Offender Management; Regional Executive Director, Community Offender Services; Acting Executive Director Offender Services; Acting Executive Director Statewide Administration of Sentences and Orders; Statewide Clinical Co-ordinator Sex Offender Programs; and the Co-ordinator Community Compliance Group. The Attorney General's Department is represented by the Director Legal Services.

8.35 In addition to contributing to the decision making of the SSOAC, the role of the Attorney Generals' Department representative

52. See *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 17(3).

53. Consider *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 13, 14(4), 14A, 19.

54. *AG (NSW) v Davis* [2008] NSWSC 664, [58].

55. Submission 20: NSW Department of Corrective Services

is to act as a liaison between the two Departments on the conduct of these matters once a recommendation has been made.

Factors considered when making a recommendation

8.36 In deciding whether to make a recommendation to the Attorney, the SSOAC considers whether the offender:

- has committed sex offences bringing him within the purview of the Act;
- is deemed to be a high risk of committing a further serious sex offence on release based on an actuarial score. In this regard a score of 6 or above on the 'Static 99' scale is considered to indicate high risk;
- has completed sex offender treatment;
- has multiple serious sex offences on his record;
- has breached previous supervision orders (eg parole or bonds) in particular, by committing further sexual offences;
- could be considered to fall within 'the handful of hard core high risk offenders' to whom the Act is directed.

8.37 If the above factors indicate that an application under the Act may be warranted, the SSOAC requests that a comprehensive psychological risk assessment report be prepared. If that report confirms that the offender would require continuing detention, or extended supervision, to contain his risk, then a recommendation is made.

8.38 As part of the recommendation, the SSOAC causes a management plan to be prepared which sets out what the Department hopes to achieve with the offender in custody and/or what could be achieved in the community if the offender is released.

Early interventions

8.39 DCS advised the Council that it regards applications under the Act to be a weapon of last resort. It is in the process of setting up an assessment centre to which all sex offenders will be referred after sentence in order to establish a treatment pathway at the outset of their sentence. It is the Department's intention that all serious sex offenders will have had the opportunity to complete sex offender treatment well before the expiration of their sentence so as, hopefully to limit the need for a CDO.

8.40 Prior to the introduction of this legislation, it was not uncommon for serious sex offenders to not participate in sex offender programs or apply for parole. They preferred to sit out their full

sentence and be released as untreated sex offenders, free of any requirement for supervision on parole.

8.41 The Commissioner has now directed that sex offenders in custody be informed of the Act and of the consequences which could flow from a refusal to undertake sex offender treatment. Such offenders are to be identified well in advance of the expiration of their sentence so that they have sufficient time to complete sex offender treatment should they chose to do so. These offenders are also to be encouraged to consider various options, such as undertaking PREP and educational/awareness courses that may assist them to apply for sex offender treatment.

8.42 The Commissioner has also directed that the SSOAC assess other sex offenders who might come within the scope of the Act, in order to ensure that other options to ensure the protection of the community are considered. In this regard, the SSOAC considers:

- if the offender is still in custody, what programs or courses he could still attend that might better equip him for release;
- the adequacy of the proposed parole conditions;
- accommodation options on release and in particular whether the offender could or should be placed in a Community Offender Support Program Centre;
- whether the Commissioner should write to the Commissioner of Police recommending that an application be made to the local court for an order under the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW); and
- if the offender is already on parole, whether the offender needs to be subject to more intensive supervision.

8.43 It can also take steps to ensure that a DCS community psychologist is aware of the proposed release of the offender and is able to provide support and counselling.

8.44 Where necessary, the Commissioner may make a submission to the State Parole Authority pursuant to section 141A of the *Crimes (Administration of Sentences) Act 1999* (NSW) concerning the proposed release of an offender on parole seeking either that parole not be granted on that occasion or that particular conditions be imposed.

PART C: MATTERS CONSIDERED AND OUTCOMES

8.45 The Council was advised that 28 offenders have been formally referred to the Attorney General for consideration of an application being brought under the Act.⁵⁶

8.46 Applications have been made to the Supreme Court in relation to 23 offenders; no application was made in relation to four offenders; and an application in relation to one offender is under consideration. A list of the relevant decisions is included in Appendix B.

Initial applications

8.47 The State has initially sought a CDO, or in the alternative, an ESO, in relation to 15 offenders. One matter is not yet finalised. A CDO was made in relation to seven offenders on the State's first application. Of these, one was overturned on appeal and one was later varied by consent to an ESO. Initial applications for a CDO resulted in an ESO being made in the alternative in relation to four offenders. Applications were withdrawn in relation to three offenders.

8.48 A total of eight initial applications have been made seeking an ESO only. To date, four ESOs have been made and four matters are not finalised.

Subsequent applications

8.49 Of the 15 offenders where orders under the Act have been made, applications for extensions of CDOs were made (successfully) in two matters. In one matter an application for a further CDO resulted in an ESO. Applications for an ESO (to follow a CDO) were made successfully in a further three matters. One further application (seeking an ESO) is currently before the Court.

Appeals

8.50 There have been three appeals to the Court of Appeal on behalf of an offender after a CDO was made. One was successful, resulting in the CDO being set aside and an ESO imposed in its place. The offender absconded on the same day that the order was made and has since served a sentence for the breach. He is now out of custody under the balance of the ESO imposed by the Court of Appeal (as varied by the Court on 11 March 2009). A Notice of Intention to Appeal has been filed in one further matter.

56. Email from Bernhard Ripperger, Legal Services Branch, NSW Attorney General's Department, to Katherine McFarlane, NSW Sentencing Council, 21 April 2009.

8.51 The State has appealed to the Court of Appeal on two occasions. The first was against the decision of the Court at first instance to release an offender on an interim ESO instead of the interim CDO sought. That appeal was upheld and the offender was returned to custody. The State was unsuccessful in the second matter.

Breaches

8.52 Breach proceedings have been brought against six offenders. Convictions have been recorded against five offenders and proceedings are on foot in relation to three offenders (two having previously been convicted of a breach).

9. Issues in relation to continuing detention orders and extended supervision – the *Crimes (Serious Sex Offenders) Act 2006* (NSW)

INTRODUCTION

9.1 As has been noted previously, orders for the continuation of an offender's detention beyond the term of his sentence, or for the extension of his supervision, are exceptions to the normal expectation of any person who has served, or substantially served, a sentence.

9.2 Such orders can only be justified in the exceptional circumstances where the interests of the community require intervention for the purpose of protecting its members from the risk of that offender committing further sexual offences of a serious kind, and then only subject to appropriate safeguards.

9.3 The *Crimes (Serious Sex Offenders) Act 2006* (NSW) ('the NSW Act') contains a number of procedural safeguards, which include:

- prompt notification to an offender of the filing of an application for an extended supervision order (ESO) or a continuing detention order (CDO);¹
- obligations for disclosure to the offender of such documents, reports and other information as are relevant to the application;²
- a requirement that the Supreme Court ('the Court') appoint two psychiatrists and/or psychologists and consider their assessment reports before making an ESO or CDO;³
- provision of a right of appeal;⁴
- provision of a power to order a variation or revocation of an order at any time, upon application by the Attorney General or the offender;⁵
- a requirement that the Commissioner of Corrective Services submit an annual report to the Attorney General on all relevant offenders;⁶ and
- review of the Act after three years of operation.⁷

1. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 7(1), 15(1).

2. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 7(2), 15(2).

3. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 7(4), 9(3)(b), 15(4), 17(4)(b).

4. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 22.

5. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 13, 19.

6. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 13(2), 19(2).

7. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 32.

9.4 In this chapter, the Council gives consideration to those procedural aspects that have been identified in the submissions received, or in decisions of the Court, as problematic, and notes the more general objections in principle which have been raised in relation to the Act.

PART A: TIME FOR BRINGING AN APPLICATION

9.5 Under the NSW Act, an application for an ESO or a CDO is not to be made until the last six months of the offender's current custody or supervision.⁸ The Act does not specify a date by which an application must be made, and concern has been expressed in some cases in relation to the lateness of the application, and in relation to the six months criterion.

Late Applications

9.6 In *Attorney-General (NSW) v Tillman*⁹ the application for an interim detention order was brought seven days before the defendant was due to be released from custody. Hoeben J stated that the lateness of the application gave rise to a fundamental unfairness to the defendant which must influence the exercise of his discretion in determining the application.¹⁰ On appeal, the Court of Appeal held that the lateness of the Attorney General's application should not have been a factor in the exercise of the judge's discretion where the protection of the community called for either form of interim order.¹¹

9.7 In *Attorney General (NSW) v Wilde*¹² an application for an interim detention order was made one month before the defendant was due for release from custody. Price J commented that the proper development of a risk management plan was hindered by the lateness of the application and by the fact that the proceedings were held in mid-December—when the application could have been commenced any time within the last six months of the offender's custody.

9.8 The delay in bringing an application for a CDO was found to be a relevant factor in three decisions of the Queensland Supreme Court where the applications were dismissed.¹³ In two of the cases, the application was brought less than a week before the date on which the offender was due for release, and in the third case it was brought

8. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 6(2), 14(2).

9. *AG (NSW) v Tillman* [2007] NSWSC 356.

10. *AG (NSW) v Tillman* [2007] NSWSC 356, [53].

11. *AG (NSW) v Tillman* [2007] NSWCA 119, [93].

12. *AG (NSW) v Wilde* [2007] NSWSC 1490.

13. *AG (Qld) v Watego* [2003] QSC 367 (affirmed on appeal in *AG (Qld) v Watego* (2003) 142 A Crim R 537); *AG (Qld) v Nash* (2003) A Crim R 312; *AG (Qld) v Foy* [2004] QSC 428.

approximately six weeks before the offender's release date. In all three cases, the Queensland Supreme Court found that the offenders were denied natural justice because they had not been given an adequate opportunity to respond to the application.¹⁴

9.9 In a review of the Queensland cases mentioned above, Keyzer and O'Toole suggested that a requirement be introduced for such applications to be made within three or four months prior to the offender's release date, subject to possible qualification in cases where there are 'exceptional circumstances'.

9.10 One problem with adopting this approach and providing a leave requirement for late applications would be identifying relevant 'exceptional circumstances'. It is in no one's interests to have protracted legal disputes about whether an application has been filed in compliance with procedural requirements. Apart from the earlier cases, where delay was in part a result of administrative practices still in their infancy, recent 'late applications' have been brought for other reasons which may or may not be seen as 'exceptional'. These reasons include, for example:

- the need to obtain an expert medical opinion on the physical possibility of an offender re-offending sexually;
- an offender only being considered following revocation of parole near the end of his sentence;
- where the head sentence itself was short; and
- where the failure to complete treatment occurred near the end of the sentence.

9.11 In relation to the last mentioned factor, it is the case that often an offender's participation in CUBIT occurs near the end of his or her current custody or supervision. It is important that any decision to make an application under the Act is based on the most up to date evidence concerning any treatment gains made, particularly in the CUBIT program or during any in- custody maintenance

9.12 In New South Wales, there are now procedures in place to ensure that the offender is aware of at least the possibility of an application at an early stage. First, the DCS has advised that it identifies, at the beginning of their sentence, any sex offender who may potentially be subject to an application for a CDO or ESO.¹⁵ The

14. *AG (Qld) v Watego* [2003] QSC 367 (affirmed on appeal in *AG (Qld) v Watego* (2003) 142 A Crim R 537); *AG (Qld) v Nash* (2003) A Crim R 312; *AG (Qld) v Foy* [2004] QSC 428.

15. Submission 20: NSW Department of Corrective Services.

offender is informed of this possibility and is thereby encouraged to participate in appropriate sex offender treatment programs.

9.13 Second, the Crown Solicitor's Office will write to the offender, on receiving instructions to advise the Attorney General about the merits of an application, indicating that an application is under consideration.

9.14 The Council understands that significant improvements have been made, and that the administrative procedures are again being reviewed to address the issue of delay.¹⁶ In particular, an interagency committee, chaired by the Commissioner, was established to assess possible candidates for applications at an early stage. In addition to assisting the application process, early identification allows treatment and other options to be explored in relation to the offender. This also allows the appropriate risk assessment and any necessary referrals to Justice Health to be organised at an earlier stage.

Council position

9.15 These procedures provide an adequate basis for bringing proceedings in a timely way, although as a general principle the Council considers that they should normally be commenced as soon as possible once the relevant six-month trigger date has been reached.

9.16 The Council is of the view that an ESO, and more particularly a CDO, is such a significant departure from the notion that a prisoner is entitled to unconditional release on completion of their sentence, that it is unacceptable for an application to be brought so late as to preclude the respondent's legal representatives having sufficient time to prepare his or her case, or to prevent the matter being determined by the Court before the date for expiry of the respondent's current custody or supervision. In general, the possibility of further custody or supervision while the application is determined¹⁷ should be avoided.

9.17 The Council is of the view that the steps outlined above should serve as an early warning system for the agencies who are responsible for preparing serious sex offender applications as well as for the offenders themselves. If a potential candidate for an application under the Act can be identified early in their sentence, it follows that the opportunity for participation in an appropriate custodial sex offender program should be capable of being addressed, and the preparation

16. Email from Bernhard Ripperger, Legal Services Branch, NSW Attorney General's Department, to Katherine McFarlane, NSW Sentencing Council, 17 December 2008.

17. By way of interim detention order, pursuant to s 16 of the *Crimes (Serious Sex Offenders) Act 2006* (NSW).

needed to support any application for a CDO or ESO completed by the time parole is due to be considered.

9.18 There may be specific circumstances which prevent an application being made less than three (3) months before the expiry of a sentence. Such circumstances would include where arrangements necessary for an ESO can only be finalised closer to the date at which they come into effect. Examples include finalising the residence of an offender who comes under the Criminal Justice Program or finalising medication and medical treatment for an offender prescribed anti-libidinal medication. In the former case vacancies may need to be assessed close to the time of release and in the latter, medical complications or limited availability of medical expertise at a proposed location could require special arrangements to be sought from a range of providers.

9.19 A majority of the Council considers that as a matter of practice applications should normally be brought no later than three (3) months before expiry of the respondent's current custody or supervision. It does not however consider it necessary to add this as a statutory requirement, since that would lead to an unnecessary degree of rigidity. Moreover in any case where there was a significant ongoing concern as to the risk posed by an offender, it is inevitable that the Court would waive any such time limit. A minority considered that applications brought later than the three-month period should only be entertained where the Court gave leave. By reason of a difference of opinion this would be an appropriate matter to be taken into account in the course of a statutory review.

Application brought within the last six months of custody or supervision

9.20 The issue of the actual date from which the six-month period commences needs to be clarified in the legislation. Section 6(2) of the NSW Act provides that an application for an ESO can not be made until the last six month's of the offender's current custody or supervision and s 14(2) provides that an application for a CDO cannot be made under until the final six months of the offender's current custody. 'Current custody' refers to the offender serving a sentence of imprisonment.

9.21 It seems clear that the intention of the NSW Act was to make provision for supervision or detention of a serious sex offender to ensure the safety of the community in circumstances when there were no other lawful means of detaining the offender in custody or supervising the offender in the community. In other words, the Act was to take effect once the offender's sentence had expired.

9.22 It seems clear therefore that the final six months of the offender's current custody or supervision refers to the final six months of the offender's total sentence after which time there would be no further restriction on the offender's liberty if an application under the Act was not made.

9.23 Therefore if a serious sex offender is in the final six months of his or her non-parole period this cannot be said to be the final six months of his or her current custody. The offender still has a period (and sometimes a considerable period) of his or her sentence to serve which may be in custody or, if released on parole, would be under supervision in the community. The *Crimes (Administration of Sentences) Act 1999* (NSW) (the CAS Act) makes adequate provision for the protection of the community such that there is no work for the NSW Act to do. The State Parole Authority (SPA) may not release an offender unless it is in the public interest to do so. If the SPA forms an intention to grant parole the CAS Act provides that the Commissioner or the State may make a submission opposing release which the SPA is bound to take into account. If the SPA nevertheless decides that it is in the public interest to release the offender on parole, the offender is then serving the remainder of his or her sentence under supervision. If the offender does not comply with the conditions of his or her parole order then the offender's parole will be revoked and he or she will return to custody to continue serving his or her sentence in a correctional centre.

9.24 If a serious sex offender is serving a sentence of less than three years then his or her release at the expiration of the non-parole period is more certain but the final six months of the non-parole period can still not be said to be the final six months of his or her current custody. The offender's parole may be revoked prior to release on the application of the Commissioner and it will be revoked if the offender is untreated and is deemed to be a risk to the community. If the offender is released on parole then again he or she is serving his or her sentence under supervision and if the offender fails to comply with his or her parole order he or she will be returned to custody to complete his or her sentence in detention.

9.25 While there are some sentences which do not require supervision of the offender following his or her release on a court-based parole order, it is inconceivable that the type of offender who would attract the interest of the NSW Act would be serving such a sentence.

9.26 There is no need for the provision of the NSW Act to be enlivened when the CAS Act provides adequate protection for the community. The NSW Act is enlivened only when the CAS Act has finished its work and the offender would otherwise have no restrictions.

9.27 As the NSW Act is unclear as to what constitutes the final six months of the current custody of supervision it should be amended to make it clear that it refers to the final six months of the head or total sentence.

9.28 The resultant provision would allow that where there is likely to be less than six months remaining on parole and an ESO is indicated then application could be commenced whilst the offender was still in custody and if granted would take effect upon the expiration of the total sentence (ie, the expiration of parole supervision). An application for a CDO would only be made in respect of a prisoner who is in custody in a correctional centre.

PART B: TIMELY DISCLOSURE OF MATERIALS TO THE OFFENDER

9.29 Section 15(2) of the Act requires that the State of New South Wales disclose to the offender all materials relevant to the proceedings 'as soon as practicable' after the application is made or after they become available. One commentator argues that the short notice at which such materials were served on the offender pursuant to this provision imposes a significant burden on defence lawyers.¹⁸

Council position

9.30 One of the causes of delays in these applications is that until recently much of the relevant material is collected only after the request to consider an application is forwarded from DCS to the Attorney General. The Council understands that administrative procedures are being implemented to allow for the collection¹⁹ and review of this material earlier in the process. In this way, when an application is commenced most of the material should be available for disclosure very shortly afterwards. This procedure, when combined with the goal of commencing proceedings closer to the relevant trigger date should address the relevant concern.

9.31 The Council has also been advised that very often the material served in these cases is voluminous, canvassing the offender's entire prison record, and commonly occupies 12 to 15 large arch-lever volumes. Clearly in such a case the Defence do need reasonable notice to absorb such material.

18. Cook, A., 'Continuing Detention Orders for Sex Offenders—Future Sex Crimes' (Paper presented at the Public Defenders Annual Criminal law Conference 15 & 26 March 2008) 6.

19. Via s 25 orders.

PART C: STANDARD OF PROOF

9.32 Proceedings under the Act are civil proceedings²⁰, and the standard of proof, imposed on the applicant, is one calling for the Court to be satisfied to a high degree of probability that the offender is “likely to commit a further serious sex offence” if not kept under supervision (for an ESO), and additionally (for a CDO) that adequate supervision will not be provided by an ESO.

9.33 It is clear that this standard of proof falls short of the criminal standard of proof which would require the Court to be satisfied beyond reasonable doubt of the relevant risk. Some commentators have contended that as orders made under the Act result in the deprivation of liberty, the criminal standard of proof should apply.²¹

Council position

9.34 The Council does not agree with that objection. Given the inherent difficulties in predicting future behaviour, and the paramount objective of community protection that underpins the legislation, adoption of the criminal standard of proof would raise the barrier too high.

9.35 The Council notes the interpretation given to the provision in *Tillman v AG (NSW)*²² and notes that in *Cornwall v AG for NSW*²³ the Court confirmed that it indicated ‘something beyond more probably than not’, and accordingly called for proof to a higher degree than the normal civil standard.

9.36 A separate problem in practice was identified by the Department of Corrective Services (DCS), which was encapsulated in the following observation of Justice Price in *Attorney General (NSW) v Wilde*:²⁴

How can this Court be satisfied to a high degree of probability that even if the defendant is subject to an extended supervision order he will still be likely to commit a further serious sex offence unless the suitability of potential conditions is properly explored and the defendant’s attitude to a proposed plan is obtained?

20. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 21.

21. Legislative Assembly Legislation Review Committee, Parliament of New South Wales, *Legislation Review Digest No 5 of 2006* (2006) 9–10. See also New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 March 2006, 21734 (Chris Hartcher, Member for Gosford, Shadow Attorney General); Greig, D., ‘The Politics of Dangerousness’ 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* (Australian Institute of Criminology, 1993) 47, 51.

22. *Tillman v AG (NSW)* [2007] NSWCA 327.

23. *Cornwall v AG (NSW)* [2007] NSWCA 374, [21].

24. *AG (NSW) v Wilde* [2007] NSWCA 1490, [121].

9.37 DCS²⁵ advised that, if an application is sought for a CDO, work has to be undertaken to develop and place before the Court a plan for supervision which is then shown to be incapable of providing adequate supervision of the offender, either because of his or her inherent nature, or because it is beyond the reasonably practicable capacity of Corrective Services to provide. This process it suggested, can be time consuming, circular and wasteful of resources, to the point of justifying a reconsideration of the relevant thresholds for the two forms of order.

9.38 The Council acknowledges that in practice the State has been required by the Court when seeking a CDO to identify the conditions that are regarded as necessary conditions to adequately reduce the relevant risk (and to justify why they are not available) *and* the available conditions (and to justify why they are not sufficient to reduce that risk). The State has been criticised in several cases²⁶ for proposing conditions which it regards as necessary for ‘adequate supervision’ but which it asserts it cannot make available.

9.39 The issue which has concerned the Court, in this respect, in deciding whether to grant an ESO over the objection of the State, in relation to untreated sex offenders, is at the heart of the submission of DCS which is dealt with later in this chapter. Its primary concern is that untreated offenders, namely those who have not satisfactorily completed CUBIT cannot be adequately supervised in the community.

9.40 In *New South Wales v Thomas*,²⁷ Adams J observed that

[t]he “adequate supervision” envisaged ... must be sufficient to reduce the risk of the defendant re-offending by committing a further serious sex offence to less than the likelihood of which the Court is required to be satisfied under the first leg of sub-s 17(3)

...

9.41 The courts have not directly addressed at appellate level what is meant by ‘adequate supervision’. In recent decisions,²⁸ the Court has contrasted what the expert evidence suggested were ‘ideal’ or ‘desirable’ conditions to reduce risk, with those that are ‘necessary’ without dealing with the meaning of adequate supervision, and has tended to read down conditions which the State suggested were impracticable to be ‘desirable’ rather than ‘necessary’, when making an ESO in preference to a CDO.

25. Submission 25: NSW Department of Corrective Services—Supplementary 2, 1.

26. *Winters v AG (NSW)* [2008] NSWCA 33, [124] (Hodgson J), [20] (Mason J); *New South Wales v Brookes* [2008] NSWCA 212, [3] (McClellan CJ at CL); *New South Wales v Wilde* [2008] NSWSC 1211, [70] (Kirby J).

27. *New South Wales v Thomas* (2008) NSWSC 1340, [21].

28. See, eg, *New South Wales v Wilde* [2008] NSWSC 1211.

Council position

9.42 The Council recognises that pending possible further judicial guidance, questions will continue to arise in relation to whether adequate supervision in the community can be provided for a respondent to an application for a CDO or ESO. However this is essentially a question of fact for the Court, and not one that is capable of legislative definition. Accordingly it does not make any recommendation to address this issue.

9.43 The Council has given consideration to the suggestion that there be a different threshold for an ESO and CDO respectively. No submission received developed a different test, and the Council has been unable to devise one. In fact the Act already makes some provision in this respect ie, in the second leg of the s 17(3) requirement for a CDO.

PART D: TIMING OF RISK ASSESSMENT

9.44 The Victorian Sentencing Advisory Council in its recent report on high-risk offenders examined the merits of assessing risk both at the time of sentencing and at the end of the offender's sentence.²⁹ The Council concluded:

risk assessments at either end of the process have their limitations. Given this, it has been suggested that the best practice would include an early assessment of an offender's risk followed by follow-up assessments that continue throughout the offender's sentence. This would allow a case manager to develop a relationship with an offender, providing the time needed for a thorough understanding of both the static and dynamic risk and protective factors that affect the individual's level of risk to the community. Consistent with the principles of therapeutic jurisprudence, early assessment of offenders would help to ensure that an appropriate treatment regime is put in place as soon as possible during an offender's prison sentence.³⁰

9.45 This Council acknowledges that if a risk management/rehabilitation plan is established following the initial risk assessment, the offender's compliance and response to it could then be used in determining:

- at the expiry of the non-parole period whether release should be opposed or supported subject to suitable conditions for supervision and reinforcement in the community;

29. Sentencing Advisory Council, 'High-Risk Offenders: Post Sentence Supervision and Detention' (Final Report, State of Victoria, 2007).

30. Sentencing Advisory Council, 'High-Risk Offenders: Post Sentence Supervision and Detention' (Final Report, State of Victoria, 2007) 16.

- if not released to parole, or if returned into custody following breach, whether an application for a CDO or ESO should be made.

Conclusion

9.46 It is understood that DCS is moving towards an earlier risk assessment, which would also help in formulating a case management plan. This would accord with the approach taken in Scotland, and would appear to be a positive development, which the Council supports.

PART E: MATTERS TO BE TAKEN INTO ACCOUNT

Views of the sentencing court

9.47 NSW Legal Aid³¹ submitted that the Act should be amended to require the view of the original sentencing court on the offender's rehabilitation prospects and the need for community protection, to be taken into account as a factor in determining whether an application for a CDO or ESO should be granted. It suggested that, while it might be unrealistic and inappropriate for the original sentencing court to consider the likelihood of a CDO or an ESO at the time of sentencing, its views on the offender's rehabilitation prospects and the need for community protection are not irrelevant.

9.48 Expression of these views at the time of the original sentencing order, against the backdrop of a scheme allowing for the making of a CDO or an ESO in the future could act as an incentive to an offender to participate in sex offender program while in custody.

Council position

9.49 The Council understands that these views are taken into account in practice both when considering whether an application should be made, and when the application is considered by the Court. It supports adding to the list of items that must be considered under s 9(3) and s 17(4) the observations of the sentencing judge based on the material presented at the time of sentence, which may include a presentence report and reports from psychiatrists or psychologists as to the factors behind the offending and the offender's rehabilitation prospects.

9.50 This could then assist in the early preparation of a case management plan, provide a yardstick against which the progress of the offender during custody could be measured, and be available as

31. Submission 17: Legal Aid NSW.

background material for any subsequent application for an ESO or CDO.

9.51 Permitting those views and the reasons for sentence to be taken into account later, would be consistent with the provisions relating to life re-determination applications.³²

Views of victims

9.52 Of the four pieces of preventive detention legislation in Australia, only the Queensland Act³³ allows victims to make a submission or to provide a statement concerning an application under the legislation.

Council position

9.53 Although victims groups in New South Wales have not been formally consulted in this respect, the Council considers that there would be merit in allowing them an opportunity to have their views taken into account, at least in circumstances where they might be aware of events not known to the authorities of relevance to any ongoing danger to themselves or other members of the community.

9.54 It is recognised that being notified of an application may of itself bring back painful memories for victims or may give rise to concerns about their privacy and safety, and that the provision of information by victims should be optional, and confined to ongoing concerns rather than a restatement of the harm caused by the original offending.

9.55 To be workable, this could only apply in the cases of victims who have placed their names on the victims register and had asked to be advised of any application for an ESO or CDO (each of which should continue to be optional).

9.56 Permitting the views of victims to be taken into account on an optional basis, would be consistent with the practice in relation to life sentence re-determinations.³⁴

PART F: SHOULD THE COURT GRANT A CDO OR AN ESO?

9.57 The Council notes the concerns which have been expressed in some decisions,³⁵ in relation to those offenders who were subject to an application for a CDO under the Act, who had not participated in a sex offender program while in custody, and for whom it was asserted that no reasonably practicable opportunity existed for their participation in

32. *Crimes (Administration of Sentences) Act 1999* (NSW) s 199(2).

33. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ss 9AA, 21A.

34. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(2).

35. *AG (NSW) v Jamieson* [2007] NSWSC 465, [34]; *AG (NSW) v Winters* [2007] NSWSC 1071, [24], [80]; *AG (NSW) v Davis* [2008] NSWSC 490, [32].

a community based program, that would provide for adequate supervision.

9.58 This is the issue which recently occupied the Court in cases such as *Wilde (No 2)*,³⁶ *Brookes*,³⁷ *Harrison*,³⁸ and *Thomas*,³⁹ and which led Justice Price in *Wilde (No 1)*⁴⁰ to question how the Court can be satisfied to the high degree of probability required for a CDO unless the suitability of the potential conditions for a supervision order can be properly explored.

Treatment in custody or in the community?

9.59 Clearly, the offender's participation in treatment programs is an important factor in deciding whether to impose a CDO or an ESO. Whether an offender does participate in and complete a program can depend on their availability in the correctional centre where the sentence is being served by the offender, on his willingness to participate, and on the time when the program becomes available.

9.60 In some cases offenders claim to have been detained past their potential parole release date because of the unavailability of programs, or because the time required to complete a program would take them past their parole release eligibility date.

9.61 This arose in *New South Wales v Davis*⁴¹ where the offender, whose release date came up very quickly after he ceased to be a forensic patient, submitted that the Supreme Court should exercise its discretion to decline to make an interim detention order on the basis that the delay in his being offered a place in CUBIT was the reason why he remained an untreated sex offender.

9.62 Other examples exist. *Winters*⁴² was described as 'a reluctant participant' in CUBIT because of his concerns 'that his intellectual disability and problems with reading and writing may make the program difficult'.⁴³ In *Tillman*⁴⁴ the offender had expressed a willingness to participate in treatment but was reluctant to participate in the CUBIT program as he was concerned that disclosures made in group sessions were not treated confidentially and because the CUBIT program was housed in a block in which he

36 *State of NSW v Wilde* [2008] NSWSC 1211.

37 *State of NSW v Brookes* [2008] NSWCA 212.

38 *State of NSW v Harrison* [2008] NSWSC 1306.

39 *State of NSW v Thomas* [2008] NSWSC 1340.

40 *AG (NSW) v Wilde* [2008] NSWSC 14.

41. *AG (NSW) v Davis* [2008] NSWSC 490.

42. *AG (NSW) v Winters* [2007] NSWSC 1071.

43. *AG (NSW) v Winters* [2007] NSWSC 1071, [52].

44. *AG (NSW) v Tillman* [2007] NSWSC 605, [142].

claimed that he had been assaulted as a fifteen year old inmate in 1977. In *Thomas*,⁴⁵ the offender said that his reluctance had been due to his refusal to mix with paedophiles who he expected to be on the program and who he would attack, and also, at some stage at least, to an unwillingness to disclose uncharged wrongdoing.

9.63 DCS has advised that most offenders who refuse to do CUBIT have their own reasons for doing so and request variations of the program to suit their own needs. Some offenders have, in the past consciously refused to undertake Sex Offender Programs and elected not to seek parole, because they prefer to be released at the end of the term of the sentence free of parole requirements. The reality however is that virtually all offenders who had refused to do CUBIT, and who were given a CDO, as a consequence, went on to complete CUBIT.

9.64 An issue which accordingly arises is whether DCS should provide, or fund, community based sex offender programs for offenders who have not been treated in custody, so as to allow the Court to make, where appropriate, ESOs with treatment requirements, in lieu of CDOs.

View of the Department of Corrective Services

9.65 The position of DCS on this issue is unequivocal, as expressed in the following submission provided to the Council:

1. Adequate community based programs are available for low risk and treated sex offenders

The Department's Forensic Psychology Service provides community based treatment programs for low risk sex offenders and maintenance programs for treated high risk sex offenders. Group programs are provided in metropolitan locations and individual follow up is provided for offenders on parole in the north and west of the State.

The Forensic Psychology Service also provides a consultancy service to Probation and Parole Officers.

2. Custodial programs are appropriate for high risk sex offenders

DCS asserts that the appropriate and most cost-effective venue for treatment of high risk sex offenders is in custody. NSW Judicial Commission data shows that in NSW in 2006-2007, 93% of those convicted for sexual assault were imprisoned (NSW Judicial Commission, Sentencing Trends and Issues, No 36, November 2007). DCS provides a program for high risk sex offenders at the Metropolitan Special Programs Centre at Long Bay and is soon to augment this with a program at Parklea.

45. *New South Wales v Thomas* [2008] NSWSC 1340.

The addition of the Parklea program will increase the number of places available at any one time from approximately 40 to approximately 70 and it is estimated that throughput will be approximately 80-100 offenders per annum. A further program is planned for Cessnock in 2010. The increased availability of treatment places will be supported by the operation of the newly established Sex Offender Assessment Unit to ensure that the treatment needs of convicted sex offenders are fully assessed and documented at the beginning of a custodial sentence and that treatment places are provided within the non parole periods.

3. Community Programs for high risk sex offenders are not an efficient use of resources

Attempts to provide a parolee treatment program in the community would represent an inefficient use of resources. Unlike the custodial setting, it is unlikely that a critical mass of parolees would be available at one time and in one place for the formation of a cost effective group.

A treatment program for a high risk untreated sex offender requires approximately 250 – 300 hours of treatment. This is generally provided by way of 8 – 10 months of group treatment three times per week for approximately 2 – 3 hours per session. This intensity of programming would be impossible to provide on a state-wide basis. Requiring parolees to remain in the metropolitan area for treatment is counter productive because the establishment of stable accommodation and employment are important protective factors against the risk of reoffending.

A related issue is whether there would be sufficient demand for such a program given the requirements of the *Crimes (Administration of Sentences) Act 1999*, which states that:

“The Parole Authority must not make a parole order for an offender unless it is satisfied, on the balance of probabilities, that the release of the offender is appropriate in the public interest”

In reaching its decision the Authority is required to consider the following (amongst others):

- the need to protect the safety of the community;
- the need to maintain public confidence in the administration of justice;
- the likelihood of the offender being able to adapt to normal lawful community life; and

- the likely effect on any victim of the offender, and on any such victim's family, of the offender being released on parole.

DCS believes that an untreated high risk sex offender poses a significant risk to the community which could not be offered a level of safety commensurate with the offender adapting to normal community life until significant treatment gains had been attained and maintained over many months. If the Authority were also of this view then the program could be frequently under-subscribed.

DCS is of the view that to fund a program in which it has limited confidence and for which there are safer and more economical alternatives would be irresponsible. In addition to the treatment costs, additional surveillance and supervision costs would need to be met if untreated parolees were released to treatment in the community. Increased police and court costs would also be expected.

4. Cost of paying for private treatment

If DCS were to fund rather than provide treatment for high risk parolees in the community adequate funding would be required as would the increased funding for surveillance and supervision.

The treatment costs alone are considerable. Based on the Australian Psychologist Society's recommended fee, the cost of 250 hours of individual treatment would be \$47,000 and for 300 hours of treatment the cost would be \$56,400. For 4 parolees attending a group, the program would cost \$62,500 for a 250 hours program or \$75,000 for a 300 hour program. By way of contrast, the salary of a specialist (clinical) psychologist employed by DCS rangers from \$75,529 to \$88,947. Such a psychologist would be expected to treat at least 10 people per week with an expected throughput of up to 15 people per annum. Such a psychologist would also be providing assessment and reports, as well as consultation with groups such as the Community Forensic Mental Health Team. In the case of a private practitioner these additional tasks would be subject to additional charges.

9.66 The lack of programs in the community has not always stood in the way of the Court granting applications for CDOs, although it has also been the subject of some critical judicial comment.⁴⁶

9.67 In *Attorney-General (NSW) v Winters*⁴⁷ the expert evidence indicated that, if the defendant was to be released subject to an extended supervision order, there should be a condition requiring him to engage in psychological treatment in the community.

9.68 McClellan CJ at CL acknowledged that the lack of government funding for community treatment of this kind has the ‘inhumane consequence’ that untreated high risk offenders might never be released under a supervision order. Nonetheless, His Honour was not satisfied that adequate supervision of this appellant could be provided by an extended supervision order.⁴⁸ This was because: (a) although his Honour was confident that an external psychologist would be able to effectively treat him through an intensive one-on-one program, there was no capacity to fund that service; and (b) the appellant had stated an intention to re-offend upon release. For these reasons, his Honour was persuaded that an interim detention order against the defendant should be made.⁴⁹

9.69 In *Attorney General (NSW) v Wilde*⁵⁰ Price J rejected the submission that a continuing detention order should not be made because the Department of Corrective Services had decided not to offer untreated high risk offenders community-based programs. The Department gave evidence that it had considered conducting a high risk offenders program in the community, but had concluded that it could not manage the risk of supervising such offenders in the community while undergoing a therapeutic program, ie, before it was completed. His Honour stated that ‘this was a decision reasonably open to the Department.’⁵¹ In a subsequent matter⁵² in relation to this offender, an ESO was however granted subject to a number of conditions including electronic monitoring, acceptance of psychiatric treatment, treatment by a private psychologist, and sex drive reduction treatment as prescribed.

46. See eg, *AG (NSW) v Gallagher* [2006] NSWSC 340, [77] (McClellan CJ at CL); *AG (NSW) v Jamieson* [2007] NSWSC 465, [36] (Hidden J); *AG (NSW) v Tillman* [2007] NSWSC 605, [195] (Bell J); *AG (NSW) v Winters* [2007] NSWSC 1071, [24], [80] (McClellan CJ at CL); *New South Wales v Brookes* [2008] NSWCA 212; *New South Wales v Wilde* [2008] NSWSC 1211.

47. *AG (NSW) v Winters* [2007] NSWSC 1071.

48. *AG (NSW) v Winters* [2007] NSWSC 1071, [24], [80], [81] (McClellan CJ at CL).

49. *AG (NSW) v Winters* [2007] NSWSC 1071, [146]–[151].

50. *AG (NSW) v Wilde* [2007] NSWSC 1490.

51. *AG (NSW) v Wilde* [2007] NSWSC 1490, [116].

52. *New South Wales v Wilde* [2008] NSWSC 1211.

9.70 In the matter of *Brookes*, the Court of Appeal held that given the offender had been released under supervision, and there was evidence that treatment was required as part of the management of risk, it would be irrational for the Department not to release funds for payment of such treatment.⁵³

9.71 A similar approach was adopted by Kirby J in *Wilde*,⁵⁴ where his Honour found that the circumstances of Mr Wilde were ‘exceptional’ and warranted a favourable exercise of discretion by the Department to fund private treatment. In both of these cases, the State was to provide treatment in the form of anti-libidinal medication and psychiatric support.

9.72 The preference of the Court to make ESOs is perhaps illustrated by the circumstance that, as at 12 May 2009:

- there are 19 offenders on ESOs;
- breach proceedings have been instituted for seven offenders;
- there are currently applications on foot in four matters in which only ESOs are being sought;
- there are currently applications on foot for two matters in which a CDO is being sought;
- one offender is subject to a guardianship order; and
- no offender is currently subject to a CDO.

9.73 DCS seeks a CDO only when it believes that a high risk sex offender, who falls within the ambit of the legislation, cannot be adequately supervised in the community pursuant to an ESO. The benefit of such a policy is to focus critical attention on the circumstance of each offender, and on whether a combination of all or some of the options for psychiatric supervision combined with anti-libidinal or other medication, psychological support, and intensive supervision by the Community Compliance Group ie the “three legs of the stool” approach noted in *Wilde*⁵⁵, will, or will not, provide the necessary degree of supervision.

9.74 In order to consider whether a CDO should be made, it is inevitable that consideration be given to the possibility of devising a practicable supervisory mechanism for the offender, that is one which is within the reasonably available resources of the State, and to

53. *New South Wales v Brookes* [2008] NSWCA 212, [30].

54. *New South Wales v Wilde* [2008] NSWSC 1211.

55. *State of NSW v Wilde* [2008] NSWSC 1211.

whether it could, of itself, adequately supervise the offender and contain his or her risk of committing a further serious sex offence.

9.75 It would be theoretically possible to provide for one on one supervision on a 24 hour basis, that would ensure that any given offender, no matter how dangerous or mentally unbalanced, does not reoffend, but that clearly would not be a feasible option. It would, in a practical sense, constitute detention.

9.76 If it is believed that the risk is so high that no reasonably practicable and adequate supervisory scheme can be identified, then this should be capable of being demonstrated by the supply of sufficient reasons, without any need for drafting and then knocking down a plan. However, as has always been the practice of DCS, if assessment suggests that an ESO could adequately supervise the offender then clearly the elements of the plan need to be identified to allow the offender and the Court to consider their acceptability, and whether the suggested requirements of the supervision plan could reasonably be met by the State.

9.77 If the offender fails to accept the suggested conditions and they are necessary for his adequate supervision then the Court has little choice other than to grant a CDO. If the conditions which would be necessary for adequate supervision are shown to be impracticable for any reason, including unjustifiable expense to the State, or supervision beyond its reasonable capacity to provide, then again the Court may have no opportunity other than to impose a CDO.

9.78 The Council recognises that in some instances the non-participation of an offender in treatment programs in custody which results in them being classed as 'untreated offenders', could be due to personal factors, including their denial of being an offender; a preference not to alter their behaviour; cognitive impairment or an unwillingness to make a disclosure of uncharged or undetected offences. In other cases, their non-participation or delayed participation could potentially relate to custodial factors beyond their control, including detention at a centre where there were no programs; their level of classification or a requirement for protection; or excess demand.

9.79 Inability to participate in community programs could be due to the unavailability of such programs (other than maintenance programs for treated offenders or programs for low risk offenders), or an inability of the offender to pay for treatment by a private practitioner, or to obtain suitable accommodation outside a correctional centre.

9.80 It is recognised that not all offenders are necessarily responsive to sex offender programs, for example, those with entrenched and serious psychiatric or dangerous paraphiliac conditions or those with no intention or motivation to moderate their behaviour. They are likely to be in the minority, and their existence should not close the door to the use of CDOs and ESOs, in conjunction with rehabilitation, to reduce the risk to the community from sexual offenders in general.

9.81 For those offenders who cannot be treated, or managed safely in the community, continued detention and management within the correctional or mental health environment, remain the only viable options.

Council position

9.82 A review of the cases, and an understanding of the different individual circumstances of the offenders, does point to the undesirability of adopting a one size fits all approach, or of automatically assuming that CUBIT, or some variation of it, undertaken in custody, will provide a universal change for the better in high risk sex offenders.

9.83 The concern which has arisen in many of the cases has largely been with the possibility of the offender receiving individualised pharmacological and psychological treatment and support in the community. As noted earlier DCS does not provide or fund this form of support, save for the community-based programs for low risk offenders and maintenance programs for treated sex offenders. Now that the funding has been merged into a budget to fund accredited programs and program facilitators to conduct group programs⁵⁶ it would appear that it can only be provided, as a matter of discretion, if DCS is satisfied that the case is 'exceptional'.⁵⁷

9.84 The practical consequence is that unless the offender can pay for the treatment himself, or be approved for a Medicare rebate for its provision (limited to 18 sessions) participation in individual psychological support will not normally be a tenable or available condition for an ESO. Awareness of the exceptional circumstances precedent has, however, led the Court in recent times to consider whether a case can be fitted within that policy exception, and in such a case, to assume that the State will release funds for such treatment, particularly where the offender has spent a lengthy period in custody and has flagged a willingness to accept anti-libidinal medication. For example in *Brookes*⁵⁸ the Court observed:

56. *New South Wales v Wilde* [2008] NSWSC 1211, [85].

57. See *Brookes and Wilde*.

58. *New South Wales v Brookes* [2008] NSWCA 212.

[29] Before an extended supervision order can be made the Court must be “satisfied to a high degree of probability that the offender is likely to commit a further serious sex offence if he or she is not kept under supervision” (s 9(2) of the Act). Conditions may be imposed on the order. In the present case his Honour did not provide that the respondent must be treated by Ms Howell as a condition of the order. Instead his Honour provided that the respondent must accept such treatment “if it is made available.” His Honour recognised that it would not be made available unless Ms Howell was adequately compensated. If the State does not fund Ms Howell’s services the effect of his Honour’s order will be that the respondent is released without any obligation for treatment. However, no question of the order becoming futile could arise.

[30] This is not a case where the Court has impermissibly intervened to dictate the decision which falls within the exclusive province of the Executive or the Legislature. The evidence clearly indicates that the respondent requires treatment in order to protect the community. Ms Booby having indicated that funds could be provided to fund Ms Howell’s services, the Court is entitled to expect, that the primary judge having decided that the respondent should be released under supervision, Ms Booby will, in the responsible exercise of the discretion given to her, decide to release the necessary funds. In the language of administrative law any other decision would be irrational. The Court must assume that the Executive will not make an irrational decision.

9.85 Ultimately the decision of the Court will depend on the strength of the evidence particularly that of the Court appointed experts and in-house psychologists, presented by the State, as to whether the offender can be adequately supervised in the community. If DCS can establish that even with each of the “three legs” in place the offender cannot be adequately supervised; or that while he might be adequately supervised provided that each of the “three legs” was in place, one or the other of them cannot be practically provided, then the proper outcome would be a CDO.

9.86 The use of the concurrent evidence approach employed in *Wilde*⁵⁹ would seem to be a positive step in the reception and analysis of the evidence specific to the subjective circumstances of the offender, that would permit a determination of this issue.

Options for reform

9.87 The only options that were identified to address the issue which arises in these cases are as follows:

Option One:

59. *New South Wales v Wilde* [2008] NSWSC 1211.

Amending the Act by repealing the provision for allowing release subject to an ESO, and confining the available remedy to a CDO, such order being available where the Court is satisfied to a high degree of probability that a sex offender (as defined) is likely to commit a further serious sex offence, if released;

Option Two:

Amending the Act so as to preclude the Court:

- i from granting an ESO, unless and until the offender has successfully completed CUBIT or an available variation of it, while in custody, or
- ii from taking into account the possibility of an offender accessing individual psychological support in the community provided otherwise than by himself or through Medicare.

Option Three:

Repeal of the Act and substitution of indefinite sentences for those sex offenders who are assessed to present as high risk of offending at the time of being sentenced, with provision for regular review at yearly or two-yearly intervals upon expiry of a nominal term.

Council position

9.88 None of these options is supported.

9.89 The first option would seem to be undesirable, since there are offenders who can be adequately supervised in the community pursuant to an ESO with appropriate conditions. The need for this option is consistent with the secondary objective of the Act of fostering a safe return to the community of rehabilitated offenders.

9.90 The second option might result in some offenders, for example those who were incapable of undertaking CUBIT, being detained indefinitely, or alternatively of encouraging them to go through the motions of a program without any tangible benefit, even though factors such as their increasing age, or deteriorating medical condition, would by itself, eventually reduce their risk of reoffending. If adopted, it would have to permit an exception where special circumstances were shown, a matter in respect of which the onus could possibly be placed on the offender. Otherwise it would seem to introduce an unnecessary degree of rigidity into a system, which already places a considerable emphasis on encouraging offenders into undertaking a suitable program in custody.

9.91 The third option, while having the advantage of simplifying at least to some extent a procedure that has now become complex and occupies a good deal of administrative effort and of providing a substantial early incentive to an offender of engaging in treatment programs while in custody, runs into the difficulties previously noted in relation to the concept of indefinite sentences generally, including future risk prediction. Additionally, a question does arise as to whether or not a comparable degree of effort might not be involved in relation to the review procedure, at least for those offenders who have made no effort to rehabilitate themselves while serving the nominal term.

9.92 The Council is currently of the view that the current system should provide sufficient protection, subject to:

- the presentation of adequate evidence as to why an ESO will not provide adequate supervision for a specific offender;
- the procedural amendments suggested elsewhere in this chapter which would tighten up the regime and provide an early and more effective response where an offender breaches an ESO;
- consideration being given to some modification of COSP, or the provision of some alternative highly controlled community based facility, so as to segregate sex offenders from other offenders, and to ensure that suitable psychological counselling and other close supervision is provided for these offenders of the kind which would be relevant to their needs and capable of being delivered in a more resource effective way;⁶⁰ and
- encouragement of the use of short term CDO orders, for the purpose of investigating an offender's suitability for anti-libidinal medication, and then monitoring his response to it, with a subsequent review as to the need to extend the CDO or to move to an ESO.

9.93 Clearly it is appropriate, if non-participation in a program while in custody is to be used as a ground for a CDO, that it is necessary that the State ensure that such programs are available and accessible for offenders, prior to expiry of the non-parole period.

60. The Council notes that concern has been expressed regarding the operation of the COSPs in other jurisdictions, such as Victoria and Queensland. Criticism has been expressed that the provision of a dedicated residential facility, particularly one that caters exclusively for sex offenders, has the potential to encapsulate the worst excesses of a custodial institution, with none of the safeguards afforded to those institutions by the oversight of offices such as the Ombudsman, Official Visitors or Inspectorates.

9.94 Moreover where possible they should be sufficiently flexible to accommodate those offenders who have practical difficulties in participation in those programs through mental or cognitive impairment, subject always to their being capable of leading to equivalent gains as CUBIT.

9.95 Further, if sex offender programs are only to be provided in certain correctional centres, whether run by DCS or by private operators, it is only reasonable that potential candidates for a CDO or ESO be transferred to such centres within a time frame that will permit their participation in a program, prior to expiry of their non-parole period.

9.96 The Council recognises that the question whether the State or DCS should provide, or fund, community based sex offender treatment programs, which would permit the release of untreated offenders on ESOs, subject to a requirement to participate in such programs, is ultimately one of policy dependent on resources, the existence of an acceptably and accredited qualified service, and proof that such a program works.

9.97 As such it is not strictly a matter on which the Council can offer a concluded opinion. It will however remain a matter of relevance for the Court faced with an application for a CDO, since it will need to determine whether the level of risk, and personal circumstances of the offender, are such as to require a CDO or would permit an ESO to be made. Essentially this will be a matter for a discretionary judgement in each case in which the Court will take into account the history, risk level and characteristics of the offender, and the existence or absence of any acceptable community based program, as well as to the feasibility of providing accommodation and a sufficient level of supervision to contain that offender's risk.

9.98 As a result, the Council does not make any formal recommendations as to the establishment of a community based program, although the majority of the Council, with the dissenting opinion of the Commissioner of Corrective Services noted above, favour the progressive development of community based programs which would provide a greater opportunity for the making of ESOs and reserve CDOs for those offenders who pose the highest level of risk (whether treated or not), as well as those who have unreasonably resisted or failed to complete custodial treatment programs.

Accommodation in the community

9.99 The lack of appropriate accommodation to enable offenders to be supervised in the community has been raised, in the past, as an issue of concern, particularly for those offenders who are socially isolated or

unable to return to their homes.⁶¹ Its availability is of importance in relation to the making of an ESO and in relation to the conditions to be imposed.

9.100 For example, in *New South Wales v Davis*,⁶² Price J made a four-month continuing detention order on the basis that adequate supervision could not be provided for the defendant by the proposed risk management plan until suitable accommodation was found. His Honour noted that the Department of Corrective Services anticipated the opening of a community support accommodation facility, the Community Offender Support Program (COSP) Centre, at Malabar by September 2008. His Honour stated that it was 'regrettable' that the proposed risk management plan for the offender could not be properly considered due to the lack of suitable community accommodation, but considered the establishment of the COSP Centre to be 'a positive development'.⁶³

9.101 After the opening of the Centre an application by the State of New South Wales for revocation of the CDO and for its replacement by an ESO was granted.⁶⁴ The availability of COSP, and residence at that facility, was also a relevant factor in the decision to grant an ESO in *Thomas*.⁶⁵

Council position

9.102 As at 12 May 2009, DCS has established COSP centres at Malabar, Penrith, Windsor, Campbelltown, and Kempsey. The Council acknowledges the value of the COSP facility, and understands that plans were on foot for additional COSP centres at Broken Hill, Wagga Wagga, Tamworth and Grafton.

9.103 The Council indicates its in-principle support for this proposal, subject to adequate oversight and accountability mechanisms, and notes the importance of having suitably qualified staff to deal with sex offenders, and to ensure their compliance with the conditions of an ESO.

61. *AG (NSW) v Jamieson* [2007] NSWSC 465, [34], [36]; *AG (NSW) v Cornwall* [2007] NSWSC 1082, [31]; *AG (NSW) v Wilde* [2008] NSWSC 14, [6]–[7]; *AG (NSW) v Davis* [2008] NSWSC 664, [3], [51]–[53], [57]. McSherry, B., Keyzer, P. and Freiberg, A., 'Preventive Detention for 'Dangerous' Individuals in Australia: A Critical Analysis and Proposals for Policy Development' (CRC 03/04-05, Criminology Research Council, 2006) 65.

62. *New South Wales v Davis* [2008] NSWSC 664.

63. *AG (NSW) v Davis* [2008] NSWSC 664, [3], [52], [57].

64. *AG (NSW) v Davis* [2008] NSWSC 862, [8].

65. *New South Wales v Thomas* [2008] NSWSC 1340.

PART G: OFFENDERS WITH COGNITIVE OR MENTAL HEALTH IMPAIRMENTS

9.104 Sex offenders who have cognitive or mental health impairments pose a particular challenge both in terms of treatment options, and the potential for supervision to provide for effective management of their risk. Provision does exist for the management of those who fall within the reach of the *Guardianship Act 1987* (NSW) by way of an application to the Guardianship Tribunal, although there are some differences in the outcome, for these offenders, by reason of the fact that:

- the Guardianship Act is premised on the best interests of the subject person, rather than on the protection of the community;
- guardianship orders are subject to more frequent review, so that there can be no guarantee that the supervision requirements will remain constant; and
- the review is conducted by a Tribunal and not the Supreme Court.

9.105 It has been suggested that management under this regime, which may involve the authorisation of ‘restrictive practices’ including physical restraint and enforced medication, can in fact be more onerous and of a longer duration, since such offenders will have only limited (if any) prospects of being successfully treated and rehabilitated.

9.106 The presence of cognitive and or mental health impairments have been the subject of consideration in several cases where applications have been brought under the Act.⁶⁶

Council position

9.107 The interaction between management of sex offenders with cognitive or mental health impairments, under the *Crimes (Serious Sex Offenders) Act 2006*, or under the *Mental Health (Criminal Procedure) Act 1990* or *Mental Health Act 2007*, or as a person under

66. *AG (NSW) v Cornwall* [2007] NSWSC 1082 (personality disorder and depression); *AG (NSW) v Winters* [2007] NSWSC 1071 (intellectual disability); *New South Wales v Davis* [2008] NSWSC 490, [2008] NSWSC 664 (chronic schizophrenia, cognitive deficits); *New South Wales v Brookes* [2008] NSWSC 473, [19], [21], [28]–[32], [53], [65]–[66] (history of psychosis, depression, personality disorder and intellectual impairment). For examples in other jurisdictions, see *TSL v Secretary of the Department of Justice* (2006) 14 VR 109, 120; *Western Australia v Alvisse* [2006] WASC 279; *DPP (WA) v Allen aka Deverell* [2006] WASC 160.

guardianship within the meaning of the *Guardianship Act 1987*, is not well defined.

9.108 The Council considers that further examination of the possibility of achieving interagency arrangements for the more effective management of this group of offenders would be appropriate, and it would encourage consultation between DCS, Justice Health, the Mental Health Review Tribunal and the Guardianship Tribunal in relation to the feasibility of achieving such an arrangement. If so, it could be a matter to be taken into account by the Supreme Court when faced with an application for a CDO or ESO.

PART H: A POST-CDO SUPERVISION ORDER

9.109 DCS has suggested that there would be merit in permitting the Court, where it makes a CDO, to make an additional order for community supervision to take effect at the expiration of the CDO, so as to put in place appropriate external controls to assist in the offender's return to the community and to provide for treatment maintenance.

9.110 As envisaged this would be an alternative to a separate application for an ESO, and would not be dependent on the need for any separate assessment by the Court at the expiration of the nominated term for the CDO. Under the proposal it would be conditional upon the offender having successfully completed prison based treatment during the continued detention, and upon his or her agreement to participate in a maintenance program while on an ESO.

Council position

9.111 The Council supports the proposal of DCS upon the basis that it would help to encourage the offender to complete CUBIT while in custody, and upon the additional basis that additional external controls would facilitate the safe return of the offender to the community.

9.112 There would need to be a power to apply to revoke the ESO before expiry of the CDO, if it became apparent from the offender's behaviour in custody that he or she could not be safely managed in the community; and additionally a power to apply to vary the conditions of the ESO if considered appropriate prior to expiry of the CDO.

PART I: SUSPENSION OF A CDO

9.113 The Council has given consideration to the possibility of empowering the Court to make a CDO and then to suspend it, subject to the offender complying with conditions of the kind that would be

imposed under an ESO. This could have an advantage in providing an incentive for compliance. It could also address the uncertainty noted in *Harrison*⁶⁷ as to the Court's power to revoke an ESO and to order an offender's return to custody under a CDO.

Council position

9.114 This is not an option which the Council favours, since the making of a CDO is predicated upon a finding that an offender cannot be managed safely in the community through an ESO.

PART J: REVIEW OF A SUSPENSION ORDER

9.115 DCS⁶⁸ drew attention to the desirability of legislating for a mechanism applicable to the situation where an offender, subject to an interim supervision order or an ESO, is facing a legitimate difficulty in complying with a condition of the order in circumstances not amounting to a breach. The example cited was that of a condition of an ESO or interim supervision order requiring the offender to use psychiatric or anti-libidinal medication, which is having adverse side effects, to the point where the offender cannot reasonably be expected to continue taking that medication, or where a prescribing medical practitioner decides to stop prescribing it.

9.116 It was suggested that, in such a case, or in equivalent circumstances, where there are practical difficulties in the continued compliance with a condition of the order, there should be a provision allowing the matter to be taken back to the Court for a variation or a rescission of the order, and for its replacement by a CDO or interim detention order to ensure that the community continues to be protected.

9.117 The inadequacy of the present legislation in this respect was the subject of critical comment by McClellan CJ at CL in *Attorney General (NSW) v Winters*.⁶⁹

Given, as this case demonstrates, that there may be conditions which the court imposes which later turn out to be incapable of being complied with by the offender, for example, an identified place of residence or program of continuing treatment, it may be that it is in the interests of the offender and the community that the person be returned to custody. As I understand the legislation this can only presently occur in relation to an offender who has been released under a supervision order if that person fails to comply with the requirements of the order in

67. *New South Wales v Harrison* [2008] NSWSC 1306, [28].

68. Submission 25: NSW Department of Corrective Services, Supplementary 2, 4.

69. *AG (NSW) v Winters* [2007] NSWSC 1071.

circumstances where an offence against s 12 of the Act is committed. This seems to me to be a crude and potentially impractical arrangement. There may be many circumstances where the requirements of an order cannot be complied with although the offender may not be guilty of an offence. It may be that although required to take anti-libidinal medication the side effects are such that the physical or psychological health of the offender is endangered and the prescribing doctor can no longer provide the treatment. It does not seem appropriate that the only mechanism to control this situation is to identify a breach of s 12 or, more significantly await the commission of a further offence before considering whether the offender should be returned to custody.⁷⁰

Council position

9.118 The Council agrees and considers that in such circumstances, the power to vary or revoke an ESO under s 13 of the Act should also include, in the case of a revocation, an express power to substitute a CDO or interim detention order. In this regard it also notes that the s 13 variation power has been interpreted as sufficiently wide to permit an extension of a supervision order, without any need for the filing of a fresh application.⁷¹ The criterion for intervention would rest upon the Court being satisfied that, by reason of altered circumstances, adequate supervision would not be provided by allowing the offender to remain in the community subject to the ESO.

PART K: VARIATIONS OR REVOCATION OF A CDO

9.119 Section 19 allows a CDO to be varied or revoked. It is not clear whether the parties can request that such an order be replaced by an ESO. This was done essentially by consent in *Davis v New South Wales*.⁷²

9.120 For more abundant caution, it was suggested that s 19 should be amended to make clear that on application for revocation of a CDO the Court can not only dismiss or vary the order, but may also make an ESO in its stead.

Council position

9.121 Consistently with the objective of limiting procedural complexity, and preserving flexibility in framing orders that can be varied to meet changing circumstances, the Council agrees with this suggestion. Similar considerations apply to those applicable to the variation of an ESO considered above.

70. *AG (NSW) v Winters* [2007] NSWSC 1071, [22].

71. *R v Harrison* (2009) NSWSC 198.

72. *Davis v New South Wales* [2008] NSWSC 862.

9.122 In appropriate cases, where the offender has demonstrated a substantial change as a result of participation in a program, and there is good reason to believe that he could be adequately supervised under an ESO, it could be useful for the Court, upon application, to be able to substitute an ESO.

PART L: BREACHES OF AN ESO OR INTERIM SUPERVISION ORDER

9.123 DCS⁷³ has suggested that there are some concerns with implementation of the breach procedures. Following a failure to comply with the requirements of an ESO or an interim supervision order⁷⁴ the Local Court can impose, for the offence for which provision is made in s 12 of the Act, a fine of 100 penalty units, or a sentence of imprisonment for up to two years, in which latter case it would normally set a non-parole period. Following the conviction of an offender for a s 12 offence the State can apply to the Supreme Court for a CDO in respect of that offender, although that will require a separate and subsequent application.⁷⁵

9.124 It is possible that the Local Court could impose a non-custodial option such as a good behaviour bond for such a breach. As a result the offender could be in the community whilst the State was in the process of preparing an application for a CDO should sufficient risk be identified. Pending the determination of the charge the offender could also be released on bail and back in the community pending a hearing.

9.125 In each instance concerns can arise in relation to whether the protection of the community can be secured in relation to an offender who has demonstrated non-compliance with an ESO, but has been released on bail or has become subject to a bond having regard to the time within which proceedings for a CDO could be commenced and brought before the Court.

9.126 Information provided by DCS in relation to five cases involving the breach of ESOs shows that in two cases bail was granted, and that with minor exceptions they were dealt with relatively quickly. Of the five breach matters currently completed, all have involved failure to comply with the order. One has also involved a new criminal offence for which the offender was separately sentenced.

9.127 DCS also suggested that there are practical limitations in having breaches dealt with in the Local Court due to the lack of experience of

73. Submission 25: NSW Department of Corrective Services, Supplementary 2, 3.

74. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 12.

75. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 14A.

those involved in these relatively unusual and complex matters, and to the fact that this Court is unlikely to have the benefit of the detailed background information in relation to the offender, which would have been prepared and placed before the Supreme Court, in the initial application leading to the order which is later breached.

9.128 Two possibilities have been identified for dealing with breaches of ESOs or interim supervision orders, (and of the proposed post CDO orders) in lieu of the current procedure requiring prosecution for s 12 offences in the Local Court, followed by an application to the Supreme Court for a CDO.

9.129 The first would involve treating a breach of an ESO as a breach of a Supreme Court order, and giving that Court the power to revoke the ESO or interim supervision order and to substitute a CDO or interim detention order, or to vary the conditions of the ESO or interim supervision order.

9.130 The second possibility would be to vest a power in the Parole Authority to deal with a breach, the suggested advantage of which would lie in its capacity to exercise its revocation power quickly.

Council position

9.131 The Council does not consider that the revocation power should vest in the Parole Authority for the following reasons:

- The Supreme Court is able to act quickly and in response to an *ex parte* application, and has a duty judge system including an after hours and telephone application capacity that would be suitable for such a case.
- Because that Court imposed the orders in the first instance, it is likely to be in a better position to judge the nature and seriousness of a proven breach and to determine the most appropriate form of sanction. Rather than be seen as a discrete offence, breach proceedings would then be akin to those for breaches of good behaviour bonds.
- Although by reason of the provisions of s 160A of the *Crimes (Administration of Sentences) Act 1999* (NSW), the obligations of an offender under an ESO are to be taken to be obligations under a parole order, it would not seem to have been the intention of the *Crimes (Serious Sex Offenders) Act* to have conferred any jurisdiction in the Parole Authority to revoke or vary an ESO and to substitute a CDO, particularly as such a jurisdiction could be exercised to detain an offender beyond the term of their sentence—a judicial function.

- Moreover unlike orders of the Court, Parole Authority decision are not subject to appeal, or to other than limited review (on grounds which do not extend to merits review).

9.132 The Council is of the view that rather than dealing with a breach of an ESO as an offence punishable in the Local Court the preferable course is to confer a jurisdiction in the Supreme Court to respond to such a breach, and to have power to revoke the ESO and substitute a CDO, or to vary the conditions under the ESO, including extending its duration.

9.133 It recognises that in one sense, this removes the deterrent effect arising from the fact that an offender found guilty of a s 12 offence would add a further conviction to his record. However, in reality the fact of such a conviction is likely to be of little moment for an offender of this kind, and there would, in any event be no inhibition on the offender continuing to be prosecuted for any criminal offence, the commission of which constitutes the breach.

9.134 The threat and reality of revocation and the substitution of a CDO are likely to provide a greater deterrent, and the fact of a previous breach remains a matter which the Court is required to take into account if, at any future date, following expiry of an ESO or CDO, circumstances arise, following a subsequent conviction justifying the State bringing a further application.⁷⁶

9.135 It is recognised that eliminating the s 12 offences would remove one offence from the definition of an 'offence of a sexual nature'.⁷⁷ However, if the conduct constituting the breach is of itself an offence of a sexual nature within the meaning of the Act, then nothing is gained by including a breach within the definition, since the offender would remain liable to prosecution for that offence, regardless of a s 12 prosecution. If it is a breach involving for example a failure to report, or to comply with some supervisory requirement of an inadvertent or technical nature, then a question does arise, in any event, whether it should be classed as an offence of a sexual nature, or of sufficient seriousness to merit prosecution. Moreover, by definition, the offender will already have qualified as a sexual offender within the meaning of the Act, and the fact of a s 12 offence will not have any additional ongoing significance.

9.136 It is noted that the failure of a person to comply with a condition attaching to an interim supervision order or an extended supervision order is only an offence in Victoria and Queensland if the breach was

76. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 9(3)(f), 17(4)(f).

77. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 5(2).

committed without reasonable excuse.⁷⁸ This requirement is not contained in the NSW Act⁷⁹ and would seem to convert a s 12 offence to one of absolute liability.

9.137 The Council considers that a breach of an interim supervision order or of an ESO would be better addressed by returning the matter to the Supreme Court to be dealt with as a breach of one of its orders, rather than being dealt with as an offence by the Local Court. The Supreme Court, having imposed the order, is better placed than the Local Court to determine the nature and seriousness of the breach, and decide the most appropriate form of sanction.

9.138 Current offence procedures have the potential advantage of bringing offenders before a court through the arrest and charging process. However, there is no reason why a breach of an interim supervision order or ESO should not similarly lead to the person being called up before the Court, akin to the procedures adopted for breaches of good behaviour bonds provided for in s 98 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

9.139 If these procedures applied to a breach of an ESO, the Supreme Court could call the person up to appear before it, issue a warrant if the person failed to appear, and, after determining whether the breach was proven, make one of the following orders: take no action on the breach; vary the conditions of the order; impose further conditions on the order; or in appropriate circumstances, revoke the order and impose a CDO or interim detention order. None of these approaches are currently available to a Local Court dealing with a charge brought under s 12 of the *Crimes (Serious Sex Offenders) Act*.

PART M: PROVISION OF INFORMATION

9.140 The Act⁸⁰ empowers the Attorney General to require any person to provide any document, report or other information in that person's possession or under his control relating to the behaviour, or physical or mental condition, of any sex offender. Failure to comply is an offence punishable by a fine and/or imprisonment.⁸¹ The Act provides, additionally:

(3) Despite any Act or law to the contrary, any document or report of a kind referred to in subsection (1), or any copy of any

78. *Serious Sex Offenders Monitoring Act 2005* (Vic) s 40(1); *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 43B(1).

79. See *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 12.

80. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 25(1).

81. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 25(2).

such document or report, is admissible in proceedings under this Act.

9.141 The section does not expressly exempt confidential or privileged information, such as documents subject to legal professional privilege, or doctor-patient confidentiality.

9.142 It has been suggested that this has potential implications for persons with sexually deviant behaviour who might seek medical assistance to address those concerns prior to committing any relevant offence, as well as for those who consult medical professionals for the purpose of obtaining expert evidence for use in criminal proceedings or in proceedings under the Act. It would be undesirable if the effect of the provision was to inhibit the kind of disclosure that would be necessary for the therapeutic or medico-legal purposes. On the other hand there are limits to the confidentiality attaching to medical practitioners such that it does not apply where the information if not disclosed could endanger the lives or health of others.⁸²

9.143 The power arising under the section is not confined to offenders in respect of whom proceedings for a CDO or ESO have been commenced, nor is it subject to review of the kind exercisable by a court where a claim to privilege or immunity from production can be reviewed in accordance with established principles.

9.144 The Council accepts that s 25 of the Act has a wide application, and that s 25(3) overcomes any potential objection to the tender in evidence of material received in response to an order in writing given by the Attorney General, on hearsay or opinion or confidentiality grounds.⁸³

Council position

9.145 While this provision confers a power whose practical effect would seem to exceed that traditionally associated with the exercise of the powers attaching to search warrants or subpoenas, or perhaps more accurately the use of materials obtained or produced in response to their use, the Council recognises the significant public interest in its availability. It does not suggest that it should be made subject to any qualifications or exceptions, or confined to cases where proceedings for a CDO or ESO have been commenced. In that respect it is sufficient that its application is confined to the provision of information in relation to a 'sex offender', that is a person who has at any time been sentenced to imprisonment following conviction for a serious sex offence.⁸⁴

82. *Kadian v Richards* (2004) 61 NSWLR 222, [45].

83. *New South Wales v Harrison* [2008] NSWSC 1306, [5]–[10] (Fullerton J).

84. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 4.

PART N: CONCLUSION

9.146 The Council notes that while there have been a limited number of offenders dealt with under the Act, its administration has been time consuming and has led to most of the cases that have arisen, occupying several court hearings, and to some differences in judicial interpretation and approach. It notes in particular that in the final quarter of 2008, the administration of the legislation has been accompanied by a significant number of decisions.

9.147 The Act which commenced on 3 April 2006 is subject to a three year requirement for review, which will need to take into account the developing jurisprudence, the progressive response of DCS to the provision of suitable facilities and programs, and relevant budgetary restraints.

9.148 The Council considers that it provides a preferable model to indefinite or disproportionate sentencing, and that it occupies a proper place within the range of available strategies for protecting the community from serious sex offenders, which have been surveyed in this Report. The Council accordingly supports its continuation, but considers it important that its effectiveness be monitored on a longer term basis, to determine whether it does reduce the recidivism of those offenders who are subject to its application and later released to the community. For this reason it is of the view that there should be a subsequent review in three years to that which is required to be carried out in 2009.

**10. Other aspects of
sentencing sex offenders**

INTRODUCTION

10.1 In this chapter the Council records its conclusions in relation to the capacity of the sentencing regime in New South Wales to address the objective of securing the protection of the community from sex offenders otherwise than through CDOs or ESOs. Necessarily the focus of this Report has been on those offenders who can be considered to be high risk offenders for whom the CDO/ESO regime will have a particular relevance. Sex offenders are, however, a heterogeneous group, given to different forms of offending, driven by different reasons, and presenting varying levels of risk. Their victims of choice may be children or adults, and for some their offending may be of a non contact nature. Some offenders will direct their activities towards persons they know, while others will be opportunistic offenders who choose victims they do not know.

10.2 For this reason, the Report has considered each aspect of criminal justice system potentially applicable to sex offenders, which may have a relevance for reducing their risk of recidivism, or for containing or supervising them in a way that will lessen their opportunity to offend.

PART A: RESTORATIVE JUSTICE AND DIVERSIONARY APPROACHES

10.3 Restorative justice and diversionary approaches have limited relevance for high risk offenders. They are, however, of value in providing an early intervention for that group of young, or cognitively impaired persons, displaying inappropriate sexual behaviour, who might otherwise progress to more serious forms of offending.

10.4 The Council is of the view that this kind of intervention is one that should be encouraged, and developed on an interagency basis, in which each of the Departments of Corrective Services (DCS); Juvenile Justice; Health; Ageing, Disability and Home Care; and Community Services would have integral roles and responsibilities.

10.5 While there are facilities or programs currently in place to provide for diversion and restorative justice that have been the subject of positive evaluations, they are limited in relation to the category and number of offenders they can reach. The first is a definitional limitation, the second is a resource limitation.

10.6 The Council favours the expansion of the programs so as to make them available to those living in remote and regional communities. It also favours consideration being given, on a trial basis, to opening up

circle sentencing and youth justice conferencing, to some of the less serious sex offences that are presently excluded.¹ This might have a particular relevance and value for consensual sexual activity between adolescents, for whom the consequences of being caught up in formal criminal proceedings may be disproportionate to the nature of the conduct involved.

PART B: INDEFINITE SENTENCING

10.7 The Council does not support the introduction of indefinite sentencing, either as an additional sentencing option or as a replacement for post sentence orders of the kind permitted under the *Crimes (Serious Sex Offenders) Act 2006* (NSW).

10.8 The Council recognises that indefinite sentences can have some benefits in that:

- offenders know, from the time that the sentence is imposed, that unless they actively participate in a sex offender program, they will not be released upon expiry of the nominal sentence, and therefore have a real incentive to become involved;
- such sentences can address the situation of those offenders with a conventional determinate sentence, who prefer to serve out the whole sentence and be released without participating in a program, and without being subject to parole release restrictions.

10.9 However a similar incentive to comply with sex offender treatment can be provided under the post sentence order regime, at least for those high risk offenders who are likely to become eligible for an order, by making it clear to them at the commencement of their sentence of the existence of that regime, and of its likely application to them.

10.10 Otherwise the Council is satisfied that the length of the available maximum sentences set out in Appendix A; the capacity to take into account the offender's prior record and other personal circumstances, including any personality disorder or psychiatric assessment pointing to the existence of deviant tendencies, and his or her response (or lack thereof) to any earlier rehabilitation opportunities, as matters relevant to any claim to leniency, to an assessment of his or her prospects of rehabilitation, and to any need to provide for community protection within the *Veen (No 2)*² constraints,

1. See, eg, *Young Offenders Act 1997* (NSW) s 8(2)(d) which specifies a number of sex offences that are not covered by the Act.

2. *Veen (No 2) v The Queen* (1988) 164 CLR 465.

allow ample opportunity for a significant sentence to be set for a high risk sex offender, which can be followed, in appropriate circumstances, by an ESO or CDO.

10.11 Those factors will have equal relevance for the setting of a non-parole period and for a determination whether the case is one attracting the standard non-parole period provisions.

10.12 It is recognised that not all sex offenders will be assessed as having a sufficiently high risk to attract an ESO or CDO, according to the assessment process currently in place, and that as a result some may complete a sentence without becoming subject to an ESO or CDO, and go on to commit further offences. However this is not an argument for indefinite sentencing, since the universal acceptance of the need for it to be confined to exceptional cases, and used only where there is cogent evidence of dangerousness or substantial risk, means that offenders in this borderline category are unlikely to be candidates for indefinite sentencing were it to be introduced.

10.13 The sentencing of an offender, in accordance with conventional sentencing principles, to a determinate sentence, does not call for the degree of accuracy and depth of inquiry as to the future dangerousness of a sex offender that is necessary for indefinite sentencing. Moreover the sentencing judge is in a position to determine the sentence in the knowledge that the offender will have an opportunity to do something about his or her offending, while in custody, and that an assessment can be made at a later time, after having had that opportunity, as to the extent of his or her then existing risk.

PART C: DISPROPORTIONATE SENTENCING

10.14 The Council does not consider that the introduction of a power to impose a disproportionate sentence would materially add anything of value to the regime currently in place in New South Wales, which permits some allowance to be made for community protection at the time of the initial sentence being imposed, and then effectively allows for the position of the offender to be reviewed proximate to the end of the sentence, and for continuing detention or extended supervision to be ordered.

10.15 If disproportionate sentences are to be justified on community protection grounds, then the current New South Wales regime is more likely to achieve that outcome. In particular it allows for an assessment of the risk of reoffending to be made at a time proximate to the offender's possible release. That allows for a more accurate assessment to be made of a prisoner whose dynamic factors may have changed substantially while in custody. More importantly it allows for

an assessment to be made closer to the point where any residual risk is likely to be realised, and also allows either for further detention to be imposed, or for additional conditions to be imposed under an ESO that might address current concerns.

10.16 Accordingly the Council does not consider that indefinite or disproportionate sentencing is either a necessary or appropriate response to the protection of the community from high risk or serious sex offenders.

PART D: UNCONTROLLABLE SEXUAL INSTINCTS LEGISLATION

10.17 The Council is also not attracted to the ‘uncontrollable sexual instincts’ legislation, which essentially rest upon psychiatric assessment as to the existence of some mental condition that materially affects or limits the offender’s power to control his or her conduct.

10.18 Sentencing in such a case can be a complicated exercise, depending on the nature and degree of the mental condition, and cannot be approached on the simple assumption that the lack of control necessarily warrants an ‘indefinite’ sentence. As was pointed out in *R v Engert*³ sentencing in such cases call for a ‘sensitive discretionary decision’ that takes into account the several objectives of sentencing. Those objectives, which include the protection of the public, the need for rehabilitation which may be best provided in the community, and that of deterrence which may be of less weight as a general deterrent, yet of greater weight as a personal deterrent, can point in different directions so far as the length of the sentence is concerned.⁴

10.19 In *R v Hemsley*,⁵ Sperling J identified the relevant principles as including the following:

First, where mental illness contributes to the commission of the offence in a material way, the offender’s moral culpability may be reduced; there may not then be the same call for denunciation and the punishment warranted may accordingly be reduced ...

Secondly, mental illness may render the offender an inappropriate vehicle for general deterrence and moderate that consideration ...

3. *R v Engert* (1995) 84 A Crim R 67.

4. And see *Veen (No 2) v The Queen* (1988) 164 CLR 465, 476 and *R v Engert* (1995) 84 A Crim R 67, 68.

5. *R v Hemsley* [2004] NSWCCA 228.

Thirdly, a custodial sentence may weigh more heavily on a mentally ill person ...

A *fourth*, and countervailing, consideration may arise, namely, the level of danger which the offender presents to the community. That may sound in special deterrence ...⁶

10.20 Where the offender's inability to control his or her sexual instincts are related to a mental condition then the Council considers it preferable for sentencing to proceed in accordance with these conventional principles and in accordance with the ESO/CDO regime than to be determined within the constraints of 'uncontrollable sexual instincts' legislation. In addition it notes that extreme cases involving cognitive impairment or serious psychiatric disturbances evidenced by a paraphiliac or deviant sexual drive can often be better managed pursuant to the Mental Health legislation or through the procedures available in the Guardianship Tribunal.

PART E: SUPERVISION IN THE COMMUNITY

Parole Supervision

10.21 For most sex offenders who do not present an obvious serious risk to the community, conditional release on parole will normally provide sufficient security. They risk return to custody if they breach parole conditions that can include substantial restrictions on residence, association, attendance at locations, or engagement in activities or employment, that might otherwise expose them to the possibility of re-offending, as well as a requirement to participate in rehabilitation programs. For many offenders within this class, that threat will suffice to act as a significant personal deterrent. Moreover their potentiality for release will have attracted consideration by the Serious Offenders Review Council, in some cases, and by the State Parole Authority (SPA) in other cases.

10.22 The capacity of the Community Compliance Group, Probation and Parole Officers and of the Child Protection Watch Team, to supervise these low and medium risk offenders is however important. Subject to those teams being sufficiently staffed and resourced to carry out that activity, the Council does not see any need for an expansion of the category of offenders potentially subject to ESOs.

10.23 In that regard the Council has taken into account:

- the existence of the sex offender registration scheme and the restrictions on working with children, which apply to most, if not all offenders whose crimes relate to children;

6. *R v Hemsley* [2004] NSWCCA 228, [33]-[36].

- the potential availability of child protection prohibition orders in relation to registrable offenders and the establishment of the Community Offender Support Program Centres at Malabar and (potentially) Campbelltown;
- the fact that compliance or non compliance with parole is a circumstance specifically to be taken into account on an application for an ESO, and would apply, for example, to a mid-risk offender whose sexual re-offending on parole had elevated his risk status;
- the need to contain the CDO/ESO scheme to high risk offenders, as an exceptional departure from sentencing principles; and
- the fact that administration of such a scheme does involve significant additional work and costs, to the point where its extension should only occur where a cost benefit can be demonstrated.

10.24 The Council does however note the limited capacity of sex offenders released on parole to access sex offender programs in the community, other than maintenance for offenders treated in custody, or programs for low risk offenders.

Serious sex offenders – review dates for parole consideration

10.25 DCS raised a concern in relation to the applicability of certain provisions of the *Crimes (Administration of Sentences) Act 1999* (“the Act”) as they apply to parole for serious sex offenders.⁷

10.26 It has suggested a possible amendment, applicable only to a serious sex offender (as defined in the *Crimes (Serious Sex Offenders) Act 2006*), who has not completed any program to address his sexual offending prior to 60 days before his parole eligibility date, to preclude any application or reapplication for parole, or consideration by the SPA of parole for such an offender for a period of 2 years from the eligibility date. It suggested that the ‘manifest injustice’ provisions of the Act (s 143B) could apply to any serious sex offender who subsequently completed a program within the 2 year period.

10.27 This amendment was proposed because CUBIT is an intensive but lengthy program, which usually requires at least 10 months intensive participation for high risk offenders. Places in the program are limited and there is a waiting list. It is not uncommon for offenders to require more than one attempt at completing the program, thus prolonging its duration.

7. [In particular ss 143 and 143A.](#)

10.28 Previously, many serious sex offenders were content to serve their full sentence without applying for parole, and without any rehabilitative benefit from CUBIT. The increased demand for CUBIT from serious sex offenders nearing the end of their sentence and those subject to continuing detention orders has reportedly had the effect of extending the waiting list and the waiting time for offenders approaching the end of their non-parole period.

10.29 DCS suggests that it is unreasonable to expect that a serious sex offender, who had not attempted the CUBIT program before his parole eligibility date, will manage to complete the program under the current timetable for parole consideration. The effect of the proposed amendment, if adopted, would be to encourage serious sex offenders to apply for CUBIT at the earliest possible opportunity instead of waiting until the last moment and demanding urgent placement in order to achieve parole consideration.

10.30 In support of this submission, reference was made to the precedent in Section 143A(3)(c) which provides:

In any case, the Parole Authority may decline to consider an offender's case for up to 3 years at a time after it last considered the grant of parole to the offender.

10.31 In the Second Reading Speech concerning this amendment the Minister said:⁸

Some offenders behave so poorly that they know, or should know, that they have no prospect of gaining parole. The Government believes that it is reasonable for the Act to be amended to provide that where the SPA has refused to make a parole order at the end of a non-parole period, or where a parole order has been revoked and the offender returned to custody, the SPA should not be automatically required to reconsider the offender for parole each year.

10.32 DCS suggested that a similar consideration should apply to a serious sex offender who has not undertaken a sex offender program during his incarceration and who knows, or should know, that he has no prospect of gaining parole until he undertakes such a program.

10.33 DCS suggested that there should also be no limit on the number of times that the provision is applied – ie, if, after 2 years, the offender still has not undertaken programs to address his sexual offending, the SPA may again extend his parole review date by a further 2 years.

8 New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 October 2004, 12098 (Tony Stewart, Parliamentary Secretary).

Council position

10.34 The Council recognises the practical considerations behind the proposal which seem to relate, on the one hand, to discourage queue jumping and, on the other hand, to encourage offenders already in custody to sign up for CUBIT. The Council notes that there would be some prisoners against whom these provisions would operate unfairly, due to the inflexibility of the proposed timeframe. Accordingly, the Council is not minded at this stage to recommend its adoption. The Council's preference is to leave it to the SPA to consider any application for release on parole, in the light of the current state of any offender's participation in programs.

Registration of Sex Offenders

10.35 The Council points out that the requirements for registration of sex offenders and the making of Child Protection Prohibition Orders, are confined to those offenders whose offences are either Class 1 or Class 2 offences. These offences are confined to offences in relation to children. While a court may make an order requiring a person convicted of an offence other than a Class 1 or 2 offence to comply with the obligations under the Act, it can only do so if it is satisfied that such person poses a risk to the lives or sexual safety of a child or children.⁹

10.36 In some other jurisdictions, including Victoria, Queensland, Western Australia, Tasmania and the ACT, registration applies, additionally, to some sex offenders whose offences were committed against adults.¹⁰ Registration requirements in several jurisdictions, including Queensland, Western Australia, Tasmania¹¹ and the Northern Territory, also extend to non-sexual offenders, such as those who were found guilty of the murder of a child¹² or those who are

9 *Child Protection (Offenders Registration) Act 2000* (NSW) ss 3D – 3H.

10. See, eg, *Sex Offenders Registration Act 2004* (Vic) ss 7, 8, 11(1), schs 3–4 (Class 3 and Class 4 offences that may result in the making of a sex offender registration order); *Child Protection (Offender Reporting) Act 2004* (Qld) sch 2 cl 1(a) (Class 2 offence includes procuring sexual acts by coercion, conspiracy to defile, and prostitution offences: *Criminal Code* (Qld) ss 218, 221, 229G–229I); *Community Protection (Offender Reporting) Act 2004* (WA) sch 1 (Class 1 offences includes sexual offences against incapable person: *Criminal Code* (WA) s 330); *Community Protection (Offender Reporting) Act 2005* (Tas) sch 1 (Class 1 offence includes wilful and obscene exposure in a public place: *Police Offences Act 1935* (Tas) s 8(1A)(a)); *Crimes (Child Sex Offenders) Act 2005* (ACT) ss 15(1), 16(1) (making of a child sex offender registration order if 'a person poses a risk to the sexual safety of 1 or more people or of the community').

11. *Community Protection (Offender Reporting) Act 2005* (Tas) sch 3 (Class 3 offence includes kidnapping: *Criminal Code* (SA) s 191A(a)).

12. *Child Protection (Offender Reporting) Act 2004* (Qld) sch 1 cl 1(a) (referring to *Criminal Code Act 1899* (Qld) s 300); *Community Protection (Offender Reporting) Act 2004* (WA) sch 1 (referring to *Criminal Code Act 1913* (WA)

subject to a registration order where they pose a risk to the lives of one or more children or persons generally.¹³

Council position

10.37 The Council has not received any submissions recommending enlargement of the registration scheme to those whose offences are committed against adults. It does not at this stage recommend enactment of legislation extending the registration requirements for sex offenders, although it is of the view that its feasibility should be considered, having regard, inter alia to the additional burden and costs for police, and to any practical impediments which this would entail. That would include the possibility that an increase in the number of registrations might dilute the capacity of the NSW Police to manage the scheme.

10.38 If the registration scheme is to be extended then the Council considers that it should be confined to the most serious offences and categories of offender, including any offender in respect of whom an ESO or CDO has been made. The case of *Harrison*¹⁴ provides an example of an offender with a pattern of particularly serious offending that had been directed at young women, some of whom were barely aged over 16 years. It would be a dubious assumption that like offenders would necessarily confine their activities to people over the age of 16 years, or to be meticulous in ascertaining the age of their victims.

10.39 In order to contain any such system within practical limits, the need for registration could be made subject to an order being made by the sentencing judge, and confined to cases where the court was satisfied that the offender presented an ongoing risk of re-offending sexually or of committing offences that risked the lives or sexual safety of others (ie both children and adults).

10.40 It would be desirable that any extension of the registration requirements along these lines be adopted uniformly by other jurisdictions, particularly in the light of the national registration system.

10.41 The Council is of the view that, in the case of first time offenders who are aged under 18 years, the Court should have a discretion, at the time of imposing sentence, to excuse the requirement for registration. This should only be exercised in less serious cases, where

s 279); *Child Protection (Offender Reporting and Registration) Act 2004* (NT) sch 1 item 5.

13. *Community Protection (Offender Reporting) Act 2004* (WA) s 13(2); *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 13(1), (3).

14. *New South Wales v Harrison* [2008] NSWSC 1306.

the Court considers that the risk of reoffending is low. It should not be available where the offender commits a subsequent offence while a juvenile.

10.42 Otherwise the long term consequence for offenders in this category, who are still in a developmental stage, and whose understanding of sexual mores may be limited, can be disproportionate both for the objective seriousness of the offence and the level of risk of reoffending. This can have a real significance for example, for consensual sexual activities between juveniles, where there is an absence of indiscriminate predatory behaviour.

PART F: CONTINUING DETENTION OR EXTENDED SUPERVISION ORDERS

10.43 The Council is of the view that the scheme for the making of CDOs and ESOs in NSW, in relation to serious sexual offenders, provides a structure that is appropriate, in principle, for responding to the need to protect the community from such offenders, and that is preferable to the alternatives discussed earlier in this chapter.

10.44 The views of the Council in relation to the details of that scheme, the issues that arise, and appropriate modifications are contained in the preceding chapter.

11. Repeat offenders

INTRODUCTION

11.1 In this chapter the Council considers the possible responses to address repeat offending by serious sex offenders. For the purpose of the chapter the Council adopts the meaning given to 'serious sex offence' and 'sex offender', provided by the *Crimes (Serious Sex Offenders) Act 2005* (NSW)¹.

11.2 Necessarily there is some overlap with the previous Part of the report, so far as consideration is given to the principles and sentencing strategies that underpin preventive detention.

11.3 The basis for the several options considered in the chapter may differ, either in whole or in part, in that they may place different weight on the relevant and permitted objects of sentencing, in particular community protection, punishment, deterrence and denunciation.

PART A: OPTIONS FOR REFORM

Option 1: Providing for a gradation in the maximum available penalty

11.4 The Council received some submissions which were supportive of legislating for increased penalties for subsequent serious sex offences committed by sex offenders.²

11.5 In general these submissions rested on the assumption that child sex offending in particular is addictive behaviour, and that repeat sexual offences are typically characterized by a number of risk factors such as antisocial personality, sexual deviancy, poor impulse control and criminal versatility, that are resistant to change. In this respect, it was suggested that repeat offending is a common indicator of the offender having poor prospects of rehabilitation and as such, it warranted a longer sentence for community protection rather than on punishment or deterrence grounds.

11.6 One submission suggested that in the case of multiple offences committed against a single victim, the sentences should be required, by legislation, to be served consecutively, rather than concurrently. Subject to totality principles, as settled in *Pearce v The Queen*,³ the

-
1. *Crimes (Serious Sex Offenders) Act 2005* (NSW) ss 4, 5. See Appendix A.
 2. Submission 7: Department of Corrections, Community Probation & Psychological Services (New Zealand); Submission 11: Central and Eastern Sydney Sexual Assault Service and Northern Sydney Sexual Assault Service; Submission 14: Ministry for Police New South Wales; Submission 19: Bravehearts.
 3. *Pearce v The Queen* (1998) 194 CLR 610.

courts already have a discretion as to the extent to which sentences should be served concurrently or consecutively.

11.7 Another submission stressed that, while additional resources should be focused on the rehabilitation of repeat offenders whilst in gaol and upon release, it accepted that an extended period in custody could be appropriate for the continually re-offending prisoner who had already had the benefit of intensive rehabilitation programs.⁴

Bravehearts model

11.8 The Council was requested to give specific attention to the Bravehearts proposal, which advocated for a mandatory scheme of sentencing applicable to adults who commit sexual offences against children. In summary, the proposal⁵ would involve:

- for any first conviction for a child sex offence (attracting a maximum sentence of five years or more) that there be a mandatory term of detention and completion of a mandatory treatment program; and
- for an offender with one previous offence (attracting a maximum sentence of five years or more) a mandatory life sentence for the second offence, where the second offence attracts a maximum of 10 years or more (or alternatively a cumulative penalty of 10 years or more).

11.9 Bravehearts also proposed that offenders sentenced in accordance with these provisions be detained in a purpose built centre.

Council position

11.10 The Council does not support the Bravehearts proposal for the following reasons:

- for reasons which are well recognised, mandatory sentencing is objectionable, and unsuited to a general sentencing system which is founded upon the exercise of judicial discretion to tailor a sentence to meet the specific objective and subjective circumstances of each case;
- multiple strikes legislation is arbitrary in its application, and can lead to wholly disproportionate sentences;
- such a system would be likely to act as a deterrent to the offer of a plea of guilty, particularly in those cases that might lead to a

4. Submission 13: Aboriginal Legal Service (NSW/ACT).

5. Submission 19: Bravehearts 'Two Strikes and They're Out! Mandatory Sentencing and Child Sex Offenders'.

life sentence, resulting in the additional trauma and uncertainty of outcome occasioned by a fully contested trial;

- the potential serious consequences of the proposal are such that there could well be a reduction in the reporting of intra-familial abuse, or pressure upon child victims not to go ahead with their complaint, if the result is to deprive the family of a breadwinner for a lengthy period or for life; or alternatively an incentive for the making of false allegations where the parents are engaged in bitterly contested family law proceedings;
- the provision of a special purpose built facility, and of potential life sentences, is likely to be cost prohibitive and not set off by commensurate benefits to the community;
- there is little evidence that multiple strike laws act as a deterrent or reduce the incidence of crime; and
- the Northern Territory legislation providing for an escalation of sentence, in relation to property offences, which was cited as an illustration of a two strikes schemes has been repealed, as a result of its unfairly harsh consequences.⁶

11.11 In summary, the Council regards the Bravehearts proposal as unacceptably inflexible, as involving the undesirable features of mandatory sentencing, and unnecessary having regard to the other options discussed in this Report.

Precedents

11.12 There are some precedents for legislation providing for an increase in the maximum available penalty for a second or subsequent offence. One example can be seen in the *Crimes Act 1900* (ACT) in relation to the offence of child grooming. For a first offence, the maximum penalty is five years imprisonment, and for a second and subsequent offence it is 10 years imprisonment.⁷

11.13 Section 443 of the *Crimes Act 1900* (NSW) previously allowed for the imposition of a sentence of imprisonment in addition to that prescribed for the offence of which an offender stood convicted, where he or she had been previously convicted of, and sentenced for, an indictable offence.⁸ For a second conviction the additional term permitted was between two and 10 years, and for a third conviction, the permitted term was one of between three and 14 years.

6. The Northern Territory mandatory sentencing provisions, contained in the *Sentencing Act 1995* (NT) ss 78A, 78B, sch 1 and the *Juvenile Justice Act 1993* (NT), were repealed on 18 October 2001.

7. *Crimes Act 1900* (ACT) s 66(1).

8. *Crimes Act 1900* (NSW) s 443.

11.14A further precedent of this form of legislation continues to exist in s 115 of the *Crimes Act 1900* (NSW) which applies when an offender having been convicted of an indictable offence, afterward commits any of the offences mentioned in s 114 of the Act.⁹ The s 114 offence which attracts a maximum penalty of imprisonment for seven years, is a separate offence from the s 115 offence.¹⁰ As a result, the s 115 offence potentially attracts a sentence of imprisonment for up to 10 years, in addition to any sentence imposed for the s 114 offence.

11.15The New South Wales Law Reform Commission (NSWLRC) recommended the repeal of both s 443 and s 115.¹¹ However, only s 443 was repealed.

11.16 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,¹² and in the *Drug (Misuse and Trafficking) Act 1985* (NSW) in relation to offences involving drug premises.¹³

11.17It may also be noted that the *Crimes Act 1900* (NSW)¹⁴ already makes provision for a specific offence, and for a potentially larger maximum penalty, for conduct involving the persistent sexual abuse of a child¹⁵ on 3 or more separate occasions occurring on separate days. That provision is however largely confined, in a practical sense, to offences committed in circumstances where there is an ongoing familial or other relationship between the offender and victim that provides an opportunity for offending.

11.18A similar approach has been taken in New South Wales for the punishment of offenders involved in the ongoing supply of prohibited drugs¹⁶ and in other jurisdictions for the offence of maintaining a

9. 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 offence (s 114 (c)), entering or remaining on building or land with intent to commit an indictable offence (s 114 (d)).

10. *R v Tillott* (1991) 53 A Crim R 46.

11. New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996) [10.20], Recommendation 53.

12. *Road Transport (Safety and Traffic Management) Act 1999* (NSW) ss 9, 12.

13. *Drug (Misuse and Trafficking) Act 1985* (NSW) pt 2B, ss 36X-36Z.

14. *Crimes Act 1900* (NSW) s 66EA.

15. That is, engaging in conduct relation to a particular child that constitutes a sexual offence as defined for the purposes of the section.

16. *Drug Misuse and Trafficking Act 1985* (NSW) s 25A.

sexual relationship with a child¹⁷ or for persistent sexual abuse of a child.¹⁸

11.19 Section 115 does seem to have had limited use, the Judicial Information Research System (JIRS) database recording some 38 cases, of which 55% (21 cases) have resulted in a sentence of imprisonment.¹⁹ However, the additional sentences arising where it has led to a conviction, have been contained within a relatively low range with 60% attracting a term of less than 12 months, and with the longest term being one of two years.

11.20 As the discussion in *R v Tillott*²⁰ shows, a prosecution under the offence would require the Crown to prove the previous conviction (although not the commission of the offence) as well as the s 114 offence, although that should not occasion any difficulty.

11.21 The New South Wales precedents reserve a discretion to the sentencing judge as to the imposition of a sentence or penalty within the enlarged maximum range. In contrast, an example of mandatory minimum sentences for repeat offences can be seen in the *Criminal Code* (WA) in relation to the offence of burglary.²¹

Arguments against gradation of sentences

11.22 One argument that has been advanced against legislating for increased penalties for second or subsequent offences is that existing mechanisms provide sentencing judges with adequate scope to take into account prior convictions. The submissions of Legal Aid NSW, the Public Defender and the Department of Juvenile Justice made this point.

11.23 The Public Defenders²² submitted that statutory maximum sentences and standard non-parole periods are already high, and noted that for example, the most serious sexual offence, aggravated sexual assault in company,²³ has a penalty which is comparable to that for murder. They submitted that if the penalty for subsequent offences was increased to match or exceed that for murder, there would be no incentive for sex offenders to spare the lives of their victims.

17. *Criminal Code Act 1899* (Qld), s 229B(1); *Criminal Code Act 1924* (Tas) s 125A(2).

18. *Criminal Law Consolidation Act 1935* (SA) s 50; *Crimes Act 1958* (Vic) s 47A(1).

19. The Judicial Commission of New South Wales, Judicial Information Research Service, <<http://jirs/>> at 3 December 2008.

20. *R v Tillott* (1991) 53 A Crim R 46.

21. *Criminal Code Act Compilation Act 1913* (WA) s 401(4).

22. Submission 16: Public Defenders Office New South Wales, 6.

23. *Crimes Act 1900* (NSW) s 61JA.

11.24 Legal Aid NSW²⁴ warned that to legislate for increased sentences could actually detract from the more rational process of assessing risk to the community based on the facts before the court.

11.25 The Office of the Director of Public Prosecutions (ODPP)²⁵ pointed out that there can be a significant problem in identifying subsequent offences, in this context, as sexual offences often represent a continuing course of conduct, possibly committed against multiple victims, who may be known to the offender. The sex offences may become known to the authorities out of chronological order, they may be of varying degrees of seriousness and the offender may be convicted and sentenced for multiple offences at the same time. The ODPP submitted that an assessment of factors such as the offender's propensity to commit crime and the offender's dangerousness at the time of sentencing, may be a more accurate way to address re-offending.

11.26 Additionally it could be argued that unless a system for increasing penalties for repeat offences is specifically founded upon the objective of ensuring community protection and requires, as a precondition to its implementation, judicial satisfaction that the offender presents an ongoing risk to the community, it could be seen to be a purely punitive response and objectionable on proportionality grounds.

Arguments in favour of gradation of sentences

11.27 The advantage of providing for an increase in the maximum available penalty, for a second or subsequent offence is that it potentially permits more room for the community protection element, in particular, to be taken into account. This might arise for example in a case within the worst category for the relevant offence where the sentence would be likely to approach the maximum penalty for that offence, even without allowing for an increase to reflect the need for community protection, or in the case of a standard non-parole period offence, where the standard non-parole period is set at a very high percentage of the current maximum sentence for that offence. An additional advantage would arise in so far as an approach of this kind could be appropriate for an offender whose record of offending might not be sufficient to elevate his or her risk classification to the point where he or she would be a potential candidate for a CDO or ESO.

24. Submission 17: Legal Aid NSW, 8.

25. Submission 12: New South Wales Director of Public Prosecutions, 11.

Council position

11.28A question does arise as to whether the court already has sufficient opportunity to take into account, when determining a sentence, any record of the offender for similar offending. In this respect the Council notes that subject to some important limitations, the prior record of a sex offender can be taken into account by a sentencing judge. While the existence of prior convictions is an, ‘aggravating circumstance’ for the purpose of s 21A(2) of the *Crimes (Sentencing Procedure) Act*,²⁶ reference to that fact is to be interpreted in the context of s 21A as a whole.

11.29 That this is the case was established by the decision of the Court of Criminal Appeal in *R v McNaughton*²⁷ where the Court gave consideration to the different views which had been expressed by the Court in relation to the application of s 21A and in relation to the decisions in *Veen v The Queen (No 2)*²⁸ and *Baumer v The Queen*²⁹. Spigelman CJ, (with whom McClellan CJ at CL, Grove, Barr and Bell JJ agreed) observed:

[24] Notwithstanding the views expressed by some judges, I interpret the joint judgments in both *Veen No 2* and in *Baumer* as establishing that the principle of proportionality requires the upper boundary of a proportionate sentence to be set by the objective circumstances of the offence, which circumstances do not encompass prior convictions. In this respect I agree with the reasoning of Howie J in *Wickham*, which I had left open in *R v Berg* [2004] NSWCCA 300 at [40].

[25] The Crown submissions to this Court put forward a cogent case for accepting that prior convictions are relevant to the mens rea element of an offence and are particularly significant in the assessment of the moral culpability of the offender in the commission of the offence for which s/he stands to be sentenced. Nevertheless, such considerations can be taken into account in determining the appropriate level of punishment for the particular offence and for determining where in the spectrum of seriousness of offences of this character, the facts of the case lie. (See *R v Way* (2004) 60 NSWLR 168 at [85]-[99] and especially at [90]-[93].) However, on the authority of *Veen No 2* and *Baumer*, it is not open to this Court to adopt the approach submitted by the Crown so as to use prior convictions to determine the upper boundary of a proportionate sentence.

26. *Crimes (Sentencing) Procedure Act 1999* (NSW) s 21A (2)(d).

27. *R v McNaughton* (2006) 66 NSWLR 566.

28. *Veen v The Queen (No 2)* (1988) 164 CLR 465.

29. *Baumer v The Queen* (1988) 166 CLR 51.

[26] There is a difficulty with the reference in *Veen v The Queen (No 2)* to prior convictions ‘illuminating’ the offender’s “moral culpability”. Nevertheless, as Howie J stated in *R v Wickham*, the majority judgment in *Veen v The Queen (No 2)* recognised that prior convictions are pertinent to where, within the boundary set by the objective circumstances, a sentence should lie. I refer specifically to the reference to an “attitude of disobedience of the law” and to the increased weight to be given to “retribution”, “deterrence” (relevantly personal deterrence) and “the protection of society”. ...

[30] Although I agree with Howie J’s identification in *R v Wickham* of the relevant sentencing principle, I do not agree with his characterisation of s 21A(2)(d). (See *R v Berg* (at 406 [40]).) His Honour said that the section appears “on its face” to “indicate that a prior criminal record is a matter of aggravation by making the offence more serious”. With respect, I do not agree that the section should be interpreted in that way. There is a distinction at common law between what Callinan J has called “a circumstance of aggravation” and a “matter adverse to an offender”. (*Weininger* (at 666 [116]).) However, Parliament has not used the word “aggravation” in its common law sense.

[31] There is a reference to “relative seriousness of the offence” in s 21A(1)(c), but it should not be assumed that the word “seriousness” there appearing is a reference to the objective gravity of the offence in the sense that the word has been used in the authorities. Nor, in my opinion, should it be assumed that the words “aggravating factors” in the section should be interpreted as if they were a reference to “objective considerations” only, as those words have been used.

[32] Section 21A(1)(c) refers expressly to “any other objective or subjective factor”, clearly indicating that the lists of aggravating and mitigating factors in s 21A(2) and s 21A(3) encompass both kinds of considerations. Some of the matters listed in s 21A(2) appear to me to encompass matters which, in the terminology that has come to be adopted in the case law are, at least in part, “subjective” rather than “objective”, for example, motive in (h) and offending whilst on conditional liberty in (j). I can see no reason why the reference to prior convictions should not be interpreted as referring to the use of that consideration in the ways authorised expressly in *Veen v The Queen (No 2)*.

[33] If *Veen v The Queen (No 2)* is understood to establish a principle to the effect that prior convictions can never be classified as an “aggravating factor” then, because the principle of proportionality applies to all sentences, s 21A(4)

would have the effect of depriving s 21A(2)(d) of any effect. Section 21A(4) should not be interpreted in that way.³⁰

11.30 McClellan CJ at CL observed:

If the question is asked “is it a worse crime to commit an offence having been previously convicted for the same or similar offence” the general community would probably answer “yes.” Although the Crown argued that this was because prior offending informs the mens rea of the instant offence there are difficulties with this argument, including matters of proof. There is force in the argument that it may inform the moral culpability of the offender for the instant offence. However, as Howie J indicated in *R v Wickham* [2004] NSWCCA 193 and the Chief Justice confirms, that argument was rejected by the High Court in *Veen [No 2]*.³¹

11.31 Accordingly, reliance on s 21A(2) as providing for the imposition of a higher sentence than would otherwise be justified, for a second offence, on the ground of it being a second or subsequent offence alone, is not permissible. The fact of the prior convictions however remains relevant, in light of the other aggravating and mitigating circumstances mentioned in s 21A, in depriving an offender of leniency, or in indicating that more weight should be given to retribution, personal deterrence and the protection of the community.³²

11.32 The Council accepts that there is clear precedent in NSW for legislating for an increase in the maximum sentence, following a second or subsequent conviction for offences of a similar nature, and that there could be some merit in doing so in the case of sexual offences although any such scheme would share some of the concerns that have led to disuse of habitual offender legislation. For these reasons, the Council does not support Option 1 at this stage.

11.33 If this option is adopted, then it would need to be confined to serious sexual offences, with recognition given to the fact that the Court can already take the offender’s antecedents into account, as can the State Parole Authority, and to the further fact that convictions for these offences already have significant consequences post release, and can potentially bring an offender within the CDO or ESO regime.

30. *R v McNaughton* (2006) 66 NSWLR 566, [24]-[26], [30]-[33].

31. *R v McNaughton* (2006) 66 NSWLR 566, [63].

32. *R v Wickham* (2004) NSWCCA 193; *R v McNaughton* (2006) 66 NSWLR 566, [26]-[28].

Option 2: Legislating for a repeat offence to be a circumstance of aggravation in relation to specific sexual offences

11.34 There are several sexual offences in the *Crimes Act* which provide for an aggravated form of that offence, with an increase in the available maximum penalty.³³

11.35 In each case, however, the circumstance of aggravation is directly related to the objective circumstances of the offence charged. To add a circumstance of aggravation attributable to the fact that the offender has committed a previous offence of the same kind, or one of equivalent seriousness, would go beyond the reason for legislating for an increase in the maximum penalty for those cases. Moreover, it could lead to a criticism of disproportionality, in that in accordance with conventional sentencing practice, the objective gravity of the offence is to be determined by reference to the facts concerning its commission.

Council position

11.36 Accordingly, the Council does not support this option.

Option 3: Reliance on habitual offender legislation

11.37 Legislation permitting the imposition of an additional sentence in relation to offenders who are declared to be habitual offenders, has a long history.

11.38 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*.³⁴

33. *Crimes Act 1900* (NSW) ss 61J, 61JA, 61M, 61O, 66C(2), 66C(4).

34. *Habitual Criminals Act 1957* (NSW) s 4(1). There is also legislative provision in relation to repeat driving offences which can lead to an offender being declared a habitual traffic offender, and disqualified for a longer period than would be permitted in relation to individual offences. A person will automatically be declared a Habitual Traffic Offender once he or she has been convicted of three

11.39 The sentence of imprisonment to be imposed is to be for a term of not less than five years, and not more than 14 years³⁵ and it is to be regarded as separate and distinct from the sentence imposed for the immediate offence.³⁶ 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.³⁷

11.40 An argument that the Act was obsolete was rejected in 1973.³⁸ The NSWLRC however recommended its repeal along with the *Inebriates Act 1912* (NSW) in 1996 for the following reasons:³⁹

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 behaviour, 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 licence" for persons declared under their provisions.

relevant sentences within a five-year period (*Road Transport (General Act) 2005* (NSW) div 3, s 199). On declaration, the person is disqualified for an accumulated period of five years (*Road Transport (General Act) 2005* (NSW) s 201); although the court that convicts the person of the offence leading to the declaration can reduce the period of disqualification to a lesser period, although not less than two years (s 201(3)), or quash the declaration (s 202), if satisfied that the declaration is a disproportionate or unjust consequence, having regard to the total driving record of the person concerned, or the special circumstances of the case.

35. *Habitual Criminals Act 1957* (NSW) s 6(1).

36. *R v Roberts* (1961) SR (NSW) 681.

37. *Habitual Criminals Act 1957* (NSW) s 6(2).

38. *R v Riley* (1973) 2 NSWLR 107.

39. New South Wales Law Reform Commission, *Sentencing*, Report No 79 (1996) [10.19]-[10.20].

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.

11.41 That recommendation has not been acted upon, even though the Australian Law Reform Commission (ALRC) had earlier recommended repeal of the equivalent provision contained in the *Crimes Act 1914* (Cth),⁴⁰ as a provision out of keeping with the modern approach to sentencing and as amounting to an unfair means of preventive detention.⁴¹

11.42 In its earlier Discussion Paper⁴² the ALRC had suggested that legislation of this kind was objectionable as providing for punishment in advance of crimes that might never be committed.

11.43 The NSW Act was most recently considered in *Strong v The Queen*,⁴³ having been invoked in proceedings in the District Court following the conviction of an offender with a lengthy criminal history, who pleaded guilty to a number of offences including stalking and intimidating a young woman.

11.44 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.⁴⁴ 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.

11.45 It would remain possible for a sentencing judge to rely on the *Habitual Criminals Act*, in the case of a repeat sex offender who met the requirements of the Act. This would not however arise in practical terms in the present context, until the commission of 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.

11.46 It would involve the revival of a sentencing weapon which has fallen into disuse, and which has been abandoned in most other

40. *Crimes Act 1914* (Cth) s 17.

41. Australian Law Reform Commission, *Sentencing*, Report No 44 (1988) [230].

42. Australian Law Reform Commission, *Sentencing*, Discussion Paper No 30 (1987).

43. *Strong v The Queen* (2005) 224 CLR 1.

44. *R v Riley* (1973) 2 NSWLR 107.

jurisdictions. Until its operation arose for consideration in *Strong*⁴⁵ very little attention seems to have been given to it in New South Wales.

Council position

11.47 The Sentencing Council does not regard its use as an appropriate response to a repeat sex offender. At best it is a blunt instrument and would not necessarily provide a suitable pathway or incentive for rehabilitation or provide a superior remedy to that which is available under the *Crimes (Serious Sex Offenders) Act*. The criticisms of the ALRC and NSWLRC remain valid.

Option 4: Legislative authority for disproportionate sentencing

11.48 As noted earlier, legislation in force in South Australia, Victoria, New Zealand, England and Wales expressly permits the court to impose a sentence which is longer than that which is proportionate to the objective gravity of the subject offence, for repeat offenders, where that is justified for the protection of the community.⁴⁶

11.49 It would be possible for the *Crimes (Sentencing Procedure) Act 1999* (NSW) or for the *Crimes Act 1900* (NSW), to be amended to incorporate a provision expressly permitting the imposition of disproportionate sentences (and lengthier non-parole periods), in such circumstances. Such a provision might attract the approbation of the community or sections of it, who could well see a benefit in courts having the express power to increase the length of sentences for dangerous and repeat sex offenders.

11.50 However, there are some problems with this approach:

- first it may add very little in practice to the available range of sentencing discretion already permitted within the constraints of *Veen (No 2)* given the general concerns which judges might be expected to have in relation to disproportionate sentencing;⁴⁷
- it would confront the difficulty of accurate risk assessment, and prediction at a time when the offender may not have had the opportunity to participate in sex offender treatment, or to have the reasons for such offending adequately assessed or addressed;

45. *Strong v The Queen* (2005) 224 CLR 1.

46. *Criminal Law (Sentencing) Act 1988* (SA) s 20B; *Sentencing Act 1991* (Vic) s 6D; *Sentencing Act 2002* (NZ) s 89; *Criminal Justice Act 2003* (UK) ss 227(2), 228(2).

47. *Veen v The Queen (No 2)* (1988) 164 CLR 465.

- it may result in an offender, who demonstrates, through case management while in custody, a reduction in his or her risk level, receiving a sentence that was longer than was justified; and
- its existence may have the effect of discouraging pleas of guilty.

11.51 Overall, a doubt arises whether it would present an option that would be preferable to that which already exists in New South Wales, which depends on an assessment conducted at a time proximate to the offender's release, in the light of a contemporary assessment of his or her risk level, which is conducted within a well defined set of criteria, and which permits a good deal of flexibility to frame, and to vary, an appropriate post sentence order, for continued detention or extended supervision.

Council position

11.52 The Council, accordingly, does not consider this to be a useful model, even though precedent for it exists in other jurisdictions.

Option 5: Indeterminate sentences

11.53 The several schemes permitting indeterminate or indefinite sentencing for serious violent and sexual offences have been noted earlier.⁴⁸ They have the benefit of allowing the State and the offender to address the appropriateness, at the time of sentencing, of specifying a 'nominal term', of paving the way for early entry into sex offender treatment, and of providing for ongoing review, and appeal at each stage of that review.

11.54 The requirement to specify a 'nominal term', the provisions for ongoing review and appeal, and the specification of strict criteria for the imposition of an indeterminate sentence give this option some advantages over disproportionate or conventional sentencing.

11.55 It would also theoretically be possible to establish a scheme that allowed for disproportionate and indefinite sentences as alternatives for repeat serious sex offenders, with different levels of risk thresholds, and with the former being a default option in any case where the sentencing judge was of the view that there was a need to increase the sentence to protect the community, falling short of the need for an indefinite sentence.

48. *Sentencing Act 1991* (Vic) pt 3 div 2 sub-div 1A; *Penalties and Sentences Act 1992* (Qld) pt 10; *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Sentencing Act 1995* (WA) pt 14; *Criminal Law (Sentencing) Act 1988* (SA) pt 3 div 3; *Sentencing Act 1997* (Tas) pt 3 div 3; *Sentencing Act 1995* (NT) part 3 div 5 sub-div 4.

11.56 This would however involve a complex process, with uncertain boundaries and considerable room for error and appellate intervention.

11.57 The problem with both indefinite sentencing and disproportionate sentencing, however, lies in the difficulty in predicting the degree of an offender's risk of offending, at the time of sentencing, and in knowing whether he or she will participate in sex offender programs, or seek release on parole. As a consequence, given their significant consequences, and the general objections to indefinite sentences based on proportionality and finality principles, it is likely that there would be some judicial reluctance for their use.

Council position

11.58 The Council does not support the introduction of indefinite sentencing.

Option 6: Post sentence orders

11.59 As noted earlier, New South Wales, Queensland and Western Australia have introduced legislation permitting the Courts to make continuing detention and extended supervision orders.⁴⁹ Victorian legislation permits the making of extended supervision orders,⁵⁰ while South Australia has legislation permitting continuing detention.⁵¹ The New South Wales legislation is similar to that in Queensland and Western Australia; and so far as extended supervision is concerned, it is similar to the Victorian legislation.

11.60 From the perspective of an offender the practical consequences of this kind of sentencing regime may be very similar to those arising from indefinite sentencing. Its advantages, however, lie in the fact that:

- the sentence originally imposed is for a finite term and hence potentially less harsh than a disproportionate or indefinite sentence;
- it allows for greater flexibility than an indefinite sentence;
- the assessment of risk is made later in time, and after the offender has had a chance to participate in sex offender rehabilitation programs, and accordingly, with an increased

49. *Crimes (Serious Sex Offenders) Act 2006* (NSW) pts 2, 3; *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) pt 2; *Dangerous Sexual Offenders Act 2006* (WA) pt 2.

50. *Serious Sex Offenders Monitoring Act 2005* (Vic) pt 2.

51. *Criminal Law (Sentencing) Act 1998* (SA) s 23.

prospect of accuracy in risk assessment and prediction of future behaviour;

- the need for an in depth assessment is confined to those cases where concerns persist, towards the end of the offender's sentence, that he or she presents a risk of re-offending, thereby reducing the costs of administering the sentence and managing the offender;
- knowledge of its existence, and potential application to an offender, is likely to encourage his or her participation in CUBIT or similar programs while in custody.

PART B: CONCLUSION

11.61 Subject to attention being given to the procedural and practical problems identified in chapters 7 and 8 of this Report, the Council considers that the possibility of repeat serious offending can be appropriately addressed through option 6.

11.62 Having regard to the significant threshold for the use of option 6, and the administrative demands on DCS and the courts associated with its invocation, the Council considers, additionally, that attention could usefully be given to option 1.

11.63 By reason of the number of sexual offences of differing gravity that would be potentially caught by the adoption of some general provision along the lines of the former s 443 of the *Crimes Act*, the Council considers that any relevant amendment could be usefully confined in the first instance to discrete offences, of comparable objective criminality, charged under the laws of New South Wales or comparable Commonwealth laws or laws of the other states and territories, including for example the following:

- child grooming offences;
- child prostitution and procurement offences; and
- child pornography offences.

11.64 In each case, the relevant provisions contained in the *Crimes Act*, or *Summary Offences Act*, could make provision for an increase in the available maximum sentences of imprisonment for a second or subsequent conviction in the order of say three to five years.

11.65 It is less easy to make specific provision in relation to the remaining offences involving sexual assault, or acts of indecency, or offences involving incitement or attempt, given the existing variations in the maximum sentences for these offences, which can be dependent

on the age of the victim or on the several circumstances of aggravation for which the legislation provides.

11.66 For the most part the approach suggested would relate to conduct of the kind that tends to be repetitive, to be of a non-contact nature and to be outside the ambit of contact offences, which are more likely to attract longer initial sentences, as well as potential resort to the provisions of the *Crimes (Serious Sex Offenders) Act*. Viewed in this way, a limited adoption of this option could supplement the remedies already available under that Act and enhance the objective of community protection.

11.67 The Council does not reject the possibility of adopting a more general provision relating to offenders convicted of repeat sexual assaults, along the lines of the former s 443 of the *Crimes Act*. It does however express a need for caution as well as a need for wider consultation within the community before revival of an approach that was abandoned some years ago. If it were adopted then there could be merit in providing for additional terms specific to separate categories of offence, eg those involving sexual intercourse as one category, and those involving indecent assaults as a second category, rather than a general provision applicable to all sex offences.

11.68 The problem identified by the DPP could be met by making the increase available in respect of a second or subsequent conviction irrespective of the chronological sequence of the relevant offences. Where more than one offence was dealt with at the same time then that should count as a single conviction.

Appendices

**A. Crimes (Serious Sex
Offenders) Act 2006 (NSW)**

A 'SERIOUS SEX OFFENCE'¹

Under the Act, a 'serious sex offence' comprises:

- 1) sexual offences committed against a child which are punishable by imprisonment for 7 years or more (Division 10, Part 3, *Crimes Act 1900* (NSW) (see Table 1)) ;
- 2) sexual offences committed against an adult, which are punishable by imprisonment for 7 years or more and which are committed in circumstances of aggravation (Division 10, Part 3, *Crimes Act 1900* (NSW) (see Table 2). Circumstances of aggravation commonly include circumstances in which:
 - the offender intentionally or recklessly inflicts actual bodily harm;
 - the offender threatens to inflict actual bodily harm by means of an offensive weapon or instrument;
 - the offender is in the company of another person or other persons;
 - or the victim is under 16 years of age, has a serious physical disability or a cognitive impairment, or is under the authority of the offender;
 - the offender breaks and enters into a dwelling house with the intention of committing the offence; or
 - the offender deprives the victim of his or her liberty before or after the offence.²
- 3) offences under section 61K or 66EA of the *Crimes Act 1900* NSW (see Table 3);
- 4) offences under section 38, 111 or 112 or 113 of the *Crimes Act 1900* NSW which have been committed with the intent to commit an offence under Division 10, Part 3 of the *Crimes Act 1900* NSW, where the offence intended to be committed is punishable by imprisonment for 7 years or more (see Table 4). These offences commonly involve the administration of an intoxicating substance, or entering a house, in order to commit a sexual offence;

1. See s 5(1) of the *Crimes (Serious Sex Offenders) Act 2006*.

2. *Crimes Act 1900* (NSW) ss 61J(2), 80A(1). See also *Crimes Act 1900* (NSW) s 61M(3), which includes some but not all of these elements.

- 5) offences committed other than in NSW, if they would be considered serious sex offences if committed in NSW, and any other offence that is a serious sex offence for the purposes of the Act.

Table 1: Offences under Division 10 of Part 3 of the *Crimes Act 1900* (NSW) committed against a child and punishable by imprisonment for seven years or more.

Offence	Maximum Sentence	Standard Non-Parole Period
Sexual assault (s 61I)	14 years	7 years
Sexual assault —attempt (ss 61I, 61P)	14 years	-
Aggravated sexual assault (s 61J(1))	20 years	10 years
Aggravated sexual assault – attempt (ss 61J(1) 61P)	20 years	10 years
Aggravated sexual assault in company (s 61JA(1))	Life	15 years
Aggravated sexual assault in company —attempt (ss 61JA(1), 61P)	Life	-
Assault with intent to have sexual intercourse (s 61K)	20 years	-
Assault with intent to have sexual intercourse —attempt (ss 61K, 61P)	20 years	-
Aggravated indecent assault (s 61M(1))	7 years	
Aggravated indecent assault – attempt (ss 61M(1), 61P)	7 years	
Aggravated indecent assault—child under 16 (s 61M(2))	10 years	8 years
Aggravated indecent assault—child under 16 —attempt (ss 61M(2), 61P)	10 years	-
Aggravated act of indecency—child under 10 (s 61O(2))	7 years	-
Aggravated act of indecency—child under 10 —attempt (ss 61O(2), 61P)	7 years	-

Offence	Maximum Sentence	Standard Non-Parole Period
Incitement to an aggravated act of indecency—child under 10 (s 61O(2))	7 years	-
Incitement to an aggravated act of indecency—child under 10—attempt (ss 61O(2), 61P)	7 years	-
Commits an act of indecency with/towards child under 16 knowing act being filmed for child pornography (61O(2A))	10 years	-
Commits an act of indecency with/towards child under 16 knowing act being filmed for child pornography – attempt (ss 61O(2A), 61P)	10 years	
Incites a person under 16 to act of indecency knowing act being filmed for child pornography (61O(2A))	10 years	-
Incites a person under 16 to act of indecency knowing act being filmed for child pornography – attempt (ss 61O(2A), 61P)	10 years	
Sexual intercourse—child under 10 (s 66A)	25 years	15 years
Aggravated sexual intercourse with a child under 10 (66A(2))	Life	15 years
Attempting, or assaulting with intent, to have sexual intercourse with child under 10 (ss 66B)	25 years	-
Sexual intercourse—child between 10 and 14 (s 66C(1))	16 years	-
Attempting, or assaulting with intent, to have sexual intercourse with child between 10 and 14 (ss 66C(1), 66D)	16 years	-
Sexual intercourse—child between 10 and 14—aggravated offence (s 66C(2))	20 years	-

Offence	Maximum Sentence	Standard Non-Parole Period
Attempting, or assaulting with intent, to have sexual intercourse with child between 10 and 14—aggravated offence (ss 66C(2), 66D)	20 years	-
Sexual intercourse—child between 14 and 16 (s 66C(3))	10 years	-
Attempting, or assaulting with intent, to have sexual intercourse with child between 14 and 16 (ss 66C(3), 66D)	10 years	-
Sexual intercourse—child between 14 and 16—aggravated offence (s 66C(4))	12 years	-
Attempting, or assaulting with intent, to have sexual intercourse with child between 14 and 16—aggravated offence (ss 66C(4), 66D)	12 years	-
Persistent sexual abuse of a child (s 66EA(1))	25 years	-
Procuring child under 14 for unlawful sexual activity (s 66EB(2))	15 years	-
Procuring child for unlawful sexual activity any other case (s 66EB(2))	12 years	-
Meeting a child under 14 that has been groomed for sexual purpose with intention of procuring unlawful sexual activity (s 66EB(2A)(a))	14 years	
Meeting a child (any other case) that has been groomed for sexual purpose with intention of procuring unlawful sexual activity (s 66EB(2A)(b))	12 years	
Grooming child under 14 for unlawful sexual activity (s 66EB(3))	12 years	-
Grooming child aged unlawful sexual activity – any other case (s 66EB(3))	10 years	-
Sexual intercourse: person responsible for care (s 66F(2))	10 years	-

Offence	Maximum Sentence	Standard Non-Parole Period
Sexual intercourse: person responsible for care—attempt (s 66F(2) & 66F(4))	10 years	-
Sexual intercourse: taking advantage of impairment (s 66F(3))	8 years	-
Sexual intercourse: taking advantage of impairment—attempt (s 66F(3) & 66F(4))	8 years	-
Sexual assault by forced self-manipulation (s 80A(2))	14 years	-
Aggravated sexual assault by forced self manipulation (s 80A (2A))	20 years	

Table 2: Offences under Division 10 of Part 3 of the *Crimes Act 1900* (NSW) against an adult punishable by imprisonment for seven years or more in circumstances of aggravation

Offence	Maximum Sentence	Standard Non-Parole Period
Aggravated sexual assault (s 61J(1))	20 years	10 years
Aggravated sexual assault—attempt (ss 61J(1), 61P)	20 years	-
Aggravated sexual assault in company (s 61JA(1))	Life	15 years
Aggravated sexual assault in company—attempt (ss 61JA(1), 61P)	Life	15 years
Aggravated indecent assault (s 61M(1))	7 years	5 years
Aggravated indecent assault—attempt (ss 61M(1), 61P)	7 years	-
Aggravated sexual assault by forced self-manipulation (s 80A(2A))	20 years	-

Table 3: Offences under *Crimes Act 1900* (NSW) s 61K or s 66EA

Offence	Maximum Sentence	Standard Non-Parole Period
Assault with intent to have sexual intercourse (s 61K)	20 years	-
Persistent sexual abuse of a child (s 66EA(1))	25 years	-

Table 4: Offences under *Crimes Act 1900* (NSW) s 38, 111, 112 or 113 that have been committed with intent to commit offences under Division 10 of Part 3 of the *Crimes Act* punishable by imprisonment for seven years or more

Offence	Maximum Sentence	Standard Non-Parole Period
Using intoxicating substance to commit an indictable offence (s 38)	25 years	-
Entering dwelling-house (s 111(1))	10 years	-
Entering dwelling-house —aggravated offence (s 111(2))	14 years	-
Entering dwelling-house —specially aggravated offence (s 111(3))	20 years	-
Breaking etc into any house etc and committing serious indictable offence (s 112(1))	14 years	-
Breaking etc into any house etc and committing serious indictable offence —aggravated offence (s 112(2))	20 years	5 years
Breaking etc into any house etc and committing serious indictable offence —specially aggravated offence (s 112(3))	25 years	7 years
Breaking etc into any house etc with intent to commit serious indictable offence (s 113(1))	10 years	-
Breaking etc into any house etc with intent to commit serious indictable offence —aggravated offence (s 113(2))	14 years	-

Offence	Maximum Sentence	Standard Non-Parole Period
Breaking etc into any house etc with intent to commit serious indictable offence —specially aggravated offence (s 113(3))	20 years	-

B 'OFFENCE OF A SEXUAL NATURE'³

Offences of a sexual nature comprise a broader range of sexual offences committed against either adults or children. They include less serious offences with penalties from 18 months, and offences committed by convicted sex offenders who fail to comply with various orders while in the community. They comprise the following:

- 1) offences contained in Division 10, Part 3 *Crimes Act 1900* (NSW) (see Table 5);
- 2) offences under section 38, 111, 112, or 113 of the *Crimes Act 1900* (NSW) that has been committed with the intent to commit an offence under Division 10, Part 3 *Crimes Act 1900* (NSW) (see Table 6). These offences commonly involve the administration of an intoxicating substance, or entering a house, in order to commit a sexual offence;
- 3) offences under Division 15 or 15A of Part 3 *Crimes Act 1900* (NSW) (see Table 7). These offences concern the engagement of children for prostitution or pornographic purposes;
- 4) offences contained in sections 91J, 91K or 91M of the *Crimes Act 1900* (NSW) which relate to observing and filming of children (see Table 9); and
- 5) offences related to the breach of reporting or supervision orders that are committed by sex offenders in the community (see Table 8, 10 and 11, 12).

Table 5: Offences under Division 10 of Part 3 of the *Crimes Act 1900* (NSW)

Offence	Maximum Sentence	Standard Non-Parole Period
Sexual assault (s 61I)	14 years	7 years
Sexual assault —attempt (ss 61I, 61P)	14 years	-
Aggravated sexual assault (s 61J(1))	20 years	10 years
Aggravated sexual assault —attempt (ss 61J(1), 61P)	20 years	-
Aggravated sexual assault in company (s 61JA(1))	Life	15 years

³ See s 5(2) of the *Crimes (Serious Sex Offenders) Act 2006*

Offence	Maximum Sentence	Standard Non-Parole Period
Aggravated sexual assault in company —attempt (ss 61JA(1), 61P)	Life	-
Assault with intent to have sexual intercourse (s 61K)	20 years	-
Assault with intent to have sexual intercourse —attempt (ss 61K, 61P)	20 years	-
Indecent assault (s 61L)	5 years	-
Indecent assault —attempt (ss 61L, 61P)	5 years	-
Aggravated indecent assault (s 61M(1))	7 years	5 years
Aggravated indecent assault —attempt (ss 61M(1), 61P)	7 years	-
Aggravated indecent assault—child under 16 (s 61M(2))	10 years	8 years
Aggravated indecent assault—child under 16 —attempt (ss 61M(2), 61P)	10 years	-
Act of indecency—child under 16 (s 61N(1))	2 years	-
Act of indecency—child under 16 —attempt (ss 61N(1), 61P)	2 years	-
Incitement to an act of indecency—child under 16 (s 61N(1))	2 years	-
Incitement to an act of indecency—child under 16 —attempt (ss 61N(1), 61P)	2 years	-
Act of indecency—person aged 16 or above (s 61N(2))	18 months	-
Act of indecency—person aged 16 or above —attempt (ss 61N(2), 61P)	18 months	-
Incitement to an act of indecency—person aged 16 or above (s 61N(2))	18 months	-

Offence	Maximum Sentence	Standard Non-Parole Period
Incitement to an act of indecency— person aged 16 or above —attempt (ss 61N(2), 61P)	18 months	-
Aggravated act of indecency—child under 16 (s 61O(1))	5 years	-
Aggravated act of indecency—child under 16 —attempt (ss 61O(1), 61P)	5 years	-
Incitement to an act of indecency— child under 16 (s 61O(1))	5 years	
Incitement to an act of indecency— child under 16 —attempt (ss 61O(1), 61P)	5 years	
Aggravated act of indecency—person aged 16 or above (s 61O(1A))	3 years	-
Aggravated act of indecency— person aged 16 or above —attempt (ss 61O(1A), 61P)	3 years	-
Incitement to an aggravated act of indecency—person aged 16 or above (s 61O(1A))	3 years	-
Incitement to an aggravated act of indecency— person aged 16 or over —attempt (ss 61O(1A), 61P)	3 years	-
Aggravated act of indecency—child under 10 (s 61O(2))	7 years	-
Aggravated act of indecency—child under 10 —attempt (ss 61O(2), 61P)	7 years	-
Incitement to an aggravated act of indecency—child under 10 (s 61O(2))	7 years	-
Incitement to an aggravated act of indecency—child under 10 —attempt (ss 61O(2), 61P)	7 years	-

Offence	Maximum Sentence	Standard Non-Parole Period
Commits an act of indecency with/towards child under 16 knowing act being filmed for child pornography (61O(2A))	10 years	-
Commits an act of indecency with/towards child under 16 knowing act being filmed for child pornography – Attempt (ss 61O(2A), 61P))	10 years	
Incites a person under 16 to act of indecency knowing act being filmed for child pornography (61O(2A))	10 years	-
Incites a person under 16 to act of indecency knowing act being filmed for child pornography – Attempt (ss 61O(2A), 61P)	10 years	
Sexual intercourse—child under 10 (s 66A)	25 years	15 years
Aggravated sexual assault – child under 10 (s 66A(2))	Life	15 years
Attempting, or assaulting with intent, to have sexual intercourse with child under 10 (ss 66B)	25 years	-
Sexual intercourse—child between 10 and 14 (s 66C(1))	16 years	-
Attempting, or assaulting with intent, to have sexual intercourse with child between 10 and 14 (ss 66C(1), 66D)	16 years	-
Sexual intercourse—child between 10 and 14—aggravated offence (s 66C(2))	20 years	-
Attempting, or assaulting with intent, to have sexual intercourse with child between 10 and 14—aggravated offence (ss 66C(2), 66D)	20 years	-
Sexual intercourse—child between 14 and 16 (s 66C(3))	10 years	-

Offence	Maximum Sentence	Standard Non-Parole Period
Attempting, or assaulting with intent, to have sexual intercourse with child between 14 and 16 (ss 66C(3), 66D)	10 years	-
Sexual intercourse—child between 14 and 16—aggravated offence (s 66C(4))	12 years	-
Attempting, or assaulting with intent, to have sexual intercourse with child between 14 and 16—aggravated offence (ss 66C(4), 66D)	12 years	-
Persistent sexual abuse of a child (s 66EA(1))	25 years	-
Procuring child under 14 for unlawful sexual activity (s 66EB(2))	15 years	-
Procuring child for unlawful sexual activity – any other case (s 66EB(2))	12 years	-
Meeting a child under 14 that has been groomed for sexual purpose with intention of procuring unlawful sexual activity (s 66EB(2A)(a))	14 years	
Meeting a child (any other case) that has been groomed for sexual purpose with intention of procuring unlawful sexual activity (s 66EB(2A)(b))	12 years	
Grooming child under 14 for unlawful sexual activity (s 66EB(3))	12 years	-
Grooming child aged for unlawful sexual activity – any other case (s 66EB(3))	10 years	-
Sexual intercourse: person responsible for care (s 66F(2))	10 years	-
Sexual intercourse: person responsible for care—attempt (ss 66F(2), (4))	10 years	-
Sexual intercourse: taking advantage of impairment (s 66F(3))	8 years	-

Offence	Maximum Sentence	Standard Non-Parole Period
Sexual intercourse: taking advantage of impairment—attempt (ss 66F(3), (4))	8 years	-
Sexual intercourse with person aged between 16 and 17 under special care (s 73(1))	8 years	-
Sexual intercourse with person aged between 16 and 17 under special care—attempt (ss 73(1), (4))	8 years	-
Sexual intercourse with person aged between 17 and 18 under special care (s 73(2))	4 years	
Sexual intercourse with person aged between 17 and 18 under special care—attempt (ss 73(2), (4))	4 years	-
Incest (s 78A(1))	8 years	-
Incest attempts (s 78B)	2 years	-
Bestiality (s 79)	14 years	-
Attempt to commit bestiality (s 80)	5 years	-
Sexual assault by forced self-manipulation (s 80A(2))	14 years	-
Sexual assault by forced self-manipulation—aggravated offence (s 80A(2A))	20 years	-

Table 6: Offences under *Crimes Act 1900* (NSW) s 38, 111, 112 or 113 that have been committed with intent to commit an offence under Division 10 of Part 3 of the *Crimes Act*

Offence	Maximum Sentence	Standard Non-Parole Period
Using intoxicating substance to commit an indictable offence (s 38)	25 years	-
Entering dwelling-house (s 111(1))	10 years	-
Entering dwelling-house—aggravated offence (s 111(2))	14 years	-

Offence	Maximum Sentence	Standard Non-Parole Period
Entering dwelling-house —specially aggravated offence (s 111(3))	20 years	-
Breaking etc into any house etc and committing serious indictable offence (s 112(1))	14 years	-
Breaking etc into any house etc and committing serious indictable offence —aggravated offence (s 112(2))	20 years	5 years
Breaking etc into any house etc and committing serious indictable offence —specially aggravated offence (s 112(3))	25 years	7 years
Breaking etc into any house etc with intent to commit serious indictable offence (s 113(1))	10 years	-
Breaking etc into any house etc with intent to commit serious indictable offence —aggravated offence (s 113(2))	14 years	-
Breaking etc into any house etc with intent to commit serious indictable offence —specially aggravated offence (s 113(3))	20 years	-

Table 7: Offences under Division 15 or 15A of Part 3 of the *Crimes Act 1900* (NSW)

Offence	Maximum Sentence	Standard Non-Parole Period
Promoting or engaging in acts of child prostitution (s 91D(1))	10 years	-
Promoting or engaging in acts of child prostitution—child under 14 (s 91D(1))	14 years	-
Obtaining benefit from child prostitution (s 91E(1))	10 years	-
Obtaining benefit from child	14 years	

Offence	Maximum Sentence	Standard Non-Parole Period
prostitution – child under 14 (s 91E(1))		
Premises not to be used for child prostitution (s 91F(1))	7 years	-
Children not to be used for pornographic purposes—child under 14 (s 91G(1))	14 years	-
Children not to be used for pornographic purposes—child under 14 —attempt (ss 91G(1), 344A)	14 years	-
Children not to be used for pornographic purposes—child aged 14 or above (s 91G(2))	10 years	-
Children not to be used for pornographic purposes—child aged 14 or above —attempt (ss 91G(2), 344A)	10 years	-
Production , dissemination or possession of child pornography (91H(2))	10 years	-

Table 8: Offences under the *Summary Offences Act 1988* (NSW) s 11G

Offence	Maximum Sentence	Standard Non-Parole Period
Loitering by convicted child sexual offenders near premises frequented by children (s 11G(1))	2 years and/or 100 penalty units	-

Table 9: Offences under section 91J, 91K, 91L or 91M of the *Crimes Act 1900* in relation to observing or filming of a child.

Offence	Maximum Sentence	Standard Non-Parole Period
Obtaining sexual arousal observing person engaged in private act – in circumstances of aggravation (s 91J(3))	5 years	

Offence	Maximum Sentence	Standard Non-Parole Period
Obtaining sexual arousal observing person engaged in private act – in circumstances of aggravation – attempt (ss 91J(3) & (6))	5 years	
Filming a person engaged in private act in circumstances of aggravation (s 91K(3))	5 years	
Filming a person engaged in private act in circumstances of aggravation – attempt (ss 91K(3) & (6))	5 years	
Filming a person’s private parts in circumstances of aggravation (s 91L(3))	5 years	
Filming a person’s private parts in circumstances of aggravation – attempt (ss 91L(3) & (6))	5 years	
Installing device to facilitate observation or filming (s91M(1))	2 years and/or 100 penalty units	

Table 10: Offences under the *Child Protection (Offenders Registration) Act 2000* (NSW) s 17 or s 18

Offence	Maximum Sentence	Standard Non-Parole Period
Offence of failing to comply with reporting obligations (s 17(1))	5 years and/or 500 penalty units	-
Offence of furnishing false or misleading information (s 18)	5 years and/or 500 penalty units	-

Table 11: Offences under the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 13

Offence	Maximum Sentence	Standard Non-Parole Period
Contravention of protection orders (s 13(1))	2 years and/or 100 penalty units	-

Table 12: Offences under the *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 12

Offence	Maximum Sentence	Standard Non-Parole Period
Breach of supervision order (s 12)	2 years and/or 100 penalty units	-

B. Matters brought pursuant
to the *Crimes (Serious Sex
Offenders) Act 2006* (NSW)

a) List of offenders who received a continuing detention order (CDO) or an extended supervision order (ESO) under the *Crimes (Serious Sex Offenders) Act 2006* (NSW) and their current status as of 21 April 2009.

Offender	Current Status
1. Tillman	Under a 5-year ESO until December 2013 (on bail for historic offences)
2. Quinn	Under a 3-year ESO until October 2011.
3. Winters	Currently serving a sentence following breach of an ESO. A 5-year ESO until November 2013 applies.
4. Cornwall	Released from custody on 20 March 2009, having served a sentence for breach of an ESO, under ESO until 18 December 2012 (with variations ordered on 11 March 2009)
5. Hayter	Under a 12-month CDO until May 2009; subsequent application seeking an ESO is before the court.
6. Wilde	In custody following conviction for breach of ESO. A 3-year ESO until December 2011 applies.
7. Brookes	Released from custody on ESO following sentencing in February 2009 for breach of ESO. Currently in custody following further alleged indecent assault (and breach of ESO), bail refused.
8. Hadson	Under a 5-year ESO until February 2013.
9. Davis	Under a 5-year ESO until August 2013.
10. Thomas	Currently in custody bail refused for alleged breach of ESO. Previously convicted of breach of ESO. A 12-month ESO applies until October 2009.
11. Toms	Under a 2-year ESO until December 2011.
12. Harrison	Initially given a 3-month ESO until February 2009; ESO extended by a further 4 year 9 months in February 2009. Currently on bail for alleged breach of ESO.

Offender	Current Status
13. Manners	Under a 5-year ESO until December 2013.
14. Myers	Convicted for a breached of ESO and sentenced to 4 months. ESO for 2 years until 10 December 2010 to continue on release.
15. Armand-Iskak	Under an ESO for 2 years and 3 months, until March 2011.

b) List of cases in relation to offenders who were subject to an application for a continuing detention order (CDO) or an extended supervision order (ESO) under the *Crimes (Serious Sex Offenders) Act 2006* (NSW)

	Decision	Judge(s)	Judgment date
1. Gallagher - application withdrawn			
<i>Attorney-General (NSW) v Gallagher</i> [2006] NSWSC 340	interim 28-day CDO	McClellan CJ at CL	13 April 2006
<i>Attorney-General (NSW) v Gallagher</i> [2006] NSWSC 420	hearing date vacated due to expected deportation	McClellan CJ at CL	2 May 2006
2. Tillman - currently under a 5-year ESO until December 2013 and on conditional bail re historic offences			
<i>Attorney-General (NSW) v Tillman</i> [2007] NSWSC 356	interim 28-day ESO	Hoeben J	17 April 2007
<i>Attorney General (NSW) v Tillman</i> [2007] NSWCA 119	appeal upheld	Mason P, Santow and Tobias JJA	24 May 2007
<i>Attorney General (NSW) v Tillman</i> [2007] NSWSC 528	interim 28-day CDO renewed	Bell J	29 May 2007
<i>Attorney General (NSW) v Tillman</i> [2007] NSWSC 605	1-year CDO	Bell J	18 June 2007

	Decision	Judge(s)	Judgment date
<i>Tillman v Attorney General (NSW)</i> [2007] NSWCA 327	appeal dismissed	Mason P, Giles and Ipp JJA	26 November 2007
<i>R v Tillman</i> [2008] NSWSC 1227	conditional bail granted	Johnson J	31 October 2008
<i>New South Wales v Tillman</i> [2008] NSWSC 1229	interim 28-day ESO	Johnson J	27 October 2008
<i>New South Wales v Tillman</i> [2008] NSWSC 1293	5-year ESO	Johnson J	5 December 2008
3. Quinn - currently under a 3-year ESO until October 2011			
<i>Attorney General (NSW) v Quinn</i> [2007] NSWSC 456	interim 28-day CDO	Hall J	9 May 2007
<i>Attorney General (NSW) v Quinn</i> [2007] NSWSC 873	1-year CDO	Hall J	10 August 2007
<i>New South Wales v Quinn</i> [2008] NSWSC 1080	3-year ESO	Hidden J	2 October 2008

	Decision	Judge(s)	Judgment date
<p>4. Jamieson - application withdrawn as sentenced for further sex offences in June 2008; expected to be deported at the expiry of his sentence</p>			
<p><i>Attorney General (NSW) v Jamieson</i> [2007] NSWSC 465</p>	interim 7-day CDO	Hidden J	11 May 2007
<p>[Decision not published]</p>	Sentenced for further sex offences for 4 years and 8 months, with 3 years and 6 months non-parole period to commence on 12 May 2007	Newcastle District Court	13 June 2008
<p>5. Winters - currently serving a sentence following breach of ESO. 5-year ESO until November 2013</p>			
<p><i>Attorney General (NSW) v Winters</i> [2007] NSWSC 611</p>	interim 28-day CDO	Bell J	13 June 2007

	Decision	Judge(s)	Judgment date
<i>Attorney-General (NSW) v Winters</i> [2007] NSWSC 1071	1-year CDO	McClellan CJ at CL	26 September 2007
<i>Winters v Attorney General (NSW)</i> [2008] NSWCA 33	appeal dismissed	Mason P, Giles and Hodgson JJA	18 March 2008
[Decision not yet published]	5-year ESO	McClellan CJ at CL	6 November 2008
6. Cornwall - under ESO until 18 December 2012 (with variations ordered on 11 March 2009)			
<i>Attorney General (NSW) v Cornwall</i> [2007] NSWSC 716	interim 28-day CDO	Price J	2 July 2007
<i>Attorney General (NSW) v Cornwall</i> [2007] NSWSC 1082	8-month CDO	Hall J	28 September 2007
<i>Cornwall v Attorney General (NSW)</i> [2007] NSWCA 374	5-year ESO	Mason P, Giles and Hodgson JJA	19 December 2007
<i>Unreported</i>	Variations to ESO		11 March 2009

	Decision	Judge(s)	Judgment date
<p>7. Hayter</p> <ul style="list-style-type: none"> - currently under a 12-month CDO until May 2009 - application for subsequent ESO before the court 			
<p><i>Attorney General (NSW) v Hayter</i> [2007] NSWSC 983</p>	psychiatric examinations etc ordered	Price J	30 August 2007
<p><i>Attorney General (NSW) v Hayter</i> [2007] NSWSC 1146</p>	6-month CDO	Hislop J	16 October 2007
<p><i>New South Wales v Hayter</i> [2008] NSWSC 394</p>	12-month CDO	Hislop J	6 May 2008
<p>8. Wilde</p> <ul style="list-style-type: none"> - currently under a 3-year ESO until Dec 2011 - in custody following conviction for breach of ESO 			
<p><i>Attorney General (NSW) v Wilde</i> [2007] NSWSC 1490</p>	interim 28-day CDO	Price J	20 December 2007
<p><i>Attorney General (NSW) v Wilde</i> [2008] NSWSC 14</p>	8-month CDO	Price J	24 January 2008
<p><i>New South Wales v Wilde</i> [2008] NSWSC 1148</p>	interim 28-day CDO	McClellan CJ at CL	16 September 2008

	Decision	Judge(s)	Judgment date
<i>New South Wales v Wilde</i> [2008] NSWSC 1211	3-year ESO	Kirby J	12 December 2008
9. Brookes - returned to custody for breach of ESO in June 2008; released following sentence in February 2009 - returned to custody bail refused following alleged indecent assault; adjourned until 15 June 2009			
<i>New South Wales v Brookes</i> [2008] NSWSC 150	interim 28-day CDO	Fullerton J	19 February 2008
<i>New South Wales v Brookes</i> [2008] NSWSC 473	5-year ESO	Grove J	15 May 2008
<i>New South Wales v Brookes</i> [2008] NSWCA 212	appeal dismissed	Ipp and Bell JJA, McClellan CJ at CL	4 September 2008
10. Hadson - currently under a 5-year ESO until February 2013			
<i>Attorney General (NSW) v Hadson</i> [2008] NSWSC 140	5-year ESO	Fullerton J	26 February 2008

	Decision	Judge(s)	Judgment date
11. Davis - currently under a 5-year ESO until August 2013			
<i>New South Wales v Davis</i> [2008] NSWSC 490	interim 28-day CDO	Price J	8 May 2008
<i>New South Wales v Davis</i> [2008] NSWSC 664	4-month CDO	Price J	24 June 2008
<i>New South Wales v Davis</i> [2008] NSWSC 862	CDO revoked and 5-year ESO imposed	Price J	20 August 2008
12. Thomas - currently in custody bail refused for alleged breach of ESO - under a 12-month ESO until October 2009			
<i>New South Wales v Thomas</i> [2008] NSWSC 640	interim CDO	Johnson J	11 June 2008
<i>New South Wales v Thomas</i> [2008] NSWSC 1340	12-month ESO	Adams J	12 December 2008
13. Toms - currently under a 2-year ESO until December 2011			
<i>New South Wales v Toms</i> [2008] NSWSC 1238	psychiatric examinations etc	Johnson J	29 October 2008
[Decision not yet published]	2-year ESO	Harrison J	11 December 2008

	Decision	Judge(s)	Judgment date
<p>14. Harrison</p> <p>- currently under a 5 year ESO until Dec 2013</p> <p>- on bail for alleged breach</p>			
<i>New South Wales v Harrison</i> [2008] NSWSC 1240	psychiatric examinations etc ordered	Johnson J	3 November 2008
<i>New South Wales v Harrison</i> [2008] NSWSC 1306	3-month ESO until February 2009	Fullerton J	9 December 2008
<i>State of New South Wales v Harrison</i> [2009] NSWSC 198	ESO extended by 4 yrs 9 months	Fullerton J	24 February 2009
<p>15. Manners</p> <p>- currently under a 5-year ESO until December 2013</p>			
<i>New South Wales v Manners</i> [2008] NSWSC 1242	psychiatric examinations etc ordered	Johnson J	7 November 2008
<i>New South Wales v Manners</i> [2008] NSWSC 1376	5-year ESO	Hulme AJ	19 December 2008
<p>16. Myers</p> <p>- in custody following conviction for breach</p> <p>- under a 2-year ESO until 10 Dec 2010</p>			

	Decision	Judge(s)	Judgment date
<i>State of New South Wales v Myers</i> [2008] NSWSC 1430	2-year ESO	McCallum J	10 December 2008
17. Armand-Iskak - currently under an ESO for 2 years and 3 months, until March 2011			
<i>New South Wales v Armand-Iskak</i> (Unreported, NSW Supreme Court, 12 December 2008)	2 years 3 months ESO	McCallum J	12 December 2008
18 Mitchell - not yet finalised			
<i>State of NSW v Mitchell</i> [2009] NSWSC 283	Psychiatric assessment & interim order	Buddin J	16 April 2009

**C. Post sentence preventive
restriction schemes in
other jurisdictions**

PART A: OTHER AUSTRALIAN JURISDICTIONS

Queensland and Western Australia

C.1 The *Dangerous Sexual Offenders Act 2006* (WA) ('the Western Australian Act') is modelled on, and substantially similar to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ('the Queensland Act').¹

C.2 Both Acts provide for the Supreme Court to make a 'continuing detention order' or an 'extended supervision order' in respect of a person who is serving a sentence of imprisonment for a 'serious sexual offence' and who is 'a serious danger to the community'.

Preliminary hearing

C.3 On application by the Attorney-General (in Queensland) or by the Director of Public Prosecutions (in Western Australia) within six months of the end of a prisoner's sentence, the Supreme Court must hold a preliminary hearing.

C.4 In Queensland, the court must determine whether there are 'reasonable grounds for believing that the prisoner is a serious danger to the community'.² In Western Australia the legislation sets a lower hurdle, namely, whether there are 'reasonable grounds on which the court might ... find that the offender is a serious danger to the community'.³

Final hearing

C.5 In both states, at the final hearing, the court must consider:

- The psychiatrists' reports which now are required and the extent to which the prisoner cooperated in the psychiatric examinations;
- Any other medical, psychiatric, psychological or other assessment;
- Information indicating a propensity to commit serious sexual offences in the future;
- Any pattern of offending behaviour;
- Efforts by the prisoner to address the cause or causes of his offending behaviour, including whether he participated in rehabilitation programs;

1. See Western Australia, *Parliamentary Debates*, Legislative Assembly, 9 November 2005 (Hon J. A. McGinty, Attorney General), 7006.

2. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 8(1).

3. *Dangerous Sexual Offenders Act 2006* (WA) ss 8, 14(2)(b) and see *DPP (WA) v Williams* [2006] WASC 140, [27]–[28].

- Whether the prisoner’s participation in rehabilitation programs has had a positive effect on him;
- The prisoner’s antecedents and criminal history;
- The risk the prisoner will commit another serious sexual offence if released into the community;
- The need to protect members of the community from that risk; and
- Any other relevant matter.⁴

C.6 The court must determine whether the prisoner is a ‘serious danger to the community’ in the sense that there is an ‘unacceptable risk that the prisoner will commit a serious sexual offence’⁵ if released from custody, or if released without a supervision order being made.⁶

C.7 The meaning of ‘unacceptable risk’ has been explained by the Western Australian Court of Appeal as follows.

“[U]nacceptable risk” is intended to mean more than merely a risk which is not a remote one.

...[A]n “unacceptable risk” ... is a risk which is unacceptable having regard to a variety of considerations which may include the likelihood of the person offending, the type of sexual offence which the person is likely to commit (if that can be predicted) and the consequences of making a finding that an acceptable risk exists. That is, the judge is required to consider whether, having regard to the likelihood of the person offending and the offence likely to be committed, the risk of that offending is so unacceptable that, notwithstanding that the person has already been punished for whatever offence they may have actually committed, it is necessary in the interests of the community to ensure that the person is subject to further control or detention.⁷

Standard of proof

C.8 The Attorney-General (in Queensland) or the Director of Public Prosecutions (in Western Australia) bears the onus of proof.⁸ A finding that a prisoner represents a ‘serious danger to the community’ must

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4. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(4); *Dangerous Sexual Offenders Act 2006* (WA) s 7(3).
 5. See *DPP (WA) v Mangalamara* (2007) 169 A Crim R 379, 405–9.
 6. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(1)–(2); *Dangerous Sexual Offenders Act 2006* (WA) ss 7, 17.
 7. *DPP (WA) v Williams* [2007] WASCA 206, [62]–[63] (Wheeler JA with whom Le Miere AJA agreed) (emphasis added). Once it is found that such an unacceptable risk exists, it automatically follows that the defendant is a serious danger to the community: [66].
 8. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(7); *Dangerous Sexual Offenders Act 2006* (WA) s 7(2).

be based on ‘acceptable, cogent evidence’ and to ‘a high degree of probability’.⁹

C.9 If it is satisfied to the requisite standard, the Court may make a continuing detention order, detaining the prisoner for ‘control, care or treatment’; make a supervision order, releasing the prisoner subject to conditions;¹⁰ or, in Queensland, may refuse to make any order despite the finding.¹¹ In Western Australia, there is no discretion to refrain from making an order.¹² That is because of the breadth of the range of matters that the court is required to take into account in determining the questions of ‘unacceptable risk’ and ‘serious danger to the community’. As Justice Wheeler explained in *Director of Public Prosecutions (WA) v Williams*.¹³

[I]n determining whether to find that a person is a serious danger to the community, the court has already, in arriving at that view, balanced all relevant considerations including the potential consequence of such a finding for the offender ... [T]here will be no further relevant considerations [to] which the court can have regard in deciding whether to make, or decline to make, an order.¹⁴

C.10 In deciding which order to make, the ‘paramount consideration’ for the court is ‘the need to ensure adequate protection of the community’.¹⁵ However, the Western Australian Court of Appeal has held that ‘paramount’ does not mean ‘only’, and ‘what is ‘adequate’ protection is a matter for judgment in each case’.¹⁶ The court should

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9. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(3); *Dangerous Sexual Offenders Act 2006* (WA) s 7(2).
 10. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(5); *Dangerous Sexual Offenders Act 2006* (WA) s 17(1).
 11. *AG (Qld) v Fardon* [2003] QSC 200, [53]–[54]; and consider *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 30(3), (5) (orders the Court may make on review of a continuing detention order).
 12. *DPP (WA) v Williams* [2007] WASCA 206, [66]–[72] (Wheeler JA with whom Le Miere AJA agreed), cf [26]–[40] (Martin CJ, dissenting). However, the court could direct that further evidence be adduced in order to inform its decision as to which order should be made: [44]–[45], [89]; *DPP (WA) v Williams (No 3)* [2007] WASC 286, [2].
 13. *DPP (WA) v Williams* [2007] WASCA 206.
 14. *DPP (WA) v Williams* [2007] WASCA 206, [68], (Wheeler JA with whom Le Miere AJA agreed) cf [26]–[40] (Martin CJ, dissenting).
 15. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(6); *Dangerous Sexual Offenders Act 2006* (WA) s 17(2).
 16. *DPP (WA) v Williams* [2007] WASCA 206, [57] (Wheeler JA with whom Le Miere AJA agreed). His Honour continued by observing, ‘the protection of the community may be impaired, rather than enhanced, by a construction which would promote the making of orders in relation to significant numbers of offenders who have already served their term of imprisonment. Orders of that kind do not, for example, protect those who are erroneously considered to be a serious danger, and who as a result may be detained for considerable

select ‘the least restrictive alternative compatible with the protection of the public’.¹⁷

C.11 Wheeler JA, with whom Le Miere AJA agreed, observed:

the protection of the community may be impaired, rather than enhanced, by a construction which would promote the making of orders in relation to significant numbers of offenders who have already served their term of imprisonment. Orders of that kind do not, for example, protect those who are erroneously considered to be a serious danger, and who as a result may be detained for considerable periods when, if released, they would not have offended further. They do not enhance the protection of those who work in prisons, since the management of prisoners is generally less difficult when they have some reasonable certainty about their likely release and about the behaviour which may secure that release. Most importantly perhaps, given the apparent legislative purpose, is the consideration reflected in the old saying that a person “might as well be hung for a sheep as for a lamb”. If there were to be a widespread expectation that sexual offending would ordinarily, or even very often, result in an order for indefinite detention, then a rational sexual offender might be more likely to resort to extreme intimidation or violence so as to lessen the probability of being detected or convicted in the first instance.¹⁸

C.12 The Director of Public Prosecutions is required to investigate and provide evidence to the court as to the supervision arrangements that might be made, to enable the court to determine whether those arrangements would adequately protect the community, or whether a continuing detention order is the only means of doing so.¹⁹

periods when, if released, they would not have offended further. They do not enhance the protection of those who work in prisons, since the management of prisoners is generally less difficult when they have some reasonable certainty about their likely release and about the behaviour which may secure that release. Most importantly perhaps, given the apparent legislative purpose, is the consideration reflected in the old saying that a person “might as well be hung for a sheep as for a lamb”. If there were to be a widespread expectation that sexual offending would ordinarily, or even very often, result in an order for indefinite detention, then a rational sexual offender might be more likely to resort to extreme intimidation or violence so as to lessen the probability of being detected or convicted in the first instance’: [58].

17. *DPP (WA) v Williams* [2007] WASCA 206, [79]. See also *Western Australia v Latimer* [2006] WASC 235, [22]; *DPP (WA) v Williams (No 3)* [2007] WASCA 286, [6]–[7].

18. *DPP (WA) v Williams* [2007] WASCA 206, [58].

19. *DPP (WA) v Williams* [2007] WASCA 206, [73]–[86] (Wheeler JA with whom Le Miere AJA agreed); see also *DPP (WA) v Mangolamara* (2007) 169 A Crim R 379, 408–10, 412–14. If the Director of Public Prosecutions does not adduce such evidence, the court may direct that further evidence be adduced. In some circumstances, if the court ‘forms the view that the responsible authorities

Supervision order

C.13 In each state, the conditions of a supervision order apply for the period specified in the order.²⁰

Continuing detention order

C.14 In Queensland, a continuing detention order is indefinite and remains in effect until rescinded.²¹ The court must review the order annually.²² After the first yearly review, the court may grant leave to the prisoner to apply for a review of the order at any time if it is satisfied of ‘exceptional circumstances’.²³ For any review, reports must be obtained from two independent psychiatrists.²⁴ The court may confirm the continuing detention order or may make a supervision order; otherwise the court must rescind the continuing detention order.²⁵

C.15 In Western Australia, a continuing detention order is also indefinite.²⁶ The order must be reviewed annually by the Supreme Court.²⁷ Additionally, after the first year, the person subject to the order may, with the leave of the court, apply for a review of the order if there are ‘exceptional circumstances’.²⁸ Prior to a review, the person must be examined by two psychiatrists, who must report to the court.²⁹

C.16 On a review, the court ‘must rescind the order if it does not find that the person subject to the order remains a serious danger to the

have simply not troubled adequately to consider what conditions might be imposed, as part of the terms of the supervision order, in order to protect the public’, the court ‘may infer that this is because the relevant authorities are confident that they can, with more or less difficulty, put in place adequate supervisory measures if required to do so’. In such a case the court could make a supervision order containing only the mandatory conditions and a condition that the offender comply with the directions of the corrective services (etc) as to psychiatric treatment (etc) once those matters have been more fully assessed: *DPP (WA) v Williams* [2007] WASCA 206, [83] (Wheeler JA with whom Le Miere AJA agreed).

20. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 15(b); *Dangerous Sexual Offenders Act 2006* (WA) ss 17(2)(b), 26.
21. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 14(1).
22. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 27.
23. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 28.
24. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 29.
25. See *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 30. The requirements for ‘acceptable, cogent evidence’ and ‘a high degree of probability’ apply.
26. *Dangerous Sexual Offenders Act 2006* (WA) ss 17(1)(a), 25.
27. *Dangerous Sexual Offenders Act 2006* (WA) s 29. Whether imposed on an initial application: s 17 or following revocation of a supervision order: s 23(b).
28. *Dangerous Sexual Offenders Act 2006* (WA) s 30.
29. *Dangerous Sexual Offenders Act 2006* (WA) s 32, pt 5.

community'.³⁰ If the court finds that person is still a serious danger to the community, it may decline to rescind the order, or may rescind the continuing detention order and make a supervision order.³¹

Implementation

C.17 In Western Australia, it has been held that the availability of funding or other resources that are needed to provide the necessary supervision and other support is not a matter with which the court should concern itself:

If [the person] require[s] control, care or treatment in order to protect the community, the court can assume that, if an order is made, the executive will perform its function of protecting the community by the provision of appropriate assessment and resources.³²

Breach of orders

C.18 In Queensland, if a court is satisfied on the balance of probabilities that a contravention of a supervision order has occurred, is occurring or is likely to occur, it may amend the order; revoke the order and instead make a continuing detention order;³³ or any other order it considers appropriate to achieve compliance or to protect the community.³⁴

C.19 In Western Australia, if a member of the police force or a community corrections officer reasonably suspects that a person subject to a supervision order 'is likely to contravene, is contravening or has contravened' a condition of the order, a magistrate may issue a summons or warrant for the person to appear or be brought before the Supreme Court.³⁵

C.20 If the Supreme Court is satisfied, on the balance of probabilities, of the (likelihood of) contravention, it may amend the

30. *Dangerous Sexual Offenders Act 2006* (WA) s 33(1). The person subject to the order has the right to appear and to give or call evidence: ss 42(2), 44.

31. *Dangerous Sexual Offenders Act 2006* (WA) s 33(2).

32. *DPP (WA) v Williams* [2007] WASCA 206, [81] (Wheeler JA with whom Le Miere AJA agreed). However, '[t]here is nothing in the Act to suggest that the Parliament intended to impose obligations on members of the public at large' as distinct from the executive branch of government: *DPP (WA) v Williams* [2007] WASCA 206, [81] (Wheeler JA with whom Le Miere AJA agreed).

33. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 22.

34. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 22.

35. See *Dangerous Sexual Offenders Act 2006* (WA) s 21.

conditions of the supervision order, or may make a continuing detention order in respect of the person.³⁶

Appeals

C.21 In both jurisdictions, an appeal by way of rehearing lies to the Court of Appeal against any decision under the applicable Act.³⁷

Victoria

Extended supervision order

C.22 The *Serious Sex Offenders Monitoring Act 2005* (Vic) empowers the County and Supreme Courts to make an extended supervision order in respect of an ‘eligible offender’ on the application of the Secretary of the Department of Justice (‘the Secretary’).³⁸ An ‘eligible offender’ is one who has been convicted of a ‘relevant offence’ and who is serving a custodial sentence in relation to that offence (or another sentence imposed concurrently with or cumulatively upon that sentence).³⁹ The ‘relevant offences’ are mostly sexual offences against children.⁴⁰

C.23 Proceedings on an application are criminal proceedings unless otherwise specified.⁴¹ The Secretary bears the onus of proof.⁴²

Standard of proof

C.24 An order may be made only if the court is ‘satisfied, to a high degree of probability, that the offender is likely to commit a relevant offence if released in the community and not made subject to an extended supervision order’.⁴³

36. *Dangerous Sexual Offenders Act 2006* (WA) ss 22, 23. The court may, in addition to amending the conditions of a supervision order, make any other order it considers appropriate in order to achieve compliance with the supervision order or necessary in order to ensure adequate protection of the community: s 23(a).

37. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) pt 4; *Dangerous Sexual Offenders Act 2006* (WA) pt 4.

38. *Serious Sex Offenders Monitoring Act 2005* (Vic) ss 4 (‘eligible offender’), 5(1) (Secretary may apply), pt 2 div 2 (extended supervision orders).

39. *Serious Sex Offenders Monitoring Act 2005* (Vic) s 4(1).

40. *Serious Sex Offenders Monitoring Act 2005* (Vic) s 3, sch 1.

41. *Serious Sex Offenders Monitoring Act 2005* (Vic) s 26.

42. *Serious Sex Offenders Monitoring Act 2005* (Vic) ss 11(2), 23(2).

43. *Serious Sex Offenders Monitoring Act 2005* (Vic) s 11(1) and see *TSL v Secretary to the Department of Justice* (2006) 14 VR 109 as to the meaning of “likely” in this context.

Conditions

C.25 If the court makes an extended supervision order, certain mandatory conditions apply, including obeying directions of the Secretary or the Adult Parole Board as to:

- reporting to or receiving visits from the Secretary or his or her nominee;
- attendance at a place for supervision, assessment or monitoring;
- not leaving Victoria except with the Secretary's permission; and
- not changing address without the Secretary's prior written consent.⁴⁴

C.26 Additionally, the offender must obey any additional instructions or directions that the Secretary considers 'necessary to ensure the effective and efficient implementation of the conditions of the order'⁴⁵ or that the Adult Parole Board considers 'necessary to achieve the purposes of the conditions of the order'.⁴⁶

C.27 Requirements that may be imposed by the Adult Parole Board include instructions or directions as to: residence; curfews; places that the offender must not visit, or may visit only at specified times; treatment or rehabilitation programs in which the offender must participate, and personal examinations by a 'medical expert' that the offender must attend; prohibitions on types of employment and community activities; forms of monitoring, including electronic monitoring; and persons or classes of persons with whom the offender must not have contact.⁴⁷

C.28 In *Fletcher v Secretary to the Department of Justice*, Fletcher had been required, as a condition of the supervision order, to reside in accommodation that was located within the prison walls, although not gazetted as part of the prison. The Court of Appeal held that this was not permissible because it was contrary to the intention of the

44. See *Serious Sex Offenders Monitoring Act 2005* (Vic) s 15.

45. *Serious Sex Offenders Monitoring Act 2005* (Vic) ss 15(3)(g), 16(1).

46. *Serious Sex Offenders Monitoring Act 2005* (Vic) ss 15(3)(h), 16(2).

47. *Serious Sex Offenders Monitoring Act 2005* (Vic) s 16(3). A direction as to residence 'may require the offender to reside at premises that are situated on land that is within the perimeter of a prison (whether within or outside any walls erected on prison land) but does not form part of the prison': s 16(3A). That provision was enacted following the case of *Fletcher v Secretary to the Department of Justice* (2006) 165 A Crim R 569, where Gillard J held that the Adult Parole Board had acted ultra vires in requiring Fletcher to reside in an accommodation unit that was located in a de-gazetted part of the grounds of Ararat prison: *Serious Sex Offenders Monitoring (Amendment) Act 2006* (Vic) and see Victoria, *Parliamentary Debates*, Legislative Assembly, 3 October 2006 (Mr Holding, Minister for Corrections), 3465–6.

legislation that the offender be supervised in the ‘community’.⁴⁸ However, the Act was subsequently amended to provide that supervision in the ‘community’ included ‘land that is within the perimeter of a prison but does not form part of the prison’.⁴⁹

C.29 Failure to comply with any condition of an extended supervision order is an indictable offence, punishable by up to five years’ imprisonment.⁵⁰

Duration of the order

C.30 An extended supervision order applies for the period, up to 15 years, specified in *the* order, unless it is revoked or replaced by another order in that period.⁵¹ There is no limit on the number of times a supervision order can be renewed.⁵²

Review

C.31 The order must be reviewed by the court after no more than three years, and subsequently at no more than three-yearly intervals.⁵³ The offender, with the leave of the court, or the Secretary may apply at any time for a review of the order.⁵⁴ On a review, the court must revoke the order unless it is satisfied, to a high degree of probability, that the offender is likely to commit a relevant offence if not subject to a supervision order.⁵⁵

Appeal

C.32 The offender or the Secretary may, within 28 days, appeal to the Court of Appeal in respect of decisions under the Act.⁵⁶ The Court of Appeal has the power to confirm or quash an order but not to vary its conditions.⁵⁷

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48. *Fletcher v Secretary to the Department of Justice* (2006) 165 A Crim R 469, [62]–[72].
49. *Serious Sex Offenders Monitoring (Amendment) Act 2006* (Vic) ss 1, 3; Victoria, *Parliamentary Debates*, Legislative Assembly, 3 October 2006, 3465–6 (Mr Holding, Minister for Corrections).
50. *Serious Sex Offenders Monitoring Act 2005* (Vic) s 40.
51. *Serious Sex Offenders Monitoring Act 2005* (Vic) s 14(1).
52. *Serious Sex Offenders Monitoring Act 2005* (Vic) s 24.
53. *Serious Sex Offenders Monitoring Act 2005* (Vic) s 21(1), (4).
54. *Serious Sex Offenders Monitoring Act 2005* (Vic) s 21(2)(b), (3). The Secretary does not require the leave of the court.
55. *Serious Sex Offenders Monitoring Act 2005* (Vic) s 23(1). The meaning of likely, the burden and onus of proof are the same as for the making of an order at first instance: see s 23.
56. See *Serious Sex Offenders Monitoring Act 2005* (Vic) pt 3.
57. *TSL v Secretary to the Department of Justice* (2006) 14 VR 109, 117. Additionally, if the Court of Appeal quashes an order and remits it to the court of first instance, it cannot order that the extended supervision order

PART B: INTERNATIONAL JURISDICTIONS

New Zealand

Extended supervision orders

C.33 The *Parole Act 2002* (NZ) provides for the making of an extended supervision order in relation to a sex offender who has been sentenced to imprisonment. The New Zealand provisions have been characterised as providing for ‘punitive detention’.⁵⁸

C.34 The object of the Act is to ‘to protect members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk of committing sexual offences against children or young persons’.⁵⁹

C.35 The chief executive of the Department of Corrections must ensure that each ‘eligible offender’ is assessed, before being released, to determine the likelihood that he or she will commit any ‘relevant offence’ after release.⁶⁰

C.36 The list of ‘relevant offences’ includes mainly sexual offences committed against children who are under 16 years of age.⁶¹ An ‘eligible offender’ is one who has been sentenced to imprisonment for a ‘relevant offence’, who is not subject to an indeterminate sentence and who remains subject to either a sentence of imprisonment or release conditions.⁶²

C.37 The chief executive of the Department of Corrections may apply for an extended supervision order.⁶³ The application must include a report by a ‘health assessor’ addressing:

- the nature of any likely further sexual offending;
- the offender’s ability to control his or her sexual impulses;
- the offender’s ‘predilection and proclivity’ for sexual offending;

remain in force until such time as the court of first instance redetermines the matter: *TSL v Secretary to the Department of Justice* (2006) 14 VR 109.

58. *Belcher v Department of Corrections* [2007] 1 NZLR 507, [35]–[49]. See chapter 6.

59. *Parole Act 2002* (NZ) s 107I.

60. *Parole Act 2002* (NZ) s 107E.

61. *Parole Act 2002* (NZ) s 107B; *Belcher v Department of Corrections* [2007] 1 NZLR 507, 510.

62. *Parole Act 2002* (NZ) s 107C(1).

63. *Parole Act 2002* (NZ) s 107F(1). The application must be made to the ‘sentencing court’, which is ordinarily the High Court but may be the District Court in some circumstances: see s 107D. The offender must be present (a summons or warrant may be issued) and may be represented by counsel at the hearing: s 107G.

- his or her acceptance of responsibility and remorse for past offending; and
- any other relevant factors.⁶⁴

C.38 The court may make an extended supervision order if it is ‘satisfied, having considered the matters addressed in the health assessor’s report ... that the offender is likely to commit any of the relevant offences ... on ceasing to be an eligible offender’.⁶⁵

C.39 The Court of Appeal has explained that ‘the jurisdiction depends upon the risk of relevant offending being both real and ongoing and one that cannot sensibly be ignored having regard to the nature and gravity of the likely reoffending’.⁶⁶ Modified rules of evidence apply.⁶⁷

Duration

C.40 An extended supervision order applies for the term specified in the order, up to 10 years.⁶⁸ The term must be the minimum period required to ensure the safety of the community in light of the level of risk posed by the offender, its likely duration and the seriousness of

64. *Parole Act 2002* (NZ) s 107F(2). ‘Health assessor’ is defined by reference to *Sentencing Act 2002* (NZ) s 4(1), which defines ‘health assessor’ to mean a psychiatrist, psychologist or a specialist assessor under the *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003* (NZ). The health assessor is not required to be independent: *R v Belcher* [2007] 1 NZLR 507, 532 where the Court of Appeal held that the fact that the health assessor was employed by the applicant Department of Corrections did not preclude him from conducting the assessment.

65. *Parole Act 2002* (NZ) s 107I(2).

66. *Belcher v Department of Corrections* [2007] 1 NZLR 507, 512; see *Parole Act 2002* (NZ) s 107I(1), (2). The court must not simply ‘rubber-stamp’ the health assessor’s report, but must carefully assess ‘all the historical and current factors, along with expert opinions of others, bearing in mind that an ESO can have substantial ongoing impact on an offender who has already completed the sentence imposed by the court for the offending’: *Barr v Chief Executive of the Department of Corrections* [2006] NZCA 313, [32] cited with approval in *R v Peta* [2007] 2 NZLR 627, 630 and see 640.

67. The court ‘may receive and take into account any evidence or information that it thinks fit for the purpose of determining the application ... whether or not it would be admissible in a court of law’: s 107H(2). The privilege against self-incrimination is also undermined by the provision that the court may take into account any refusal by the offender to cooperate with the preparation of the health assessor’s report: s 107H(3). However, the court must take into account any reasons given by the offender for his or her refusal: s 107H(3).

68. *Parole Act 2002* (NZ) ss 107I(4), 107L. However, the offender or the chief executive of the Department of Corrections may apply to the court to cancel the order on the grounds that the offender is no longer likely to commit any of the relevant offences (onus on the applicant): s 107M.

harm that might be caused to victims.⁶⁹ '[O]rders are not to be made for the minimum period required to facilitate treatment, rather, for the minimum period required to achieve protection of vulnerable members of the community'.⁷⁰ An extended supervision order may be extended or renewed, but only up to a total supervision period of 10 years.⁷¹

Conditions

C.41 The conditions under an extended supervision order are the 'standard release conditions' (including reporting requirements, restrictions on residence, employment, association and a requirement to participate in a rehabilitative and integrative needs assessment if directed)⁷² as well as any additional 'special conditions' imposed by the Parole Board.⁷³ In the first 12 months of the extended supervision order, the special conditions may include a 'home detention' condition.⁷⁴

C.42 The special conditions may also include a condition that the offender take prescribed medication.⁷⁵ However, if the offender withdraws his or her consent to take the medication, that is not to be regarded as a breach of the order.⁷⁶

C.43 The conditions of an extended supervision order may be varied by the Parole Board on the application of the offender or a probation officer.⁷⁷

Breach

C.44 It is an offence, punishable by two years' imprisonment, to breach a condition of the extended supervision order without reasonable excuse.⁷⁸

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69. *Parole Act 2002* (NZ) s 107I(5) and consider *Bill of Rights Act 1990* (NZ) s 25(g).
70. *Belcher v Department of Corrections* [2007] 1 NZLR 507, 535 citing *Chief Executive of the Department of Corrections v McIntosh* (unreported, New Zealand High Court, Panckhurst and John Hansen JJ, 8 December 2004).
71. *Parole Act 2002* (NZ) ss 107I(6), 107N(5). An application to extend the order must be made by the chief executive of the Department of Corrections, but can only be made if the offender has been convicted of breaching a condition of the order within the previous 12 months or if the offender agrees to the application being made: s 107N(1)–(2).
72. *Parole Act 2002* (NZ) ss 14, 107J.
73. *Parole Act 2002* (NZ) ss 15, 107J, 107K.
74. *Parole Act 2002* (NZ) s 107K(1)(b), (2), (3)(b).
75. *Parole Act 2002* (NZ) ss 15(3)(d), 107K(1)(a).
76. *Parole Act 2002* (NZ) s 107K(5).
77. *Parole Act 2002* (NZ) s 107O; as to review of Parole Board decisions, see s 107S.
78. *Parole Act 2002* (NZ) s 107T.

France⁷⁹

Precautionary Detention

C.45 *The Act on Precautionary Detention and Absence of Criminal Responsibility by Reason of Mental Disorder* was passed on 25 February 2008. The Act amended the French Criminal Code to allow, amongst other things, the detention of certain offenders who meet specific criteria after their terms of sentence have been completed:⁸⁰

*Under the Act “precautionary detention shall consist in placing the person in question in a secure socio-medico-judicial facility where he or she shall be offered ongoing medical, social and psychological care with a view to enabling this measure to be brought to an end”. This possibility must have been explicitly provided for in the sentencing judgment, where the convicted person is “particularly dangerous and highly likely to reoffend because he or she suffers from a serious personality disorder”.*⁸¹

C.46 While the original Bill restricted the measure to perpetrators of sex offences against minors under the age of 15, this was subsequently amended to include all crimes committed against minors, as well as serious crimes committed against adults, such as premeditated or aggravated murder, torture or aggravated barbaric acts, aggravated rape and aggravated abduction or illegal confinement.⁸²

79 Due to difficulties in accessing English translation material, including the primary Act, the *Act on Precautionary Detention and Absence of Criminal Responsibility by Reason of Mental Disorder* (the *Loi relative a la retention de surete et a la declaration d’irresponsabilite penale pour cause de trouble mental*), and the French Criminal Code, the Council has largely relied on secondary sources, such as those made by the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, who visited France in May 2008 and commented on the legislation in his subsequent memorandum.

80. ‘France’s Sarkozy calls for new law to limit early release of repeat sex offenders’, *International Herald Tribune* (online), 20 August 2007, <http://www.iht.com>; Bremner, C., ‘Sarkozy vows to get tough as paedophile crisis deepens’, *Timesonline* (online), 22 August 2007, <<http://www.timesonline.co.uk>>; ‘France announces paedophile curbs: French President Nicolas Sarkozy has announced new measures to deal with repeat sex offenders in response to paedophile scandal’, *BBC News* (online), 20 August 2007, <http://news.bbc.co.uk>; ‘French justice minister visiting Dutch custodial clinics for sex offenders’, *International Herald Tribune* (online), 31 August 2007, <<http://www.iht.com>>.

81. Hammarberg, T., ‘Memorandum: by Thomas Hammarberg Council of Europe Commissioner for Human Rights, following his visit to France from 21 to 23 May 2008’ (Council of Europe, 2008), [53].

82. Hammarberg, T., ‘Memorandum: by Thomas Hammarberg Council of Europe Commissioner for Human Rights, following his visit to France from 21 to 23 May 2008’ (Council of Europe, 2008) [52]. See also Human Rights Watch, ‘France: Internment for Former Violent Offenders Violates Human Rights. Senate Should Reject Government Proposal’ (Press Release, 28 January 2008).

C.47 The legislation is not retrospective and thus is applicable only applicable to offences which came to trial after its promulgation⁸³.

C.48 At least one year before the scheduled release date of an offender, he or she is placed under observation and a medical report is prepared. A Multi-disciplinary Commission for Preventive Measures (comprising the regional prefect, the relevant inter-regional director of prison services, a psychiatric expert, a lawyer, and a representative of a national victim support organisation) then assesses the offender's ongoing dangerousness on the basis of this report and may give an opinion with reasons proposing precautionary detention. The Regional Precautionary Detention Tribunal, which comprises three judges, may order precautionary detention on the basis of this opinion.⁸⁴

C.49 Precautionary detention is ordered for an initial period of one year, and this may be reviewed indefinitely by the three judge regional commission. If and when the regional commission terminates the precautionary detention, it can order security surveillance which can include a requirement by the offender to wear an electronic bracelet, or to regularly report to the authorities.

C.50 According to Council of Europe Commissioner for Human Rights, the legislation makes treatment orders almost automatic. In the event the measures were not complied with the Committee could order a further period of precautionary detention.⁸⁵

Comment on The Act

C.51 As has been the case with other preventive detention regimes in the jurisdictions examined by the Sentencing Council, the legislation has been the subject of some criticism both in France and

83. Hammarberg, T., 'Memorandum: by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, following his visit to France from 21 to 23 May 2008' (Council of Europe, 2008) [51]-[63]. See Hammarberg's memorandum as Constitutional Council, Decision No. 2008-562 DC on the Act on Precautionary Detention and Declaration of Absence of Criminal Responsibility by Reason of Mental Disorder, 21 February 2008. See also Conseil Constitutionnel "Decision no. 2008-562 DC du 21 fevrier 2008", <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/2008/2008-562-dc/decision-n-2008-562-dc-du-21-fevrier-2008.12318.html> at 14 January 2009.

84. Hammarberg, T., 'Memorandum: by Thomas Hammarberg Council of Europe Commissioner for Human Rights, following his visit to France from 21 to 23 May 2008' (Council of Europe, 2008), [54].

85. Hammarberg, T., 'Memorandum: by Thomas Hammarberg Council of Europe Commissioner for Human Rights, following his visit to France from 21 to 23 May 2008' (Council of Europe, 2008), [55].

internationally.⁸⁶ These criticisms can essentially be summarised as follows:

- the security retentions are discretionary in nature and in practice represent additional sanctions and sentences for perpetrators who have already served their sentences;⁸⁷
- the legislation in effect retroactively extends the sentence of a person indefinitely, creates a source of legal uncertainty, and replaces the presumption of innocence with a presumption of guilt;⁸⁸
- the scheme amounts to a double punishment for the same crime;⁸⁹
- the scheme may potentially result in life sentences;⁹⁰
- the scheme may give rise to arbitrary decisions arising from the assessment of an offender’s “dangerousness”;⁹¹ and
- is inconsistent with France’s obligations under international human rights law, to respect the right to liberty, the prohibition of

86. Hammarberg, T., ‘Memorandum: by Thomas Hammarberg Council of Europe Commissioner for Human Rights, following his visit to France from 21 to 23 May 2008’ (Council of Europe, 2008), [56].

87. The United Nations Office, ‘Human Rights Committee Concludes Ninety-Third Session’ (Press Release, 25 July 2008). See too Hammarberg, T., ‘Memorandum: by Thomas Hammarberg Council of Europe Commissioner for Human Rights, following his visit to France from 21 to 23 May 2008’ (Council of Europe, 2008), [60].

88. Amnesty International USA ‘France: Amnesty International’s concerns on preventive detention bill’ (Press Release, 8 February 2008). These concerns were also expressed by The Commission Nationale Consultative de Droits de L’homme, and the Council of Europe Commissioner for Human Rights, in Hammarberg, T., ‘Memorandum: by Thomas Hammarberg Council of Europe Commissioner for Human Rights, following his visit to France from 21 to 23 May 2008’ (Council of Europe, 2008), [57]. Referenced in this Memorandum as ‘Opinion on the Bill Strengthening Measures to Combat Reoffending by Adults and Minors of 20 September 2007.

89. Human Rights Watch, ‘France: Internment for Former Violent Offenders Violates Human Rights. Senate Should Reject Government Proposal’ (Press Release, 28 January 2008).

90. Hammarberg, T., ‘Memorandum: by Thomas Hammarberg Council of Europe Commissioner for Human Rights, following his visit to France from 21 to 23 May 2008’ (Council of Europe, 2008), [61]; ECHR, *Kafkaris v Cyprus*, 12 February 2008, [97]. See too Human Rights Watch, ‘France: Internment for Former Violent Offenders Violates Human Rights. Senate Should Reject Government Proposal’ (Press Release, 28 January 2008).

91. Hammarberg, T., ‘Memorandum: by Thomas Hammarberg Council of Europe Commissioner for Human Rights, following his visit to France from 21 to 23 May 2008’ (Council of Europe, 2008), [59]. The Commissioner was concerned that “dangerousness” was not a clear legal concept, is scientifically vague; that France appeared to lack the necessary instruments to accurately measure dangerousness; and that judicial decisions would be dictated largely by medical reports.

arbitrary detention and the presumption of innocence,⁹² specifically Article 15 of the International Covenant on Civil and Political Rights (ICCPR)⁹³ and Article 7 of the European Convention on Human Rights (ECHR).⁹⁴

C.52 Critics also argued that the law was unnecessary, as France had pre-existing measures to allow psychiatric confinement for those who posed a direct threat to themselves or others, and that there were mechanisms in place to allow the monitoring of certain offenders upon release, for instance requiring some offenders to register with the police and wear electronic bracelets.⁹⁵

The Effectiveness of the regime

C.53 As the provisions are not retrospective and apply only to offenders who are sentenced after the commencement of the legislation to terms of imprisonment of 15 years or more, observation of the regime in practice will not be able to be undertaken for some time. The Council was unable to locate any information as to the effectiveness of the regime to date.

92. Human Rights Watch, 'France: Internment for Former Violent Offenders Violates Human Rights. Senate Should Reject Government Proposal' (Press Release, 28 January 2008).

93. *Article 15: 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.*
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

94. *Article 7: No punishment without law*
1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

95. Human Rights Watch, 'France: Internment for Former Violent Offenders Violates Human Rights. Senate Should Reject Government Proposal' (Press Release, 28 January 2008). See too Hammarberg, T., 'Memorandum: by Thomas Hammarberg Council of Europe Commissioner for Human Rights, following his visit to France from 21 to 23 May 2008' (Council of Europe, 2008), [59]. The Commissioner was concerned that "dangerousness" was not a clear legal concept, is scientifically vague; that France appeared to lack the necessary instruments to accurately measure dangerousness; and that judicial decisions would be dictated largely by medical reports.

Germany

Preventive detention

C.54 Preventive detention, designed to deal with the ‘dangerous habitual offender’ was introduced in Germany in 1933 by the Nazi Government.⁹⁶ It fell out of favour during the 1960s, and increasingly stringent requirements on its use, such as a time limit of 10 years for the period of first detention, were imposed in 1970.⁹⁷

C.55 In the last decade three major changes to the legal requirements for its imposition signalled a resurgence of this measure as a preventive and incapacitative tool. Before 1998, preventive detention could only be imposed on an offender who, inter alia, has:

- (a) two previous convictions (for which he or she must have been imprisoned for at least two years for each conviction) and is being sentenced to a term of imprisonment of at least two years for the current offence; or
- (b) committed three separate serious offences.

C.56 In 1998, the law was amended to extend preventive detention to offenders who had one prior conviction for a felony or specified misdemeanour, or had committed two such offences.⁹⁸ It also allowed for the abolition of the 10-year time limit for the first preventive detention order, including for cases where preventive detention was imposed before the legislative amendment.

C.57 The German Federal Constitutional Court held that the abolition of the time limit for preventive detention orders imposed before 1998 did not violate the prohibition against retrospective punishment, because preventive detention is not a punitive measure.⁹⁹

C.58 In 2002, the federal preventive detention law was amended to allow the trial court to impose a deferred preventive detention order on an offender whose risk of reoffending had not yet been established at the time of sentencing.¹⁰⁰ The court may decide to impose

96. Kinzig, J., ‘Preventive Measures for Dangerous Recidivists’ (1997) 5 *European Journal of Crime, Criminal Law and Criminal Justice* 27; Weber, H., ‘Life Imprisonment and Secure Preventative Detention: Problems and Pitfalls’ (2006) 8 *Zeitschrift für Internationale Strafrechtsdogmatik* 364, 366.

97. Weber, H., ‘Life Imprisonment and Secure Preventative Detention: Problems and Pitfalls’ (2006) 8 *Zeitschrift für Internationale Strafrechtsdogmatik* 364, 366.

98. Hörnle, T., ‘Penal Law and Sexuality: Recent Reforms in German Criminal Law’ (2000) 3 *Buffalo Criminal Law Review* 639, 676.

99. BverfGE 109, 133, as discussed in Weber, H., ‘Life Imprisonment and Secure Preventative Detention: Problems and Pitfalls’ (2006) 8 *Zeitschrift für Internationale Strafrechtsdogmatik* 364, 366.

100. German Criminal Code s 66a.

preventive detention on the offender at least six months before his or her earliest possible release date.¹⁰¹

C.59 In late 2003, this deferred order was extended to apply to young adults.¹⁰²

C.60 In 2004, a further legislative amendment allowed for the imposition of a subsequent preventive detention order, which may be imposed during the offender's prison term and even after his or her release.¹⁰³ In addition, the amendment provided that such an order also may be imposed on first time offenders and offenders released from a psychiatric hospital because they are able to resume criminal responsibility.¹⁰⁴

Number of detainees

C.61 In 1940, preventive detention orders were imposed on almost 2,000 offenders in Germany. From 1942, preventive detainees were mostly transferred to concentration camps. After World War II, there was great caution in ordering preventive detention and the number of detainees did not exceed 200 per year until 1958. The highest number of preventive detainees before the 1970 criminal law reform was 268 in 1968.

C.62 As a result of the 1970 reform restricting the use of preventive detention, the annual number of people sentenced to preventive detention dropped from around 200 in the 1960s to fewer than 40 by the early 1990s.¹⁰⁵ The number of people who were in prison on preventive detention on a given day also was reduced from 1,500 in early 1960s to 200 in the 1980s, which was approximately 0.3% of the total prison population.¹⁰⁶

C.63 Since 1998, the use of preventive detention again increased. The annual number of preventive detention sentences has increased to

101. Weber, H., 'Life Imprisonment and Secure Preventative Detention: Problems and Pitfalls' (2006) 8 *Zeitschrift für Internationale Strafrechtsdogmatik* 364, 366.

102. *Juvenile Justice Act* (Germany) s 106(3). The extension applies to young adults who are under the jurisdiction of the Juvenile Courts and were sentenced for offences committed between the ages of 18 and 21 years.

103. German Criminal Code s 66b.

104. Weber, H., 'Life Imprisonment and Secure Preventative Detention: Problems and Pitfalls' (2006) 8 *Zeitschrift für Internationale Strafrechtsdogmatik* 364, 366–7.

105. Kinzig, J., 'Preventive Measures for Dangerous Recidivists' (1997) 5 *European Journal of Crime, Criminal Law and Criminal Justice* 27, 30.

106. Dünkel, F. and van Zyl Smit, D., 'Preventive Detention of Dangerous Offenders Re-examined: A Comment on Two Decisions of the German Federal Constitutional Court (BverfG–2 BvR 2029/01 of 5 February 2004 and BverfG–2BvR 834/02–2 BvR 1588/02 of 10 February 2004) and the Federal Draft Bill on Preventive Detention of 9 March 2004' (2004) 5(6) *German Law Journal* 619, 619–20.

74 in 2001, and the number of persons in prison serving such a sentence on a given day also has increased to 230 on 31 March 2003.¹⁰⁷

Offender demographics

C.64 A study of 318 orders for preventive detention that fell mainly between 1981 and 1990 showed that after the 1970 reform, there was a significant increase in the proportion of such orders being made against sexual offenders (34%), and perpetrators of robbery (26.7%), manslaughter (12.9%) and other violent crimes. There was a decline in the proportion of preventive detention orders made against perpetrators of theft and fraud, which constituted nearly one-fourth of the 318 orders (22.9%).¹⁰⁸

C.65 The study also revealed that those in preventive detention tended to be older compared to offenders who were detained in psychiatric institutions. The average prison sentence imposed on preventive detainees was almost seven and a half years, indicating that preventive detention orders were made against people who have committed serious crimes.¹⁰⁹

Time in detention

C.66 In 1993–94, the average length of time a detainee had been in preventive detention was over four and a half years (56.3 months). Eight people had been in preventive detention for over 10 years, mostly with interruptions. Of the 32 detainees who were successfully released, the average length of their preventive detention was just over five and a half years (67.2 months).¹¹⁰ Sexual offenders served the longest period of detention of over seven years (86.2 months).¹¹¹

C.67 A follow-up longitudinal study of the criminal career of 501 current or former preventive detainees showed that about one-third of the detainees were still held in preventive detention 10 years after the beginning of the original study in 1993.¹¹² In addition, it was noted

107. Dünkel, F. and van Zyl Smit, D., 'Preventive Detention of Dangerous Offenders Re-examined: A Comment on Two Decisions of the German Federal Constitutional Court (BverfG–2 BvR 2029/01 of 5 February 2004 and BverfG–2BvR 834/02–2 BvR 1588/02 of 10 February 2004) and the Federal Draft Bill on Preventive Detention of 9 March 2004' (2004) 5(6) *German Law Journal* 619, 619–20.

108. Kinzig, J., 'Preventive Measures for Dangerous Recidivists' (1997) 5 *European Journal of Crime, Criminal Law and Criminal Justice* 27, 31.

109. Kinzig, J., 'Preventive Measures for Dangerous Recidivists' (1997) 5 *European Journal of Crime, Criminal Law and Criminal Justice* 27, 31–2.

110. Kinzig, J., 'Preventative Measures for Dangerous Recidivists' (1997) 5(1) *European Journal of Crime, Criminal Law and Criminal Justice* 27, 32.

111. Kinzig, J., 'Preventative Measures for Dangerous Recidivists' (1997) 5(1) *European Journal of Crime, Criminal Law and Criminal Justice* 27, 32.

112. Another third of the detainees were released and about 20% served a sentence of imprisonment: Max Planck Institute for Foreign and International Criminal

that since an increasing number of people were serving preventive detention and for longer periods of time, there was a growing problem that preventive detainees may die in prisons.¹¹³

C.68 The Council has been advised that there are currently 423 individuals being held in preventive detention in Germany.¹¹⁴

Federal Preventive Detention Law

C.69 Under the German Criminal Code, preventive detention (which is called an ‘incapacitation order’) is considered to be one of several ‘measures of rehabilitation and incapacitation’.¹¹⁵ Such measures are distinguished from ‘punishment’ under the Code. There are three types of incapacitation orders—‘traditional’ incapacitation order, deferred incapacitation order and subsequent incapacitation order.¹¹⁶

Incapacitation order

C.70 Under s 66 of the German Criminal Code, the court may, at the time of sentencing, impose an ‘incapacitation order’ in addition to a term of imprisonment on certain offenders if they were shown to pose a danger to the general public because of their propensity to commit serious offences, particularly those resulting in serious emotional trauma or physical injury to the victim or serious economic damage.¹¹⁷

C.71 Section 66 of the Code applies to four categories of offenders. First, an incapacitation order may be imposed on an offender who has been sentenced to a term of imprisonment of two years or more for an intentional offence if the offender:

- has two prior convictions¹¹⁸ for intentional offences, for each of which he or she has served a prison term of one year or more; and

Law, *Recidivism of Preventive Detainees and Dangerous People: A Follow-up Study* <<http://www.mpicc.mpg.de/ww/en/pub/forschung/forschungsarbeit/kriminologie/legalbewaehrung.htm>> at 15 January 2009.

113. See Max Planck Institute for Foreign and International Criminal Law, *Recidivism of Preventive Detainees and Dangerous People: A Follow-up Study* <<http://www.mpicc.mpg.de/ww/en/pub/forschung/forschungsarbeit/kriminologie/legalbewaehrung.htm>> at 15 January 2009.

114. Correspondence from the NSW Attorney Generals’ Office, December 2008.

115. The other ‘measures of rehabilitation and incapacitation’ are mental hospital orders, custodial addiction treatment orders, supervision orders, disqualification from driving, and disqualification from exercising a profession: German Criminal Code s 61.

116. German Criminal Code ss 66, 66a, 66b. See also Weber, H., ‘Life Imprisonment and Secure Preventative Detention: Problems and Pitfalls’ (2006) 8 *Zeitschrift für Internationale Strafrechtsdogmatik* 364, 364.

117. German Criminal Code s 66(1)–(3).

118. Note that this excludes prior offences which have been committed five years before the subsequent offence: German Criminal Code s 66(4).

- as a result of at least one of these prior convictions, has served a term of imprisonment or detention under a measure of rehabilitation and incapacitation for a total term of two years or more.¹¹⁹

C.72 Secondly, an incapacitation order may be made against an offender, including an offender who has never received a sentence of detention, who:

- has committed three intentional offences, for each of which he or she was sentenced to a term of imprisonment of one year or more; and
- has been sentenced to a term of imprisonment for three years or more for at least one of these offences.¹²⁰

C.73 Thirdly, the court may impose an incapacitation order on an offender who is sentenced to a term of imprisonment of two years or more for a felony¹²¹ or certain specified offences¹²²—provided that the act committed while intoxicated is a felony or one of the specified offences—if the offender:

- already had been sentenced to a term of imprisonment of three years or more for at least one of his or her prior offences; and
- as a result of at least one of these prior offences, has served a term of imprisonment or detention under a measure of rehabilitation and incapacitation for a total term of two years or more.¹²³

C.74 Finally, the court may impose an incapacitation order on an offender, including a first time offender, who has committed two felonies or specified offences,¹²⁴ for each of which he or she is

119. German Criminal Code s 66(1) Nos 1–3.

120. German Criminal Code s 66(2).

121. A felony is an unlawful act punishable by a sentence of imprisonment of at least one year: German Criminal Code s 12(1).

122. The specified offences are those under s 174 (abuse of position of trust to engage in sexual activity with a child), s 174a (sexual abuse of prisoners, patients and institutionalised persons), s 174b (abuse of official position to engage in sexual activity) 174c (abuse of a relationship of counselling, treatment or care to engage in sexual activity), s 176 (child sexual abuse), s 179 (1)–(4) (serious sexual abuse of persons who are incapable of resistance by reason of a mental illness or disability), s 180 (causing minors to engage in sexual activity), s 182 (sexual abuse of juveniles), s 224 (causing bodily harm by dangerous means), s 225 (1)–(2) (abuse of position of trust), or s 323a (committing offences in a senselessly drunken state) of the German Criminal Code.

123. German Criminal Code s 66(3).

124. The specified offences are those under ss 174–174c, s 176, s 179 (1)–(4), s 180, s 182, s 224, s 225 (1) or (2), or s 323a of the German Criminal Code.

sentenced to a term of imprisonment of two years or more, and a total term of imprisonment of three years or more.¹²⁵

Deferred incapacitation order

C.75 Section 66a of the Criminal Code provides for the making of a ‘deferred incapacitation order’ on an offender who has committed a felony or a specified offence¹²⁶ in circumstances where, at the time of sentencing, it cannot be established with sufficient certainty that the offender presents a danger to the general public.¹²⁷

C.76 The court must make an incapacitation order, if no later than six months before the offender becomes eligible for early conditional release, the offender is assessed as ‘likely to commit serious offences resulting in serious emotional trauma or physical injury to the victims’.¹²⁸

Subsequent incapacitation order

C.77 Section 66b of the Criminal Code provides further for a ‘subsequent incapacitation order’ to be imposed after sentencing if:

- the offender was convicted of certain felony¹²⁹ or a specified misdemeanour;¹³⁰
- there is new evidence to show that an offender presents a significant danger to the general public;¹³¹ and
- a comprehensive evaluation of the offender, his or her offences and development in custody shows that there is a high likelihood of his or her committing serious offences resulting in serious emotional trauma or physical injury to the victim.

C.78 For offenders who are serving a sentence for the commission of the felony or misdemeanour, the new evidence must come to light

125. German Criminal Code s 66a(1).

126. The specified offences are those under ss 174–174c, s 176, s 179 (1)–(4), s 180, s 182, s 224, s 225 (1) or (2), or s 323a of the German Criminal Code.

127. German Criminal Code s 66a(1).

128. German Criminal Code s 66a(2).

129. Namely, ‘a felony against life and limb, personal freedom or sexual self-determination, or a felony pursuant to section 250 [aggravated robbery] and section 251 [robbery causing death], also in conjunction with section 252 [theft and use of force to retain stolen goods] or section 255 [blackmail and use of force or threats against life or limb]’: German Criminal Code s 66b(1).

130. The specified misdemeanours are those under ss 174–174c, s 176, s 179 (1)–(4), s 180, s 182, s 224, s 225 (1) or (2), or s 323a of the German Criminal Code: German Criminal Code s 66b(1). A misdemeanour is an unlawful act punishable by a minimum term of imprisonment of less than one year or by fine: German Criminal Code s 12(2).

131. The new evidence must relate to circumstances that were not present or detected before the conviction: see Esposito, A. and Safferling, C., ‘Report—Recent Case Law of the *Bundesgerichtshof* (Federal Court of Justice) in *Strafsachen* (Criminal Law)’ (2008) 9(5) *German Law Journal* 683, 707.

before the end of their prison term and the remaining conditions of s 66 of the Criminal Code must be satisfied.¹³²

C.79 For offenders who are sentenced to a term of imprisonment of five years or more for the felony or misdemeanour, the new evidence may be put forward at any time after sentencing,¹³³ including after their release.¹³⁴

C.80 A subsequent incapacitation order also may be made against an offender who has been subject to a mental hospital order that was declared moot because the offender is fit to resume criminal responsibility, if:

- the mental hospital order was made based on two or more felonies or specified offences;¹³⁵ or
- the offender had been sentenced to not less than three years imprisonment previously, or had a previous mental hospital order made against him or her for one or more such offences.¹³⁶

Application to young adults

C.81 The Council understands that preventive detention also applies to young adults who are serving a sentence of imprisonment of more than five years, and in some circumstances, those who have been confined in psychiatric institutions.¹³⁷

Timing

C.82 Section 275a(4) of the German *Code of Criminal Procedure* requires that the court consider expert opinion before deciding whether to impose an incapacitation order. The incapacitation order is to be served after the offender has completed his or her prison term. This sequence is intended to distinguish the punitive component from the incapacitative component of the sentence.¹³⁸

Duration

C.83 An incapacitation order is terminated after 10 years ‘if there is no danger that the person under placement will, due to his [or her] propensity, commit serious offences resulting in serious emotional

132. German Criminal Code s 66b(1).

133. German Criminal Code s 66b(2).

134. Decision of the German Federal Court of Justice in BGHSt 50, 180, 182–5, as discussed in Esposito, A. and Safferling, C., ‘Report—Recent Case Law of the *Bundesgerichtshof* (Federal Court of Justice) in *Strafsachen* (Criminal Law)’ (2008) 9(5) *German Law Journal* 683, 707.

135. The specified offences are those under ss 174–174c, s 176, s 179 (1)–(4), s 180, s 182, s 224, s 225 (1) or (2), or s 323a of the German Criminal Code.

136. German Criminal Code s 66b(3).

137. *Juvenile Justice Act* (Germany) s 106(5), (6).

138. Connelly, C. and Williamson, S., *A Review of the Research Literature on Serious Violent and Sexual Offenders* (2000) [4.71].

trauma or physical injury to the victims'.¹³⁹ After the termination of the order, the individual is released and subject to supervision automatically.¹⁴⁰ However, there is no time limit on any subsequent incapacitation orders.¹⁴¹

C.84 The German Federal Constitutional Court has held that the maximum duration of an incapacitation order need not be set in advance, and that periodic review of the order provided 'the appropriate procedural legal certainty'.¹⁴²

C.85 The adverse effects of the potentially indefinite duration of an incapacitation order have been noted by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.¹⁴³ After its visit to the Berlin-Tegel Prison, which contains a special Unit for Secure Placement for preventive detainees, the Committee reported that 'the vast majority of the inmates [in the Unit] were demotivated', and that

Even among those inmates who apparently assumed and coped with the responsibility for their daily lives on the unit, the sense was that the activities were strategies to pass time, without any real purpose. As might be expected, this appeared to be related to their indefinite *Sicherungsverwahrung* [ie, preventive detention]. Several inmates interviewed expressed a clear sense that they would never get out and one stated that the only thing he could do was prepare himself to die.¹⁴⁴

C.86 The Committee commented on the 'need for on-going support to deal with indefinite detention'.¹⁴⁵ It stated further that:

139. German Criminal Code s 67d(3).

140. German Criminal Code s 67d(3).

141. Connelly, C. and Williamson, S., *A Review of the Research Literature on Serious Violent and Sexual Offenders* (2000) [4.72].

142. BverfG of 5 February 2004, 2 BvR 2029/01, as discussed in Dünkel, F. and van Zyl Smit, D., 'Preventive Detention of Dangerous Offenders Re-examined: A Comment on Two Decisions of the German Federal Constitutional Court (BverfG–2 BvR 2029/01 of 5 February 2004 and BverfG–2BvR 834/02–2 BvR 1588/02 of 10 February 2004) and the Federal Draft Bill on Preventive Detention of 9 March 2004' (2004) 5(6) *German Law Journal* 619, 623–4.

143. See Council of Europe, *Report to the German Government on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 November to 2 December 2005* (2007).

144. Council of Europe, *Report to the German Government on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 November to 2 December 2005* (2007) [96].

145. Council of Europe, *Report to the German Government on the visit to Germany carried out by the European Committee for the Prevention of Torture and*

Due to the potentially indefinite stay for the small (but growing) number of inmates held under *Sicherungsverwahrung*, there needs to be a particularly clear vision of the objectives in this unit and of how those objectives can be realistically achieved. The approach requires a high level of care involving a team of multi-disciplinary staff, intensive work with inmates on an individual basis (via promptly-prepared individualised plans), within a coherent framework for progression towards release, which should be a real option. The system should also allow for the maintenance of family contacts, when appropriate.¹⁴⁶

Review and release

C.87 There are several stages at which an offender on whom an incapacitation order was imposed may be released. Initially, at the end of the prison term, the court may suspend the order if the offender is no longer considered dangerous.¹⁴⁷ Where the incapacitation order takes effect at the end of the prison sentence, the court must review the order at least every two years to decide whether the order should be suspended or terminated.¹⁴⁸ If an incapacitation order is not suspended by the court, the order runs its course after 10 years and the detainee will be released if he or she is no longer a danger to the general public.¹⁴⁹

Treatment

C.88 Treatment of dangerous sexual offenders who were sentenced to at least two years imprisonment is compulsory. Such treatment must take place in socio-therapeutic correctional institutions.¹⁵⁰ Compulsory treatment also may be a parole condition or part of a suspended sentence.¹⁵¹

C.89 The German Federal Constitutional Court held that there is a constitutional requirement that preventive detention be accompanied

Inhuman or Degrading Treatment or Punishment (CPT) from 20 November to 2 December 2005 (2007) [99].

146. Council of Europe, *Report to the German Government on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 November to 2 December 2005* (2007) [100].
147. Weber, H., 'Life Imprisonment and Secure Preventative Detention: Problems and Pitfalls' (2006) 8 *Zeitschrift für Internationale Strafrechtsdogmatik* 364, 365.
148. German Criminal Code s 67e(2). The court also may review such an order before the end of the two-year period: German Criminal Code s 67e(3).
149. Weber, H., 'Life Imprisonment and Secure Preventative Detention: Problems and Pitfalls' (2006) 8 *Zeitschrift für Internationale Strafrechtsdogmatik* 364, 365.
150. Albrecht, H.-J., 'Security Gaps: Responding to Dangerous Sex Offenders in the Federal Republic of Germany' (2004) 16(3) *Federal Sentencing Reporter* 200, 202–3.
151. Albrecht, H.-J., 'Security Gaps: Responding to Dangerous Sex Offenders in the Federal Republic of Germany' (2004) 16(3) *Federal Sentencing Reporter* 200, 202–3.

by adequate treatment. It found that preventive detention in Germany was constitutionally valid because the scheme was organised around the idea of resocialisation and was not ‘the mere warehousing of detainees’.¹⁵²

C.90 Concerns have been raised however that forcing reluctant offenders into treatment often results in unsuccessful treatment.¹⁵³ A further concern raised was that some preventive detainees were considered too old for treatment.¹⁵⁴

Separation of accommodation

C.91 Section 140(1) of the *Prison Act* requires that inmates subject to an incapacitation order must be accommodated in separate establishments or units within a prison.¹⁵⁵ This principle of separate accommodation arises from the fact that the purpose of preventive detention—the protection of the general public—is different from the punitive purpose of imprisonment.¹⁵⁶

C.92 The German Federal Government has stated that the ‘principle of separation in its current absolutist form as a legal right of the individual in secure placement creates problems, particularly in everyday life’.¹⁵⁷ For example, prison authorities claimed that they have experienced difficulties in dealing with breach of prison rules because they cannot transfer an inmate out of secure placement.¹⁵⁸

152. BverfG of 5 February 2004, BvR 2029/01, as discussed in Dünkel, F. and van Zyl Smit, D., ‘Preventive Detention of Dangerous Offenders Re-examined: A Comment on Two Decisions of the German Federal Constitutional Court (BverfG–2 BvR 2029/01 of 5 February 2004 and BverfG–2BvR 834/02–2 BvR 1588/02 of 10 February 2004) and the Federal Draft Bill on Preventive Detention of 9 March 2004’ (2004) 5(6) *German Law Journal* 619, 623.

153. Hörnle, T., ‘Penal Law and Sexuality: Recent Reforms in German Criminal Law’ (2000) 3 *Buffalo Criminal Law Review* 639, 680–1.

154. Demleitner, N., ‘Abusing State Power or Controlling Risk? Sex Offender Commitment and Sicherungsverwahrung’ (2003) 30 *Fordham Urban Law Journal* 1621, 1652–3, citing letter from Dr Jörg Kinzig, Max Planck Institute for Foreign and International Criminal Law, to Nora Demleitner, 24 March 2003.

155. However, the principle of separate accommodation may be abandoned if necessary for treatment purposes: *Prison Act* (Germany) s 140(2).

156. Council of Europe, *Response of the German Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Germany from 20 November to 2 December 2005* (2007) 38.

157. Council of Europe, *Response of the German Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Germany from 20 November to 2 December 2005* (2007) 39.

158. Council of Europe, *Response of the German Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Germany from 20 November to 2 December 2005* (2007) 39.

Privileges in detention

C.93 Prison authorities are required to provide preventive detainees with integration assistance¹⁵⁹ and to ensure that the condition of their detention is better than ordinary prison conditions.¹⁶⁰ The German Federal Constitutional Court has held that individuals in preventive detention should be granted privileges—and additional privileges in case of lengthy periods of detention—because they are not ordinary prisoners but are detained solely for the purpose of preventing the commission of further offences. In the Court’s opinion, such privileges are necessary ‘in order to guarantee a minimum quality of life to detainees without hope’.¹⁶¹

Comment regarding the German regime

C.94 Preventive detention in Germany has been criticised for many of the same reasons that have proved of concern in other jurisdictions, as well as for reasons peculiar to the German regime. These concerns may be summarised as follows:

- Since the prediction of dangerousness is largely based on an offender’s criminal history and the seriousness of the offence committed—which are the same criteria used to determine punishment—in reality there is no distinction between preventive detention and punishment;¹⁶²
- The separation of the punitive and preventive/rehabilitative objectives of the different measures is not understood by

159. *Prison Act* (Germany) s 129(1).

160. Council of Europe, *Response of the German Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Germany from 20 November to 2 December 2005* (2007) 38.

161. BverfG of 5 February 2004, BvR 2029/01, as discussed in Dünkel, F. and van Zyl Smit, D., ‘Preventive Detention of Dangerous Offenders Re-examined: A Comment on Two Decisions of the German Federal Constitutional Court (BverfG—2 BvR 2029/01 of 5 February 2004 and BverfG—2BvR 834/02—2 BvR 1588/02 of 10 February 2004) and the Federal Draft Bill on Preventive Detention of 9 March 2004’ (2004) 5(6) *German Law Journal* 619, 625.

162. Weber, H., ‘Life Imprisonment and Secure Preventative Detention: Problems and Pitfalls’ (2006) 8 *Zeitschrift für Internationale Strafrechtsdogmatik* 364, 368. Several commentators have argued that the conditions of preventive detention is similar to, if not more severe than, imprisonment see too Demleitner, N., ‘Abusing State Power or Controlling Risk? Sex Offender Commitment and Sicherungsverwahrung’ (2003) 30 *Fordham Urban Law Journal* 1621, 1652, citing Kinzig, J., ‘Die Praxis der Sicherungsverwahrung’ (1997) 109(1) *Zeitschrift für die Gesamte Strafrechtswissenschaft* 122, 128–9, 155. The lack of beds in socio-therapeutic correctional institutions and the lack of trained staff has resulted in longer periods of detention for sexual offenders than other offenders, so that compulsory treatment has become punitive in effect, see Albrecht, H.-J., ‘Security Gaps: Responding to Dangerous Sex Offenders in the Federal Republic of Germany’ (2004) 16(3) *Federal Sentencing Reporter* 200, 202–3.

individual detainees and therefore does not contribute to their rehabilitation;¹⁶³

- There is some evidence that the courts are under pressure to release offenders—whether they are ordinary prisoners or preventive detainees—after a certain period of time;¹⁶⁴
- Predictions of dangerousness are inherently unreliable and result in a large number of people wrongly classified as dangerous¹⁶⁵ and so brought under the scope of the legislation;
- There is a lack of legal guidance as to how the court is to establish a propensity to commit further offences,¹⁶⁶ and insufficient guidelines for prosecutors to select cases that merit an application for preventive detention;¹⁶⁷
- There is an over-reliance on expert evidence by the judiciary;¹⁶⁸

163. Kinzig, J., 'Preventive Measures for Dangerous Recidivists' (1997) 5 *European Journal of Crime, Criminal Law and Criminal Justice* 27, 30.

164. Kinzig, J., 'Preventative Measures for Dangerous Recidivists' (1997) 5(1) *European Journal of Crime, Criminal Law and Criminal Justice* 27. The author found that longer prison terms often were followed by shorter periods of preventive detention, and vice versa, and argues that this finding suggests that the courts are blurring the distinction between punitive and reform measures and so undermining the rehabilitative goal of preventive detention.

165. Weber, H., 'Life Imprisonment and Secure Preventative Detention: Problems and Pitfalls' (2006) 8 *Zeitschrift für Internationale Strafrechtsdogmatik* 364, 367; Kelly, M., 'Lock Them Up—and Throw Away the Key: The Preventive Detention of Sex Offenders in the United States and Germany' (2008) 39 *Georgetown Journal of International Law* 511, 567–8. Criticism of the dangerousness test as it applies in Germany has also been made by Kinzig, J., 'Preventive Measures for Dangerous Recidivists' (1997) 5 *European Journal of Crime, Criminal Law and Criminal Justice* 27, 31.

166. Demleitner, N., 'Abusing State Power or Controlling Risk? Sex Offender Commitment and Sicherungsverwahrung' (2003) 30 *Fordham Urban Law Journal* 1621, 1651.

167. Demleitner, N., 'Abusing State Power or Controlling Risk? Sex Offender Commitment and Sicherungsverwahrung' (2003) 30 *Fordham Urban Law Journal* 1621, 1653. In one jurisdiction, it was found that a significant number of offenders were subject to preventive detention only because the district attorney apparently had a preference for such a measure: Demleitner, N., 'Abusing State Power or Controlling Risk? Sex Offender Commitment and Sicherungsverwahrung' (2003) 30 *Fordham Urban Law Journal* 1621, 1651, citing Kinzig, J., 'Die Praxis der Sicherungsverwahrung' (1997) 109(1) *Zeitschrift für die Gesamte Strafrechtswissenschaft* 122, 150.

168. Demleitner, N., 'Abusing State Power or Controlling Risk? Sex Offender Commitment and Sicherungsverwahrung' (2003) 30 *Fordham Urban Law Journal* 1621, 1651, citing Küpper, G., 'Diskussionsbericht über die Arbeitssitzung der Fachgruppe Strafrechtsvergleichung bei der Tagung der Gesellschaft für Rechtsvergleichung am 14.9.1989 in Würzburg' (1990) 102 (2) *Zeitschrift für die Strafrechtswissenschaft* 448, 449. The author notes that one study showed that in nearly all cases, experts appointed by German courts found the offender dangerous; and where the experts predicted future reoffending, the courts invariably imposed an incapacitation order. Concern was also expressed

- There is considerable expense involved in obtaining reports, and a lack of suitably qualified experts;¹⁶⁹ and
- The regime may infringe the principles of arbitrary detention, retrospective punishment; double punishment; unlawful deprivation of liberty; inhuman and degrading punishment; the German constitutional right to personal development¹⁷⁰; and the inviolability of human dignity.¹⁷¹

C.95 The European Commission of Human Rights has held that German preventive detention law is consistent with the provisions of article 5(1)(a) of the European Convention on Human Rights,¹⁷² because such a measure ‘pursues the legitimate aim of social protection and rehabilitation of offenders’.¹⁷³

C.96 The case of *Mücke v Germany*¹⁷⁴ is currently before the European Court of Human Rights. In 1986, the applicant was convicted of attempted murder and robbery and sentenced to five years imprisonment in Germany. The trial court further ordered that the applicant be placed in preventive detention (which was limited to a maximum period of 10 years at the time) at the expiry of his sentence. The applicant has been in preventive detention since 1991, and has been refused a suspension of the incapacitation order a number of times since then.

C.97 In 1998, s 67d(3) of the Criminal Code was amended to allow the retrospective extension of the period of preventive detention from 10 years to an unlimited period of time. In 2001, the applicant lodged

the legislative requirement that expert opinion be obtained in preventative detention cases may result in more refusal of parole—for both felony offenders and dangerous sexual offenders—because experts may hesitate to find that an offender no longer poses a danger to the general public. Other concerns

169. Hörnle, T., ‘Penal Law and Sexuality: Recent Reforms in German Criminal Law’ (2000) 3 *Buffalo Criminal Law Review* 639, 679–80. Similar concerns have been raised regarding difficulties in finding appropriately qualified therapists, especially as many therapists will not agree to work with involuntary patients, see Hörnle, T., ‘Penal Law and Sexuality: Recent Reforms in German Criminal Law’ (2000) 3 *Buffalo Criminal Law Review* 639, 680–1.

170. *Basic Law* (German) art 2[1].

171. Weber, H., ‘Life Imprisonment and Secure Preventative Detention: Problems and Pitfalls’ (2006) 8 *Zeitschrift für Internationale Strafrechtsdogmatik* 364, 368. See too Hammel, A., ‘Preventive Detention in Comparative Perspective’ in Miller, R. and Zumbansen, P. (eds), *Annual of German & European Law Volumes II & III* (2006) 89, 114. See too Hörnle, T., ‘Penal Law and Sexuality: Recent Reforms in German Criminal Law’ (2000) 3 *Buffalo Criminal Law Review* 639, 676–7, 685.

172. *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

173. *X v Germany*, Application No 99/55 (Yearbook, Vol I, p 160) See also *DAX v Germany*, Application No 19969/92, 7 July 1992, 2 (decision as to admissibility).

174. *Mücke v Germany*, Application No 19359/04.

a complaint with the German Federal Constitutional Court against the decisions extending his continued preventive detention despite the expiry of the 10-year period. After the dismissal of constitutional complaint, the applicant lodged a complaint with the European Court of Human Rights, which found that the application was admissible and a determination of its merits was warranted.¹⁷⁵ A date for the hearing on the merits of the case has not yet been set at the time of writing.

The Netherlands

Terbeschikkingstelling (TBS) orders

C.98 The Netherlands Criminal Code (*Wetboek van Strafrecht*)¹⁷⁶ Article 37(a) establishes *terbeschikkingstelling* (TBS) orders (translated as placement under a hospital order¹⁷⁷ or disposal to be treated on behalf of the state¹⁷⁸) which empower sentencing courts to impose compulsory hospital treatment on eligible offenders.

C.99 An eligible offender is an offender who has committed a crime carrying a statutory custodial sentence of at least four years,¹⁷⁹ and who is deemed to bear no responsibility, or a diminished responsibility for their actions by reason of mental disorder.¹⁸⁰ The offender must further pose a risk to the safety of other people, the general public or property, such that the imposition of the order is appropriate.¹⁸¹ This system has been in place since 1988.¹⁸²

175. See *Mücke v Germany*, Application No 19359/04, 1 July 2008 (decision as to admissibility).

176. *WETBOEK: Wetboek van Strafrecht* (2008) <<http://wetboek.net/wetboek/Sr.html>>

177. Ministry of Justice, Netherlands, *Placement Under a Hospital Order (TBS)* (2008) <<http://english.justitie.nl/themes/tbs/index.aspx>> at 12 January 2009.

178. McInerny, T., 'Dutch TBS Forensic Services: A Personal View' (2000) 10 *Criminal Behaviour and Mental Health* 213.

179. Connelly, C. and Williamson, S., Scottish Executive Central Research Unit, *A Review of the Research Literature on Serious Violent and Sexual Offenders* (2000) [4.46].

180. Kogel, C., Salize, H., and Dreßing, H. Central Institute of Mental Health, European Commission, *Placement and Treatment of Mentally Ill Offenders, Legislation and Practice in EU Member States, Final Report* (2005) 189. The Dutch criminal law distinguishes five degrees of accountability for commission of a crime: full accountability, slightly diminished accountability, diminished accountability, severely diminished accountability and non-existent accountability: Van Marle, H., 'Assessment of Sex Offenders in the Netherlands: The Linkage Between Accountability, Penal Law and Treatment' (1997) 10(2) *Federal Sentencing Reporter* 94.

181. Tak, P., *The Dutch Criminal Justice System* (1st ed, 2008) 120.

182. Kinzig, J., 'Preventive Measures for Dangerous Recidivists' (1997) 5 (1) *European Journal of Crime, Criminal Law and Criminal Justice* 27, 40.

C.100 The purpose of a TBS order is twofold:

- (a) to protect society from the risk criminal recidivism with serious consequences; and
- (b) to care for the offender, providing treatment that will prevent criminal recidivism and support reintegration into society.¹⁸³

C.101 There are two kinds of TBS order: a compulsory treatment order (CTO) and a conditional hospital order (CHO). Under a compulsory treatment order an offender is confined to a secure purpose designed clinic where he undertakes mandatory treatment.¹⁸⁴

C.102 A conditional hospital order does not confine the offender, but imposes conditions on the conduct of the offender such as compulsory participation in treatment or abstinence from drugs and alcohol. If breached, a conditional hospital order can be converted to a compulsory treatment order.¹⁸⁵ A conditional hospital order is appropriate where the risk to society of criminal recidivism is not such that mandatory hospitalization is necessary.¹⁸⁶

C.103 In cases where the offender is deemed only partially responsible for commission of the crime, it is open to the court to impose a prison sentence in addition to the TBS order. This punitive sentence will be served first, and Dutch policy emphasises consecutive imposition of sentences.¹⁸⁷

Imposition of a TBS order

C.104 The Court can only impose a TBS order after two behavioural experts, at least one of who must be a psychiatrist (the other usually being a psychologist), have examined the defendant and recommended placement in the TBS program.¹⁸⁸

C.105 Such an assessment is obligatory if the Court is considering imposing TBS, and occurs before finalization of criminal

183. Kogel, C., Salize, H., and Dreßing, H. Central Institute of Mental Health, European Commission, *Placement and Treatment of Mentally Ill Offenders, Legislation and Practice in EU Member States, Final Report* (2005) 190; Ministry of Justice, *About TBS* (2008) <<http://english.justitie.nl/themes/tbs/about-tbs>> at 12 January 2009.

184. Tak, P., *The Dutch Criminal Justice System* (1st ed, 2008) 120.

185. Ministry of Justice, *Placement Under a Hospital Order (TBS)* (2008) <<http://english.justitie.nl/themes/tbs/index.aspx>> at 12 January 2009.

186. Kogel, C., Salize, H., and Dreßing, H. Central Institute of Mental Health, European Commission, *Placement and Treatment of Mentally Ill Offenders, Legislation and Practice in EU Member States, Final Report* (2005) 189.

187. McInerny, T., 'Dutch TBS Forensic Services: A Personal View' (2000) 10 *Criminal Behaviour and Mental Health* 213, 216.

188. Article 37(a), Section 3; Article 37, Section 2 Sr.

responsibility. The prosecutor, the judge of inquiry, the defence or the court can initiate the assessment process.¹⁸⁹

C.106 As the Dutch criminal justice system is inquisitorial in nature, the investigation will typically take place on the motion of the investigating judge.¹⁹⁰ The judge has the ability to appoint the behavioural experts, thus ensuring the independence of their contribution to the proceedings.¹⁹¹ It is open to the defendant to refuse the examination. If he does so, he will be returned to the ambit of the ordinary sentencing laws.¹⁹² The assessment generally takes the form of a non-residential mental health evaluation. However, residential observation and assessment will be utilized where the crime is particularly serious or bizarre.¹⁹³

C.107 Ultimately, approximately 50% of those assessed will be recommended for TBS placement.¹⁹⁴

C.108 The TBS is initially imposed for two years, and can be extended by a further one to two years on application by the prosecution.¹⁹⁵ As such, the maximum duration of a TBS order is four years. However if a compulsory treatment order is made:

- (a) pursuant to an offence directed against or causing danger to the bodily integrity of one or more persons; and

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189. Kogel, C., Salize, H., and Dreßing, H. Central Institute of Mental Health, European Commission, *Placement and Treatment of Mentally Ill Offenders, Legislation and Practice in EU Member States, Final Report* (2005) 189, 191.
190. De Ruiter, C. and Hilderbrand, M., 'The Dual Nature of Forensic Psychiatric Practice: Risk Assessment and Management under the Dutch TBS-Order' (2007) 35 (1) *Journal of the American Academy of Psychiatry and the Law* 92, 93.
191. De Ruiter, C. and Hilderbrand, M., 'The Dual Nature of Forensic Psychiatric Practice: Risk Assessment and Management under the Dutch TBS-Order' (2007) 35 (1) *Journal of the American Academy of Psychiatry and the Law* 92, 93.
192. Tak, P., *The Dutch Criminal Justice System* (1st ed, 2008) 120, Connelly, C. and Williamson, S., Scottish Executive Central Research Unit, *A Review of the Research Literature on Serious Violent and Sexual Offenders* (2000) [4.47].
193. De Ruiter, C. and Hilderbrand, M., 'The Dual Nature of Forensic Psychiatric Practice: Risk Assessment and Management under the Dutch TBS-Order' (2007) 35 (1) *Journal of the American Academy of Psychiatry and the Law* 92, 94.
194. McInerny, T., 'Dutch TBS Forensic Services: A Personal View' (2000) 10 *Criminal Behaviour and Mental Health* 213, 217.
195. Wetboek van Strafrecht, Article 38(d).

(b) the extension is required in the interests of safety of others or of the public;¹⁹⁶

the order can be extended indefinitely.

C.109 While the current maximum duration of a conditional hospital order is capped at four years, a recommendation from the Visser Commission (a Parliamentary TBS Study Commission) to increase the maximum duration to nine years is being implemented.¹⁹⁷

C.110 An application to extend must be accompanied by a report of the treating institution recommending continuing treatment. Applications are heard by the District Court. The Court is not bound by the recommendation of the treating institution. However, a discharge without the supporting recommendation of the TBS facility will result in a return to society without the offender having completed a period of resocialisation.¹⁹⁸ If the risk of criminal recidivism has reached an acceptable level, the order will not be extended.

C.111 Every six years the application for renewal of the order must be accompanied by an independent evaluation of the hospital order, undertaken by two behavioural experts not affiliated with the treating institution.¹⁹⁹

C.112 Both the detained offender and the prosecutor may appeal decisions of the Court to extend or refuse to extend the TBS measure. These appeals are heard by the Penitentiary Division of the Court of Appeal in Arnhem.²⁰⁰ The division is composed of three judges and two non-judge behavioural experts.²⁰¹ Further appeal to the Supreme Court is unavailable.²⁰²

196. Wetboek van Strafrecht, Article 38(e); Kinzig, J., 'Preventive Measures for Dangerous Recidivists' (1997) 5 (1) *European Journal of Crime, Criminal Law and Criminal Justice* 27, 42.

197. Ministry of Justice, *About TBS* (2008) <<http://english.justitie.nl/themes/tbs/about-tbs>> at 12 January 2009.

198. Connelly, C. and Williamson, S., Scottish Executive Central Research Unit, *A Review of the Research Literature on Serious Violent and Sexual Offenders* (2000) [4.50]. On this point, see further *Release to the Community* [1.13].

199. Tak, P., *The Dutch Criminal Justice System* (1st ed, 2008) 120; Kogel, C., Salize, H., and Dreßing, H. Central Institute of Mental Health, European Commission, *Placement and Treatment of Mentally Ill Offenders, Legislation and Practice in EU Member States, Final Report* (2005) 189.

200. Tak, P., *The Dutch Criminal Justice System* (1st ed, 2008) 120.

201. *Judicial Organisation Act* (NL) s 73.

202. CCP s 509, Tak, P., *The Dutch Criminal Justice System* (1st ed, 2008) 121.

C.113 The TBS order will lapse when extension is not sought, or is refused by the courts.²⁰³

Treatment under a TBS order

C.114 When the TBS order commences, the offender's first two months of treatment are used for observation, assessment and preparation for treatment. A treatment plan, treatment goals and a plan for work and education are developed through observation of the patient in daily activities, semi-structured interviews and indirect testing.²⁰⁴

C.115 In preparing a treatment plan, the following factors are considered:

- the personality disorder;
- the type of crimes committed;
- the danger of the offender escaping;
- the offender's dangerousness to the public; and
- the necessary treatment;

with emphasis being given to the latter.²⁰⁵ The patient is treated at the facility which best caters to their individual treatment and security requirements.²⁰⁶

C.116 The treatment takes the form of a 'therapeutic community with underlying psychoanalytical, learning and systemic models'.²⁰⁷ Patients live in 'home groups' unless circumstances necessitate otherwise.²⁰⁸ Patients have significant access to workshops and recreational facilities, which creates strong 'opportunities to develop work-based and communication skills'.²⁰⁹ Drug use is not permitted, and regular drug tests are performed.²¹⁰

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203. Kogel, C., Salize, H., and Dreßing, H. Central Institute of Mental Health, European Commission, *Placement and Treatment of Mentally Ill Offenders, Legislation and Practice in EU Member States, Final Report* (2005) 190.
204. De Ruiter, C. and Hilderbrand, M., 'The Dual Nature of Forensic Psychiatric Practice: Risk Assessment and Management under the Dutch TBS-Order' (2007) 35 (1) *Journal of the American Academy of Psychiatry and the Law* 92, 100.
205. McInerny, T., 'Dutch TBS Forensic Services: A Personal View' (2000) 10 *Criminal Behaviour and Mental Health* 213, 217.
206. McInerny, T., 'Dutch TBS Forensic Services: A Personal View' (2000) 10 *Criminal Behaviour and Mental Health* 213, 217.
207. McInerny, T., 'Dutch TBS Forensic Services: A Personal View' (2000) 10 *Criminal Behaviour and Mental Health* 213, 221.
208. Kinzig, J., 'Preventive Measures for Dangerous Recidivists' (1997) 5 (1) *European Journal of Crime, Criminal Law and Criminal Justice* 27, 45.
209. McInerny, T., 'Dutch TBS Forensic Services: A Personal View' (2000) 10 *Criminal Behaviour and Mental Health* 213, 222. For instance, at the

C.117 The regular term of treatment is considered to be 6 years. The average term of treatment in 2006 was 89 months (approximately 7.5 years). This has increased significantly over time. The average term of treatment in 1995 was 59 months (approximately 5 years).²¹¹

Release to the community

C.118 The patient's return to the community is effected gradually, decreasing the restrictions placed on the patient and granting periods of supervised and, later, unsupervised leave. The next step towards release is transmural leave. This involves the offender living outside the TBS facility but under its supervision and responsibility.²¹² Finally, probationary leave is granted. While the offender remains subject to certain conditions, they reside independently and their supervision becomes the responsibility of the Probationary Service.

C.119 The Minister of Justice must authorize all leave. In order that leave may be granted, the TBS facility must demonstrate that the risk of recidivism has been reduced such that leave is justified. Standardised risk assessment tools assist in this assessment.²¹³

Long stay facilities

C.120 If patients have not 'shown substantial improvement despite many years of treatment' they are considered 'permanently dangerous'. In 1999, the Dutch government introduced a new type of facility to cater for these patients called the long stay unit.²¹⁴ In this unit, patients no longer receive intensive treatment for their disorder.²¹⁵

C.121 The aims of long stay facilities are threefold:

- (a) to protect society from the risk of criminal offences by these patients;

Pompekliniek Intensive Care Unit, patients have access to fully equipped workshops in woodwork, engineering, art, horticulture, music and performing arts. Patients can access a recording studio, a TV studio, a theatre, an indoor swimming pool, a judo room, a massage room and all weather outdoor sports pitches.

210. McNerny, T., 'Dutch TBS Forensic Services: A Personal View' (2000) 10 *Criminal Behaviour and Mental Health* 213, 222.

211. Tak, P., *The Dutch Criminal Justice System* (1st ed, 2008) 121.

212. Ministry of Justice, *About TBS* (2008) <<http://english.justitie.nl/themes/tbs/about-tbs>> at 12 January 2009.

213. Ministry of Justice, *About TBS* (2008) <<http://english.justitie.nl/themes/tbs/about-tbs>> at 12 January 2009.

214. Netherlands, Wetenschappelijk Onderzoek- en Documentatiecentrum, Ministerie van Justitie, *De longstay afdeling van Veldzicht*, Final Report, Research and Policy 207 (2003) 151.

215. Ministry of Justice, *About TBS* (2008) <<http://english.justitie.nl/themes/tbs/about-tbs>> at 12 January 2009.

(b) to provide care for the patients in order to optimize their quality of life and minimize their risk of committing offences; and

(c) to provide care at lower costs than a regular treatment unit.²¹⁶

C.122 In order to determine whether a patient can be classified as ‘permanently dangerous’ such that resocialisation should no longer be the aim of treatment four criteria are used:²¹⁷

(a) during his TBS measure the patient had been treated in a forensic psychiatric hospital for at least six years;

(b) the treatment took place in at least two different forensic psychiatric hospitals;

(c) treatment did not result in a substantial decrease of the risk of committing a serious offence; and

(d) the patient cannot be admitted to a psychiatric facility with less than maximum security, because of the risk of committing offences.²¹⁸

C.123 A 2003 study of 21 residents of the long stay unit found that compared with the population of offenders subject to TBS orders:

the longstay patients are older, less intelligent, and they are more often diagnosed with a combination of mental and personality disorders. Furthermore, they have in more cases committed a sexual (paedophile) offence and are more often diagnosed with a sexual disorder.²¹⁹

C.124 Long stay patients are required to work at various services in the hospital (there are adjusted programs for those who are unable to work) during the week. While no treatment aimed at rehabilitation is available, environmental therapy is provided to prevent patient

216. Netherlands, Wetenschappelijk Onderzoek- en Documentatiecentrum, Ministerie van Justitie, *De longstay afdeling van Veldzicht*, Final Report, Research and Policy 207 (2003) 151.

217. Ministry of Justice, *About TBS* (2008) <<http://english.justitie.nl/themes/tbs/about-tbs>> at 12 January 2009.

218. Netherlands, Wetenschappelijk Onderzoek- en Documentatiecentrum, Ministerie van Justitie, *De longstay afdeling van Veldzicht*, Final Report, Research and Policy 207 (2003) 151.

219. Netherlands, Wetenschappelijk Onderzoek- en Documentatiecentrum, Ministerie van Justitie, *De longstay afdeling van Veldzicht*, Final Report, Research and Policy 207 (2003) 151.

deterioration. For cost reasons, long stay patients are excluded from the education resources and facilities at the hospital.²²⁰

C.125 Long stay patients comprise approximately 10% of the TBS population.²²¹

Effectiveness of the TBS regime

C.126 There is a limited amount of research available in English as to recidivism in the TBS exit population generally and recidivism of sex offenders in the exit cohort specifically.

C.127 A study by Leuw, Brouwers and Smit in 1999 reported that the population level of recidivism after three to eight years for 'any offence' after completion of TBS treatment is just over 50%. Recidivism rates of more serious sexual crime reported at 15 – 20%. This study further found that patients who participated in an extramural resocialisation phase reported lower recidivism rates: 11% compared to 30% recidivism of patients released directly from the treatment institution. Release without a transmural adjustment period is often the result of discharge decisions against the advice of the treating institution.²²²

C.128 A 2003 study by Hildebrank, de Ruiter and de Vogel which covered 94 sex offenders (adult victims) over a post-release period of 11.8 years found that 34% recommitted sex offences, and 73% reoffended in some manner. Where the offender evidenced a high PCL-R²²³ score, the recidivism rate for sexual offences increased to 55%.²²⁴ It should be noted that changes in the size, composition and average treatment length of the TBS population from 1995 to present

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220. Netherlands, Wetenschappelijk Onderzoek- en Documentatiecentrum, Ministerie van Justitie, *De longstay afdeling van Veldzicht*, Final Report, Research and Policy 207 (2003) 152.
221. Select Committee on Home Affairs, United Kingdom Parliament, *Managing Dangerous People with Severe Personality Disorder* (2000) [30].
222. Leuw, E., Brouwers, M., and Smit, J. 'Recidivism After Forensic Psychiatric Treatment: Patterns, Trends Processes and Risk Assessment' (Wetenschappelijk Onderzoek-en Documentatiecentrum, Ministerie van Justitie, 1999) 109.
223. PCL-R stands for Psychology Checklist Revised. It enables the clinician to determine an individual's psychopathy ratings on the basis of a semi-structured interview and a review of collateral information. The assessment yields a dimensional total score, which can be used to help assess the degree to which an individual matches the prototypical psychopath, or to help identify and diagnose psychopaths.
224. Nijman, H., de Kuryk, C., and Nieuwenhuizen, C., 'Behavioural changes during forensic psychiatric (TBS) treatment in the Netherlands' (2004) 27 *International Journal of Law and Psychiatry* 79, 79 citing Hildebrand, M., de Ruiter, C., and de Vogel, C., 'Recidivie van verkrachters en aaranders na TBS' (2003) *Psycholoog* 114 (this resource is unavailable in English).

will impact on the value of these studies to an analysis of the current system.

Issues regarding TBS Orders

Impact on personal autonomy

C.129 TBS orders are theoretically indefinite and ‘in individual cases the measure can have, due to its unlimited (and usually long) duration and preventive character, a greater impact on individual autonomy than a prison sentence’.²²⁵ This results in offenders who demonstrate a lesser responsibility for their crimes bearing more onerous sentences in reality than comparable offenders outside the purview of the TBS regime.

Discharge against the advice of the TBS treatment facility

C.130 The termination of a TBS order by the court against the recommendation of the treating hospital or institution is known as a ‘contrary ending’.²²⁶ There is a perception among academics that such discharges tend to produce higher subsequent rates of recidivism.²²⁷

C.131 A ten-year review of TBS patients released in 1994 – 1998 found that rates of reoffence were 40% where the TBS measure had been terminated contrary to treatment advice. Criminal recidivism was 25% in the general population. Achieving proportionality between the maximum sentence for the underlying crime and the duration of the TBS order has been identified as a possible explanation for contrary endings.

C.132 The Ministry of Justice commissioned a study in 2005 that completed a statistical analysis of the relevant cases and interviewed judges and behavioural experts involved in TBS prolongation procedures. This study reported the following:

- In 2001-2004 contrary endings formed 14-24% of the total TBS orders ended. Of total prolongation procedures, the amount is insignificant (11 from 850-1700).

225. Kogel, C., Salize, H., and Dreßing, H. Central Institute of Mental Health, European Commission, *Placement and Treatment of Mentally Ill Offenders, Legislation and Practice in EU Member States, Final Report* (2005) 190.

226. Kogel, C. and Den Hartogh, V., ‘Termination of the Dutch TBS-order by the Court Against the Advice of the Institution Treating or Supervising the Patient: Frequency, Nature, Causes and Relationship with Subsequent Criminal Recidivism’ (Wetenschappelijk Onderzoek-en Documentatiecentrum, Ministerie van Justitie, 2005) 90.

227. Leuw, E., Brouwers, M., and Smit, J. ‘Recidivism After Forensic Psychiatric Treatment: Patterns, Trends Processes and Risk Assessment’ (Wetenschappelijk Onderzoek-en Documentatiecentrum, Ministerie van Justitie, 1999) 109.

- In the majority of cases with a ‘contrary ending’ the treating institution assessed the patient’s risk of criminal recidivism as small.
- Judges and behavioural experts perceived differences in emphasis between judicial and behavioural criteria and the margin of uncertainty in the risk of assessment of criminal recidivism as important causes of contrary endings. A view that the treating institution is exercising ‘strategic’ caution in advising discontinuation may also lead to a contrary ending result. The proportionality argument was not relied upon.²²⁸

C.133 The development of stricter criteria for release of TBS patients, particularly those who have been convicted of child sex offences, is a significant topic of public discussion and Parliamentary debate in the Netherlands.²²⁹

Interaction between punitive and therapeutic considerations

C.134 The purposes of TBS orders and punitive custody are difficult to reconcile. The Dutch Ministry of Justice notes that TBS is not a means of retribution, stating that ‘often offenders have served a prison sentence by way of retribution before the commencement of a TBS order.’²³⁰ Literature considers the prison sentence the primary legal sanction.²³¹

C.135 The combination of imprisonment and treatment orders raises ethical concerns. TBS orders are imposed for the purpose of treating the psychiatric disorder of an offender. The superiority of the punitive sentence over the hospital order under Dutch law results in patient’s treatment needs being unmet for an extended period of time. It can be argued it is ethically unsound to withhold or postpone treatment that has been judged necessary to ameliorate the mental health of a patient.²³² However, it is similarly problematic to treat the offender

228. Kogel, C. and Den Hartogh, V., ‘Termination of the Dutch TBS-order by the Court Against the Advice of the Institution Treating or Supervising the Patient: Frequency, Nature, Causes and Relationship with Subsequent Criminal Recidivism’ (Wetenschappelijk Onderzoek-en Documentatiecentrum, Ministerie van Justitie, 2005) 97-98.

229. Kogel, C., Salize, H., and Dreßing, H. Central Institute of Mental Health, European Commission, *Placement and Treatment of Mentally Ill Offenders, Legislation and Practice in EU Member States, Final Report* (2005) 194.

230. Ministry of Justice, *About TBS* (2008) <<http://english.justitie.nl/themes/tbs/about-tbs>> at 12 January 2009.

231. Kinzig, J., ‘Preventive Measures for Dangerous Recidivists’ (1997) 5 (1) *European Journal of Crime, Criminal Law and Criminal Justice* 27, 42 citing Haffmans, C., *De berechting van de psychisch gestoorde delinquent* (Arnhem, 1989) 100.

232. De Ruiter, C. and Hilderbrand, M., ‘The Dual Nature of Forensic Psychiatric Practice: Risk Assessment and Management under the Dutch TBS-Order’

first, and then execute the prison sentence after treatment has been successful and he no longer poses a danger to society.²³³

Overcapacity

C.136 The number of beds in TBS facilities has grown from 650 in 1995 to around 1650 in 2006.²³⁴ Despite this, declining outflow of patients and an increasing number of TBS orders have resulted in long waiting lists of offenders waiting to be transferred from prison to hospital.²³⁵ In 1998, Leuw advised that the average waiting period for admission to a TBS facility had risen to over a year. This report also noted concerns that the criminal justice system, particularly the TBS measure, was being used to combat mental health issues that are more appropriately the province of the mental health system.²³⁶

C.137 If a patient's placement has not been effected a year after the commencement of the TBS measure, he is entitled to a monthly compensation of 600 euro, with a three monthly increase of 125 euro. Given the types of offences committed by those individuals subject to TBS orders this is a subject of public dissatisfaction.²³⁷

Absence of empirical research

C.138 No studies have been executed that document the relationship between treatment outcome under the TBS measure and subsequent recidivism. Further, there is no research as to the 'differential effectiveness' of treatments: that is, whether the degree of treatment success varies as the type of patient changes.²³⁸

C.139 While there are studies available in relation to clinical progress after TBS treatment, these have been undertaken in TBS facilities.

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- (2007) 35 (1) *Journal of the American Academy of Psychiatry and the Law* 92, 97.
233. De Ruiter, C. and Hilderbrand, M., 'The Dual Nature of Forensic Psychiatric Practice: Risk Assessment and Management under the Dutch TBS-Order' (2007) 35 (1) *Journal of the American Academy of Psychiatry and the Law* 92, 97.
234. De Ruiter, C. and Trestman, R., 'Prevalence and Treatment of Personality Disorders in Dutch Forensic Mental Health Services' (2007) 35 *Journal of the American Academy of Psychiatry and the Law* 92, 92.
235. Van Marle, H., 'The Dutch Entrustment Act (TBS): Its Principles and Innovations' (2002) 1 (1) *International Journal of Forensic Mental Health* 83.
236. Leuw, E., 'The Dutch Forensic Psychiatric System: Admissions and Capacity' (Wetenschappelijk Onderzoek-en Documentatiecentrum, Ministerie van Justitie, 1998).
237. Kogel, C., Salize, H., and Dreßing, H. Central Institute of Mental Health, European Commission, *Placement and Treatment of Mentally Ill Offenders, Legislation and Practice in EU Member States, Final Report* (2005) 192.
238. De Ruiter, C. and Hilderbrand, M., 'The Dual Nature of Forensic Psychiatric Practice: Risk Assessment and Management under the Dutch TBS-Order' (2007) 35 (1) *Journal of the American Academy of Psychiatry and the Law* 92, 105-6.

As such, they lack a comparable control group and do not necessarily evince a lower risk of reoffending after discharge from the TBS facility.²³⁹

239. See generally, Nijman, H., de Kuryk, C., and Nieuwenhuizen, C., 'Behavioural changes during forensic psychiatric (TBS) treatment in the Netherlands' (2004) 27 *International Journal of Law and Psychiatry* 79, 84 and Greeven, P., and de Ruiter, C., 'Personality Disorders in a Dutch Forensic Psychiatric Sample: Changes With Treatment' (2004) 14 *Criminal Behaviour and Mental Health* 280.

**D. Sex offender treatment
models and programs in
other jurisdictions**

INTRODUCTION

D.1 This chapter describes sex offender treatment programs and models available in jurisdictions other than New South Wales, with an emphasis on those programs which have been accredited or evaluated, and where information is readily available in the public sphere.

PART A: SEX OFFENDER PROGRAMS GENERALLY - AUSTRALIA

Victoria

D.2 The Sex Offender Programs (SOP) unit in Victoria employs similar treatment methods to those at CUBIT, and also includes a dedicated program for special needs sex offenders. It is open to both adult sex offenders in prison and in community corrections settings. A recent evaluation of SOP reported that of 330 offenders only 4% of treatment completers sexually re-offended compared with 20% of those who withdrew and 10% of those who were removed from the program.¹

Western Australia

D.3 The Western Australian Sex Offender Treatment Unit (SOTU) runs programs both in prison and in the community. Programs are generally based on group CBT and relapse prevention strategies² and there are provisions for special needs sex offenders such as those with cognitive impairment and Aboriginal offenders.

D.4 A 2002 evaluation of the SOTU involving 2165 sex offenders found that treatment did not significantly reduce rates of sexual recidivism although this non-significant finding could have been due to methodological limitations.³

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1. Macgregor, S., *Sex Offender Treatment Programs: Effectiveness of Prison and Community Based Programs in Australia and New Zealand*. (2008) Indigenous Justice Clearinghouse <<http://indigenousjustice.gov.au/briefs/brief003.pdf>> at 27 November 2008.
 2. Davies, J., 'Aboriginal Sex Offender Treatment Program—Greenough Regional Prison, WA' (Paper presented at the Best Practice Interventions in Corrections for Indigenous People Conference, Adelaide, 13-15 October 1999).
 3. Greenberg, D., Da Silva, J. and Loh, N., 'Evaluation of the Western Australian Sex Offender Treatment Unit (1987-1999): A Quantitative Analysis' (Forensic Research Unit, Department of Psychiatry and Behavioural Sciences, University of Western Australia, 2002).

Queensland

D.5 The Queensland Department of Corrective Services offers five treatment programs for convicted male sex offenders.⁴ These programs are based upon cognitive-behavioural principles and vary in intensity (in terms of duration and frequency) according to the offenders' risk of re-offending, criminogenic needs and responsivity levels. The programs include the following⁵:

Getting Started

D.6 This is a preparatory program for offenders with responsivity and participation issues. The program is available to sex offenders in custody and in the community.

Crossroads

D.7 This is a high intensity sexual offending program for high-risk offenders in custody.

New Directions

D.8 This is a medium intensity program for low to medium risk offenders. This program is similar to Crossroads but of shorter duration and intensity. It is available to sex offenders in custody and in the community.

Indigenous Sex Offender Programs

D.9 These programs are based on the high and medium intensity programs except that they include a number of culturally relevant strategies such as Elders Groups visits and indigenous program facilitators; and

Staying on Track

D.10 This is a relapse prevention program.

D.11 The Department has also introduced a version of its male-orientated custodial program 'Making Choices', tailored so that it can be used to address the criminogenic needs of female sex offenders.⁶ The program has yet to be systematically evaluated.

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4. Queensland Corrective Services, 'Assessment, Management and Supervision of Sex Offenders in Queensland' (Information Paper, Queensland Government, 2006).
 5. Queensland Corrective Services, 'Assessment, Management and Supervision of Sex Offenders in Queensland' (Information Paper, Queensland Government, 2006); Queensland Corrective Services, *The Management of Convicted Sex Offenders in Queensland* (2007).
 6. This program adopts dialectical behaviour therapy and relational approaches elements and addresses the personal/emotional domain (eg, victimization issues and interpersonal effectiveness) as well as risk factors such as offence

PART B: SEX OFFENDER PROGRAMS GENERALLY – OTHER JURISDICTIONS

Canada

D.12 Canada has been a world leader in the research of ‘what works’ literature and in the development of sex offender treatments.⁷ The Correctional Service of Canada (CSC) manages offenders both in custody and in the community.

D.13 Upon conviction of an offence, assessments are carried out to devise a sentence management plan that must be strictly adhered to. Failure to do so results in ineligibility for parole.

Phoenix Program—Alberta

D.14 The Phoenix Program is a residential sex offender treatment program run by the Alberta Mental Health Board, available to offenders who volunteer for entry into the program (offenders are rarely referred). Typically, offenders participate in the program towards the end of sentence of imprisonment as they are transferred from the prison to the hospital, and are not required to return to the prison.⁸ The program is delivered in a minimum to medium security unit and offenders are required to stay for a minimum of six months (the average time to complete the program is 10 months). Intensive treatment and a strict schedule are the main elements.

D.15 Offenders attend different types of group therapy throughout the week. The program is divided into three phases. The first is a six to 12 month intensive treatment schedule conducted entirely within the facility. The second phase runs for four to eight months, and consists of nightly four-hour sessions delivered in the community. The final phase consists of weekly follow up group sessions accessed over the long term.

D.16 To be eligible for the program, offenders are required to acknowledge their crime, and show a willingness to change. Those

related emotions and cognition. See, Queensland Corrective Services, ‘Assessment, Management and Supervision of Sex Offenders in Queensland’ (Information Paper, Queensland Government, 2006).

7. Brown, S., *Treating Sex Offenders: An Introduction to Sex Offender Treatment Programs* (1st ed, 2005).

8. Studer, L., *Sex Offender Treatment—More Than Just Relapse Prevention. Reflecting on the Phoenix Program Experience* (2006) <<http://209.85.173.104/search?q=cache:r4Him8-pb4gJ:www.iatso.org/database/06hamburg/Studer%2520-%2520Sex%2520Offender%2520Treatment%2520-%2520More%2520than%2520Relapse%2520Prevention+Phoenix+Program+Canada&hl=en&ct=clnk&cd=7&gl=au>> at 3 July 2008.

with psychosis, or suicidal or self-harm behaviour are not accepted into the program. Intellectual capacity to participate in a group is also required, measured by an Intelligence Quotient (I.Q.) of over 70.⁹

Program Efficacy

D.17 Follow-up of the cohort discharged between July 1987 and June 1992 indicated that over 13 years, 8% of those who completed the Phoenix program committed another sexual offence, compared with 24% in a comparison group who did not participate in the program.¹⁰

D.18 Studies of the program suggest that the importance of serum testosterone levels¹¹, number of prior offences,¹² and a preference for male victims¹³ as predictors of future offence significantly decreases after treatment in the program.

Clearwater Program—Saskatchewan

D.19 The Clearwater program is a sex offender unit that operates at the Correctional Services Canada's (CSC) Regional Psychiatric Centre (Prairies). The program takes in high-risk sex offenders and runs for six to eight months. Clearwater adopts a structured cognitive-behavioural approach together with a relapse prevention treatment framework.¹⁴

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9. Studer, L., *Sex Offender Treatment—More Than Just Relapse Prevention. Reflecting on the Phoenix Program Experience* (2006) <<http://209.85.173.104/search?q=cache:r4Him8-pb4gJ:www.iatso.org/database/06hamburg/Studer%2520-%2520Sex%2520Offender%2520Treatment%2520-%2520More%2520than%2520Relapse%2520Prevention+Phoenix+Program+Canada&hl=en&ct=clnk&cd=7&gl=au>> at 3 July 2008.
 10. Studer, L., *Sex Offender Treatment—More Than Just Relapse Prevention. Reflecting on the Phoenix Program Experience* (2006) <<http://209.85.173.104/search?q=cache:r4Him8-pb4gJ:www.iatso.org/database/06hamburg/Studer%2520-%2520Sex%2520Offender%2520Treatment%2520-%2520More%2520than%2520Relapse%2520Prevention+Phoenix+Program+Canada&hl=en&ct=clnk&cd=7&gl=au>> at 3 July 2008.
 11. Studer, L., Aylwin, A., and Reddon, J., 'Testosterone, Sexual Offense Recidivism, and Treatment Effect Among Adult Male Sex Offenders' (2005) 17 *Sexual Abuse: A Journal of Research and Treatment* 171.
 12. Studer, L. and Reddon, J., 'Treatment May Change Risk Prediction for Sex offenders' (1998) 10 *Sexual Abuse: A Journal of Research and Treatment* 175.
 13. Studer, L. and Aylwin, A., 'Male Victims and Post Treatment Risk Assessment Among Adult Male Sex Offenders' (2008) 31 *International Journal of Law and Psychiatry* 60.
 14. Nicholaichuk, T. et al, 'Outcome of an Institutional Sex offender Treatment Program: A Comparison Between Treated and Matched Untreated Offenders' (2000) 12 *Sexual Abuse: A Journal of Research and Treatment* 139.

D.20 The Clearwater program accepts both Aboriginal and non-Aboriginal offenders and culturally relevant components are included to address the needs of Aboriginal offenders.¹⁵

Program Efficacy

D.21 Evaluation reports of the Clearwater program, examining those who completed between 1981–1996, indicate that completion of the program reduced sexual, but not general, recidivism.¹⁶ Those who completed the Clearwater program were incarcerated for less time, survived longer before re-offending, and reoffended less than those who did not complete the program (14.5% compared to 33.2%). In addition, it was found that repeat sex offenders tended to reoffend more than first-time sex offenders, and that participation in the program reduced this likelihood slightly.

D.22 A study that examined data for only those offenders who had been released in the past 10 years found a recidivism rate of 13.1% compared with 24.3% for the comparison group.¹⁷

Rockwood Preparatory Program for Sex offenders—Ontario

D.23 This program is offered to sex offenders at the beginning of their federal sentence. The Rockwood program takes all sex offenders, regardless of risk, and runs for six to eight weeks. It uses a cognitive-behavioural approach, and aims to motivate and prepare offenders for a full treatment program once they are placed in the prison chosen for them.¹⁸

Program Efficacy

D.24 Preliminary evaluations¹⁹ reveal that offenders who participated in the program showed an increase in motivation to change which is consistent with its goal. Participants were more likely to be placed in a lower security facility and assessed as more suited to less intensive levels of sex offender treatment than persons who were not involved.

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15. Hylton, J., 'Aboriginal Sexual Offending in Canada' (Aboriginal Healing Foundation, 2002).
 16. Nicholaichuk, T. et al, 'Outcome of an Institutional Sex offender Treatment Program: A Comparison Between Treated and Matched Untreated Offenders' (2000) 12 *Sexual Abuse: A Journal of Research and Treatment* 139.
 17. Hanson, R. and Nicholaichuk, T., 'A Cautionary Note Regarding Nicholaichuk et al (2000)' (2000) 12 *Sexual Abuse: A Journal of Research and Treatment* 289.
 18. Marshall, L. et al, 'The Rockwood Preparatory Program for Sex offenders' (2008) 20 *Sexual Abuse: A Journal of Research and Treatment* 25.
 19. Marshall, L. et. al, 'The Rockwood Preparatory Program for Sex offenders' (2008) 20 *Sexual Abuse: A Journal of Research and Treatment* 25.

Circles of Support & Accountability—South-Central Ontario

D.25 The Circles of Support & Accountability (COSA) initiative began as a response to the highly publicised release of a high risk, repeat, child sex offender. A Mennonite pastor formed a group of volunteers to support the offender in his reintegration into community, and as a means of managing his likelihood of re-offending. A pilot project was established as a possible resource for newly released offenders.²⁰

D.26 COSA provides a circle of volunteers (ideally five) around the offender, known as the ‘inner’ circle whose purpose is to keep the offender on track. One volunteer initially monitors the offender each day, and the full Circle meets with the offender on a weekly basis. In addition, there is an ‘outer’ circle consisting of community-based professionals such as psychologists, law officers, correctional officers, and social workers, whose purpose is to address the criminogenic needs of the offender.²¹

D.27 Eligibility for a COSA includes willingness to follow the requirements of intensive supervision, commitment to the circle, and willingness to pursue a predetermined course of treatment as decided by the circle.²²

Program Efficacy

D.28 Examination of actual re-offending rates has found that offenders who were not involved with COSA reoffended faster, and at a higher rate.²³

New Zealand

D.29 There are a number of community based sex offender treatment programs operating in New Zealand. They are quite similar and employ cognitive-behavioural strategies with a strong focus on relapse

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20. Correctional Service of Canada, *Guide to COSA Project Development* (2003) <<http://www.csc-scc.gc.ca/text/prgrm/chap/circ/proj-guid/index-eng.shtml>> at 1 August 2008.
 21. Wilson, R., Picheca, J. and Prinzo, M., ‘Circles of Support & Accountability: An Evaluation of the Pilot Project in South-Central Ontario’ (Research Report No 168, Correctional Service of Canada, 2005).
 22. Hylton, J., ‘Aboriginal Sexual Offending in Canada’ (Aboriginal Healing Foundation, 2002).
 23. Wilson, R., Picheca, J and Prinzo, M., ‘Circles of Support & Accountability: An Evaluation of the Pilot Project in South-Central Ontario’ (Research Report No 168, Correctional Service of Canada, 2005).

prevention. Each includes Maori workers.²⁴ They include the following:

SAFE

D.30 SAFE is a 'community based professional treatment program for adult and adolescent sex offenders' operating in Auckland. Programs typically run for 12 to 24 months and are offered to 'adult males as well as females, adolescents, children, Maori clients, offenders with a cognitive impairment; and internet offenders, especially child pornography offenders'.

D.31 SAFE accepts direct client referrals as well as referrals from the Courts, Department of Corrections, Department of Child, Youth and Family Services (CYFS), health professionals, or family members and it is the largest community-based treatment program in New Zealand.

²⁵

STOP

D.32 The STOP program is available in Wellington, Christchurch and Nelson 'for men and adolescents who have been sexually abusive and who are ready to do something about stopping their abusive behaviour'.²⁶

D.33 The Wellington STOP (WellStop) program which began in 1993 is a minimum 12-month psycho-educational program, employing CBT methods and supported by a family systems approach.²⁷ WellStop is also open to female sex offenders although thus far there have been insufficient female offenders to establish a group program.²⁸ The program includes specialist services for adults with special learning needs.²⁹

24. Lambie, I. and Stewart, M., 'Community Solutions for the Community's Problems: an Outcome Evaluation of Three New Zealand Community Child Sex Offender Treatment Programs' (University of Auckland, 2003).

25. Safe Network Incorporated, *SAFE Network* (2008) <<http://www.safenetwork.co.nz/about.htm>> at 27 November 2008.

26. WellStop Incorporated, *Well Stop Positive Choices for a Safer Future* (2008) <<http://www.wellingtonstop.co.nz/Default.aspx>> at 27 November 2008.

27. Lambie, I. and Stewart, M., 'Community Solutions for the Community's Problems: an Outcome Evaluation of Three New Zealand Community Child Sex Offender Treatment Programs' (University of Auckland, 2003).

28. WellStop Incorporated, *Support and Information for Family and Those Associated with Adults who Sexually Abuse* (2008) <<http://www.wellingtonstop.co.nz/Programmes/Adult%20Program%20Family%20and%20Support%20Booklet.pdf>> at 27 November 2008.

29. West, B., 'Using The Good Way Model To Work Positively With Adults And Youth With Intellectual Difficulties And Sexually Abusive Behaviour' (2007) 13 *Journal of Sexual Aggression* 253.

D.34 The Christchurch STOP program started in 1989 and runs for a duration of 12 months using similar treatment approaches.³⁰

Evaluation of STOP and SAFE

D.35 In February 2003 an evaluation was undertaken of Auckland SAFE, Wellington STOP and Christchurch STOP,³¹ commissioned by the Policy Development Section of the New Zealand Department of Corrections.³² Overall, the research concluded that the programs were 'having a significant impact on lowering the recidivism rate amongst offenders they treat'.³³

United Kingdom — England and Wales

D.36 Recent years have seen a dramatic growth in the development of sex offender treatment programs in the U.K. They include the following:

Prison Sex Offender Treatment Program (SOTP)

D.37 The Sex Offender Treatment Program (SOTP) was initiated in 1991 and comprises a framework for the integrated assessment and treatment of sex offenders in prison.³⁴ The SOTP currently runs in 26 prisons across England and Wales and treats approximately 1,000 men per year. All types of sex offenders are treated, but it is estimated that 80% are child sexual abusers, 15% are rapists, and 5% are sexual murderers.³⁵

Core 2000

D.38 The primary goals of Core 2000 are to increase the motivation of sex offenders to avoid re-offending, and to develop the self-

30. Lambie, I. and Stewart, M., 'Community Solutions for the Community's Problems: an Outcome Evaluation of Three New Zealand Community Child Sex Offender Treatment Programs' (University of Auckland, 2003).

31. Lambie, I. and Stewart, M., 'Community Solutions for the Community's Problems: an Outcome Evaluation of Three New Zealand Community Child Sex Offender Treatment Programs' (University of Auckland, 2003).

32. Lambie, I. and Stewart, M., 'Community Solutions for the Community's Problems: an Outcome Evaluation of Three New Zealand Community Child Sex Offender Treatment Programs' (University of Auckland, 2003), 4.

33. Lambie, I. and Stewart, M., 'Community Solutions for the Community's Problems: an Outcome Evaluation of Three New Zealand Community Child Sex Offender Treatment Programs' (University of Auckland, 2003), 5.

34. Friendship, C. and Thornton, D., 'Sexual Reconviction for Sex offenders Discharged From Prison in England and Wales' (2001) 41 *British Journal of Criminology* 285.

35. Beech, A. et al, *The Sex Offender Treatment Program in prison: Addressing the offending behaviour of rapists and sexual murderers*. (2008) HM Prison Service

<<http://www.hmprisonservice.gov.uk/resourcecentre/publicationsdocuments/index.asp?cat=114>> at 8 July 2008.

management skills necessary to achieve this.³⁶ The program is run for 180 hours.

The Extended SOTP

D.39 This program is an extension of the Core 2000 designed to address the extra treatment needs that some sex offenders may have. This second stage aims to identify and challenge dysfunctional thinking, to develop skills to manage emotions, relationships, and intimacy, to address deviant fantasy and sexual arousal, and to identify how these factors work together in sexual offending.³⁷

The Healthy Sexual Functioning Program

D.40 This program is currently in development. It is designed as a behavioural modification component for sex offenders who require additional work to address deviant sexual fantasy and arousal.

The Rolling Program

D.41 This program addresses the same range of content as the Core Program but is modified to be 'rolling', such that groups do not start and finish at the same time, but individuals can progress faster (or slower) through the program and exit earlier.

Booster Program

D.42 This program is designed for those who have completed the Core 2000, Rolling, or extended programs, and are available to offenders who are within 18 months of their projected release into the community. The program comprises 35 sessions of three sessions per week, and aims to reiterate work completed in the earlier programs.

United Kingdom — Scotland

STOP Program

D.43 The STOP program is run by the Scottish Prison Service and is similar to the SOTP Core program in England and Wales. It requires an average of 180 hours to complete and is designed for low, medium and high-risk offenders serving four years or more in prison for a sexual offence. Other programs in Scotland that are commensurate with that of England and Wales are the adapted ASTOP, Extended STOP, and Rolling Program.

36. Beech, A., Fisher, D. and Beckett, R., 'Step 3: An evaluation of the Prison Sex Offender Treatment Programme' (Home Office, 1998).

37. Beech, A. et al, *The Sex Offender Treatment Program in prison: Addressing the offending behaviour of rapists and sexual murderers*. (2008) HM Prison Service
<<http://www.hmprisonservice.gov.uk/resourcecentre/publicationsdocuments/index.asp?cat=114>> at 8 July 2008.

Relationships Program

D.44 This program is designed for those with difficulties developing and maintaining relationships and addresses self-awareness and the understanding of intimate relationships. The program runs for 20 hours.

Sex Offender Awareness Program (SOAP)

D.45 Those who deny their offending are often excluded from other programs and the SOAP was designed for this group. It aims to raise awareness and challenge the attitudes of deniers.

STOP for Youth Offenders (YSTOP)

D.46 This program is the STOP program designed for juvenile sex offenders.

General Eligibility for all SOTP programs

D.47 Any offender who has a conviction for a sexual offence, or a previous conviction for a sex offender and who is considered medium-high risk (measured by Risk Matrix 2000), or a homicide conviction with a clear sexual element is suitable for participation in the SOTP program.³⁸ Offenders who are sentenced to life imprisonment where it is suspected that there may be a sexual element to their crime, and offenders who have requested treatment and claim they have sexually offended but do not have any convictions, or offenders who display sexually offensive behaviour in custody require further assessment prior to acceptance.

Exclusion Criteria

D.48 Offenders who score above 30 on the Psychopathy Checklist Revised (PCL-R) are excluded from the CORE 2000 program. Those who are on the borderline (ie, PCL-R score of 25–30) need to be assessed for any psychopathic behaviour in the past three years that will render them ineligible for the program (eg, dishonesty and/or manipulation).³⁹ Offenders with an I.Q. of less than 80 are also excluded from the Core 2000 program. However, they may be referred

38. Beech, A. et al, *The Sex Offender Treatment Program in prison: Addressing the offending behaviour of rapists and sexual murderers*. (2008) HM Prison Service

<<http://www.hmprisonservice.gov.uk/resourcecentre/publicationsdocuments/index.asp?cat=114>> at 8 July 2008.

39. Beech, A. et al, *The Sex Offender Treatment Program in prison: Addressing the offending behaviour of rapists and sexual murderers*. (2008) HM Prison Service

<<http://www.hmprisonservice.gov.uk/resourcecentre/publicationsdocuments/index.asp?cat=114>> at 8 July 2008.

to the Adapted SOTP program that is designed for offenders with an I.Q. of 65–80.⁴⁰

D.49 Offenders who are suffering from a current mental illness are only excluded if they do not have capacity to relate to others or to concentrate on the work during treatment. Those who were suffering from a mental illness or brain damage at the time of their offence may be excluded.⁴¹

D.50 Sex offenders who exhibit total denial of the offence, refusal of treatment, inability to speak English, poor literacy skills, or suicidal/self-harming ideation are excluded. Regular reviews of their eligibility will however be carried out to ensure that they receive treatment when they are ready.⁴²

Program Efficacy

D.51 An evaluation of the earlier SOTP program was conducted in 2003.⁴³ It compared 647 sex offenders who completed the program between 1992 and 1994 with a group of 1,910 untreated sex offenders. The follow-up period was two years from the time of release. Significant reductions in sexual and/or violent reconviction rates were found in medium-high risk and medium-low risk offenders who received treatment. For low and high risk sex offenders, there was a trend showing that treatment slightly reduced the rate of reconviction but this was not significant.

Community-based programs

D.52 Community based programs in England and Wales are an extension of those delivered in custody. With the development of an accreditation program, three programs were selected to continue operations based on positive evaluations and their accordance with the ‘what works’ literature. They include the following:

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40. Craig, L. and Hutchinson, R., ‘Sex offenders with Learning Disabilities: Risk, Recidivism and Treatment’ (2005) 11 *Journal of Sexual Aggression* 289.
 41. Beech, A. et al, *The Sex Offender Treatment Program in prison: Addressing the offending behaviour of rapists and sexual murderers*. (2008) HM Prison Service
<<http://www.hmprisonservice.gov.uk/resourcecentre/publicationsdocuments/index.asp?cat=114>> at 8 July 2008.
 42. Beech, A. et al, *The Sex Offender Treatment Program in prison: Addressing the offending behaviour of rapists and sexual murderers*. (2008) HM Prison Service
<<http://www.hmprisonservice.gov.uk/resourcecentre/publicationsdocuments/index.asp?cat=114>> at 8 July 2008.
 43. Friendship, C., Mann, R. and Beech, A.R., ‘Evaluation of a National Prison-Based Treatment Program for Sex offenders in England and Wales’ (2003) 18 *Journal of Interpersonal Violence* 744.

C-SOGP

D.53 C-SOGP is run in London, Wales, West Midlands and East Midlands. All offenders complete a 50 hour induction program, and are then assessed into various risk levels. Medium-high risk offenders progress into intensive long-term treatment that takes 190 hours over 76 weeks to complete, while those offenders assessed as low risk complete a relapse-prevention program.

TV-SOGP

D.54 Originally developed in the Thames Valley region, TV-SOGP operates in East England, South East, and South West regions. The program takes 160 hours to complete. It also offers a partner's program for those who intend to continue a relationship with their partners. Low risk offenders complete only the foundation, victim-empathy, and relapse-prevention components.

N-SOGP

D.55 N-SOGP currently operates in the North East, North West, Yorkshire and Humberside regions. The program has a core program, plus relapse prevention. The program runs for 180 hours. Those who are low risk complete only the relapse prevention component.

West Midlands Community Sex Offender Groupwork Program

D.56 In 2005, a Regional Sex Offender Unit (RSOU) was established to deliver the Community Sex Offender Groupwork Program (CSOGP) in four probation areas of the West Midlands region.

D.57 The program is designed for adult sex offenders convicted of an offence against children or adults as well as non-contact sexual offences.⁴⁴ Acceptance into the program usually arises as a condition of a three year probation order following a pre-sentence assessment that it is appropriate to deal with the offender in the community.⁴⁵ There may be additional conditions attached to the order to minimise the risk posed by a particular offender in the community (eg, no unsupervised contact with children).

D.58 If a pre-sentence report suggests that an offender is at too high a risk to be dealt with in the community, then a custodial sentence linked to extended supervision on license after release can be imposed.

44. Probation West Midlands, *Probation West Midlands: Enforcement, Rehabilitation and Public Protection* (2008) <<http://www.westmidlands-probation.gov.uk/wmps/info/programmes.asp>> at 21 July 2008.

45. Allam, J., Middleton, D., and Browne, K., 'Different Clients, Different Needs? Practice Issues on Community-Based Treatment for Sex Offenders.' (1997) 7 *Criminal Behaviour and Mental Health* 69.

D.59 The program starts with a week-long induction, followed by five full day sessions over a few weeks. Low risk offenders are then required to complete 100 hours of treatment, while those who are higher risk complete 240 hours. The programs can take up to two years to complete.⁴⁶

D.60 The RSOU also provides a program designed specifically for offenders convicted of internet related sexual offences.

D.61 Offenders with an I.Q. below 70, with any serious mental health problems, or substance abuse problems are excluded from the main RSOU program.

Evaluation of the Program

D.62 An evaluation of the initial program provided by the Sex offender Unit prior to 2005 of 150 sex offenders over five years, found that:

- 8.2% of child sex abusers who completed the program were reconvicted of another sexual offence, while 18.4% of those who did not complete the program were reconvicted; and
- A similar pattern was found for rapists—15.4% of rapists who completed the program compared with 34.6% of those who did not do so were convicted of another sexual offence within five years.⁴⁷

46. Probation West Midlands, *Probation West Midlands: Enforcement, Rehabilitation and Public Protection* (2008) <<http://www.westmidlands-probation.gov.uk/wmps/info/programmes.asp>> at 21 July 2008.

47. Probation West Midlands, 'Sex offender treatment program success in West Midlands' (Press Release, 12 November 2001).

PART C: PROGRAMS TARGETING INDIGENOUS OFFENDERS – OTHER JURISDICTIONS

Canada

D.63 In Canada, the *Corrections and Conditional Release Act* (CCRA) requires that the Correctional Services Canada (CSC) provide programs and services that are tailored to the distinct cultural interests of Aboriginal (Inuit) offenders. A common aspect of all sex offender programs designed for Inuit offenders is the integration of spiritual healing and a cultural focus with cognitive-behavioural techniques. Among the sex offender programs designed for Inuit offenders are the following:⁴⁸

Tupiq Program

D.64 The Tupiq program is located at Fenbrook Institution, a medium-security jail in Gravenhurst, Ontario.⁴⁹ The program started in 2001 and is voluntary. Those who wish to participate must self identify as Inuit have a history of offences relating to sexual violence against women or children, and be classified as moderate to high risk. The program is a high-intensity, 16 week program that uses a cognitive-behavioural and multi-model approach. The Inuit culture is integrated into the program via the use of Inuit staff.

Eligibility

D.65 Those who have very low cognitive functioning and/or whose language skills are not sufficient for participation are excluded. High needs sex offenders (eg, those that have issues regarding deviant sexual arousal) are also excluded.⁵⁰

D.66 Resistant offenders (ie, those unwilling to admit responsibility for an offence) are usually permitted to commence the program but their motivation and attitude are reviewed regularly and if after a

48. For a detailed review of Aboriginal sex offenders, and treatment programs targeted to this group see, Hylton, J., 'Aboriginal Sexual Offending in Canada' (Aboriginal Healing Foundation, 2002).

49. Trevethan, S., Moore, J. and Naqitarvik, L., 'The Tupiq Program for Inuit Sex offenders: A Preliminary Investigation' (Research Report 153, Correctional Services of Canada, 2004).

50. Trevethan, S., Moore, J. and Naqitarvik, L., 'The Tupiq Program for Inuit Sex offenders: A Preliminary Investigation' (Research Report 153, Correctional Services of Canada, 2004).

third of the program, no positive changes are observed, they cannot continue.⁵¹

Program Effectiveness

D.67 The Tupiq program is relatively new and at the time of the 2004 evaluation report only 38 participants had completed it. Scores on actuarial tools that measure risk of re-offending and the Denial/Minimisation Checklist were found to have decreased upon completion of the program compared with pre-treatment scores.⁵²

Hollow Water Community Holistic Circle Healing—Hollow Water, Manitoba

D.68 The model of Community Holistic Circle Healing (CHCH) was created in an attempt to break the cycle of abuse common among Inuit communities. The approach is borne from the belief that incarceration of offenders does not heal any of the parties involved, but rather places the offenders in an environment that maintains their attitudes and problems.⁵³

D.69 The Hollow Water CHCH is a diversionary program. Once an offence is reported to the Hollow Water authorities, a circle is formed to support all parties involved including the victim, the perpetrator and their families. To be diverted from the criminal justice system, the offender must agree to a ‘healing contract’ that outlines the 13 steps⁵⁴ requiring compliance. The last step in the process, the cleansing ceremony is conducted to initiate the offender’s contract and to acknowledge their reintegration into the community.⁵⁵

51. Trevethan, S., Moore, J. and Naqitarvik, L., ‘The Tupiq Program for Inuit Sex offenders: A Preliminary Investigation’ (Research Report 153, Correctional Services of Canada, 2004).

52. Trevethan, S., Moore, J. and Naqitarvik, L., ‘The Tupiq Program for Inuit Sex offenders: A Preliminary Investigation’ (Research Report 153, Correctional Services of Canada, 2004).

53. McGlade, H., ‘Justice as Healing: Developing Aboriginal Justice Models to Address Child Sexual Assault’ (2007) 7 *Indigenous Law Bulletin* 10.

54. The 13 steps are: Disclosure; Establishing safety for victim; Confronting the perpetrator; Supporting the spouse/parent of offender; Assisting the families; Meeting of the assessment team (RCMP, Crown counsel, community representatives, CHCH, victim, offender, family etc); Conducting circles with the perpetrator; Conducting circles with the victim and perpetrator; Preparing the victim(s); Preparing all of the families; Conducting a special gathering; Completing a sentencing review (healing contract); and Conducting a cleansing ceremony. See Hylton, J., ‘Aboriginal Sexual Offending in Canada’ (Aboriginal Healing Foundation, 2002).

55. McGlade, H., ‘Justice as Healing: Developing Aboriginal Justice Models to Address Child Sexual Assault’ (2007) 7 *Indigenous Law Bulletin* 10.

New Zealand

Kia Marama

D.70 Begun in 1989, Kia Marama is the New Zealand treatment program developed for incarcerated child sex offenders⁵⁶ that adopts a relapse prevention framework based on cognitive-behavioural methods. The program is not Maori-specific although it is available for this group and incorporates Maori cultural factors.

D.71 The Kia Marama program lasts for 31 weeks.⁵⁷ Psychological Service staff throughout the 11 prisons in South Island and lower North Island refer eligible participants to the program. Those with intellectual disabilities (I.Q. lower than 70) and/or mental illness are excluded. The preference is for the offender to transfer to the program towards the end of his sentence. Admission is voluntary but the offender must have been convicted of, or admitted to one or more sexual offences against someone under the age of 16 years, and have a medium or minimum security classification. Persistent and total denial of the offence result in a discharge from the program.

D.72 A 1998 outcome evaluation study⁵⁸ involving 238 treated adult male sex offenders and 283 non-treated adults showed that the program significantly reduced sexual recidivism, with a reconviction rate of 8% for treatment completers compared with 22% for those left untreated. Recidivism rates were higher for offenders with male victims and victims under the age of 12, for those whose offending began before adulthood (age 20) and for those who had previous convictions or prison sentences. Reoffenders were also found to have a lower I.Q., to hold attitudes supporting their offending, and to be five times more likely to be judged as having severe literacy problems compared with non reoffenders. The authors also found that the number of previous sexual offences reduced survival times (length of time before reconviction).⁵⁹

56. Department of Corrections New Zealand, *The Effectiveness of Correctional Treatment: the Kia Marama Sex Offender Treatment Programme* (2003) <<http://www.corrections.govt.nz/research/the-effectiveness-of-correctional-treatment/2-kia-marama-sex-offender-treatment-programme.html>> at 27 November 2008.

57. Bakker, L. et al, 'And There Was Light: Evaluating the Kia Marama Treatment Program for New Zealand Sex Offenders Against Children' (Department of Corrections, New Zealand, 1998), 6.

58. Bakker, L. et al, 'And There Was Light: Evaluating the Kia Marama Treatment Program for New Zealand Sex Offenders Against Children' (Department of Corrections, New Zealand, 1998), 18.

59. Bakker, L. et al, 'And There Was Light: Evaluating the Kia Marama Treatment Program for New Zealand Sex Offenders Against Children' (Department of Corrections, New Zealand, 1998), 16.

Te Piriti

D.73 Te Piriti, a prison-based treatment program for male child sex offenders has been operating since 1994. It is closely modelled on the Kia Marama program although it incorporates a far stronger Maori content by combining cognitive-behavioural therapy (CBT) with tikanga Maori, a holistic set of practices based on a Maori world view and understanding of the universe.⁶⁰

D.74 A 2003 study involving 201 convicted child sex offenders conducted by the Psychological Service section of the New Zealand Department of Corrections reported:⁶¹

The Te Piriti program was found to be effective in reducing sexual reconviction for Māori and non-Māori men. The total study sample of all men who completed the program had a 5.47% sexual recidivism rate. This was significantly less than a comparable untreated control group of Māori and non-Māori convicted child sex offenders who had a sexual recidivism rate of 21%.

The majority of the sexual recidivism by men completing the Te Piriti program occurred within the period two to four years after release. Only two offenders committed further sexual offences within the two year period post release.

D.75 This study also found that Maori men who completed the Te Piriti program (4.41%) had lower sexual recidivism rate as compared with Maori who completed the Kia Marama program (13.58%).⁶²

D.76 The promising results of Te Piriti support the notion that treatment ‘programs are more effective in reducing sexual recidivism when the design and implementation are attuned to the cultural background of offenders’.⁶³

60. Department of Corrections New Zealand, *The Effectiveness of Correctional Treatment: the Te Piriti Sex Offender Treatment Programme* (2003) <<http://www.corrections.govt.nz/research/the-effectiveness-of-correctional-treatment/5-the-te-piriti-sex-offender-treatment-programme.html>> at 27 November 2008.

61. Nathan, L., Wilson, N. and Hillman, D., ‘Te Whakakotahitanga: an Evaluation of the Te Piriti Special Treatment Program for Child Sex Offenders in New Zealand’ (Department of Corrections, New Zealand, 2003).

62. Nathan, L., Wilson, N. and Hillman, D., ‘Te Whakakotahitanga: an Evaluation of the Te Piriti Special Treatment Program for Child Sex Offenders in New Zealand’ (Department of Corrections, New Zealand, 2003), 9.

63. Macgregor, S. *Sex Offender Treatment Programs: Effectiveness of Prison and Community Based Programs in Australia and New Zealand*. (2008) Indigenous Justice Clearinghouse 4 <<http://indigenousjustice.gov.au/briefs/brief003.pdf>> at 27 November 2008.

PART D: PROGRAMS TARGETING JUVENILE OFFENDERS - AUSTRALIA

ACT

D.77 There are two relatively new programs in ACT that cater for juvenile sex offenders:

The Young Sex Offender Program (YSOP)

D.78 This program is offered by the ACT Corrective Services Offender Intervention Programs Unit and is designed for sex offenders aged 12 to 24 years. Community safety and victim focus is a major concern of the program. Treatment is delivered in a group-based cognitive behavioural format although family therapy and individual counselling are also available. Referrals are accepted where the sexually abusive behaviours have been reported to the police, although preference is given to offenders following a court conviction.⁶⁴

The ACT Specialised Treatment Options Program (ACTSTOP)

D.79 This service caters for young males and females between the ages of 10 to 17. Involvement in the legal system is not a requirement for entry. Like many other juvenile sex offender programs, the ACTSTOP program is multi-modular and focuses on broader care issues as well such as the roles of family, school and other parties.⁶⁵

Queensland

Griffith Youth Forensic Service (GYFS)

D.80 This program commenced in 2000. Formerly the Griffith Adolescent Forensic Assessment and Treatment Centre, it is Queensland's only assessment and treatment service for adjudicated adolescent sex offenders.⁶⁶

D.81 GYFS accepts clients between the ages 13 to 17 years who have pleaded guilty or who have been found guilty of a sexual offence.⁶⁷

D.82 Although some of its clients are serving detention orders, most of the juveniles in GYFS are on community orders.⁶⁸

64. Flanagan, K., 'Intervention with Sexually Abusive Young People in Australia and New Zealand' (2003) 9 (2) *Journal of Sexual Aggression* 135.

65. Flanagan, K., 'Intervention with Sexually Abusive Young People in Australia and New Zealand' (2003) 9 (2) *Journal of Sexual Aggression* 135.

66. Smallbone, S., Marshall, W. and Wortley, R., *Preventing Sexual Abuse: Evidence, Policy and Practice*. (1st ed, 2008), 112-32.

67. Australian Institute of Criminology, *Griffith Adolescent Forensic Assessment and Treatment Centre* (2001) <<http://www.aic.gov.au/research/openaxis/db/project/273941.html>> at 21 July 2008.

D.83 GYFS is unique in Australia as it is constituted as a State Government/University partnership,⁶⁹ with outreach to rural and remote communities.⁷⁰ It works on the broader risk-need-responsivity framework, with the highest risk adolescents receiving greater treatment priority. Treatment is very much based on cognitive-behavioural with relapse prevention and multisystemic models⁷¹ with the aim of addressing the several factors that support sexual offending.⁷²

D.84 GYFS does not offer group-based intervention. Instead, clients are offered individualized interventions that involve collaboration between individuals in the youth's personal circle and the treatment team. It is thought that placing the serious young offender with other high risk or problem youths (especially older youths who have sexually reoffended) would impede the development of positive peer associations given the peer influence on adolescent attitudes and behaviours.⁷³

South Australia

Mary Street Adolescent Program

D.85 This is an intervention program for adolescents between the ages of 12 to 18 years who have sexually offended.

D.86 Mary Street accepts referrals from parents/caregivers, the young people themselves, the Youth Court, the Family Conference Team, the Children Youth and Family Services (CYFS), as well as from the police, health and welfare workers, and other community groups. Like many other juvenile treatment programs, parents/caregivers participation is encouraged.⁷⁴

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68. Smallbone, S., Marshall, W. and Wortley, R., *Preventing Sexual Abuse: Evidence, Policy and Practice*. (1st ed, 2008), 112-32.
 69. Australian Institute of Criminology, *Griffith Adolescent Forensic Assessment and Treatment Centre* (2001) <<http://www.aic.gov.au/research/openaxis/db/project/273941.html>> at 21 July 2008.
 70. Smallbone, S., Marshall, W. and Wortley, R., *Preventing Sexual Abuse: Evidence, Policy and Practice*. (1st ed, 2008), 112-32.
 71. Smallbone, S., Marshall, W. and Wortley, R., *Preventing Sexual Abuse: Evidence, Policy and Practice*. (1st ed, 2008), 112-32.
 72. Flanagan, K., 'Intervention with Sexually Abusive Young People in Australia and New Zealand' (2003) 9 (2) *Journal of Sexual Aggression* 135.
 73. Smallbone, S., Marshall, W. and Wortley, R., *Preventing Sexual Abuse: Evidence, Policy and Practice*. (1st ed, 2008), 112-32.
 74. Flanagan, K., 'Intervention with Sexually Abusive Young People in Australia and New Zealand' (2003) 9 (2) *Journal of Sexual Aggression* 135.

Victoria

Male Adolescent Program for Positive Sexuality (MAPPS)

D.87 Established in 1993, MAPPS⁷⁵ is Victoria's first offence-specific program to target males aged 10 to 21 years who have been found guilty of a sexual offence and placed on court orders supervised by Juvenile Justice.

D.88 The program attempts to rehabilitate the juvenile in the community. It is based on a cognitive-behavioural group approach with relapse prevention strategies. Family and caregivers are very much involved in the treatment process in recognition of the fact that ongoing community supervision and support maximizes the offender's long-term success in remaining offence-free. Participants attend MAPPS throughout the duration of their court order, averaging about 11 months of weekly sessions.

D.89 An independent evaluation⁷⁶ of MAPPS undertaken in 1998 found that only 5% of the 138 adolescents who completed the program sexually reoffended.⁷⁷

The Sexual Abuse Counselling and Prevention program (SACPP)

D.90 In collaboration with the MAPPS program, the Sexual Abuse Counselling and Prevention program (SACPP) was developed in 1994. The SACPP caters for children and adolescents up to the age of 18 years who have sexually abused and are residents of Metropolitan Melbourne. Referrals are accepted from voluntary and court mandated clients, although it is a requirement that all sexual offences must have been reported to the police, and that the young offenders are separated from their victims until further risk assessment and treatment indicate their suitability to live safely together again.

D.91 Due to growing demand, the Southern Sexual Abuse Counselling and Prevention Program (SSACPP) was set up for residents of Southern Metropolitan Region of Melbourne. Both SACPP and SSACPP adopt a multisystemic approach and include interventions

75. State Government of Victoria, *Male Adolescent Program for Positive Sexuality—MAPPS: Youth Justice* (2008) <<http://www.cyf.vic.gov.au/youth-justice/library/publications/mapps>> at 27 November 2007. See also, Lievore, D., 'Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy' (2004) (Australian Institute of Criminology, 2004), 101.

76. Cunrow, R., Streker, P. and Williams, E., 'Juvenile Justice Evaluation Report: Male Adolescent Program for Positive Sexuality' (State Government of Victoria, Department of Human Services, 1998).

77. Macgregor, S. *Sex Offender Treatment Programs: Effectiveness of Prison and Community Based Programs in Australia and New Zealand*. (2008) Indigenous Justice Clearinghouse 4 <<http://indigenousjustice.gov.au/briefs/brief003.pdf>> at 27 November 2008.

such as risk assessment, individual, family and group counselling. Victim services and community education on prevention of sexual abuse are included in SACPP and SSACPP extended services.⁷⁸

Western Australia

Safecare Young People's Program (SYPP)

D.92 This is an integrated treatment service in Perth for adolescents aged 12 to 18 years who have committed intra-familial sexual abuse. With a focus on family intervention and emphasis on child protection, SYPP works with the young people and their families during a six week assessment phase to address issues of sexually abusive behaviours, childhood trauma, cognitive distortions, education, victim empathy, healthy sexuality, and further risk and relapse prevention plans.⁷⁹

D.93 SYPP works on a premise that is consistent with family risk assessment models whereby 'the adolescent risk of re-offending is judged in the context of the strengths of the family in relation to future provision of safety for the victim'.⁸⁰

PART E: PROGRAMS TARGETING JUVENILE OFFENDERS – OTHER JURISDICTIONS

Canada

Counterpoint House—Edmonton

D.94 Counterpoint House is a residential treatment program run by the Alberta Mental Health Board directed at adolescent sex offenders. This program shares the same philosophy and approach as the Phoenix Program and its main goals include reducing adolescent sex offender recidivism, promoting mental health, and facilitating the reintegration of offenders into the community.⁸¹ Offenders are required to participate in a day program, community outings, and also part-time or full-time work. Therapy provided at Counterpoint house is delivered via cognitive behavioural therapy, psychotherapy, and skills therapy. A minimum stay of six months is required.

78. Flanagan, K., 'Intervention with Sexually Abusive Young People in Australia and New Zealand' (2003) 9 (2) *Journal of Sexual Aggression* 135.

79. Flanagan, K., 'Intervention with Sexually Abusive Young People in Australia and New Zealand' (2003) 9 (2) *Journal of Sexual Aggression* 135, 143.

80. Grant, J., Thorton, J. and Chamarette, C., 'Residential placement of intra-familial adolescent sex offenders' (Report No 315, Australian Institute of Criminology, 2006).

81. John Howard Society of Alberta, *Sex Offender Treatment Programs* (2002) <<http://www.johnhoward.ab.ca/PUB/respaper/treatm02.htm>> at 27 November 2008.

SAFE-T Program

D.95 The Sexual Abuse, Family Education and Treatment (SAFE-T) program is a community-based program that provides sexual abuse support to child victims of incest and their families, children with sexual behaviour problems and their families, and adolescent offenders and their families.

D.96 The program accepts both male and female clients. Individual treatment plans are developed after clinical and psychometric assessments and are reviewed every four to six months.⁸² A cognitive-behavioural and relapse prevention approach is used for sex offender treatment made up of group, individual, and family therapy. The program also addresses denial and accountability, victim empathy, sexual attitudes, and deviant sexual arousal.⁸³

D.97 An evaluation study found that relative to the comparison group, adolescent sex offenders who completed the SAFE-T program showed a 72% reduction in sexual recidivism. There was also a 41% reduction in violent nonsexual recidivism and a 59% reduction in non-violent offending.⁸⁴

New Zealand

D.98 Currently New Zealand has nine specialist community-based treatment programs for adolescents who sexually offend, including the SAFE, WellStop and STOP mentioned above.⁸⁵ These programs are generally open to those aged 10 to 18 years and include specialist services for female juveniles, adolescents with intellectual disabilities and developmental delay, as well as children aged 10 to 12 years who demonstrate sexually abusive behaviours.⁸⁶ The majority of participants are regarded as presenting a medium to high risk of sexual re-offending. Low risk offenders are usually referred for individual or family counselling instead. Typically, treatment lasts for up to two years and referrals are accepted from the Department of

82. Worling, J. and Curwen, T., 'Adolescent sex offender recidivism: Success of specialised treatment and implications for risk prediction.' (2000) 24 *Child Abuse and Neglect* 965.

83. Worling, J. and Curwen, T., 'Adolescent sex offender recidivism: Success of specialised treatment and implications for risk prediction.' (2000) 24 *Child Abuse and Neglect* 965.

84. Worling, J. and Curwen, T., 'Adolescent sex offender recidivism: Success of specialised treatment and implications for risk prediction.' (2000) 24 *Child Abuse and Neglect* 965.

85. Lambie, I., 'Getting it Right: An Evaluation of New Zealand Community Treatment Programs for Adolescents Who Sexually Offend.' (Summary Report, Centre for Social Research and Evaluation, Ministry of Social Development New Zealand, 2007) 17.

86. Safe Network Incorporated, *Child Treatment Programme* (2008) SAFE Network. <<http://www.safenz.org/child.htm>> at 8 August 2008.

Child, Youth and Family (CYF), the courts, police, family and individuals themselves.⁸⁷

D.99 A 2007 evaluation of SAFE (Auckland), WellStop (Wellington) and STOP (Christchurch), which sampled 682 adolescents, comprising male and female youths, those with special learning needs and children below the age of 13 years, found that:

- the risk of sexual re-offending was lowest in youths who successfully completed treatment (2%) compared with those who dropped out (10%) or received no treatment (6%);
- non-completion of the program was associated with the highest risk of sexual and non-sexual re-offending;
- older youths were more likely to drop out of treatment; and
- analysis of three psychological measures—Child Behaviour Checklist⁸⁸, Youth Self-Report⁸⁹ and Millon Adolescent Clinical Inventory⁹⁰—indicated that treatment reduced behavioural and psychological problems.⁹¹

Te Poutama Arahi Rangatahi (TPAR)

D.100 Opened in 1999 in Christchurch, TPAR is a national residential treatment program that caters for high risk, sexually abusive

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87. Lambie, I., 'Getting it Right: An Evaluation of New Zealand Community Treatment Programs for Adolescents Who Sexually Offend.' (Summary Report, Centre for Social Research and Evaluation, Ministry of Social Development New Zealand, 2007).
88. The Child Behaviour Checklist (CBCL) is a 113-item instrument that records the behavioural problems and competencies of children aged 4 to 16, as rated by their parents, teachers or others who knows the child well. See Achenbach, T. and Edelbrock, C., *Manual for the Child Behaviour Checklist and Revised Child Behaviour Profile* (1983) <<http://www.injuryresearch.bc.ca/Publications/Repository/Child%20Behavior%20Checklist.pdf>> at 8 August 2008.
89. The Youth Self-Report (YSR) is a 20-item self-report for youths aged 11 to 18 that measures aggression and related constructs. See Achenbach, T. M. *Manual for the Youth Self-Report and 1991 profile*. (1991) University of Vermont, Department of Psychiatry <[http://vinst.umdj.edu/VAID/TestReport.asp? Code=YSR](http://vinst.umdj.edu/VAID/TestReport.asp?Code=YSR)> at 28 November 2008.
90. The Millon Adolescent Clinical Inventory (MACI) is a 160-item self-report designed to measure adolescent personality patterns and psychopathology. See Millon T., *The Million Adolescent Clinical Inventory (MACI)* (1993) Institute for Advanced Studies in Personology and Psychopathology <[http://www.millon.net/instruments/ MACI.htm](http://www.millon.net/instruments/MACI.htm)> at 8 August 2008. Cf. Amato, J., Cornell, D. and Fan, X., 'Adolescent Psychopathy: Factor Structure and Correspondence with the Millon Adolescent Clinical Inventory' (2008) 35 *Criminal Justice and Behavior* 294.
91. Lambie, I., *Getting It Right: An Evaluation of New Zealand Community Treatment Programs for Adolescents Who Sexually Offend Summary Report* (2007), 7.

adolescent males aged between 12 and 17 years who are usually not suitable to be treated in the community. The main aims of the program are to enhance positive life outcomes for this group and to equip them with safety plans and adaptive life skills for community reintegration.⁹²

D.101 Referrals into TPAR must be from the Department of Child, Youth and Family Services (CYF) and it is a requirement that participants be under the custody/guardianship of the Director General of Child Youth and Family and assessed by community-based service providers (eg, SAFE and STOP). Youths who have been sentenced to a term of imprisonment or have a history of violence or a learning disability are excluded.⁹³

D.102 Each cycle of TPAR lasts between 18 months to two years and consists of group and individual therapy sessions.⁹⁴

D.103 An evaluation of TPAR on 41 youths who participated in the program from August 1999 to June 2006 concluded that the program is successful in the treatment of adolescent sex offenders with only three participants reconvicted of a sexual offence after leaving the residence. Participants also reported achievements in terms of vocational success, anger management, interpersonal and social skills, and educational advancements. Maori participants also benefited from the Maori component of TPAR.⁹⁵

92. Child, Youth and Family, Government of New Zealand, *Evaluation of Te Poutama Arahi Rangatahi—Key Facts: A Review of the Residential Treatment Program for Adolescent Sex offenders* (2007) <http://www.cyf.govt.nz/documents/key_facts_te_poutama_arahi_rangatahi.pdf> at 28 November 2008.

93. Kingi, V. and Robertson, J., *Evaluation of the Te Poutama Arahi Rangatahi Residential Treatment Programme for Adolescent Males—Final Report* (2007).

94. Kingi, V. and Robertson, J., *Evaluation of the Te Poutama Arahi Rangatahi Residential Treatment Programme for Adolescent Males—Final Report* (2007).

95. Child, Youth and Family, Government of New Zealand, *Evaluation of Te Poutama Arahi Rangatahi—Key Facts. A Review of the Residential Treatment Program for Adolescent Sex offenders* (2007) <http://www.cyf.govt.nz/documents/key_facts_te_poutama_arahi_rangatahi.pdf> at 28 November 2008.

PART F: PROGRAMS TARGETING OFFENDERS WITH COGNITIVE IMPAIRMENT – AUSTRALIA

Queensland

D.104 Queensland Corrective Services has stated that its five mainstream sex offender treatment programs (noted above) are ‘responsive to the needs of sex offenders with lower levels of cognitive functioning’. However, it conceded that for some sex offenders with lower intellectual functioning, sexual education, living skills interventions, and reintegration support programs are more appropriate than the typical programs that are based on criminogenic needs.⁹⁶

Victoria

Statewide Forensic Service (SFS)

D.105 This is a forensic disability service that aims to reduce dangerous antisocial behaviour of some people with cognitive impairment and to promote prosocial, adaptive behaviours that will facilitate community living. The Service co-facilitates a range of treatment programs and services that address offending behaviour.⁹⁷

D.106 The Residential Program is a secure residential service that consists of the Intensive Residential Treatment Program (IRTP) and the Long Term Residential Program (LTRP). The IRTP is a short-term treatment program with the goal of returning clients to the community with the necessary living skills. The LTRP is limited to offenders who are unable to return to the community due to their behaviours.⁹⁸

D.107 Sex offenders⁹⁹ who satisfy the eligibility criteria outlined above are able to be assessed for intake to the programs.

96. Queensland Corrective Services, ‘Assessment, Management and Supervision of Sex Offenders in Queensland’ (Information Paper, Queensland Government, 2006).

97. Department of Human Services, State Government of Victoria, *Statewide Forensic Service: Policy and Guidelines* (2008) Statewide Forensic Service <http://www.dhs.vic.gov.au/data/assets/pdf_file/0008/152783/sfs.pdf> at 28 November 2008 and Holland, S. et al, ‘Intellectual Disability in the Victorian Prison System: Characteristics of Prisoners with an Intellectual Disability Released from Prison in 2003–2006’ (Research Paper No 2, Department of Justice, State Government of Victoria, 2007).

98. Department of Human Services, State Government of Victoria, *Statewide Forensic Service: Policy and Guidelines* (2008) Statewide Forensic Service <http://www.dhs.vic.gov.au/data/assets/pdf_file/0008/152783/sfs.pdf> at 28 November 2008.

99. For example, sexual penetrators or perpetrators of serious indecent assault.

The Joint Treatment Program (JRT)

D.108 This comprises a 35-bed unit at Port Phillip Prison, which is a private maximum security prison for male prisoners.¹⁰⁰ The Program is jointly delivered by the SFS (Department of Human Services), Port Phillip Prison (GSL (Australia) Pty Ltd), and Corrections Victoria (Department of Justice). In its therapeutic approach the JRT utilizes positive peer culture to address the offending behaviour and social skills deficits and to promote prosocial behaviour in sentenced male prisoners with a cognitive impairment.

D.109 The Program has an offence-specific, customised program for sex offenders with a cognitive impairment and also offers generic programs such as art therapy, education, and skills deficits programs.¹⁰¹

Western Australia

Sex Offender Treatment Unit (SOTU)

D.110 This unit of the Department of Justice offers treatment programs for sex offenders with a cognitive impairment. The Intellectually Disabled Program addresses social skills, sexuality, relationships, victim empathy and includes relapse prevention methods, delivered in a simplified version. Each group usually comprises six to eight medium-risk offenders with low levels of intellectual functioning.¹⁰²

D.111 A community-based Intellectually Disabled Program has the same content as the custody-based program. Participants, who are sex offenders with a cognitive impairment living in the Perth area, meet for three hours per week for six months.¹⁰³

Reasoning and Rehabilitation Cognitive Skills Program

D.112 This is offered to offenders who deny their sexual offence or refuse to participate in sex offender treatment programs. The generic

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100. Marlborough Unit, Port Phillip Prison, State Government of Victoria, *The Joint Treatment Program* (2008) <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/eba957059fc801d/Joint_Treatment_Program_.pdf> at 28 November 2008.
101. Marlborough Unit, Port Phillip Prison, State Government of Victoria, *The Joint Treatment Program* (2008) <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/eba957059fc801d/Joint_Treatment_Program_.pdf> at 28 November 2008.
102. Lievore, D., 'Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy' (2004) (Australian Institute of Criminology, 2004), 87.
103. Lievore, D., 'Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy' (2004) (Australian Institute of Criminology, 2004), 87.

program runs for 78 hours and ‘provides participants with the insights and skills to accept responsibility for their offending behaviour, allowing them to move into the sex offender program’.¹⁰⁴

PART G: PROGRAMS TARGETING OFFENDERS WITH COGNITIVE IMPAIRMENT – OTHER JURISDICTIONS

Canada

Opportunities for Independence Inc.

D.113 This non-profit organisation provides support and programs for offenders with a cognitive impairment. The organisation’s support for adults include residential treatment centres that provide 24-hour monitoring on-site, community-based support programs, adaptive skills support and intensive needs support. A specific program for sex offenders that provides cognitive-behavioural therapy and helps individuals reintegrate into the community is offered.

Treatment Foster Care (TFC)

D.114 This is an alternative to residential treatment and incarceration offered by the same organisation that places adolescent offenders in a foster home in the community where they are monitored and supported by a family. It is designed for intellectually disabled offenders who have chronic problems with antisocial behaviour, emotional disturbances, and criminal activity.

D.115 The offenders have access to all treatment facilities within the organisation while they are in foster care. Access to an Aboriginal elder to provide traditional guidance and counselling is provided as well as access to a traditional Sharing Circle and regular sweat lodges. Sessions are individualised and are culturally sensitive to the client.

D.116 There are four requirements for eligibility into any of the programs provided by the organisation:¹⁰⁵

- the client must be amenable to treatment;
- the prognosis for change must be reasonable;
- the client must be in actual or potential conflict with the law; and
- the client must be suitable for a community placement.

104. Lievore, D., ‘Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy’ (2004) (Australian Institute of Criminology, 2004), 88.

105. Opportunities for Independence Incorporated, *Opportunities for Independence: A Community Based Treatment Alternative* (2008) <<http://www.ofi.ca/>> at 7 July 2008.

D.117 There is no specific criteria excluding sex offenders who otherwise satisfy the above criteria, although offenders who “possess recent histories of violent offences or offences that would place others at extreme risk”¹⁰⁶ will not be accepted into the residential program.

D.118 If accepted, appropriate programs are provided based on the psychological, medical, and psychiatric assessments and vocational and life skills of the client.

New Zealand

D.119 The two main community-based treatment program in New Zealand—WellSTOP (Wellington) and SAFE (Auckland)—cater for both adult and juvenile sex offenders with a cognitive impairment. The details of these programs have been discussed earlier.

¹⁰⁶ Opportunities for Independence Inc, *Referral and Admission* (2008) <<http://www.ofii.ca/referral.html>> at 11 December 2008.

E. Submissions

- Submission 1 – Women’s Electoral Lobby (NSW)
- Submission 2 – New South W ales Department of Community Services
- Submission 3 – Professor B. McSherry (Monash University)
- Submission 4 – NSW Ombudsman
- Submission 5 – The Chief Magistrate of the Local Court
- Submission 6 – New Zealand Ministry of Justice

- Submission 7 – Department of Corrections; Community Probation & Psychological Services (New Zealand)
- Submission 8 – New South Wales Council of Civil Liberties
- Submission 9 – Department of Aging Disability and Home Care
- Submission 10 – Department of Justice, Government of South Australia
- Submission 11 – Central and Eastern Sydney Sexual Assault Service and Northern Sydney Sexual Assault Service
- Submission 12 – New South Wales Director of Public Prosecutions
- Submission 13 – Aboriginal Legal Service (NSW/ACT)
- Submission 14 – Ministry for Police New South Wales
- Submission 15 – NSW Department of Juvenile Justice
- Submission 16 – Public Defenders Office New South Wales
- Submission 17 – Legal Aid New South Wales
- Submission 18 – Minister of Justice and Attorney General of Canada
- Submission 19 – Bravehearts
- Submission 20 – NSW Department of Corrective Services
- Submission 21 – NSW Children’s Guardian
- Submission 22 – NSW Department of Corrective Services – supplementary No 1

Submission 23 – NSW Department of Juvenile Justice –
supplementary No 1

Submission 24 – The Law Society of New South Wales

Submission 25 – NSW Department of Corrective Services –
supplementary No 2

Submission 26 – Public Defenders Office New South Wales –
supplementary No 1

F. Consultations

APPENDIX F: CONSULTATIONS

Aboriginal Justice Advisory Council

Terry Chenery, Executive Officer, Aboriginal Justice Advisory Council (AJAC)

Department of Justice, Victoria

Annie Tinney, Acting Assistant Director, Criminal Law Policy

Legal Aid Commission of NSW

Janet Witmer, Solicitor, Prisoners Legal Service

NSW Attorney Generals' Department

Bernhard Ripperger, Manager, Legal Services Branch

Brendan Thomas, Assistant Director General

Mandy Young, Manager, Domestic and Family Violence

NSW Department of Corrective Services

Mark Adams, Acting Director Offender Programs Unit

Simon Corben, Data Manager, Corporate Research Evaluation and Statistics Branch

Luke Grant, Assistant Commissioner, Offender Services & Programs

Jason Hainsworth, Research Officer, Corporate Research Evaluation and Statistics Branch

Jarrold Letch, Production Support Officer, Offenders Information Management System (OIMS)

Margaret Parmeter, Acting Executive Director, Statewide Administration of Sentences and Orders

Jayson Ware, Statewide Clinical Coordinator Sex Offender Programs

NSW State Parole Authority

Paul Byrnes, Director and Secretary

Office of the Director of Public Prosecutions

Phillip Ingram, Prosecutor

Johanna Pheils, Assistant Solicitor (Legal)

Public Defender's Office

Andrew Haesler, Public Defender

Commonwealth Department of Public Prosecutions

Karen Twigg, Legal and Practice Management Branch

Sentencing Guidelines Council, UK

Bee Ezete, Sentencing Guidelines Secretariat

Consultations with individuals

Professor William L Marshall B Psych MSc PhD, Emeritus Professor of Psychology and Psychiatry at Queen's University and Director of Rockwood Psychological Services, Canada

Prof. Patrick Keyzer, Deputy Dean (Students & Curriculum), Faculty of LawBond University

Magistrate David Heilpern, Downing Centre Local Court

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'Sarkozy acts after paedophile is given Viagra', *The Independent* (online), 21 August 2007 <<http://www.independent.co.uk>>.

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- CUBIT [6.8]–[6.16]; [9.11]; [9.82]; [9.87]; [9.90]; [9.94]; [9.111]; [10.27]–[10.29]; [10.34]; [11.60]; [D.2]
- effectiveness of [6.12]–[6.19]
- **definition** [6.2]
- **other jurisdictions**
 - Canada
 - generally [D.12]–[D.28]
 - targeting specific population groups
 - indigenous offenders [D.63]–[D.69]
 - juvenile offenders [D.94]–[D.97]
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 - indigenous offenders [D.70]–[D.76]
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