Sentencing Council
Attorney General & Justice

High-Risk Violent Offenders

Sentencing and Post-Custody Management Options

A report by the NSW Sentencing Council

May 2012

NSW Sentencing Council

www.lawlink.nsw.gov.au/sentencingcouncil
Phone: 02 8061 9333
Email: sentencingcouncil@agd.nsw.gov.au
GPO Box 6
SYDNEY NSW 2001

Copyright permissions

© New South Wales Sentencing Council, Sydney, 2012

You may copy, distribute, display, download and otherwise freely deal with this work for any purpose, provided that you attribute the owner. However, you must obtain permission if you wish to (a) charge others for access to the work (other than at cost), (b) include the work in advertising or a product for sale, or (c) modify the work.

Disclaimers

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

This document has been prepared by the NSW Sentencing Council for general information purposes and while every care has been taken in relation to its accuracy, no warranty is given or implied. Recipients should obtain their own independent advice before making any decisions that rely on this information.

This publication deals with the law at the time it was first published and may not necessarily represent the current law.

Translating and Interpreter Service

If you need an interpreter ring 131 450 and ask the operator to contact us on the above number.

For alternative formats (audio tape, electronic or Braille versions) of this publication contact the NSW Sentencing Council or Diversity Services:

email: diversityservices@agd.nsw.gov.au,
phone: 02 8688 7507
fax: 02 8688 9626
TTY: 02 8688 7733 for people who have a speech or hearing impairment.

ISBN 978-1-921590-98-6 (Print)
978-1-921590-97-9 (Online)

TABLE OF CONTENTS

CONTRIBUTORS ..... **iv**
TABLE OF ACRONYMS ..... **v**
RECOMMENDATIONS ..... **vi**

1. Introduction

Terms of reference **1**
Background to the review **1**
Terminology **2**
'Serious violent offenders' 2
'High-risk violent offenders' 2
'Sentencing or Post-Custody Management Options' 2
The Council's approach **3**

2. Background Issues

Introduction **4**
Sentencing principle **6**
Definition of HRVO **7**
'Serious Offenders' – statutory definition 8
High security, extreme high security and extreme high risk restricted inmates 9
Former forensic patients 9
HRVO—The Council's interpretation 10
Can we define a HRVO cohort? **11**
Defining HRVOs based on commission of a specified violent offence 17
Defining HRVOs based on repeat offending 19
Defining HRVOs based on sentence length 19
Defining HRVOs based on risk 20
Risk assessment **20**
Methods for measuring risk of violence 21
Limitations of risk assessment—risk prediction v risk management 24
Timing of risk assessment 26
Expertise in utilising risk assessment tools 27
Potential size of the HRVO group **29**

3. The Current NSW Model for Managing HRVOs

Introduction **33**
Crimes (Serious Sex Offenders) Act 2006 ..... **34**
Life sentences in NSW and mandatory life sentences for murder 35
Habitual criminal legislation 41
Gradation in sentence or disproportionate sentencing for repeat offenders 44
Protection or prohibition orders 45
Sentencing of high-risk violent offenders who have a mental health or cognitive impairment **48**
Mental Health Legislation 50
In-custody treatment of violent offenders **57**

Current in-custody treatment programs in NSW 57
Serious Offenders Review Council (SORC) 61
Parole 61

4. Schemes in Other Jurisdictions Aimed at Public Protection

Introduction 66
Statutory encroachment on the principle of proportionality 66
Indefinite sentencing schemes 67
Victoria 69
Queensland 72
Northern Territory 74
South Australia 75
Tasmania 78
Western Australia 79
England and Wales 81
Scotland 85
New Zealand 89
Canada 90
Disproportionate sentencing 92
Continuing detention and extended supervision 96
Introduction 96
Legislative objects and purposes 96
Who may apply for an order, when and where 97
Preliminary stages in establishing 'dangerousness' 97
Establishing the grounds for final orders 98
Effect of detention orders 105
Effect of supervision orders 105
Preventive Detention for the purpose of preventing a terrorist act 108
Release on license schemes 109
New South Wales 109
Australian Capital Territory 110
Commonwealth 112
South Australia 114
England and Wales 116
Control or prohibition orders 116
Orders aimed at interpersonal violence including domestic violence 117
Orders aimed at the protection of Children 118
Orders aimed at public protection 119

5. Options for Reform and Recommendations

Introduction 123
Preliminary matters 123
Terminology 124
Identifying the gap in the existing framework in NSW: is there a need for a SPCMO in NSW? 124
The HRVO cohort - previous attempt to classify Dangerous Offenders in NSW 125
Defining the cohort for the purposes of any scheme 126
Minimum safeguards applicable to any SPCMO 128

Support structures required for a SPCMO in NSW 129
Options for a SPCMO for HRVOs in NSW 131
Option 1: Introduce a continuing detention and/or extended supervision scheme for HRVOs .. 131
Option 2: Introduce an indefinite detention scheme for HRVOs 134
Option 3: Introduce a scheme permitting the imposition of a disproportionate sentence for HRVOs 136
Option 4: Introduce a scheme based on the lifelong restriction model that exists in Scotland... 138
Option 5: Introduce a scheme for prohibition or control orders for HRVOs 140
The Council's preferred SPCMO 141
Additional reform options 142
Improve existing treatment / rehabilitation options for HRVOs 143
Response to HRVOs with mental health or cognitive impairments 145
Reform or Repeal of Habitual Criminals Act 146
Introduce parole in relation to life sentences 148

Appendices

APPENDIX A: LIST OF SUBMISSIONS 155
APPENDIX B: EXTRACTS OF LEGISLATION 156

CONTRIBUTORS

The Council

Hon Jerrold Cripps QC, Chairperson

Hon James Wood AO QC, Deputy Chairperson

His Honour Acting Judge Paul Cloran

Mr David Hudson APM, NSW Police

Mr Lloyd Babb SC, Office of the Director of Public Prosecutions

Mr Mark Ierace SC, Public Defenders Office

Mr Nicholas Cowdery AM QC

Professor Megan Davis, Indigenous Law Centre, University of NSW

Mr Howard Brown OAM, Victims of Crime Assistance League

Mr Ken Marslew AM, Enough is Enough Anti-Violence Movement

Ms Martha Jabour, Homicide Victims Support Group

Ms Karin Abrams, Community representative

Mr John Hubby, Juvenile Justice NSW[1]

Ms Penny Musgrave, Department of Attorney General and Justice

Professor David Tait, University of Western Sydney

The Council also acknowledges the valuable contribution of Mr Luke Grant, Corrective Services NSW

Officers Of The Council

Executive Officer	Sarah Waladan
Policy and Research Officer	Bridget O'Keefe
Legal Intern	Emily Kerr

1. Resigned 30 March 2012.

TABLE OF ACRONYMS

Acronym	Definition
ALRC	Australian Law Reform Commission
BOCSAR	Bureau of Crime Statistics and Research
CSNSW	Corrective Services NSW
CSPA	*Crimes (Sentencing Procedure) Act 1999* (NSW)
CSSOA	*Crimes (Serious Sex Offenders) Act 2006* (NSW)
DAGJ	Department of Attorney General and Justice
DG	Director General
DPP	Director of Public Prosecutions
EHRRI	Extreme High Risk Restricted Inmate
EHSI	Extreme High Security Inmate
HRVO	High Risk Violent Offender
HSI	High Security Inmate
IPP	Imprisonment for Public Protection
MAPPA	Multi-Agency Public Protection Arrangements
MHA	*Mental Health Act 2007* (NSW)
MHFPA	*Mental Health (Forensic Provisions) Act 1990* (NSW)
MHRT	Mental Health Review Tribunal
NGMI	Not Guilty on the ground of Mental Illness
NPP	Non-Parole Period
NSW LRC	NSW Law Reform Commission
OLR	Order for Lifelong Restriction
RMA	Risk Management Authority
SAB	Sentence Administration Board
SORC	Serious Offenders Review Council
SPA	State Parole Authority
SPCMO	Sentencing or Post-Custody Management Option
SPJ	Structured Professional Judgement
VOO	Violent Offender Order

RECOMMENDATIONS

Recommendation 1

Any sentencing or post-custody management option should apply a two stage process to defining high-risk violent offenders, defining them as offenders who:

a) are convicted of a serious indictable offence that involves the use of, attempted use of, or shows a propensity towards, serious interpersonal violence; and

b) have been assessed as presenting a high risk of violent re-offending in accordance with the most accurate risk-assessment tools available at the time of assessment, in conjunction with an individual case-by-case clinical assessment.

Recommendation 2

a) Any SPCMO for HRVOs should:

- be subject to periodic review;

- be subject to review on application by the offender, at any time, on the basis that as a result of a change in circumstances, the offender is no longer a HRVO;

- form part of a broader management framework for HRVOs, which includes targeted rehabilitation.

b) Any legislation implementing a SPCMO should be subject to a requirement that it be reviewed as soon as possible after 3 years of operation.

Recommendation 3

a) The Government should introduce legislation whereby State Government agencies are required to:

- cooperate with other agencies to provide appropriate services to HRVOs subject to community supervision orders; and

- share information with other agencies to facilitate such support;

and such a scheme should be extended to offenders managed under the *Crimes (Serious Sex Offenders) Act 2006* (NSW).

b) As part of any new sentencing or post-custody management option for high-risk violent offenders, an independent risk-management body should be established, to facilitate and regulate best-practice in relation to risk-assessment and risk-management.

Recommendation 4

The Government should introduce a continuing detention and extended supervision scheme for high-risk violent offenders, subject to the safeguards and support structures outlined in this Report.

Recommendation 5

a) An independent review of VOTP should be conducted to assess whether it effectively targets the diverse therapeutic needs of HRVOs, and whether it is sufficiently accessible to those who may benefit from it, and if not, how it should be reformed or what other programs or resources should be introduced in order for the therapeutic needs of HRVOs to be met.

b) In-custody treatment programs for HRVOs should be expanded to cater for all HRVOs, including women and offenders with mental or cognitive impairments.

c) BOCSAR should review and monitor the grant of parole to gauge trends in relation to parole eligibility and post-release conduct of serious violent offenders.

Recommendation 6

The *Habitual Criminals Act 1957* (NSW) should be repealed.

Recommendation 7

a) The *Crimes (Sentencing Procedure) Act 1999* (NSW) should be amended so as to make it clear that, subject to (d) below, the court can, from the commencement of that amendment, impose a life sentence for any offence that attracts life as a maximum sentence and specify in respect of that sentence, a non-parole period.

b) The exclusion of life sentences from the general requirement to set a non-parole period under s 54 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should be removed.

c) Section 44(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should be amended so as to exclude life sentences from its reach.

d) Provision should be made for the court in appropriate circumstances, including where required by s 19B of the *Crimes Act*, s 61 of the CSPA, or otherwise by law, to impose a 'whole of life sentence', that is, a life sentence without the option of release on parole.

e) The offences for which a life sentence may be imposed should not be expanded.

1. Introduction

Terms of reference **1**
Background to the review **1**
Terminology **2**
'Serious violent offenders' 2
'High-risk violent offenders' 2
'Sentencing or Post-Custody Management Options' 2
The Council's approach **3**

Terms of reference

1.1 On 30 December 2010, the Attorney General requested that the Council provide advice on the most appropriate way of responding to risks posed by serious violent offenders, in accordance with the following terms of reference:

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

Background to the review

1.2 In April 2010, in line with a direction from the Premier of NSW, Corrective Services NSW (CSNSW) undertook an audit of all serious offenders in custody who were under the management of the Serious Offenders Review Council (SORC).[1] The Audit was intended to identify offenders who persistently refused to engage in rehabilitation; and to help determine whether a continuing detention scheme should be implemented in relation to serious violent offenders.[2]

1.3 The Audit was ordered in conjunction with a media release by the then Premier,[3] which indicated an intention to expand to violent offenders the provisions of the *Crimes (Serious Sex Offenders) Act 2006* (NSW) (CSSOA), which allow for

1. Corrective Services NSW, *Serious Violent Offender Audit* (2010).
2. K Keneally, *State to audit worst of the worst*, Media Release (11 April 2010).
3. K Keneally, *State to audit worst of the worst*, Media Release (11 April 2010).

continuing detention or extended supervision of certain sexual offenders beyond the expiration of their sentence.[4]

1.4 The Audit occurred contemporaneously with the Department of Attorney General and Justice's (DAGJ) review of the CSSOA,[5] with the intention that the results of the Audit would be reported in that review.[6] Having considered the findings of the Audit, DAGJ concluded that further investigation was required in relation to options for post-sentence management of serious violent offenders. It recommended that the issue be referred to the NSW Sentencing Council.[7]

1.5 That recommendation formed the basis for the current referral to the Council.

Terminology

'Serious violent offenders'

1.6 The Council's terms of reference refer to 'serious violent offenders'. The term 'Serious Offender' is given a specific legislative meaning for the purpose of the *Crimes (Administration of Sentences) Act 1999* (NSW). The offenders who are the subject of this review represent a much narrower cohort than those included in the definition of 'Serious Offender', for the purposes of that Act.

'High-risk violent offenders'

1.7 In order to avoid confusion with the term 'Serious Offender', the Council has adopted the terminology of 'high-risk violent offender' (HRVO), to reflect the fact that the terms of reference anticipate the possibility of introducing sentencing or post-custody management options in relation to those violent offenders who are assessed as posing a serious and ongoing risk to the safety of the community upon their release.

1.8 Chapter 2 discusses the terms 'Serious Offender' and HRVO in more detail.

'Sentencing or Post-Custody Management Options'

1.9 The Council's terms of reference require consideration of both options for sentencing and options for post-custody management, which might be adopted in NSW in relation to HRVOs. Details of the various schemes that fall within these terms are included in Chapter 4, but briefly, the types of schemes considered by the Council fall within three categories:

- *sentencing* schemes that enable an indefinite sentence to be imposed;

4. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 9, 17.
5. Department of Attorney General and Justice (Criminal Law Review Division), *Review of the Crimes (Serious Sex Offenders) Act 2006 (NSW)*, (2010).
6. K Keneally, *State to audit worst of the worst*, Media Release (11 April 2010).
7. Department of Attorney General and Justice (Criminal Law Review Division), Review *of the Crimes (Serious Sex Offenders) Act 2006 (NSW)*, (2010), 100.

- *sentencing* schemes that enable a disproportionate sentence to be imposed;
- *post-custody management* schemes that enable a further detention or supervision order to be made towards the end of a term of imprisonment. These are not sentencing schemes, as orders are not made as part of the sentencing exercise, but rather at a later date when the potential release of the offender from prison raises concerns about public safety.

1.10 For ease of reference, options for dealing with HRVOs are collectively referred to throughout the report as 'sentencing or post-custody management options' (SPCMOs).

The Council's approach

1.11 The Council published a consultation paper in May 2011, seeking submissions to the questions that were identified. The Council also conducted a number of consultations. A list of stakeholders who have had input to this review, either through written submissions or via consultation, is included at Appendix A.

1.12 In Chapter 2 of this report, we provide a background to the issues raised in the review, and address Terms of Reference 2 and 5. The Chapter considers the permitted objectives of sentencing and the rules that have been set down in case law regarding proportionality and the use of preventive detention. It goes on to outline the difficulties involved in providing a satisfactory definition of the cohort of people who might potentially qualify as HRVOs, and the limitations of tools used to assess the risk that these offenders will engage in future conduct that might endanger the public.

1.13 In Chapter 3 of the report we outline the existing mechanisms in NSW for dealing with HRVOs, including sentencing options and treatment and management options, in response to Terms of Reference 2 and 3.

1.14 In Chapter 4 we examine the SPCMOs utilised in other Commonwealth jurisdictions.

1.15 In Chapter 5, we identify and make recommendations in relation to the possible options for sentencing reform in relation to HRVOs, in the course of which the arguments for and against their adoption are considered.

2. Background issues

Introduction **4**
Sentencing principle **6**
Definition of HRVO **7**
'Serious Offenders' – statutory definition 8
High security, extreme high security and extreme high risk restricted inmates 9
Former forensic patients 9
HRVO—The Council's interpretation 10
Can we define a HRVO cohort? **11**
Defining HRVOs based on commission of a specified violent offence 17
Defining HRVOs based on repeat offending 19
Defining HRVOs based on sentence length 19
Defining HRVOs based on risk 20
Risk assessment **20**
Methods for measuring risk of violence 21
Unstructured professional opinion 21
Actuarial risk assessment tools 21
Structured Professional Judgment model (SPJ) and criminogenic needs identification 22
Limitations of risk assessment—risk prediction v risk management 24
Timing of risk assessment 26
Expertise in utilising risk assessment tools 27
Potential size of the HRVO group **29**

Introduction

2.1 The sentencing exercise involves consideration of the appropriate punishment for a particular offence. In assessing the appropriate punishment, courts consider a number of sentencing objectives, including prevention of crime through deterrence and protection of the community through incapacitation of the offender.[1] However, each of the accepted rationales for punishment is given equal priority and it is left to the sentencing judge to determine the importance of each factor in a particular case. As stated in *Veen v The Queen (No 2)*, the objectives of sentencing 'overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case'.[2]

2.2 The rule of law dictates that, in sentencing, the relevant consideration is the punishment of criminal *conduct*, not the punishment of criminal *types*.[3] That is, people should be punished for what they have done, not for what they are like.

2.3 In contrast, a person's individual characteristics are highly relevant in the context of non-criminal incapacitation. Compulsory detention under mental health legislation is the most obvious example of a civil system that detains individuals on the basis of

1. The purposes of sentencing are set out in the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.
2. (1988) 164 CLR 465, at 476.
3. B McSherry, 'Indefinite and preventive detention legislation: From caution to an open door' (2005) 29 *Criminal Law Journal* 94, 107.

personal characteristics that are considered to be likely to result in serious harm to the individual or to others.[4]

2.4 The current reference arises from an increasing desire of the community to prevent serious crime by applying concepts of dangerousness, harm and risk that are found in systems of civil detention, to the criminal justice system. This desire has, over the past two decades, led to an increasing number of 'preventive detention' schemes being legislated in Australia.[5] These schemes detain individuals not as punishment for an act they have done, but because their personal traits may make them 'dangerous' if they were at large in the community.[6]

2.5 Although these schemes operate within the sphere of the criminal justice system, they are not compatible with traditional notions of 'sentencing', because:

- they elevate certain objectives of punishment to a position of prominence, notably, protection of the public and crime prevention;
- they impose periods of incapacitation on offenders which are not referable to the crime that has been committed;
- they often involve a term of incarceration in a custodial environment, despite there having been no additional conviction;
- they enable people to be detained on a lesser standard of proof than the criminal standard, 'beyond reasonable doubt'.

2.6 They are likewise incompatible with notions of civil commitment, because, despite being framed in non-punitive terms, the effect of an order for preventive detention is that an offender remains in a custodial setting. That is, 'the deprivation of liberty through imprisonment does not magically change from punishment to rehabilitation because a section of a statute says so'.[7]

2.7 Undoubtedly though, there are individuals nearing the end of a sentence of imprisonment who have made no attempt to rehabilitate themselves while incarcerated; or who have made it quite clear to authorities that they intend to re-offend, and re-offend seriously, upon their release. It is therefore legitimate to ask whether the public has a right to protection from such individuals, beyond that which can be achieved through the application of ordinary sentencing principles.

2.8 As McSherry and Keyzer have noted:

> The main challenge for policymakers is to find a midway point between assuming that all people in a certain group … are dangerous in the sense that they are at a high probability of harming others and assuming that no one, even

4. Civil detention in a mental health facility in NSW is regulated by the *Mental Health Act 2007* (NSW).
5. Notably the continuing detention and extended supervision schemes for sex offenders outlined in Chapter 4.
6. B McSherry, 'Indefinite and preventive detention legislation: From caution to an open door' (2005) 29 *Criminal Law Journal* 94, 107–108.
7. B McSherry, 'Indefinite and preventive detention legislation: From caution to an open door' (2005) 29 *Criminal Law Journal* 94, 110.

> those who have declared their intentions of committing crimes, are a danger to others.[8]

2.9 An appropriate policy response to the issue of HRVOs requires consideration of many issues, as is evident from the remainder of this report. However, there are two preliminary issues which are of utmost importance in determining whether any form of SPCMO for HRVOs should be adopted in NSW.

2.10 The first, foreshadowed above, relates to the permitted objectives of sentencing, as specified in s 3A of the CSPA, and the sentencing principle of proportionality.

2.11 The second factor relates to the practical difficulty in providing a satisfactory definition of the cohort of persons who might potentially qualify as HRVOs, and in assessing their risk of engaging in future conduct that might endanger the public.

2.12 The question of who qualifies as a HRVO might arise at either the sentencing stage, during incarceration, or at the time of expected release. Both the definition and the risk assessment strategies used to identify HRVOs may vary depending on the stage at which risk is being assessed.

2.13 This Chapter provides an introductory exploration of the above issues.

Sentencing principle

2.14 The introduction of any form of sentence for HRVOs must take into account several fundamental principles of sentencing law.

2.15 The permitted purposes for which a court may impose a sentence on an offender are set out in s 3A of the CSPA, as follows:

> (a) to ensure that the offender is adequately punished for the offence,
>
> (b) to prevent crime by deterring the offender and other persons from committing similar offences,
>
> (c) to protect the community from the offender,
>
> (d) to promote the rehabilitation of the offender,
>
> (e) to make the offender accountable for his or her actions,
>
> (f) to denounce the conduct of the offender,
>
> (g) to recognise the harm done to the victim of the crime and the community.

2.16 It is a fundamental principle of sentencing that the sentence imposed on an offender should never exceed or be less than what is proportionate to the gravity of the crime in question.[9]

---

8. B McSherry and P Keyzer, '"Dangerous people": An overview', in B McSherry and P Keyzer (Eds), *Dangerous People* (2011) 3, 5.
9. *R v Scott* [2005] NSWCCA 152; *Veen v The Queen* (No 2) (1988) 164 CLR 465.

2.17 However, both common and statutory law establish that the purpose of protection of the community is a valid consideration in sentencing.[10]

2.18 The majority judgment in *Veen v The Queen (No 2)* considered the conflict between the desire to protect the community through a lengthy sentence on the one hand, and the need for proportionality on the other, resolving the issue in the following terms:

> The principle of proportionality is now firmly established in this country. It was the unanimous view of the Court in *Veen (No 1)* that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection to society from the risk of recidivism on the part of the offender.
>
> …
>
> It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.[11]

2.19 As a matter of general sentencing principle, preventive detention aimed at protecting the community is prohibited. As set out in Chapter 4, however, there are a number of SPCMOs that create statutory exceptions to the requirement for proportionality in sentencing.

Definition of HRVO

2.20 This report reviews responses to the management of HRVOs who present a high risk of dangerousness to the community without detention or supervision. In formulating any response, it is necessary to identify when and how that assessment will be made. It is not justified to undertake such an inquiry in relation to every offender, so there is a question as to how the cohort should be limited.

2.21 The second question that arises is determining the risk that an offender presents. In broad terms, these two questions apply to responses at sentence and those imposed post-sentence, however, the approach to these questions may differ, depending on the stage at which they are asked.

2.22 As set out below, the *Crimes (Administration of Sentences) Act 1999* and *Crimes (Administration of Sentences) Regulation 2008* provide various statutory definitions for serious offenders in NSW.

2.23 Classification or designation of an offender as a 'Serious Offender', a 'high security inmate' (HSI), an 'extreme high security inmate' (EHSI), or an 'extreme high risk restricted inmate' (EHRRI),[12] determines how the offender will be managed while in

10. *Veen v The Queen (No 2)* (1988)164 CLR 465; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(c).
11. *Veen v The Queen (No 2)* (1988) 164 CLR 465, at 472–473.
12. See paragraph 2.29 below for further information in relation to these designations.

custody. However, such a classification, in itself, says little about the risk the offender poses to community safety at some future point in time.

2.24 In defining who qualifies as a HRVO for the purposes of legislation designed to secure public safety, it is important to distinguish between the past conduct of offenders—that is, the conduct that has led to their incarceration—and their likely future conduct. In discussing SPCMOs, the term HRVO needs to be limited to those offenders who present a *future* risk to the community.

2.25 The existing statutory definitions in NSW are set out below.

'Serious Offenders' – statutory definition

2.26 The *Crimes (Administration of Sentences) Act 1999* (NSW) defines a 'Serious Offender' as:

> (a) an offender who is serving a sentence for life, or
>
> (b) an offender who is serving a sentence for which a non-parole period has been set in accordance with Schedule 1 to the *Crimes (Sentencing Procedure) Act 1999* [a redetermined life sentence], or
>
> (c) an offender who is serving a sentence (or one of a series of sentences of imprisonment) where the term of the sentence (or the combined terms of all of the sentences in the series) is such that the offender will not become eligible for release from custody, including release on parole, until he or she has spent at least 12 years in custody, or
>
> (d) an offender who is for the time being required to be managed as a serious offender in accordance with a decision of the sentencing court, the Parole Authority or the Commissioner, or
>
> (e) an offender who has been convicted of murder and who is subject to a sentence in respect of the conviction, or
>
> (f) an offender who belongs to a class of persons prescribed by the regulations to be serious offenders for the purposes of this definition.[13]

2.27 The Act also establishes SORC,[14] which has among its functions the provision of advice in relation to the security classification, placement, case management and release of serious offenders.

2.28 The Regulations prescribe a number of additional categories of 'Serious Offenders':

- inmates who, in the opinion of the Commissioner of CSNSW (the Commissioner), represent a special risk to national security (for example, because of a perceived risk that they may engage in, or incite other persons to engage in, terrorist activities) and should at all times be confined in special

13. *Crimes (Administration of Sentences) Act 1999* (NSW) s 3.
14. *Crimes (Administration of Sentences) Act 1999* (NSW) s 195.

facilities within a secure physical barrier that includes towers or electronic surveillance equipment;[15]

- inmates who have been designated as EHRRI by the Commissioner (see below).[16]

High security, extreme high security and extreme high risk restricted inmates

2.29 Regardless of whether or not an inmate comes within the definition of a 'Serious Offender', the Commissioner has the power to designate an offender as a HSI, an EHSI, or an EHRRI. These provisions are aimed at managing the conduct of an offender in the custodial environment.

2.30 Clause 25 of the *Crimes (Administration of Sentences) Regulation 2008* (NSW) sets out the requirements in relation to these designations. For HSI designation, the Commissioner must form an opinion that an inmate is:

(a) a danger to other people, or

(b) a threat to good order and security.[17]

2.31 The test is the same for EHSI designation, except that the danger or threat posed is required to be extreme.[18]

2.32 An inmate who meets the requirements for designation as an EHSI may be designated as an EHRRI if the Commissioner is of the opinion that 'there is a risk that the inmate may engage in, or incite other persons to engage in, activities that constitute a serious threat to the peace, order or good government of the State or any other place'.[19]

Former forensic patients

2.33 At the outset, it should be made clear that cognitive and mental health impairment should not be conflated with concepts of 'dangerousness'. It would be wrong to assert that all people with such impairments are inherently dangerous or generally present a risk to the community. However, some forms of cognitive and mental health impairments have been found to be associated with violent offending,[20] leading to affected persons becoming involved in the criminal justice system. This may result in them being managed as forensic patients, either because at trial they were found not guilty by reason of mental illness (NGMI), or because they were unfit to stand trial and became subject to a qualified finding of guilt following a special

15. These offenders are classified as Category AA (male offenders) and Category 5 (female offenders): *Crimes (Administration of Sentences) Regulation 2008* (NSW), cl 22–23.
16. *Crimes (Administration of Sentences) Regulation 2008* (NSW), cl 25.
17. *Crimes (Administration of Sentences) Regulation 2008* (NSW), cl 25(1).
18. *Crimes (Administration of Sentences) Regulation 2008* (NSW), cl 25(2).
19. *Crimes (Administration of Sentences) Regulation 2008* (NSW), cl 25(2A).
20. J Ogloff and M Davis, 'Assessing Risk for Violence in the Australian Context' in D Chappell & P Wilson (Eds), *Issues in Australian Crime and Criminal Justice* (2005) 294, 308–309.

hearing.[21] Alternatively they may be held as an inmate in a mainstream custodial facility. On exit, however, the options are the same. If they are or later again become mentally ill, they may be subject to detention ordered by the Mental Health Review Tribunal (MHRT). Such detention does not, however, exist for people with a cognitive impairment who, for that reason alone, are a risk to themselves or others. At present in NSW, guardianship orders may be the only option in their case.

2.34 The provisions regulating forensic and civil detention of people with a mental illness in a mental health facility, and their management and release subject to the jurisdiction of the MHRT, are discussed in Chapter 3.

2.35 The position of people with a cognitive or mental health impairment is being considered by the NSW Law Reform Commission (LRC), however, it is reviewed in the context of the present discussion because the violent behaviour that resulted in their detention may have occurred as a direct result of their cognitive or mental health impairment. Following treatment or support in a mental health facility, their impairment may be stabilised so that they no longer pose a danger to the community, with the result that they can be released following an order of the MHRT. Without adequate support and management in the community, however, the impairment that caused them to behave dangerously in the past may deteriorate, to the extent that they again become a high risk to the safety of others.

HRVO—The Council's interpretation

2.36 The above definitions for 'Serious Offender', HSI, EHSI or EHRRI cannot be conflated with the concept of a HRVO. An offender may be managed as a 'Serious Offender', an HSI, an EHSI, or an EHRRI, by virtue of the crime they have committed, the length of their sentence, and/or their behaviour while in custody. However, such an inmate may not present a future risk to the public and so should not be classified as a HRVO, notwithstanding the seriousness of the original offence. This may be the case, for example, if:

- the offence for which the offender is serving a sentence attracts a high penalty, but does not involve any element of personal violence;
- the offender is unlikely to ever be released and therefore has no opportunity to re-offend outside a custodial environment (for example, an offender serving an existing life sentence who is the subject of a non-release recommendation, or an offender subject to a whole of life sentence) or;
- the offender, if released, may be unlikely to re-offend (for example, if the offence giving rise to the sentence resulted from specific circumstances that no longer exist, or if any relevant criminological need has been suitably addressed while in custody).

2.37 The CSNSW Audit and the DAGJ Review, which preceded this report, made it clear that the concept of a 'serious violent offender' is limited in scope and is not intended

21. *Mental Health (Forensic Provisions) Act 1990* (NSW) Part 2. The criteria for making a finding of unfitness are set out in *R v Presser* [1958] VR 45. For a more detailed discussion of the steps to be taken by the Court and the MHRT when a defendant is unfit for trial, see: NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences*, Consultation Paper 6 (2010).

to apply to every 'Serious Offender' who has committed a violent offence. For example, the CSNSW Audit was focused on:

> **any 'Serious Offender' serving a current custodial sentence in relation to a serious violent crime who is likely to continue posing a serious risk to community safety at the expiration of their sentence.**[22]

2.38 In this Chapter, we give consideration to the difficult but necessary question as to the cohort of offenders who might appropriately be brought within any NSW SPCMO for HRVOs.

Can we define a HRVO cohort?

2.39 The Council's Terms of Reference require it to 'identify the defining characteristics of the cohort of offenders to whom any proposals should apply'.[23]

2.40 In its 1997 briefing paper, the NSW Parliamentary Library Service explained the difficulty in 'defining' the characteristics of a HRVO, as follows:

> The 'dangerous' person with a career of seriously injuring others is relatively rare, and virtually impossible to identify in advance. … [I]n an Australian context … the mental health and behavioural science professions have as yet been unable to demonstrate an effective technology for distinguishing violent offenders who will recidivate from those who will not.[24]

2.41 It was the unanimous view of stakeholders who responded to this question in the Consultation Paper that there was insufficient homogeneity amongst HRVOs to enable the compilation of a set of characteristics held in common by all HRVOs—there is no 'checklist' that would enable violent offenders to be categorised as 'high-risk' or otherwise.[25]

2.42 CSNSW's Audit of violent offenders similarly confirmed that there were not 'sufficient common characteristics [amongst the 14 offenders identified as HRVOs] for them to be considered a single cohort'.[26]

2.43 Sexual offenders are also not a homogenous group, however, unlike HRVOs, they at least share some more easily identified commonalities relating, for example, to:

> the method of offending, the choice of victims, the grooming behaviour, the distortion of relationships, and the eventual abuse of power that such offending entails.[27]

---

22. Corrective Services NSW, *Serious Violent Offender Audit* (2010), 6.
23. Term of Reference 5.
24. NSW Parliamentary Library, *Dangerous Offenders Legislation: An Overview*, Briefing Paper 14/97 (1997), 10.
25. Responses to question 1 of the Council's Consultation Paper: Submissions SVO5, *NSW Young Lawyers*; SVO6, *Justice Action*; SVO9, *Office of the Director of Public Prosecutions*; SVO11, *Law Society of NSW*; SVO13, *NSW Police Association*; SVO15, *Dr Olav Nielssen* 17, 20.
26. Submission SVO20, *Corrective Services NSW*, 9.
27. Department of Attorney General and Justice (Criminal Law Review Division), *Review of the Crimes (Serious Sex Offenders) Act 2006 (NSW)*, (2010), 96.

2.44 These commonalities allow preventive detention schemes for sexual offenders to target clear categories of offending.[28] The lack of such commonalities in HRVOs, however, creates difficulties in creating a scheme which can appropriately target the categories of violent re-offending.

2.45 Notwithstanding, it is clear that any legislative scheme proposed by the Council to deal with HRVOs would require some definition of the class of offenders to which it is to apply.

2.46 As explored in Chapter 4, SPCMOs in other jurisdictions differ in the approach that they take to identifying qualifying offenders. Table 1 below lists schemes existing in Commonwealth jurisdictions specifically designed to deal with HRVOs. The table sets out a summary of factors taken into account in determining which violent offenders the schemes apply to.

28. Department of Attorney General and Justice (Criminal Law Review Division), *Review of the Crimes (Serious Sex Offenders) Act 2006 (NSW)*, (2010), 96.

Table 1: Definitions for HRVOs in other Commonwealth jurisdictions

Jurisdiction	Victoria	Queensland	Northern Territory	South Australia	Tasmania	Western Australia	England & Wales	Scotland	New Zealand	Canada
Legislation	Sentencing Act 1991	Penalties and Sentences Act 1992	Sentencing Act 1995	Criminal Law (Sentencing) Act 1988	Sentencing Act 1997	Sentencing Act 1995	Criminal Justice Act 2003	Criminal Procedure (Scotland) Act 1995	Sentencing Act 2002	Criminal Code 1985
Type of scheme	Indefinite sentence	Indefinite sentence	Indefinite sentence	Negation of parole eligibility order on life sentences for murder	Indefinite sentence	Indefinite sentence	Imprisonment for public protection (indefinite sentence)	Order for Lifelong Restriction (indefinite sentence)	Preventive detention (indefinite sentence)	Dangerous Offender declaration (incl indeterminate detention)
Relevant cohort	▪ adults; ▪ not required to be detained for assessment, diagnosis or treatment of a mental illness; ▪ convicted of a listed serious offence; ▪ who are a serious danger to the community.	▪ adults; ▪ convicted of a listed offence; ▪ not covered by forensic mental health provisions; ▪ who are a serious danger to the community.	▪ offenders convicted of a qualifying or listed violent offence; ▪ who are a serious danger to the community.	▪ offenders convicted of murder committed in the course of deliberately and systematically inflicting severe pain; or in conjunction with a serious sexual offence; ▪ who are a serious danger to the community or a member of it.	▪ people over 17; ▪ convicted of a crime involving violence or an element of violence; ▪ with a previous conviction for a crime involving violence or an element of violence; ▪ who are declared to be a dangerous criminal.	▪ adults and young offenders who turn 18 prior to sentencing; ▪ convicted of an indictable offence; ▪ sentenced to a custodial term with no parole eligibility order; ▪ who would be a danger to society upon release	▪ adults and young people; ▪ convicted of a listed and qualifying offence attracting a custodial term of at least 10 years; ▪ not required to be sentenced to life imprisonment; ▪ who pose a significant risk of serious harm; ▪ who have a prior conviction for a specified offence; or who would be sentenced to a minimum non-parole period of at least 2 years for the instant offence	▪ offenders convicted of (or who, in the view of the court, have a propensity to commit), a listed sexual offence, or a qualifying violent offence; ▪ who are likely to seriously endanger the lives or well-being of the public;	▪ adults; ▪ convicted of a listed offence; ▪ who are likely to commit another qualifying sexual or violent offence if released at the sentence expiry date.	▪ offenders convicted of a listed and qualifying offence ▪ who constitute a threat to the life, safety or physical or mental well-being of others; OR ▪ (for certain sexual offences), who have shown a failure to control sexual impulses and a likelihood of causing injury, pain or other evil to other persons through such a failure in the future.

High-Risk Violent Offenders

Jurisdiction	Victoria	Queensland	Northern Territory	South Australia	Tasmania	Western Australia	England & Wales	Scotland	New Zealand	Canada
Risk criteria	Serious danger to the community based on: ▪ character, past history, age, health or mental condition; AND ▪ nature and gravity of serious offence; AND ▪ any special circumstances	Serious danger to the community based on ▪ antecedents, character, age, health or mental condition; AND ▪ severity of qualifying offence; AND ▪ any special circumstances	Serious danger to the community based on ▪ antecedents, character, age, health or mental condition; AND ▪ severity of violent offence; AND ▪ any special circumstances	Serious danger to the community or a member of it.	The declaration is warranted for the protection of the public.	Danger to society, or part of it, because of: ▪ the exceptional seriousness of the offence; ▪ the risk that the offender will commit other indictable offences; ▪ the character of the offender and in particular — ▪ any psychological, psychiatric or medical condition affecting the offender; ▪ the number and seriousness of other offences of which the offender has been convicted; ▪ any other exceptional circumstances.	The court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences. Serious harm means death or serious personal injury, whether physical or psychological	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, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large.	The person is likely to commit another qualifying sexual or violent offence if the person is released at the sentence expiry date of any other sentence that the court is able to impose.	A likelihood of causing injury, pain or other evil through a failure in the future to control sexual impulses, OR A threat to the life, safety or physical or mental well-being of other persons on the basis of ▪ pattern of repetitive behaviour showing failure to restrain behaviour and likelihood of causing death, injury or severe psychological damage; OR ▪ pattern of persistent aggressive behaviour showing indifference to reasonably foreseeable consequences of behaviour; OR behaviour of such a brutal nature as to compel a conclusion that future behaviour is unlikely to be inhibited by normal standards of behavioural restraint.

Jurisdiction	Victoria	Queensland	Northern Territory	South Australia	Tasmania	Western Australia	England & Wales	Scotland	New Zealand	Canada
How risk to be determined	Court *must* have regard to: ▪ whether nature of serious offence is exceptional; ▪ transcripts of any proceedings against offender for a serious offence; ▪ any medical, psychiatric or other relevant report; ▪ the risk of serious danger to members of the community if an indefinite sentence were not imposed; ▪ the need to protect members of the community from this risk Court *may* have regard to: ▪ anything else that it thinks fit.	Court *must* order Corrections to prepare an assessment report Court *must* have regard to: ▪ whether the nature of the offence is exceptional; ▪ the offender's antecedents, age and character; ▪ any medical, psychiatric, prison or other relevant report; ▪ the risk of serious harm to members of the community if an indefinite sentence were not imposed; ▪ the need to protect members of the community from this risk; Court *may* have regard to: ▪ anything else it thinks fit	Court *may* order production of medical, psychiatric, prison and other reports as the Court considers relevant Court *must* have regard to: ▪ whether the nature of the offence is exceptional; ▪ the offender's antecedents, age and character; ▪ any medical, psychiatric, prison or other relevant report in relation to the offender; ▪ the risk of serious physical harm to members of the community if an indefinite sentence were not imposed; ▪ the need to protect members of the community from that risk; Court *may* have regard to: ▪ anything else it thinks fit	Court *may* have regard to: ▪ sentencing remarks; ▪ contrition shown by the offender; ▪ behaviour of offender in prison; ▪ rehabilitation in prison; ▪ cooperation with the Parole Board; ▪ reports or submissions by the Parole Board, the offender, the DPP or the Commissioner for Victims' Rights; ▪ the likelihood of the offender committing another murder, a serious sex offence or a serious violent offence; ▪ reductions to the non-parole period during sentencing; ▪ character, antecedents, age, means and physical or mental condition of the offender; ▪ probable circumstances of the offender after release; ▪ anything else it thinks fit.	Court *may* have regard to: ▪ the nature and circumstances of the current and past violent crimes; ▪ the offender's antecedents or character; ▪ any medical or other opinion; ▪ any other matter that the judge considers relevant.	Court is bound by any guideline judgment; Court *may* have regard to any other evidence as it sees fit.	Court *must* take into account all such information as is available to it about the nature and circumstances of the offence. Court *may* have regard to: ▪ the nature and circumstances of any other offences of which the offender has been convicted by a court anywhere in the world, ▪ any pattern of behaviour of which the current or prior offences forms part, and ▪ any information about the offender which is before it.	Court *must* order production of assessment report by an accredited assessor. ▪ The assessor may take into account any previous conviction of the convicted person and any allegation that the person has engaged in criminal behaviour (whether or not that behaviour resulted in prosecution and acquittal ▪ The assessor must have regard to such standards and guidelines as are issued by the Risk Management Authority in determining whether the risk is high, medium or low	Court *must* take into account reports from at least 2 appropriate health assessors about the likelihood of the offender committing a further qualifying sexual or violent offence Court *must* take into account ▪ any pattern of serious offending disclosed by the offender's history; and ▪ the seriousness of the harm to the community caused by the offending; and ▪ information indicating a tendency to commit serious offences in future; and ▪ 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	Prosecution *must* make application for assessment of offender by an expert for use as evidence. Court must be satisfied of threat to the life, safety or physical or mental well-being of others

High-Risk Violent Offenders

Jurisdiction	Victoria	Queensland	Northern Territory	South Australia	Tasmania	Western Australia	England & Wales	Scotland	New Zealand	Canada
Qualifying *violent* offences	▪ murder; ▪ manslaughter; ▪ child homicide; ▪ defensive homicide; ▪ causing serious injury intentionally; ▪ threats to kill; ▪ rape; ▪ assault with intent to rape; ▪ incest; ▪ sexual penetration of child under the age of 16; ▪ persistent sexual abuse of child under the age of 16; ▪ abduction or detention; ▪ abduction of child under the age of 16; ▪ kidnapping; ▪ armed robbery; ▪ an offence of conspiracy to commit, incitement to commit or attempting to commit, any of the above offences.	▪ demands with menaces upon agencies of government ▪ unlawful sodomy ▪ indecent treatment of children under 16 ▪ owner etc. permitting abuse of children on premises ▪ carnal knowledge with or of children under 16 ▪ abuse of persons with an impairment of the mind ▪ procuring young person etc. for carnal knowledge ▪ procuring sexual acts by coercion etc. ▪ taking child for immoral purposes ▪ conspiracy to defile ▪ incest ▪ maintaining a sexual relationship with a child ▪ murder ▪ manslaughter ▪ attempt to murder ▪ conspiring to murder ▪ aiding suicide ▪ killing unborn child ▪ disabling in order to commit indictable offence ▪ counselling, procuring, attempting or conspiring to commit any of the above offences.	▪ a crime that involves the use, or attempted use, of violence against a person; and for which an offender may be sentenced to imprisonment for life; ▪ sexual assault or gross indecency without consent or against a child.	▪ murder; ▪ conspiracy to murder; ▪ aiding, abetting, counselling or procuring the commission of murder.	▪ a crime involving violence or an element of violence	▪ indictable offences	There are 75 listed violent offences and a further 88 sexual offences listed.	▪ any offence (other than an offence which is a sexual offence within the meaning of this section) inferring personal violence. ▪ an offence which endangers life; or ▪ 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 one of the above offences. ▪ Murder is not included as it attracts a life sentence.	▪ manslaughter ▪ attempt to murder counselling or attempting to procure murder ▪ conspiracy to murder ▪ accessory after the fact to murder ▪ wounding with intent to cause GBH ▪ injuring with intent ▪ aggravated wounding or injury ▪ discharging firearm or doing dangerous act with intent ▪ using any firearm against law enforcement officer, etc ▪ commission of crime with firearm ▪ acid throwing ▪ abduction for purposes of marriage or sexual connection ▪ kidnapping ▪ young person under 16 cannot consent to being taken away or detained ▪ abduction of young person under 16 ▪ robbery ▪ aggravated robbery ▪ assault with intent to rob	The Act contains 56 'designated offences' and 'primary designated offences' To qualify, as a 'serious personal injury offence' the designated offence must also be: ▪ an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving the use or attempted use of violence against another person, or 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 ▪ sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, or aggravated sexual assault (or attempts to commit any of these offences).

2.47 It can be seen from the above that one or more of the following mechanisms are generally used to determine who should be covered by SPCMOs:

- specifying a list of qualifying offences or classes of offences, and limiting application of the scheme to offenders who have been convicted of such an offence;[37]
- limiting the application of the scheme to repeat offenders who have in the past committed a qualifying offence;[38]
- confining application of the scheme to those cases where a court would have imposed a sentence of at least a specified duration, had it not utilised the sentencing option(s) available under the scheme;[39]
- requiring the court, at the time of sentencing or subsequently, to consider an assessment of future risk and limiting the scheme to those offenders considered likely to be dangerous on release.[40]

2.48 A scheme may use one or more of the above criteria to determine eligibility.

Defining HRVOs based on commission of a specified violent offence

2.49 Defining the applicability of any potential HRVO sentencing model on the basis of a list of scheduled or qualifying criminal offences, can result in either net-widening at one end of the spectrum, or inadequate coverage at the other. Such an approach:

i) may result in offenders who have committed a scheduled offence but who pose no ongoing threat to community safety being classified as HRVOs, resulting in wasted resources and arbitrary sentencing; and

ii) may result in offenders who pose an extreme risk to community safety, but who have committed an offence other than a qualifying offence, not being captured by the HRVO definition, resulting in systemic failure of the scheme.[41]

2.50 Framing a scheme in terms that would capture a broad range of offences that might have some connection with serious violent offending, risks being unwieldy and could result in broader reach than is justified. As pointed out in the DAGJ review:

> the experience of England and Wales in relation to the 96 offences that can qualify someone for a (sic) an IPP sentence, and the extreme numbers of prisoners now serving such sentences, should be heeded. Any preventative

37. For example, *Sentencing Act 1991* (Vic) ss 3, 18A; *Penalties and Sentences Act 1992* (Qld) ss 162; *Sentencing Act 1995* (NT) s 65; *Criminal Law (Sentencing) Act 1988* (SA) s 23.
38. For example, *Sentencing Act 1997* (Tas) s 19; *Criminal Law (Sentencing Act) 1988* (SA) s 20B; *Criminal Code 1985 (Canada)* s 753.
39. For example, *Criminal Justice Act 2003* (UK) s 224(2).
40. For example, *Sentencing Act 1995* (WA) s 98; *Criminal Procedure (Scotland) Act 1995*, s 210 F. See also the various sex offender schemes in Australia which rely on risk assessment, set out in Chapter 4.
41. The Victorian Sentencing Advisory Council made a similar observation: *High-Risk Offenders: Post-Sentence Supervision and Detention*, Discussion and Options Paper (2007), 14.

> detention model should only be reserved for a very small, but truly dangerous, group of offenders.[42]

2.51 Including a broad range of offences would require stringent safeguards so as not to impose a level of scrutiny and oversight on offenders that would be completely disproportionate to the seriousness of their offence, particularly where they have not demonstrated any past propensity to commit offences of that type.

2.52 The observations of Gummow J in *Fardon*, in relation to the Queensland legislation that permits the continued detention of certain sexual offenders,[43] are of particular relevance:

> the factum upon which the attraction of the Act turns is the status of the appellant to an application by the Attorney-General as a "prisoner" (s 5(6)) who is presently detained in custody upon conviction for an offence of the character of those offences of which there is said to be an unacceptable risk of commission if the appellant be released from custody. To this degree there remains a connection between the operation of the Act and anterior conviction by the usual judicial processes. A legislative choice of a factum of some other character may well have imperilled the validity of [the scheme].[44]

2.53 On the other hand, a scheme that was limited to offenders who have committed the most serious of offences is difficult to justify as a crime prevention tool, both for under-inclusivity (since an offender may be considered extremely dangerous for reasons other than the commission of a very serious offence), and for over-inclusivity (since very serious offenders cannot universally be considered 'high-risk').

2.54 Re-offending rates for the most serious offence, murder, for example, are low:

> Perhaps contrary to public sentiment, convicted murderers are extremely unlikely to be convicted of a second homicide even without treatment. They are also comparatively unlikely to be convicted of a further offence of any kind. NSW data published in 1995 showed that 13% of offenders convicted for homicide were re-imprisoned for lesser offences within 2 years of release (this figure was only 8% for those for whom it was a first imprisonment). Only 2% of this sample returned for a violent offence and none of these offenders were re-convicted for another homicide.[45]

2.55 The Council considers that there needs to be a nexus between offending behaviour and future risk, but does not regard the adoption of a list of qualifying offences alone as the way to achieve such a nexus.

2.56 The Council's preferred approach is discussed in Chapter 5.

---

42. Department of Attorney General and Justice (Criminal Law Review Division), *Review of the Crimes (Serious Sex Offenders) Act 2006* (NSW), (2010), 97.
43. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).
44. *Fardon v Attorney-General* (Qld) [2004] HCA 46, (2004) 223 CLR 575, at [108].
45. J Ware, C Cieplucha and D Matsuo, 'The Violent Offenders Therapeutic Programme (VOTP) – Rationale and effectiveness' (2011) 6 *Australasian Journal of Correctional Staff Development*, 2.

Defining HRVOs based on repeat offending

2.57 It was submitted by Dr Olav Nielssen that programs providing special attention to HRVOs should be targeted towards individuals who have 'a history of repeated and irrational violent behaviour, rather than violence for obvious gain such as obtaining money for drugs or gaining acceptance in a violent peer group'.[46]

2.58 While the majority of the offenders identified as high-risk offenders in the CSNSW Audit had a history of serious violent offending, this was not universal. One offender had no criminal history prior to the index offence; and another had a small number of less-serious convictions that were dealt with using non-custodial options.

2.59 Criminal history is a matter that undoubtedly is relevant to an assessment of an offender's risk of re-offending, as well as to that person's entry into appropriate rehabilitation and behaviour modification programs. A requirement that an offender be considered high-risk, on the basis of a risk assessment, must necessarily incorporate consideration of prior serious offences.

2.60 However, that cannot be the sole or exhaustive criterion. A legislative requirement that an offender must have been convicted of prior serious offences in order to be considered a HRVO risks:

- excluding a first-time offender who commits a heinous crime (for example, a terrorist related bombing) who, as a consequence of the circumstances and nature of its commission, obviously presents as highly dangerous; and
- excluding an offender who has committed prior serious offences but has not been caught.

Defining HRVOs based on sentence length

2.61 Limiting the scope of a SPCMO to offenders who, but for the scheme, would have received a lengthy determinate sentence has some attraction, since an order that requires ongoing detention, supervision or monitoring after the expiry of that sentence is more likely to constitute a proportionate response to the index offence.

2.62 On the other hand the CSNSW Audit highlights the fact that HRVOs do not only commit serious violent offences. A high-risk offender with a history of violent offending may be before a court in relation to relatively low-level offending. For example, three offenders identified as high-risk by CSNSW were serving sentences of 5 years or less at the time of the Audit, but had a history of serious violent offending.[47]

2.63 It seems preferable that an offender's classification as a HRVO should be determined at the time of sentencing, not by sentence length alone, but by reference to the then identifiable concerns in relation to that person's long-term risk to the public, where all the relevant evidence is before the court.

2.64 The Council is concerned that setting a minimum term as a prerequisite for access to a SPCMO for HRVOs may have a net-widening effect, whereby sentences for

46. Submission SVO15, *Dr Olav Nielssen*, 2.
47. Corrective Services NSW, *Serious Violent Offender Audit* (2010), Appendix 2.

offenders, who present as dangerous but are being sentenced for a low-level offence, are increased in order to meet the requirements for any such scheme.

Defining HRVOs based on risk

2.65 The Council's views on the breadth of any SPCMO accord with judicial decisions in relation to preventive detention, that is, such a scheme should apply only in exceptional cases where existing sentencing options are insufficient to protect the public.[48]

2.66 This necessitates an evaluation of whether existing sentencing schemes are in fact sufficient to protect the public and, by extension, to cater for the risk that an individual offender poses to the public.

2.67 In order to limit the reach of HRVO legislation to exceptional cases, it is the Council's view that any SPCMO should include strict risk criteria that would require the court to be satisfied that an offender would be highly likely to commit an act of serious violence against another member of the public if released at the end of the sentence that would otherwise be appropriate for the index case.

2.68 Categorisation of an offender as a HRVO must depend on the propensity of that particular individual to commit a serious violent offence in the future. This can only be considered on a case-by-case basis, by looking at the factors particular to each individual.

Summary of Council's view

In relation to Term (5) of the Terms of Reference:

The characteristics of HRVOs are too disparate to enable them to be defined in a way that would allow them to be sentenced or managed post-sentence as a single cohort;

HRVOs can only be identified on an individual case-by-case basis using risk assessment tools;

Any SPCMO for HRVOs should only apply to offenders who:

- **are convicted of an offence that has a sufficient nexus with the order made under the SPCMO; and**
- **meet stringent risk criteria that require a court to be satisfied that an offender would be *highly* likely to commit an act of *serious* violence against another member of the public if they were released into the community.**

Risk assessment

2.69 Some factors have been shown to have an association with violent offending; for example, major mental illness, psychopathy; and substance abuse.[49] However,

48. *Buckley v The Queen*[2006] HCA 7, (2006) 224 ALR 46, at [7], [42]; *R v Moffat* [1998] 2 VR 229, at 234.

49. J Ogloff and M Davis, 'Assessing Risk for Violence in the Australian Context' in D Chappell and P Wilson (Eds), *Issues in Australian Crime and Criminal Justice* (2005) 294, 312.

although these characteristics are risk factors for violence, it cannot be determined from their presence alone whether a particular offender who possesses one or more of these characteristics will or will not offend.

2.70 Assessing the nature and likelihood of violent re-offending requires consideration of risk factors that are particular to each individual.

2.71 There are many risk assessment tools utilised by psychologists and psychiatrists to assess risk of violent re-offending. These tools can be broadly grouped into three categories:

- unstructured professional opinion;
- actuarial prediction;
- structured professional judgement/criminogenic need identification tools.

Methods for measuring risk of violence

Unstructured professional opinion

2.72 This method of risk assessment relies on the judgement and experience of the individual clinician performing the risk assessment. This method may be subject to bias of the clinician,[50] or 'impressionistic, subjective and intuitive conclusions'.[51]

2.73 Unstructured clinical judgment does not contain the elements of 'quality control standardization and procedural safeguards to protect against incomplete analysis, arbitrariness and individual bias', which have been identified as necessary elements for an ethical system of clinical evaluation,[52] and it is widely accepted that this method of risk assessment is not as accurate as more structured tools.[53]

Actuarial risk assessment tools

2.74 These tools are generally the result of statistical analysis identifying a list of risk factors linked with offending. Clinicians or other users of the tools assess the existence of the specified risk factors in an individual, before scoring their assessment and comparing that score against the tool's 'scale' to give a final view as to the offender's risk rating.

2.75 The risk rating is a statistical measure. It is based on outcomes for a group of people sharing the characteristics of the offender. So, for example, if an individual is rated as having a 30% risk of offending, that means that 30% of people who have

50. S Sreenivasan, A Frances and L Weinberger, 'Normative versus consequential ethics in sexually violent predator laws: an ethics conundrum for psychiatry' (2010) 38(3) *The Journal of the American Academy of Psychiatry and the Law* 386, 390.
51. Justice Health (NSW), *Clinical Risk Assessment & Management: A Practical Manual for Mental Health Clinicians* (2010), 16.
52. S Sreenivasan, A Frances and L Weinberger, 'Normative versus consequential ethics in sexually violent predator laws: an ethics conundrum for psychiatry' (2010) 38(3) *The Journal of the American Academy of Psychiatry and the Law* 386, 390.
53. R Hanson and K Morton-Bourgon, 'The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies' (2009) 21(1) *Psychological Assessment* 1.

the same risk factors as the individual will offend, based on past figures. The rating says nothing about the propensity of the individual in question to commit an offence and so has little value in deciding whether a particular individual presents an unacceptable risk to the public.[54]

2.76 Actuarial tools are designed to 'predict' risk, not to manage it. The risk factors considered are usually 'static'. Static risk factors are objectively obtainable facts that are not easily changed, such as age and previous offences.[55]

2.77 On the other hand, dynamic risk factors are 'characteristics that are capable of change, and changes on these factors are associated with increased or decreased recidivism risk'.[56]

2.78 Actuarial tools that identify static risks are not particularly useful for designing a plan for risk management, since the risks are not amenable to change through management.[57]

Structured Professional Judgment model (SPJ) and criminogenic needs identification

2.79 As indicated by Ogloff and Davis, in relation to the assessment of risk for violence in Australia:

> the need for formal, structured risk assessment schemes cannot be overemphasized. Not only are such schemes clearly more accurate than unstructured clinical judgment, but an approach that involves a wide range of risk factors, including static and dynamic predictors, is bound to be of particular value in tracking changes in risk between major reviews.[58]

2.80 SPJ based tools for assessing violent risk provide clinicians with a list of factors to guide their evaluation of the offender. They also provide guidance on making a clinical judgement as to risk level.[59] They go further than actuarial tools which merely predict the likelihood of violence, to enable evaluation of factors such as the 'imminence, duration, severity, targets, nature and management' of risk.[60]

---

54. K Gledhill, 'Preventive Sentences and Orders: The Challenges of Due Process' (2011) 1 *Journal of Commonwealth Criminal Law* 78, 86.
55. Justice Health (NSW), *Clinical Risk Assessment & Management: A Practical Manual for Mental Health Clinicians* (2010), 17.
56. R Hanson and K Morton-Bourgon, 'The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies' (2009) 21(1) *Psychological Assessment* 1.
57. Justice Health (NSW), *Clinical Risk Assessment & Management: A Practical Manual for Mental Health Clinicians* (2010), 17.
58. J Ogloff and M Davis, 'Assessing Risk for Violence in the Australian Context' in D Chappell and P Wilson (Eds), Issues *in Australian Crime and Criminal Justice* (2005) 294, at 301.
59. J Ogloff and M Davis, 'Assessing Risk for Violence in the Australian Context' in D Chappell and P Wilson (Eds), *Issues in Australian Crime and Criminal Justice* (2005) 294, at 315.
60. J Ogloff and M Davis, 'Assessing Risk for Violence in the Australian Context' in D Chappell and P Wilson (Eds), *Issues in Australian Crime and Criminal Justice* (2005) 294, at 316.

2.81 SPJ does not rely on numerical probability levels and the decision as to an individual's risk level is made with reference to the degree of intervention required to manage the risk.[61]

2.82 HRC-20 is a commonly used SPJ tool that provides clinicians with a list of 20 risk factors for assessment, including 10 historical factors, 5 clinical factors and 5 risk management factors. It results in a final judgement of low, medium or high risk, based on the rating of each risk factor and the degree of intervention required to manage the identified risks.[62]

2.83 Importantly, advances in the accuracy of risk assessment tools will not be fully actualised unless those applying the tools are suitably qualified. As noted by McSherry:

> While the last two decades have "shown great advances in reshaping the concept of dangerousness", there has been a disappointing lack of improvement in the "abilities of frontline clinical decision makers to make violence risk assessments".[63]

2.84 SPJ tools, particularly when used in the context of a broader risk management scheme, may lead to an improvement in the skills of risk assessors, as has been the case following the creation of Scotland's Risk Management Authority:

> One of the advantages of the Scottish scheme is that it has provided the courts with a more structured approach to high-risk offenders than existed in the past. The creation of the Risk Management Authority to accredit risk assessors and to provide guidelines has led to more consistent practice by mental health and criminal justice professionals on the assessment and management of risk.[64]

2.85 Some tools focus heavily on identifying criminogenic needs, by assessing a wide variety of dynamic factors. A strong needs-based predictor of recidivism among certain offender populations is the LSI-R assessment, which is extensively used in a number of jurisdictions, including NSW.[65]

2.86 The LSI-R assesses 54 items,[66] many of which are dynamic risk factors and determines the needs which are most associated with offending behaviour and require priority interventions.[67] This enables specific targeting of resources to the areas where offenders most need intervention. The heavy focus on criminogenic

---

61. J Ogloff and M Davis, 'Assessing Risk for Violence in the Australian Context' in D Chappell and P Wilson (Eds), *Issues in Australian Crime and Criminal Justice* (2005) 294, at 316.
62. K Douglas and J Ogloff, 'The Impact of Confidence on the Accuracy of Structured Professional and Actuarial Violence Risk Judgements in a sample of Forensic Psychiatric Patients' (2003) 27(6) *Law and Human Behaviour* 573, 578.
63. B McSherrry, *Risk Assessment by Mental Health Professionals and the Prevention of Future Violent Behaviour*, Report for the Criminology Research Council (2002), 11, quoting H Steadman 'From dangerousness to risk assessment of community violence: taking stock at the turn of the century' (2000) 28(3) *Journal of the American Academy of Psychiatry & the Law* 265.
64. B McSherry and P Keyzer, '"Dangerous" people: The Road Ahead for Policy, Prediction and Practice', in B McSherry and P Keyzer (Eds), *Dangerous People* (2011) 251, 253.
65. J Ogloff and M Davis, 'Assessing Risk for Violence in the Australian Context' in D Chappell and P Wilson (Eds), *Issues in Australian Crime and Criminal Justice* (2005) 294, at 318.
66. J Ogloff and M Davis, 'Assessing Risk for Violence in the Australian Context' in D Chappell and P Wilson (Eds), *Issues in Australian Crime and Criminal Justice* (2005) 294, at 317.
67. M Wong, 'The Need Principle: Knowing what to target in offender rehabilitation and how to apply it in corrections' (2012) *Australasian Journal of Correctional Staff Development*.

needs can assist in changing the dynamic risk factors and reducing the probability of offending.[68]

Limitations of risk assessment—risk prediction v risk management

2.87 There are strong opponents to the use of risk assessment in sentencing. Many of the criticisms levelled at risk assessment tools relate to the high rates of 'false positives', that is, assessments where a prediction is made that an offender will be violent and the person does not, in fact, go on to be violent.

2.88 Different types of risk assessment tools have different rates of success in predicting violent risk. Success rates have been the subject of a great deal of empirical research, which we do not attempt to synthesise here. The crucial point for our consideration is that, by any measure, there are substantial numbers of 'false positive' and 'false negative' predictions of risk.[69]

2.89 In preventive detention regimes where risk assessment can form the basis of detention beyond the expiry of a sentence, false positive are viewed as unacceptable because there is no justifiable basis for the detention.

2.90 False positives are common because of the paucity of violent offenders in the community:

> the base rate of violence in many populations is generally so low that is difficult to accurately predict whether one is violence (sic). For an example of the effect of base rates on prediction, imagine being in a room of Australian adults. If you were asked to identify the adults who drink coffee, the task would be easy because most Australian adults drink coffee (that is, the base rate of coffee drinkers is high). Conversely, if you were asked to identify those who do not drink coffee, the task would be prone to failure since so few adults do not drink coffee (that is, the base rate of non-coffee drinkers is low). Thus, for every non-coffee drinker you correctly identified, you would have probably identified many coffee drinkers in error.
>
> The same principle holds true for the prediction of violence.[70]

2.91 It is clear that there are individuals who will present a real risk to public safety if released in the community without supervision, for example:

> If one is dealing with an individual who has committed violent crimes in the past and he indicates he will commit violent crimes when he next gets a chance and is regarded by experience psychiatrists as being very likely to carry out his threats, the probabilities are that one has on one's hands an individual who is likely to be dangerous.[71]

---

68. J Ogloff and M Davis, 'Assessing Risk for Violence in the Australian Context' in D Chappell and P Wilson (Eds), *Issues in Australian Crime and Criminal Justice* (2005) 294, at 317.
69. A Gray, 'Detaining Future Dangerous Offenders: Dangerous Law' (2004) 9(1) *Deakin Law Review* 243, 259.
70. J Ogloff and M Davis, 'Assessing Risk for Violence in the Australian Context' in D Chappell and P Wilson (Eds), *Issues in Australian Crime and Criminal Justice* (2005) 294, at 306.
71. NSW Parliamentary Library, *Dangerous Offenders Legislation: An Overview*, Briefing Paper 14/97 (1997), 11, quoting evidence to the Victorian Social Justice Committee, Social Development Committee, Parliament of Victoria, *Inquiry into Mental Disturbance and Community*

2.92 Despite this, it must be accepted that no system of risk assessment and management will ever prevent 100% of violent recidivism. A system of preventive detention, in particular, does not reduce recidivism if predictions of risk are not infallible, because any offender who is incorrectly assessed as not dangerous will be at large in the community.

2.93 Predicting violent re-offending is particularly difficult because of the above noted diversity amongst HRVOs, and because HRVOs are not generally specialists – they engage in violent behaviour as part of a broader criminal career.[72]

2.94 As McSherry and Keyzer have noted:

> The main challenge for policymakers is to find a midway point between assuming that all people in a certain group … are dangerous in the sense that they are at a high probability of harming others and assuming that no one, even those who have declared their intentions of committing crimes, are a danger to others.[73]

2.95 A further important limitation of risk assessment tools is that they are developed by studying the characteristics of particular samples of individuals. There is no guarantee that those characteristics are common across other samples. As Ogloff and Davis point out, assessment instruments should be validated in each population and sample in which it is intended that they will be used.[74]

2.96 Use of risk assessment tools to identify and manage risk factors present in relation to a particular individual is far less controversial than using such tools as the basis of a prediction of whether the individual will re-offend.[75]

2.97 Certain risk assessment tools are not designed to 'predict' violence, but to identify risk factors, assess the level of risk posed and inform suitable interventions.[76]

2.98 Management of offenders in the community through a risk management plan provides more diversity in available intervention options:

> As well as including the cognitive-behavioural and relapse prevention aspects of treatment that are found in prison programs, community-based programs often last several years and help offenders develop a network of family and friends to help with rehabilitation and with finding essentials such as stable employment. Such treatment may also include classes for offenders' families so that they can learn to recognize the offenders' external risks and triggers, and to reduce the opportunities for recidivism. These maintenance programs provide a continuity

---

Safety: Interim Report: Strategies to deal with persons with persons with severe personality disorder who pose a threat to public safety (1990).

72. The Victorian Sentencing Advisory Council made a similar observation: *High-Risk Offenders: Post-Sentence Supervision and Detention*, Discussion and Options Paper (2007), 20, 22.
73. B McSherry and P Keyzer, '"Dangerous people": An overview', in B McSherry and P Keyzer (Eds), *Dangerous People* (2011) 3, 5.
74. J Ogloff and M Davis, 'Assessing Risk for Violence in the Australian Context' in D Chappell and P Wilson (Eds), *Issues in Australian Crime and Criminal Justice* (2005) 294, at 315.
75. B McSherry and P Keyzer, '"Dangerous" people: The Road Ahead for Policy, Prediction and Practice', in B McSherry and P Keyzer (Eds), *Dangerous People* (2011) 251, p 252.
76. An example is the HCR-20: J Murray and M Thomson, 'Clinical judgement in violence risk assessment' (2010) 1 *Europe's Journal of Psychology* 128, 132.

> of care from prison into the community, and are thought to be essential aspects of effective treatment programs.[77]

2.99 Further, and specifically in relation to violent offenders:

> Community programs control some of the situational factors that can result in violence and makes the prediction of risk less critical in release decisions. Assertive community treatment might be the best practice for ensuring public safety while providing sound clinical care for conditionally released forensic patients.[78]

2.100 However, if a SPCMO was to rely on community treatment programs, the relatively limited quantity of empirical evidence for the effectiveness of violent offender treatment should be borne in mind.[79] Community treatment options must be supported by adequate research funding in order to ensure that programs being implemented are the most effective available and are developed in response to the specific treatment needs of NSW offenders.

2.101 The line between the use of risk management to predict offending and its use to manage risk is a fine one. The Scottish Risk Management Authority describes the importance of the distinction:

> Risk *prediction* involves an assessment that comes up with a 'score' of likely risk of reoffending in an attempt to 'predict' likely future behaviour. Hart and colleagues argue that this is technically impossible when applied to individuals and therefore sets itself up to fail. Risk prediction shows particular limitations regarding estimates of whether someone poses a 'continuing threat to society', even where structured risk assessments are used. … Risk assessment for the purpose of management, on the other hand, is a more dynamic process that takes into account the need for an individualised and responsive risk management process and assists in its development. Risk assessment is only one part of a wider process of risk management. The distinction may be a fine one, but it is important in terms of understanding the purpose of assessments of risk and in working towards the prevention of future offending.[80]

Timing of risk assessment

2.102 As discussed elsewhere in this Report, the choice of whether to assess an offender for risk of future violence at the time of sentencing, or near the conclusion of a term of imprisonment, raises issues in terms of legal principles such as the rule of law, the prohibition on double punishment and proportionality.

2.103 The choice also has practical ramifications for practitioners utilising risk assessment tools.

2.104 The major issue with assessing risk at the time of sentencing is that it requires a high degree of foresight into what might occur at some point, potentially many years into the future. It would be virtually impossible for clinicians assessing risk at the

---

77. Sentencing Advisory Council (Victoria) *High-Risk Offenders: Post-Sentence Supervision and Detention*, Discussion and Options Paper (2007), 27.
78. A Ellis et al 'A survey of the conditionally released forensic patient population in New South Wales' (2010) 18(6) *Australian Psychiatry* 542, 542).
79. Submission SVO20, *Corrective Services NSW*, 8–9.
80. Risk Management Authority (Scotland), *Serious Violent Offenders: Developing a Risk Assessment Framework* (2007), 36.

time of sentencing to predict, with any level of certainty, how an offender might behave many years down the line. However, requiring regular reviews of an offender's risk level, can substantially mitigate this disadvantage.

2.105 Assessing risk when an offender is nearing completion of his or her sentence is also problematic. As pointed out by CSNSW:

> one of the difficulties in risk assessment of an offender who has been in custody for extended periods is that they have had little opportunity to practice skills they have learned in less restrictive environments, and dynamic risk factors such as whether the offender will have supportive social networks post release will not be known.[81]

2.106 It should also be borne in mind that risk assessment tools are developed within certain populations and must be evaluated in other populations before they can be used with any degree of confidence. Little is known about the validity of risk assessment tools when used to assess a population of people who have been detained for many years.[82]

2.107 Neither option for the timing of risk assessment is without fault, which illustrates the necessity for stringent controls on the utilisation of SPCMOs. However, assessing risk at the time of sentencing, backed up by regular reviews of whether a SPCMO remains necessary, would seem to be more consistent with the legal principles listed above.

Expertise in utilising risk assessment tools

2.108 If a SPCMO is adopted in NSW and, as advised above,[83] the reach of the scheme is limited by strict risk criteria, the question arises as to who should determine whether a particular offender comes within those risk criteria.

2.109 A number of risk assessment tools are designed for use, not only by qualified psychologists and psychiatrists, but also by other clinical staff.[84] Notwithstanding this, the Council considers that, given the consequences that may flow from a determination that an offender is a HRVO, it is appropriate that the identification of HRVOs using risk assessment should be undertaken by qualified psychiatrists and psychologists who have particular expertise in dealing with violent offenders.

2.110 There is no evidence to suggest that psychiatrists are better able to predict risk than psychologists. What is important is that the clinician:

> must have knowledge of the area of violence risk assessment (including sexual offending risk where relevant), expertise in individual assessment that includes training and experience in the administration and interpretation of standardised

81. Submission SVO20, *Corrective Services NSW*.
82. J Ogloff and M Davis, 'Assessing Risk for Violence in the Australian Context' in D Chappell and P Wilson (Eds), *Issues in Australian Crime and Criminal Justice* (2005) 294, at 3322.
83. At [2.63]–[2.66].
84. For example, the LSI-R was designed to be administered by clinical and justice personnel, as well as by psychologists and psychiatrists: J Ogloff and M Davis, 'Assessing Risk for Violence in the Australian Context' in D Chappell and P Wilson (Eds), *Issues in Australian Crime and Criminal Justice* (2005) 294, at 317.

tests, and expertise in the assessment and diagnosis of mental disorder (major mental illness and personality disorder).[85]

2.111 Ensuring adequate expertise may require a process of accreditation or selection to a panel. As discussed in Chapter 4, the Risk Management Authority in Scotland has been established, among other things, to accredit risk assessors who undertake risk assessments on offenders subject to an Order for Lifelong Restriction.[86] The competencies required for accreditation include understanding, knowledge of, or ability in the following areas:

- criminal justice;
- risk assessment tools;
- report writing;
- risk formulation;
- information management;
- communication skills;
- multiagency working;
- risk management of offenders; and
- risk assessment processes.[87]

2.112 Although CSNSW has extensive experience in the assessment of risk for violence,[88] the Council considers that it is preferable that risk assessments carried out for the purpose of determining qualification for a SPCMO should be undertaken independently of the corrections system, so as to avoid potential claims of bias and interference by the Executive government in the sentencing process.

2.113 There are further issues raised by treatment providers undertaking risk assessments for the courts. Practitioners involved in treatment of offenders owe a duty of confidentiality to their patients and face an ethical dilemma if asked to report to the court on matters discussed during treatment. Further, patients who are aware that there may be sentencing ramifications to sharing information with their practitioner may withhold information and consequently limit the potential benefit from treatment.[89]

85. J Ogloff and M Davis, 'Assessing Risk for Violence in the Australian Context' in D Chappell and P Wilson (Eds), *Issues in Australian Crime and Criminal Justice* (2005) 294, at 320.

86. See Ch 4 at [4.83]–[4.100].

87. R Darjee and K Russell, 'The Assessment and Sentencing of High-Risk Offenders in Scotland', in B McSherry and P Keyzer (Eds), *Dangerous People* (2011) 217, 219.

88. Staff at CSNSW, including clinical staff trained in the use of assessment tools and qualified psychologists (such as those within the Serious Offenders Assessment Unit), assess inmates for risk of violence at various points during their incarceration. This is an important aspect of planning intervention strategies for particular offenders and determining eligibility for particular treatment and rehabilitation programs: Corrective Services NSW, *Correspondence* (2011).

89. Sentencing Advisory Council (Victoria), *High-Risk Offenders: Post-Sentence Supervision and Detention*, Final Report (2007), 113.

2.114 In its response to Victoria's review of high-risk sex offenders, Forensicare suggested:

> the development of an independent sex offender assessment service that would allow an independent specialist forensic clinician to provide reports to the court. Separating risk assessment from treatment would reduce the possibility that offenders are discouraged by the potential negative legal consequences of disclosure to provide more honest information to the treating clinician.[90]

2.115 The suggestion was made in the context of assessments of sex offenders, but has equal merit in relation to violent offender assessments.

Potential size of the HRVO group

2.116 It is difficult to determine how many people in NSW might qualify as HRVOs under a SPCMO, particularly given that the size of the group may vary substantially depending on the option that is implemented and the definition for HRVO that the option adopts.

2.117 The CSNSW Serious Violent Offender Audit identified 14 inmates who fell within the Terms of Reference for the Audit.[91] However, the Audit considered only inmates who were within 3 years of the expiration of their non-parole period (NPP) and excluded a number of other categories of inmates. As such, while the Audit provides a useful background in relation to the number of HRVOs nearing release from prison, it does not assist in identifying the total number of HRVOs within the NSW criminal justice system.

2.118 Figures from other Australian jurisdictions that have schemes that deal with violent offenders provide little illumination. Table 2 provides a crude estimate of the rate of HRVOs per 100,000 people in each relevant state, based on the number of people serving sentences under the respective HRVO schemes for those states.

90. The Victorian Sentencing Advisory Council made a similar observation: *High-Risk Offenders: Post-Sentence Supervision and Detention*, Discussion and Options Paper (2007), 24.

91. Corrective Services NSW, *Serious Violent Offender Audit* (2010), Executive Summary.

Table 2: Potential rate of HRVO inmates per 100,000 people in other Australian jurisdictions[92]

Jurisdiction	Vic[93]	Qld[94]	NT[95]	Tas[96]	WA[97]
Number of inmates sentenced under relevant scheme[98]	4	5[99]	10	20[100]	51
Total prison population[101]	4,737	5,574	1,269	513	4,648
Imprisonment rate, per 100,000 adult population[102]	108.5	157.8	761.5	130	260.1
Number of HRVO inmates per 100,000 adult population[103]	**0.09**	**0.14**	**6**	**5.07**	**2.85**

2.119 As is evident from the above, the proportion of the population covered by any SPCMO for HRVOs varies greatly, from 0.09 HRVOs per 100,000 people in Victoria to 6 HRVOs per 100,000 people in the Northern Territory.

2.120 Applying these rates to the estimated NSW population,[104] the total number of HRVO inmates at any given time might be expected to range from 7 to 139, although this would depend on the definition of HRVO used, and the spread of serious violent offending throughout Australia.

2.121 The Council has attempted to obtain a more accurate indication of the number of potential HRVOs in NSW by examining re-offending data for offenders who:

92. Note that a number of these schemes also include other serious offenders, as set out in the footnotes below.
93. Victoria operates an indefinite sentencing scheme for certain serious violent and sexual offences: *Sentencing Act 1991* (Vic) s 18A. See Chapter 4 for further information.
94. Queensland operates an indefinite sentencing scheme for certain offenders who commit serious violent and sexual offences: *Penalties and Sentences Act 1992* (Qld) s 163. The figure may therefore include some sexual offenders. See Chapter 4 for further information about the scheme.
95. The Northern Territory operates an indefinite sentencing scheme for certain offenders who commit serious violent and sexual offences: *Sentencing Act 1995* (NT) s 65. The figure may therefore include some sexual offenders. See Chapter 4 for further information about the scheme.
96. Tasmania operates a 'dangerous criminal' declaration scheme for repeat violent offenders: *Sentencing Act 1997* (Tas) s 19. See Chapter 4 for further information about the scheme.
97. Western Australia operates an indefinite imprisonment scheme for certain offenders who commit indictable offences: *Sentencing Act 1995* (WA) s 98. The figure may therefore include other non-violent offenders. See Chapter 4 for further information about the scheme.
98. As at 30 June 2011, based on data from Australian Bureau of Statistics, *Prisoners in Australia* (2011) (Prisoner characteristics, states and territories data cube), Table 9, with the exception of the figures for Tasmania and Queensland (see footnotes below).
99. Department of Justice and Attorney General (Qld), *Correspondence* (2012).
100. Tasmania Prison Service, *Correspondence* (2012).
101. As at 30 June 2011, based on data from Australian Bureau of Statistics, *Prisoners in Australia* (2011) (Prisoner characteristics, states and territories data cube), Table 2.
102. As at 30 June 2011, based on data from Australian Bureau of Statistics, *Prisoners in Australia* (2011) (Prisoner characteristics, states and territories data cube), Table 3.
103. Number of inmates sentenced under HRVO scheme divided by Total prison population multiplied by Imprisonment rate.
104. 7,317,500 people as at 30 September 2011: Australian Bureau of Statistics, *Australian Demographic Statistics* (September 2011)

- committed a proven offence involving a serious degree of violence in 1994;[105] and
- were released from custody by 2009;[106] and
- committed a further proven offence involving a serious degree of violence by 30 September 2011.

2.122 Analysis undertaken by the NSW Bureau of Crime Statistics and Research (BOCSAR) shows the number of offenders falling within the above specifications, as well as the number of subsequent serious violent offences committed by those offenders who did re-offend. The analysis is set out in Table 3 below.

Table 3: People who committed a 'serious violent offence' in 1994 which was proven in court and the number of proven 'serious violent offences' they had following their first proven offence in 1994

Number of proven 'serious violent offences' following the first proven violent offence in 1994	Frequency	Percent	Cumulative Frequency	Cumulative Percent
0	362	83.2	362	83.2
1	46	10.6	408	93.8
2	18	4.1	426	97.9
3	6	1.4	432	99.3
4	1	0.2	433	99.5
6	2	0.5	435	100.0

2.123 As can be seen from the above, of the 435 serious violent offenders in 1994 who were at liberty (and thus in a position to re-offend in the community) by 2009, 83.2% committed no further serious violent offences.

2.124 A total of 73 offenders went on to commit another serious violent offence by September 2011.

2.125 This figure cannot be compared to the data presented in Table 2 above, as that information is based on a snapshot of inmates at a particular point in time, whereas Table 3 presents a long-term picture of re-offending. However, since SPCMOs are designed to identify and respond to those HRVOs who are likely to go on to commit a future serious violent offence, the data in Table 3 provides an imperfect estimate of the potential size of the HRVO group in NSW for the index year of 1994.

2.126 There are serious qualifications to the above analysis. It provides only an indication of the number of serious violent offenders from a single index year who re-offended with a serious violent offence within a 17-year follow up period. It cannot be said

105. The Council identified a large number of serious violent offences contained in the various versions of the Crimes Act 1900 (NSW) since 1994. The minimum level of violence required for inclusion was grievous bodily harm. The NSW Re-offending Database contains information on offenders who have been convicted of an offence since 1994, hence the index year of 1994 was chosen for our analysis.

106. Offenders who had not been released by 2009 were excluded so as not to understate re-offending. Including offenders who had been in prison for the entire period examined, and who had not had an opportunity to re-offend in the community may lead to a 'dilution' of re-offending rates.

whether the same rate of re-offending would occur taking another year as the index year. Nor does this analysis provide any information about when re-offending occurred. It is noted that an in-depth statistical analysis of re-offending rates of serious violent offenders, including an analysis of the average time before commission of a further violent offence, would be a valuable tool in the development of HRVO policy, particularly in determining the period for which an offender should be the subject of a SPCMO.

3. The current NSW model for managing HRVOs

Introduction **33**
Crimes (Serious Sex Offenders) Act 2006 ..... **34**
Life sentences in NSW and mandatory life sentences for murder 35
Scope of s 61 with respect to 'dangerous' offenders 40
Habitual criminal legislation 41
Gradation in sentence or disproportionate sentencing for repeat offenders 44
Protection or prohibition orders 45
Crimes (Domestic and Personal Violence) Act 2007 (NSW) 45
Child Protection (Offenders Prohibition Orders) Act 2004 (NSW) 46
Crimes (Criminal Organisations Control) Act 2012 (NSW) 48
Sentencing of high-risk violent offenders who have a mental health or cognitive impairment **48**
Mental Health Legislation 50
Not guilty by reason of mental illness (NGMI) 51
Persons who are unfit to be tried 53
Risk of re-offending by former forensic patients 55
In-custody treatment of violent offenders **57**
Current in-custody treatment programs in NSW 57
The Moderate Risk of Violent Reoffending Pathway 57
Treatment programs to address violent offending 58
Violent Offender Therapeutic Program 59
Serious Offenders Review Council (SORC) 61
Parole 61

Introduction

3.1 In this Chapter, we consider the sentencing framework that currently exists in NSW that may potentially be applicable to the HRVO cohort; and identify the various legislative and rehabilitative options that are available, the scope of those options and their limitations with respect to HRVOs.

3.2 We note at the outset that this framework does to some extent provide for the risk-management of high-risk offenders, for example:

- on sentence, by providing for sentencing options such as life sentences and disproportionate sentencing options, which allow for the incarceration of the offender, in part based on protection of the community;
- by way of parole, which involves the assessment of risk of an offender by the parole board towards the end of the offender's sentence, in order to determine whether that risk can best be managed through the offender's reintegration back into the community via parole;
- to a limited extent, by way of preventive detention, if the risk is one that falls within the scope of the CSSOA or mental health legislation (discussed below).

3.3 We note that the sentencing framework discussed in this Chapter necessarily applies to a much broader range of offenders than the HRVO cohort. However, in determining whether or not the existing framework for HRVOs is inadequate, and if

it is, the nature and extent to which it is inadequate, it is essential to first consider existing options.

Crimes (Serious Sex Offenders) Act 2006

3.4 As discussed in Chapter 4, extended supervision and continuing detention orders pursuant to the CSSOA are available in relation to a serious sexual offender where the Supreme Court is satisfied to a high degree of probability that the offender poses an unacceptable risk of committing a serious sex offence.[1]

3.5 In some cases, there may be a degree of overlap between serious sexual offending and serious violent offending, and to that degree, the CSSOA may apply to HRVOs.

3.6 This is exemplified by the case of *State of NSW v Richardson,* in which the Court noted:

> whilst a good deal of the material points to likelihood of further violent offending, it only points to further sexual offending in an opportunistic way as the development from an offence of violence. This appears to be the precise course of events in relation to the index offences.[2]

3.7 The Court found that on the whole of the evidence, the offender posed an unacceptable risk of committing a serious sex offence if he was not kept under supervision. The Court observed:

> the legislation is not directed to supervising persons who are likely to commit further violent offences. The relevance of that threat of further violence by the Defendant is, according to the experts, the risk of a further sexual offence that is committed in an opportunistic way associated with a further offence of violence in a similar manner to the sex offences that formed part of the index offences. Those similar offences were so violent and so gratuitous that, in accepting the relationship between violence and sex offences expressed by the experts, I find that the defendant poses an unacceptable risk in that way of committing a serious sex offence if he is not kept under supervision. The experts point to a number of things to justify the conclusion of a risk of opportunistic sexual offending including lack of impulsivity control and lack of empathy to his victims.
>
> I do not find that it is more likely than that that (sic) he will commit a further serious sex offence, but sub-s (3A) makes it unnecessary to find that it is more likely than not that he will do so before conclusion can be reached that he poses an unacceptable risk. Indeed, for reasons I will discuss, I think the likelihood of the defendant committing a further serious sex offence is low but that the risk remains unacceptable.[3]

As a result, an extended supervision order was made.

3.8 The purpose of the CSSOA is to provide post-custody detention or supervision for serious sex offenders who are determined to be at high risk of sexual re-offending. The legislation is not targeted towards HRVOs, but may also be available for HRVOs if they are also serious sexual offenders, such that they fall within the scope of the legislation.

---

1. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 9(2), 17(2).
2. *State of NSW v Richardson (No. 2)* [2011] NSWSC 276, at [91].
3. *State of NSW v Richardson (No. 2)* [2011] NSWSC 276, at [93]-[94].

3.9 As we discuss in Chapter 4, similar legislation in relation to serious sex offenders exists in other jurisdictions.[4]

Life sentences in NSW and mandatory life sentences for murder

3.10 In NSW, the sentence of natural life imprisonment is available under State laws for the offences listed in Table 3 below.

Table 3: NSW offences punishable by life imprisonment

Offence	Legislative provision for life sentence
Murder	*Crimes Act 1900* (NSW) s 19A, 19.
Aggravated sexual assault in company	*Crimes Act 1900* (NSW) s 61JA
Sexual intercourse with a child under 10 years in circumstances of aggravation	*Crimes Act 1900* (NSW) s 66A(2)
Certain drug offences involving the manufacture, cultivation or supply of large commercial quantities	*Drug Misuse and Trafficking Act 1985* (NSW) s 33(3)
Certain drug offences involving the manufacture or production of drugs in the presence of children, or procuring children to supply drugs, involving not less than large commercial quantities	*Drug Misuse and Trafficking Act 1985* (NSW) s 33AC(4)

3.11 The key violent offence for which an offender may be liable to a sentence of life imprisonment (other than a violent sexual offence) is murder. That offence attracts a mandatory life sentence where the victim is a police officer, if it was committed while the officer was on duty, or as a consequence of or in relation to actions taken by that officer or any other police officer in the execution of their duty.[5] It will also attract a mandatory life sentence in the circumstances set out in s 61(1) of the CSPA, which provides:

> A court is to impose a sentence of imprisonment for life on a person who is convicted of murder if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.[6]

3.12 The precursor to this provision, s 431B, was inserted into the *Crimes Act 1900* in 1996 as a result of the *Crimes Amendment (Mandatory Life Sentences) Act 1996*, making a natural life sentence for murder mandatory in certain circumstances.[7]

---

4. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Dangerous Sexual Offenders Act 2006* (WA); *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic).
5. *Crimes Act 1900* (NSW) s 19B.
6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61. The Council notes that the offences of serious heroin trafficking and serious cocaine trafficking also attract mandatory life sentences in NSW, subject to the court being satisfied of the existence of the matters identified in s 61(2) of the CSPA.
7. *Crimes Act 1900* (NSW) s 431B (repealed). Section 431B provided that 'A court is to impose a sentence of penal servitude for life on a person who is convicted of murder if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community

3.13 In the second reading speech in relation to the *Crimes Amendment (Mandatory Life Sentences) Act 1996*, the then Attorney General said in relation to its interpretation:

> As I said when introducing the Bill in 1995, the Court of Criminal Appeal in this State has affirmed the imposition of a life sentence when the level of culpability for the offence is so extreme that the community interest in retribution and punishment demands it. This Government agrees with that principle. We would add to this formulation that the community interest in its own protection and deterrence of others is a relevant consideration. These are all well-understood and commonly applied sentencing principles which, given statutory expression, will provide further legislative authority to our courts to impose a punishment commensurate with the crime. It will mandate a life sentence for those offences to which the legislation applies and leave the community in no doubt of the Government's intention to remain tough on crime.[8]

3.14 In *R v Merritt* the court noted that the test in s 61(1) 'broadly accords with the common law approach' with respect to 'worst case category' cases for which life imprisonment may be imposed for murder.[9]

3.15 Apart from the sentencing options under the CSSOA considered above, natural life sentences are the only other form of 'indeterminate' sentence that currently exists in NSW. Life sentences are 'indeterminate' in the sense that the term of an offender's natural life cannot be pre-determined.

3.16 In NSW, unlike every other Australian jurisdiction, there is no opportunity for release on parole, where a life sentence is imposed for a State offence and no parole period may be fixed in relation to any such sentence.[10] Release on licence, or redetermination and substitution of a determinate sentence, which were formerly available, are no longer possible. As a consequence, in NSW a life sentence means imprisonment for life, subject only to the possibility of release in the exercise of the prerogative of mercy.

3.17 In *R v Merritt*, the NSW Court of Criminal Appeal considered the interpretation of s 61(1) and the extent to which a sentencing judge must be satisfied, before passing a life sentence for murder, that each of the four indicia referred to in that section, is present. The Court held that the burden of proving that a case falls within s 61(1) rests upon the crown, and that the standard of such proof is beyond reasonable doubt.[11] It also held that s 61(1) should be given a purposive application:

> The section should be interpreted as requiring a sentence of life imprisonment where the offender's culpability is so extreme that the community's interest in the combined effect of such of the four indicia as are applicable under s 61(1),

---

interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence'.

8. NSW, *Parliamentary Debates*, Legislative Council, 17 April 1996, 84 (J Shaw—Attorney General).
9. *R v Merritt* [2004] NSWCCA 19, (2004) 59 NSWLR 557, at [51].
10. In relation to murder see s 19A (2) and s 19B (2) of the *Crimes Act 1900* (NSW); See also ss 61JA(2) and 66A(4) in relation to serious sexual offences noted in the Table. Otherwise see s 54(a) of the CSPA. See also, *R v Harris* [2000] NSWCCA 469; (2000) 50 NSWLR 409, at [117]-[122].
11. *R v Merritt* [2004] NSWCCA 19, (2004) 59 NSWLR 557, at [35].

> retribution, punishment, community protection and deterrence, could only be met through a life sentence.[12]

3.18 It was held that on the facts of the case, an absence of any finding of future dangerousness of the applicant did not rule out an application of s 61(1).[13] In *Adanguidi v R*, the Court confirmed that while the Court must be satisfied beyond reasonable doubt that the case is one that meets the requirements of s 61(1), it did not follow that each of the factors which ultimately lead to the conclusion that s 61(1) is applicable need to be determined beyond reasonable doubt.[14]

3.19 In *Knight v R*, a case decided after the introduction of s 61(1), but determined by reference to the worst-case common law approach, McClellan CJ at Common Law, with whose reasons Latham J agreed, set out the relevant principles guiding the imposition of a life sentence as follows:

- the maximum penalty for an offence in the case of murder, life imprisonment, is intended for cases falling within the worst category of case for which that penalty is prescribed;
- it is not possible to prescribe a list of cases falling within the worst category—ingenuity can always conjure up a case of greater heinousness;
- a life sentence is not reserved only for those cases where the offender is likely to remain a continuing danger to society for the rest of his or her life or for cases where there is no chance of rehabilitation; the maximum may be appropriate where the level of culpability is so extreme that the community interest in retribution and punishment can only be met by a sentence of life imprisonment;
- in many cases a two-stage approach to the consideration of whether the maximum penalty should be imposed is appropriate. Firstly, consideration is given to whether the objective gravity of the offence brings it within the worst class of case and then consideration is given to whether the subjective circumstances of the offender require a lesser sentence;
- it is the combined effect of the four indicia in s 61(1) which is critical;
- the absence of any one or more of the indicia of retribution, punishment, community protection or deterrence may make it more difficult for a sentencing judge to reach the conclusion that a life sentence is required although will not be determinative.[15]

3.20 Earlier, in *R v Baker*, in considering the difficulty in determining the point at which the offence of murder fell within the predecessor to s 61(1), Allen J outlined three scenarios that may justify a sentence of imprisonment for the natural life of the offender:

> Such a sentence cannot lightly be imposed in any civilized society.
>
> There are, of course, circumstances in which in a civilized society such a sentence may be called for. Such cases will be quite exceptional. But clearly they exist. The Law so provides. It would be foolish in the extreme to attempt to give a list of the types of cases which would warrant the court taking this, the

12. *R v Merritt* [2004] NSWCCA 19, (2004) 59 NSWLR 557, headnote, see [42], [54].
13. *R v Merritt* [2004] NSWCCA 19, (2004) 59 NSWLR 557, at [54].
14. *Adanguidi v The Queen*[2006] NSWCCA 404, (2006) 167 A Crim R 295, at [55].
15. *Knight v The Queen*[2006] NSWCCA 292, (2006) 164 A Crim R 126; at [23].

> most extreme measure available to the law. Three, however, stand out in respect of murder. The first is the case of the professional killer, the person who cold-bloodedly assassinates others for gain. That is one category. Another is the case where the killer is so fundamentally psychotic that it could never be safe to release him back into the community. I may say that the evidence that that is so would, as far as I am concerned, need to be quite strong. The third is the case of an offender who embarks on such a course of criminality that nothing short of the knowledge that the most extreme punishment the law can give awaits him would deter him from continuing that course.[16]

3.21 An issue arose in the early application of s 61(1) of the CSPA as to whether and to what extent, regard could be had to previous or related offending involving violence or murder, when the Court assessed the level of culpability of the offender for the commission of an offence of murder.[17]

3.22 Of relevance to this issue is the principle of proportionality, which requires that a sentence for an offence should not exceed,[18] or be less than,[19] that which is proportionate to the gravity of the crime, having regard to the objective circumstances constituting the offence.

3.23 It is settled, in this respect, that prior convictions of the offender do not of themselves play a part in the determination of the gravity of the current offence for which the offender stands for sentence. Its gravity is to be determined solely by reference to the objective circumstances of that offence.[20] This does not however preclude prior convictions from being taken into account as a factor depriving the offender of leniency, or indicating that more weight is to be given to retribution, personal deterrence and/or the protection of the community, for example where the antecedent criminal history shows that the present offence was not an uncharacteristic aberration but rather revealed a continuing attitude of disobedience to the law.[21]

3.24 In *R v Harris*,[22] the application of s 61(1), and of the common law worst case category principle arose for consideration in relation to the sentencing of the Respondent for three counts of murder committed in similar circumstances over a period of three months. In substance it was held that two avenues are available for the imposition of a life sentence. The first involves an application of s 61(1) where the circumstances referred to in that provision are present. The second depends on the common law approach that is applicable where the case possesses features that can be seen to be of 'very great heinousness' and where there is an absence of facts mitigating its seriousness.[23] In that respect it was noted that s 61(3) has the

16. *R v Baker* (Unreported, NSWCCA, Allen J, 20 September 1995).
17. *R v Petrinovic* [1999] NSWSC 1131; *R v Harris* [2000] NSWCCA 469, (2000) 50 NSWLR 409.
18. *Hoare v The Queen*, [1989] HCA 33 (30 June 1989), (1989) 167 CLR 348, at [354].
19. *R v Whyte* [2002] NSWCCA 343, (2002) 55 NSWLR 252, at [156]–[158].
20. *Veen v The Queen (No 2)* (1988) 164 CLR 465, [477]–[478]; *Baumer v The Queen* (1988) 166 CLR 51; *R v Shankley* [2003] NSWCCA 253, at [31]; *R v Johnson* [2004] NSWCCA 76; *R v McNaughton* [2006] NSWCCA 242, (2006) 66 NSWLR 566 at [24]-[25]; *R v Aslett* [2006] NSWCCA 360 at [24].
21. *Veen v The Queen (No 2)* (1988) 164 CLR 465, at [477]–[478]; *R v Wickham* [2005] NSWCCA 193, at [24].
22. *R v Harris* [2000] NSWCCA 469, (2000) 50 NSWLR 409.
23. *R v Twala* (Unreported, NSWCCA 4 November 1994).

effect of preserving the discretion under s 21(1) of the CSPA for the imposition of a lesser sentence than life imprisonment.

3.25 The application of the common law approach in cases of this kind was considered in *R v Baker,* where Gleeson CJ noted that one of the factors that 'might justify assigning a case to the worst category of cases is the number of murders committed by an offender';[24] and in *R v Street* where the Court upheld life sentences imposed in respect of two murders committed twelve weeks apart, by an offender who had a serious history of physical violence and sexual assault, even though each murder standing alone would not have justified a life sentence.

3.26 Further consideration was given to this question in *R v Aslett,*[25] in relation to a life sentence imposed for an offence of felony murder committed by an offender who had a substantial history of violence, including current or recent offences of aggravated sexual assault in company, armed robbery, aggravated carjacking, specially aggravated breaking and entering, and specially aggravated kidnapping; which had all been committed over a period of just in excess of three months. Even though it was acknowledged that standing alone, the murder would not have qualified for a life sentence in accordance with s 61, it was held, at first instance, that the level of culpability in its commission, combined with the finding of dangerousness to the community arising from the offender's history and his negligible prospects of rehabilitation, required the imposition of a life sentence.

3.27 In allowing the appeal McClellan CJ at CL, with whose reasons James and Hoeben JJ agreed, said in relation to the decision in *R v Harris*:[26]

> To my mind there is some difficulty reconciling the result in *Harris* with the principle defined in *Veen (No 2).* If a prior offence, including a prior killing, is not capable of informing the objective criminality of the instant offence, even if it be another killing, the imposition of a life sentence for the latest killing, as was done on appeal in *Harris* requires that the latest offence qualifies as an offence of extreme culpability justifying a life sentence (s 61(1)). Be that as it may, as I have said, the approach to the issue of prior offending has been authoritatively determined in so far as this Court is concerned in *McNaughton.*

and added, in relation to the current appeal

> Appropriate application of the principles in *Veen (No 2)* as explained in *McNaughton* to the present case leads inevitably to the conclusion that the life sentence which Wood CJ at CL imposed for the count of murder was not appropriate. When sentencing Wood CJ at CL observed that "standing alone" the offence did not justify a life sentence. However, his Honour decided to impose a life sentence in light of the fact that the murder followed other serious and appalling offences for which the applicant had been and was now being sentenced. Finding that the murder involved an utter recklessness and disregard of human life and occurred in the course of an armed robbery, his Honour concluded that the dangerousness of the applicant to the community and his negligible prospects of rehabilitation left no alternative but to impose a life sentence.
>
> The difficulty with his Honour's approach is that, notwithstanding the legitimacy of each of the individual findings which his Honour made as to the criminality

24. *R v Baker* (Unreported, NSWCCA, Gleeson CJ, 20 September 1995).
25. *R v Aslett* [2006] NSWCCA 360.
26. *R v Harris* [2000] NSWCCA 469, (2000) 50 NSWLR 409.

> involved in the offences and the personal characteristics of the applicant, his Honour concluded that standing alone the offence would not have qualified for a life sentence. This must mean that his Honour concluded that the culpability of the applicant for the crime of felony murder, even one involving utter recklessness and disregard of human life, could not justify a life sentence.[27]

3.28 In other cases where there have been multiple murders committed as part of the one episode of criminal conduct, the difficulty identified by McClellan CJ at CL in *R v Aslett*, has been held not to arise.[28]

3.29 Section 61 does not apply to offenders who were less than 18 years of age at the date of commission of the offence.[29]

Scope of s 61 with respect to 'dangerous' offenders

3.30 As outlined above, s 61 requires a court to impose a natural life sentence for an offence of murder if it is satisfied that the level of culpability in the commission of that offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.

3.31 The exercise of this power remains subject to the limitations that were explored in V*een v The Queen (No 2),*[30] where the court examined the distinction between taking into account the protection of the community arising out of the potential dangerousness of an offender, for the purposes of imposing a life sentence merely by way of preventive detention on the one hand (which is impermissible), and taking that factor into account as one of the circumstances that ultimately determine whether a natural life sentence is required, on the other hand.

3.32 In applying *Veen (No 2)* in the context of the imposition of a life sentence, whether through the common law worst-case avenue, or where mandated by s 61(1), attention has been given in the cases to the difficulties of forecasting an offender's future dangerousness and likelihood of re-offending over the course of a lengthy future term.[31]

3.33 Similarly the Courts have noted the extreme nature of a penalty that requires imprisonment of an offender for the term of that offender's natural life without hope of release or parole or otherwise, with the attendant lack of incentive to work towards rehabilitation and the potential for future difficulties in managing that offender as he or she ages.[32]

3.34 In *Knight v The Queen*, Adams J in his separate judgement said, in relation to evaluating the future dangerousness of the offender:

---

27. *R v Aslett* [2006] NSWCCA 360, at [25]–[27].
28. *R v Adanguidi* [2006] NSWCCA 404, (2006) 167 ACrimR 295, at [32]; and see the earlier decision in *R v Villa* [2005] NSWCCA 4, at [93].
29. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(6).
30. *Veen v The Queen (No 2)* (1988) 164 CLR 465.
31. *Bugmy v The Queen* (1990) 169 CLR 525, at [537]; *Mitchell v The Queen* (1996) 184 CLR 333; *Fardon v Attorney-General for the State of Queensland* [2004] HCA 46, (2004) 223 CLR 575, at [124]–[125].
32. *R v Petroff* (unreported, SCNSW, Hunt J, 12 November 1991); *R v Garforth* (unreported, NSWCCA, Gleeson CJ, 23 May 1994).

> This is self-evidently a very difficult task. That is not to say that it ought not to be undertaken; to the contrary, it must be. But, in my respectful opinion, it should be done with a high degree of scepticism about the reliability of any conclusion about the likely position in, say, two or three decades.[33]

3.35 In summary, life sentences for murder may apply to HRVOs where the HRVO has committed the offence of murder and where the offender's culpability with respect to the offence or offences before the court, or the course of the offending, is so extreme that the offence either falls within s 61(1) of the CSPA or otherwise meets the threshold for such a sentence in accordance with the common law worst case principle.

3.36 However, the use of life sentences with respect to HRVOs is limited in that, as the law stands currently:

- life sentences are not available for offenders convicted of violent offences other than those listed in Table 3 above; and
- the fact that an offender who is convicted of murder or of another offence for which life imprisonment may be imposed, has an extensive history of violent offences, will not of itself necessarily justify the imposition of a life sentence; nor is dangerousness alone sufficient to bring a murder into the worst case category, although it will be a highly relevant factor for an application of s 61(1);[34]
- life sentences as they currently exist, without the opportunity of possible release on parole or license, have been significantly criticised and their extension to additional offences does not have the support of the stakeholders who were engaged in the Council's consultation process in relation to this reference. Stakeholder views and the nature of the criticisms that exist in respect of life sentences are discussed in more detail in Chapter 5.

Habitual criminal legislation

3.37 In addition to the sentencing options that are available in the circumstances outlined above, a form of disproportionate sentencing is also available in NSW that may be applicable to HRVOs if they are deemed to be 'habitual criminals' in accordance with the *Habitual Criminals Act 1957* (NSW).

3.38 As outlined in the Council's Consultation Paper, the *Habitual Criminals Act* permits a judge, amongst other things, 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:

- the offender is of or above the age of 25 years and is convicted on indictment of an offence,
- the offender has on at least two occasions previously served separate terms of imprisonment as a consequence of convictions for indictable offences (not being

33. *Knight v The Queen*, [2006] NSWCCA 292, (2006) 164 A Crim R 126, at [50]. Although agreeing with the proposed outcome of the appeal, His Honour also made it clear that had he been considering the matter afresh he would have imposed an overall sentence of imprisonment for 45 years with a NPP of 33 years, at [67].
34. *R v Hillsby* [2006] NSWCCA 312, (2006) 124 A Crim R 252, at [24].

indictable offences that were 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.[35]

3.39 The sentence of imprisonment to be imposed is to be for a term of not less than five years, and not more than 14 years, 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 pronouncement is to be served concurrently with the sentence imposed in consequence of that pronouncement.[37]

3.40 The *Habitual Criminals Act* has rarely been used in recent times. In the 1973 decision of *R v Riley*, while an argument that the Act was obsolete was rejected, it was held 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.[38]

3.41 Similarly, in Victoria in the case of *R v Moffatt,* the court in discussing the use of provisions of this nature in that State, said:

> It is, of course, true that the power to sentence prisoners on the basis that they are "habitual offenders" has fallen into disfavour not only in this State but in other States as well. This is not only because the common law recognizes the fundamental principle of proportionality in sentencing but also because of dissatisfaction which flowed from giving priority to the principle of protection of the community in cases where the offender was a "nuisance criminal" as distinct from a "dangerous" one.[39]

3.42 The Victorian Supreme Court referred to the decision in *Chester v R*, where it was noted that:

> 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.[40]

3.43 The NSW Act was most recently considered in *Strong v The Queen*,[41] having been invoked in proceedings in the District Court following the conviction of an offender with a lengthy criminal history, who had pleaded guilty to a number of offences

35. Separate provision exists where the offender is convicted summarily before a magistrate of an indictable offence punishable summarily only with the consent of that person, and that person has on at least two prior occasions served separate terms of imprisonment as a consequence of convictions for indictable offences, in which event the matter may be referred to the District Court to allow an habitual offender declaration, ss 4(1), 4(2).
36. *Habitual Criminals Act 1957* (NSW) s 6(1); *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. *R v Moffat* [1998] 2 VR 229, at [235].
40. *Chester v R* (1988) 165 CLR 611, at [618].
41. *Strong v The Queen* [2005] HCA 30, (2005) 224 CLR 1.

including stalking and intimidating a young woman.[42] While the High Court in that case confirmed the continuing applicability of the Act, Kirby J drew attention to its disuse and proposals for its repeal:

> *Disuse and proposed repeal*: For various reasons, from the 1970s, the Habitual Criminals Act, and statutes like it in other jurisdictions, fell into disuse in Australia. In the *Australian Criminal Reports* series, which began in 1979, there is not a single case involving the application of the Habitual Criminals Act. In part, this may have reflected changing attitudes of prosecutors and in part the view of judges that the assumptions, procedures and consequences of such legislation had been overtaken by later sentencing developments. A similar change had occurred in respect of the somewhat analogous provisions of the *Inebriates Act 1912* (NSW) and its equivalents. In proposals for the reform of the law of sentencing as late as 1996, the New South Wales Law Reform Commission recommended the repeal of the Habitual Criminals Act….
>
> The Law Reform Commission recorded that the Office of the Director of Public Prosecutions at that time was in favour of repeal of the Habitual Criminals Act and that already the Act had "fallen into disuse". Nevertheless, the Act was not repealed. It remains part of the law of the State. Over the last decade, in the way of these things, there has been a revival in Australian law of notions of preventive detention for "the protection of the public". This has been given effect in legislation providing for lengthy mandatory imprisonment for repeat offenders; additional sentences of indefinite detention; and specific legislation addressed to certain long-term prisoners. So long as such laws are constitutionally valid, when they are invoked (as here) it is the duty of courts to uphold them and of sentencing judges to apply them in accordance with their language and purpose. In the present appeal, no challenge was raised to the constitutional validity of the Habitual Criminals Act.[43]

3.44 HRVOs may fall within the scope of the *Habitual Criminals Act*, if they have committed a third indictable offence, and if the offender has previously served two separate terms of imprisonment as a consequence of convictions for indictable offences. However, the Act was targeted towards 'habitual offenders', as they were viewed when it and its predecessor were enacted, based on a view of criminal behavior and with objectives that arguably have ceased to be relevant.[44] The

---

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

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

    On appeal to the High Court, the appellant contended that the Court of Criminal Appeal had erred by failing to determine for itself whether appellant should be pronounced to be an habitual criminal. The majority held that, having set aside the sentences that led to the appellant being pronounced, an habitual criminal, the Court of Criminal Appeal was obliged to determine the pronouncement afresh: *Strong v The Queen* [2005] HCA 30, (2005) 224 CLR 1.
43. *Strong v The Queen* [2005] HCA 30, (2005) 224 CLR 1; at [61]-[62].
44. NSW, *Parliamentary Debates*, Legislative Assembly, 14 March 1957, 4070 (B Sheahan).

resultant effect of this is that, the Act may apply to a broader cohort of offenders than HRVOs, based on the definition of 'habitual offenders'.

3.45 This legislation was criticised by the NSW LRC in 1996 as being archaic and inconsistent with legal principles in relation to proportionality, double punishment and arbitrary detention.[45] As will be considered further in Chapter 5, stakeholders who made submissions in response to the Council's Consultation Paper on the whole did not support retention of the legislation, and were in favor of the NSW LRC's earlier recommendation that it should be repealed.

Gradation in sentence or disproportionate sentencing for repeat offenders

3.46 Section 115 of the *Crimes Act 1900* provides a form of disproportionate sentence that may be available in relation to HRVOs who, having been convicted of an indictable offence, are subsequently convicted of an offence under s 114 of the *Crimes Act 1900* (being armed with intent to commit an indictable offence). In these circumstances, the s 114 offence, which would otherwise attract a maximum penalty of imprisonment for seven years, attracts a maximum penalty of imprisonment for 10 years.[46]

3.47 This kind of provision, for which there are other examples in NSW,[47] which provides for an enlargement of the maximum available sentence, could possibly be developed as a means of dealing with those violent offenders who commit repeat offences involving violence. However, it is targeted towards repeat offenders rather than HRVOs and may not capture HRVOs who are not repeat offenders or may, of itself, inadequately provide for HRVOs who are repeat offenders.

3.48 The NSW LRC has recommended the repeal of this provision for reasons similar to those which led it to recommend the repeal of the *Habitual Criminals Act 1957*,[48] including the fact that it may lead to disproportionate sentences.

3.49 However, as we note in Chapter 4, other states have passed legislation in relation to serious offenders, which enables courts to impose a sentence that is longer than that which is proportionate to the gravity of the offence being considered.[49]

45. NSW Law Reform Commission, *Sentencing*, Report 79 (1996), Recommendation 53, at [10.20].
46. *Crimes Act 1900* (NSW) s 115.
47. As was noted in the report of this Council '*Penalties Relating to Sexual Assault Offences in NSW*'. For example, under 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; under the *Drug (Misuse and Trafficking) Act 1985* (NSW) ss 36X–36Z, in relation to offences involving drug premises; and under the *Crimes Act 1900* (NSW) s 66EA, in relation to conduct involving the persistent sexual abuse of a child.
48. NSW Law Reform Commission, *Sentencing*, Report 79 (1996), Recommendation 53, at [10.20].
49. *Criminal Law (Sentencing) Act 1988* (SA) s 20B; *Sentencing Act 1991* (Vic) s 6D.

Protection or prohibition orders

Crimes (Domestic and Personal Violence) Act 2007 (NSW)

3.50 This Act empowers the NSW Local Court (and NSW Children's Court) to make apprehended domestic violence orders to protect individuals from domestic violence, intimidation and stalking,[50] and apprehended personal violence orders to protect individuals who experience personal violence outside of a domestic relationship.[51]

3.51 Section 16(1) provides that:

> A court may, on application, make an apprehended domestic violence order if it is satisfied on the balance of probabilities that a person who has or has had a domestic relationship with another person has reasonable grounds to fear and in fact fears:
>
> (a) the commission by the other person of a personal violence offence against the person, or
>
> (b) the engagement of the other person in conduct in which the other person:
>
> (i) intimidates the person or a person with whom the person has a domestic relationship, or
>
> (ii) stalks the person,
>
> being conduct that, in the opinion of the court, is sufficient to warrant the making of the order.

3.52 Section 17 provides for the matters that may be considered by a court when determining whether to grant the order.

3.53 Section 19 similarly provides:

> (1) A court may, on application, make an apprehended personal violence order if it is satisfied on the balance of probabilities that a person has reasonable grounds to fear and in fact fears:
>
> (a) the commission by the other person of a personal violence offence against the person, or
>
> (b) the engagement of the other person in conduct in which the other person:
>
> (i) intimidates the person, or
>
> (ii) stalks the person,
>
> being conduct that, in the opinion of the court, is sufficient to warrant the making of the order.

50. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(1).

51. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 10(1).

3.54 Apprehended violence orders may apply to HRVOs with respect to a 'protected person', in a wide range of circumstances, and prohibit or restrict a wider range of behaviour, including but not limited to:

- approaches by the defendant to the protected person;
- access by the defendant to any or all of the following:
    - any premises occupied by the protected person from time to time or to any specified premises occupied by the protected person;
    - any place where the protected person works from time to time or to any specified place of work of the protected person;
    - any specified premises or place frequented by the protected person;

  whether or not the defendant has a legal or equitable interest in the premises or place;
- approaches by the defendant to the protected person, or any such premises or place, within 12 hours of consuming intoxicating liquor or illicit drugs;
- possession of all or any specified firearms or prohibited weapons (within the meaning of the *Weapons Prohibition Act 1998*) by the defendant;
- destroying or deliberately damaging or interfering with the protected person's property;
- specified behaviour by the defendant that might affect the protected person.[52]

3.55 An intentional breach of an apprehended violence order attracts a maximum penalty of imprisonment for 2 years or 50 penalty units or both.[53]

3.56 In summary, apprehended violence orders may apply to HRVOs to restrict or prohibit a wide range of the HRVOs behaviour in order to protect individuals at risk from that behaviour.

Child Protection (Offenders Prohibition Orders) Act 2004 (NSW)

3.57 This Act enables the NSW Local Court to make either a *child protection prohibition order* or a *contact prohibition order*, in respect of 'registrable persons', being persons whom a court has previously sentenced in respect of a registrable offence, in accordance with s 3A of the *Child Protection (Offenders Registration) Act 2000*.[54]

3.58 These orders may therefore apply to HRVOs who are 'registrable persons' and who pose a risk to children.

3.59 A child protection prohibition order is an order prohibiting a registrable person from engaging in certain conduct specified in the order. Such an order can be made if, on the balance of probabilities, the Court is satisfied that the order will reduce the

52. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35(1)
53. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(1)
54. For a list of registrable offences, see *Child Protection (Offenders Registration) Act 2000* (NSW) s 3(1).

risk that it is reasonably believed the person poses 'to the lives or sexual safety of one or more children, or children generally'.[55]

3.60 Section 5(3) sets out the factors the court is required to consider in determining whether to make an order. If an order is made, its term cannot exceed 5 years (or 2 years for a young registrable person).[56]

3.61 A child protection prohibition order may prohibit conduct including, but not limited to:

- associating with or other contact with specified persons or kinds of persons;
- being in specified locations or kinds of locations;
- engaging in specified behaviour; and
- being in specified employment or employment of a specified kind.[57]

3.62 Breach of a child protection prohibition order attracts a maximum penalty of 100 penalty units or imprisonment for 2 years, or both.[58]

3.63 A contact prohibition order is an order prohibiting a registrable person from contacting any victim of the registrable offence, or any person who was a co-offender in relation to that offence.[59]

3.64 Section 16C provides that:

> (1) The Local Court may make a contact prohibition order if it is satisfied that there are sufficient grounds for making the order.
>
> (2) The Local Court must specify the term (not exceeding 12 months) of the contact prohibition order.
>
> …
>
> (4) This section does not limit the kinds of prohibition or restriction that may be imposed on a registrable person by means of any other order or direction under this Act.

3.65 Breach of a contact prohibition order attracts a maximum penalty of 50 penalty units or imprisonment for 12 months or both.[60]

3.66 In summary, child protection prohibition orders and contact prohibition orders may apply in respect of HRVOs who are 'registrable persons' for the purposes of s 3A of the *Child Protection (Offenders Registration) Act 2000* and who pose a risk to children pursuant to the provisions outlined above.

---

55. *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 5.
56. *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 6.
57. *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 8.
58. *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 13.
59. *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 16A.
60. *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 16G(1).

Crimes (Criminal Organisations Control) Act 2012 (NSW)

3.67 This Act enables the Supreme Court, upon application by the Commissioner of Police, to declare that a particular organisation is a 'declared organisation' for the purposes of the Act, if an 'eligible judge' is satisfied that:

> (a) members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity, and
>
> (b) the organisation represents a risk to public safety and order in this State.[61]

3.68 The Act also enables the Supreme Court to:

- make an interim control order pending the hearing and final determination of a control order;[62] and
- make a control order, in relation to a person on whom notice of an interim control order has been served, if it is satisfied that the person is a member of a declared organisation, or is or purports to be a former member of a declared organisation that has an on-going involvement with the organisation and its activities.[63]

3.69 A control order suspends existing authorisation (for example via a licence, registration or certification) to carry on certain prescribed activities until the order (or interim order) is revoked;[64] and makes it an offence to:

- associate with other controlled persons of the declared organisation;[65] and
- recruit another person to become a member of the declared organisation.[66]

3.70 Breach of a control order attracts a maximum penalty of imprisonment for 5 years.[67]

3.71 In summary, control orders may apply in respect of HRVOs who are members of 'declared organisations' and who fall within the scope of the provisions outlined above.

Sentencing of high-risk violent offenders who have a mental health or cognitive impairment

3.72 Clearly there are cases where a person who commits a serious offence involving violence has a form of mental health or cognitive impairment. This can have relevance both in the assessment of the degree of that person's culpability for the

61. *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 9.
62. *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 14.
63. *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 19.
64. *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 27.
65. *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 26.
66. *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 26A.
67. *Crimes (Criminal Organisations Control) Act 2012* (NSW),Div 3.

offence, and in relation to the assessment of his or her risk of re-offending and hence dangerousness to the community.[68]

3.73 The principles are well settled, for example, in *R v Engert* Gleeson CJ observed:

> …the question of the relationship, if any, between the mental disorder and the commission of the offence, goes to circumstances of the individual case to be taken into account in the application of the relevant principles. The existence of such a causal relationship in a particular case does not automatically produce the result that the offender will receive a lesser sentence, any more than the absence of such a causal connection produces the automatic result that an offender will not receive a lesser sentence in a particular case. For example, the existence of a causal connection between the mental disorder and the offence might reduce the importance of general deterrence, and increase the importance of particular deterrence or of the need to protect the public. By the same token, there may be a case in which there is an absence of connection between the mental disorder and the commission of the offence for which a person is being sentenced, but the mental disorder may be very important to considerations of rehabilitation, or the need for treatment outside the prison system.[69]

3.74 In *Veen v The Queen (No 2)*, Mason CJ, Brennan, Dawson and Toohey JJ said:

> a mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter. These effects may balance out …[70]

3.75 In *Benitez v The Queen*, Simpson J noted:

> Generally speaking, the well-known authorities indicate that mental disorder may be relevant to the assessment of the offender's culpability and to the level to which it is appropriate to give greater or lesser emphasis to principles of general or specific deterrence.[71]

3.76 Instances where the protection of the community have been found to be of particular relevance for the fixing of a sentence, can be seen in several decisions of the Court of Criminal Appeal that were concerned with persons suffering from a severe personality disorder of an antisocial type or a severe borderline personality disorder.[72] Community protection is particularly likely to be relevant where the underlying condition may not be amenable to treatment.

3.77 It follows that, in cases involving serious violence where the offender has a mental illness or other disorder of the mind or of cognition, which affects his or her capacity to control behaviour or to exercise a reasoned judgment, current sentencing laws will require a complex exercise of a discretion in which the issues relating to the level of culpability involved, as well as those concerned with specific deterrence,

---

68. *R v Israil* [2002] NSWCCA 255, at [23]; *R v Henry* [1999] NSWCCA 111, (1999) 46 NSWLR 346, at [354].
69. *R v Engert* (1995) 84 ACrimR 67, at [71].
70. *Veen v The Queen (No 2)* (1988) 164 CLR 465, at [476]-[477].
71. *Benitez v The Queen* [2006] NSWCCA 21, (2006) 160 ACrimR 166, at [38].
72. *R v Lawrence* [2005] NSWCCA 91; *R v Adams* [2002] NSWCCA 448, at [54] (a case concerned with a limiting term rather than a sentence imposed following conviction); and *R v Knight* [2006] NSWCCA 292, (2006) 164 A Crim R 126.

general deterrence, hardship to the offender, and protection of the community need to be taken into account at the time the sentence is imposed. Adding to the complexity in this regard is the difficulty in predicting the manner in which a mental disorder or disability may progress or become amenable to treatment (for example as the result of new forms of treatment or medication) and the extent to which an offender might continue to be a danger to the community.

3.78 In the absence of some scheme of the kind that can cater for such offenders, along the lines of those that exist in other jurisdictions, then there will continue to be difficulties in ensuring the long term protection of the community. What we have said in this respect has an obvious relevance for the offence of murder and also for cases of manslaughter (attracting a maximum sentence of imprisonment for 25 years) where that verdict was dependent on the finding of a substantial impairment by reason of an abnormality of mind arising from an underlying condition. It is not, however, restricted to cases of this kind.

3.79 In the event of a person, who falls within the category of offenders mentioned above, receiving a determinate sentence of imprisonment and re-offending violently during a subsequent period of release on parole, then parole will almost certainly be revoked leading to resumption of the custodial sentence. However once such an offender is released at the end of the sentence, then under current law his or her dangerousness, if related to the existence of some form of mental illness, can only be dealt with under the Mental Health legislation that permits civil detention. Otherwise the only recourse currently available will be to await the commission of a new offence that will re-engage the justice system.

Mental Health Legislation

3.80 HRVOs who are due to be released from prison or who have been released from prison, and who fall within the scope of the provisions of the *Mental Health Act 2007* (MHA), may be involuntarily detained pursuant to the provisions of that Act.[73]

3.81 To fall within the scope of the involuntary civil detention provisions of the MHA, offenders must be either 'mentally ill persons' within the meaning of s 14 or 'mentally disordered persons' within the meaning of s 15.

3.82 A person is a 'mentally ill person' for the purposes of the Act if he or she is suffering from a 'mental illness' and owing to that illness, there are reasonable grounds for believing that care, treatment or control of the person is necessary for that person's own protection, or the protection of others, from serious harm.[74] 'Mental illness' is defined in s 4 to mean:

> a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms:
>
> (a) delusions,
>
> (b) hallucinations,

73. *Mental Health Act 2007* (NSW) ss 14, 15.
74. *Mental Health Act 2007* (NSW) s 14.

(c) serious disorder of thought form,

(d) a severe disturbance of mood,

(e) sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a)–(d).

3.83 A person may also be involuntarily detained if he or she is a 'mentally disordered person';[75] that is, if (whether or not the person is suffering from a mental illness) the person's behaviour is so irrational as to justify a conclusion on reasonable grounds that temporary care, treatment or control of the person is necessary either for the person's own protection from serious physical harm or for the protection of others from serious physical harm. However, a mentally disordered person may only be detained for a maximum of 3 days.[76]

3.84 In addition to the MHA provisions, an offender serving a sentence in a correctional facility, who is subsequently assessed as mentally ill, can be transferred involuntarily to a mental health facility, in accordance with the provisions of the *Mental Health (Forensic Provisions) Act 1990* (MHFPA), if it appears that he or she is a 'mentally ill person' as defined in the MHA; or otherwise with consent if it appears that he or she is suffering from a 'mental condition' for which treatment is available in a mental health facility.[77] 'Mental Condition' is defined for this purpose as 'a condition of disability of mind not including either mental illness or developmental disability of mind'.[78]

3.85 Any period of time spent in a mental health facility as a result of such a transfer is treated as if it were a period of imprisonment for the purposes of the person's sentence or parole.[79]

Not guilty by reason of mental illness (NGMI)

3.86 There is a group of people whose conduct has involved violence, often extreme violence, who will be found NGMI, of the offence that they would otherwise be taken to have been committed.[80] This may occur after a regular trial, or after a special hearing of a person who was found unfit to be tried (as discussed in the following section of this Report). In either case the test for whether a person should be found NGMI is established by the *McNaghten* rules that currently define the criteria for mental illness in the context of the criminal laws of NSW.[81]

3.87 When a special verdict of NGMI is returned in a regular trial then the Court may:

- make an order that the relevant person be detained in such place and in such manner as the Court thinks fit until released by due process of the law; or

75. *Mental Health Act 2007* (NSW) ss 12, 13.
76. *Mental Health Act 2007* (NSW) s 31(1).
77. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 55(4).
78. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 3.
79. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 60.
80. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 38.
81. *R v McNaghten.(1843) 8 ER 718.*

- make any other order it considers appropriate, including an order releasing the person from custody either unconditionally or conditionally.[82]

3.88 The Court cannot, however, make an order for release unless it is satisfied, on the balance of probabilities, that the safety of that person or any member of the public will not be seriously endangered by the release.[83]

3.89 If the Court orders that the person be detained, or conditionally released, the person becomes a forensic patient for the purpose of Part 5 of the MHFPA,[84] and as a consequence will be subject to the exercise of the review and other powers assigned to the MHRT.

3.90 Pursuant to the MHFPA, the MHRT will be required to make an initial review of the case, and to make an order as to the person's care, detention or treatment or as to his or her release.[85] Thereafter it will have a responsibility to conduct ongoing reviews as required by the Act,[86] at which time further orders can be made of the same kind as those that are available on the initial review.[87] Additionally the MHRT can, on any review, order the transfer of a forensic patient to a mental health facility, correctional centre or other place.[88]

3.91 The making by the MHRT of an order for release is prohibited unless it is satisfied that:[89]

> (a) the safety of the patient or any member of the public will not be seriously endangered by the patient's release, and
>
> (b) other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the patient or that the patient does not require care.

3.92 Section 74 of the MHFPA specifies a number of matters that the MHRT must consider in deciding what orders to make. Relevant matters include: whether the person is suffering from a mental illness or other mental condition; whether care, treatment or control of the person is necessary for the person's own protection from serious harm or the protection of others from serious harm; and the continuing condition of the person, including any likely deterioration.

3.93 Where an order for release is made, the Act also specifies the conditions that can be imposed, including the appointment of relevant health care professionals to assist in the person's care and treatment, medication, accommodation, participation in programs, drug testing, association restrictions and so on.[90]

---

82. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 39(1).
83. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 39(2).
84. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 42.
85. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 44.
86. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 46.
87. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 47.
88. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 48.
89. *Mental Health (Forensic Provisions) Act 1900* (NSW) ss 43(a), (b).
90. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 75.

3.94 A person subject to this regime will continue to be a forensic patient subject to the review responsibilities and exercise of powers by the MHRT, until he or she is released unconditionally in accordance with an order of the MHRT, or by order of the Court; or, if released conditionally, the time specified in the order for release as the time by which the conditions are to be complied with, expires.[91]

3.95 Where a person who is detained in a mental health facility ceases to be a forensic patient then he or she must be discharged from that facility.[92] However as noted earlier, that person can be detained pursuant to the MHA as a civil patient, if the requirements for an involuntary detention in accordance with that Act are present.

3.96 While a person remains a forensic patient, the MHRT can, upon any review, make a community treatment order, which will be subject to the provisions of the MHA.[93] Forensic patients who commit a breach of a conditional order for release; or who, having been granted a conditional release, suffer a deterioration in their mental condition and are at risk of causing serious harm to themselves or to others as a consequence, may be apprehended pursuant to an order of the President of the MHRT, whereupon the MHRT will be required to review the case and make an appropriate order in accordance with the Act.[94]

Persons who are unfit to be tried

3.97 Also included in the category of those who are charged with committing crimes of violence, will be people who have some form of mental health or cognitive impairment that precludes them from being fit to be tried. Where such a person is found, after inquiry by a judge, to be unfit, he or she will be referred to the MHRT.[95]

3.98 The MHRT then has the responsibility of determining whether, on a balance of probabilities, the person will become fit to be tried in the 12 months after the finding of unfitness. If the person is determined to become fit within that period then the MHRT is required to determine whether he or she is mentally ill, or suffering from a mental condition for which treatment is available in a mental health facility. When reporting back to the Court, the MHRT can make a recommendation as to the care or treatment of the person.[96]

3.99 Where the MHRT reports a determination that the person will not become fit within the ensuing 12 months, or where at the expiry of that period, contrary to an original determination that the person will become fit, the person remains unfit, then a special hearing by the Court may need to be held. Its purpose is to inquire whether, on the basis of the limited evidence available, and according to the ordinary criminal standard, the person committed the offence charged or some available alternative offence.[97]

---

91. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 51.
92. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 54.
93. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 67.
94. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 68.
95. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 14.
96. *Mental Health (Forensic Provisions) Act* 1900 (NSW) s 16.
97. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 19.

3.100 The available verdicts in a special hearing include a verdict of not guilty of the offence charged;[98] a special verdict of NGMI; or a verdict that, on the limited evidence available, the accused committed the offence charged or an available alternative offence.[99]

3.101 Where the verdict is one of NGMI then the person will be managed in accordance with the procedures outlined above that apply to a person in respect of whom that verdict is returned in a regular trial.[100] If the verdict involves a finding that on the limited evidence available the person committed an offence and the case is one where a sentence of imprisonment would have been imposed in a regular trial, then the Court will be required to nominate a "limiting term". That term is to be the best estimate of the sentence that the Court considers would have been appropriate if the special hearing had been a regular trial.[101] However the limiting term will not be subject to the specification of any NPP.[102]

3.102 Where a limiting term is nominated, the Court must refer the person back to the MHRT and it may make such order with respect to the custody of the person as it considers appropriate.[103] It then becomes the responsibility of the MHRT to determine and report to the Court whether the person is suffering from a mental illness, or from a mental condition for which treatment is available in a mental health facility.[104] Depending on the determination made, the Court will then make an order for the detention of the person in such a facility or elsewhere.[105]

3.103 Where a person is subject to a limiting term then the MHRT has a similar review responsibility to that applicable to those found to be NGMI, including the making of orders as to care, detention, treatment and eventual release.[106]

3.104 A person who, after a special hearing, has been detained in a mental health facility, correctional centre or other place, ceases to be a forensic patient if the limiting term expires, or if that person is classified as an involuntary patient.[107] Such a classification can be made by the MHRT, on a review, if the patient would cease to be a forensic patient within the ensuing six months, in which event the MHRT can order that he or she be transferred from a correctional centre to a mental health facility.[108]

3.105 Guidance is given to the MHRT in relation to the orders that can be made in accordance with Part 5 of the MHFPA.[109] In the case of a proposed release of a

---

98. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 22(1)(a). In this case the person will be dealt with in the same way as if found not guilty in a regular trial: s 26.
99. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 21B and s 22(1).
100. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 25.
101. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 23(1).
102. *R v Mailes* [2004] NSWCCA 394, (2004) 62 NSWLR 181, at [22], [43]; *Mental Health (Forensic Provisions) Act 1900* (NSW) s 23(6).
103. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 24(1).
104. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 24(2).
105. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 27.
106. *Mental Health (Forensic Provisions) Act 1900* (NSW) ss 46 and 47.
107. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 52(2).
108. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 53.
109. *Mental Health (Forensic Provisions) Act 1900* (NSW).

forensic patient subject to a limiting term, the MHRT is required to consider 'whether or not the patient has spent sufficient time in custody'.[110]

Risk of re-offending by former forensic patients

3.106 The release of a forensic patient depends on the MHRT being satisfied, on the evidence available to it, that the safety of the patient or of any member of the public would not be seriously endangered; and that, either other care of a less restrictive kind that is consistent with safe and effective care, is appropriate and reasonably available to the patient, or that the patient does not require care. Before making a release decision the MHRT must have regard to a report from an independent forensic psychiatrist or other professional of a prescribed class, as to the patient's condition and whether the safety of that person or of any member of the public will be seriously endangered by his or her release.[111]

3.107 Recent research has been carried out retrospectively tracking the outcome for a group of persons who, having been found NGMI, were released from a secure facility, following an order of the MHRT or the Court. It shows that a very small number (less than 2%) of those within this group had killed or attempted to kill another person after their release.[112] The study also indicated that violent recidivism generally (that is, including other violent offences as well as murder and attempted murder) was very low, with a conviction rate for violent offences of less than 3%.[113]

3.108 It is not suggested that either the clinician who performed the assessment in relation to those people who killed or attempted to kill again, or the MHRT, was wrong in ordering their release. Rather, the fact that each of these later cases was dealt with by way of a further NGMI verdict indicates that they had again fallen into a high risk category by virtue of their mental illness, which led to their being involved in violent conduct.

3.109 Had the behaviour of those within this group deteriorated to the point where there was concern as to the likelihood of their re-engaging in violent or dangerous conduct, then they could have been detained as a civil patient under the MHA, or, if still subject to conditional release, brought back as a forensic patient and managed in accordance with the procedures outlined above.

3.110 So far as we are aware there has been no similar study of those who have received limiting terms following a special hearing. Some of those within this group can present management difficulties because of their severe cognitive impairments, while others will present with additional concerns because of the presence of some form of mental illness.

---

110. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 74(e).

111. *Mental Health (Forensic Provisions) Act 1900* (NSW) s 74(d).

112. Between 1990 and 2010, 197 individuals who were detained as forensic patients following a verdict of NGMI were released into the community. Of those, two individuals attempted to kill another person. One individual did kill another person, however, this occurred while he was detained following the revocation of his conditional release: Hayes, H, '*Guilty by reason of mental illness: A 21-year retrospective study of released forensic patients in New South Wales'*, Thesis, University of New South Wales, 2011.

113. Hayes, H, '*Guilty by reason of mental illness: A 21-year retrospective study of released forensic patients in New South Wales'*, Thesis, University of New South Wales, 2011, 34.

3.111 A practical problem that exists in relation to those within this group is that once the limiting term has expired, they cease to be a forensic patient and are entitled to be released. At that point the only basis for their continued detention will depend upon them meeting the criteria that will allow civil detention under the MHA. Some of those within this group may in fact have been released prior to expiry of the limiting term, subject to the MHRT having been satisfied that they have spent a sufficient time in custody.[114]

3.112 It is understood that the limiting terms imposed to date have ranged between 3 months and 21 years, and that although potentially available, the Council is not aware of any occasions on which a life sentence has been imposed as a limiting term.[115]

3.113 In relation to those within the NGMI and limiting term groups, there is a potential window during their period of release when they will not qualify for civil detention or for some other form of management under the MHA.

3.114 For these reasons we give further consideration in this Report to the possible approaches that might be adopted, including a system of centralised and structured risk management, such as that which exists in Scotland through the Risk Management Authority. Such a system could reduce further offending by attempting to identify risk factors, such as non-compliance with medication regimes, and offering management options for those risks so that people within these groups do not escalate and engage in further violent conduct.

3.115 Such an approach can however raise issues in relation to proportionality, and punishment for individuals who are not responsible at law for their conduct. This would be the case if risk monitoring and management activities were to be founded on a punitive basis, where 'control' of the individual was the primary aim. However, it is a common criticism of the NSW mental health system that individuals suffering serious mental health impairments are not offered the support structures they need until after they have come within the criminal justice system. A rehabilitative and treatment focus to risk management regimes may present a way of providing ongoing support to individuals with serious mental health and/or cognitive impairments, while at the same time offering an increased level of protection to the community.

3.116 Violent offenders who do not have either a mental illness or disorder, or a condition that is recognised as treatable in a mental health facility will not fall within the reach of the provisions noted above. That legislation relies on identification of a recognised mental illness, disorder or condition and there may be limits to its applicability to violent offenders whose violence arises out of a personality disorder, or an intellectual disability.[116]

3.117 The Council notes that the NSW LRC has a current reference in relation to people with cognitive and mental health impairments in the criminal justice system, which

114. Mental Health (Forensic Provisions) Act 1900 (NSW) s 74(e).

115. Judicial Commission of NSW, *Correspondence* (2012).

116. NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences*, Consultation Paper 6 (2010), at [3.30]–[3.40].

will, amongst other things, review the definitions that should be adopted in this context. It will also explore in more detail proposals for the management of people with mental health and cognitive impairments who come into contact with the criminal law including those who are potentially dangerous.

3.118 The Council also notes that the MHRT has prepared a draft legislative proposal in relation to forensic patients who pose a serious risk of harm to others but who may not be adequately captured by existing Mental Health legislation.[117] The proposal involves amending the MHFPA to provide for a system of treatment, detention or community supervision in relation to certain forensic patients with a mental condition or developmental disability who are nearing the end of their limiting term. The provisions, if implemented, would enable a forensic patient who will cease to be a forensic patient within 6 months to be reclassified by the MHRT as a 'compulsory patient' (and consequently to remain under the jurisdiction of the MHRT) if the following criteria are met:

> (1) The person is suffering from a mental condition or developmental disability and, owing to that condition, there are reasonable grounds for care, treatment or control of the person to be necessary:
>
> (a) for the person's own protection from serious harm, or
>
> (b) for the protection of others from serious harm, and that
>
> (2) No other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available.[118]

In-custody treatment of violent offenders

3.119 In this part we consider the existing in-custody treatment and rehabilitative options available for violent offenders in NSW.

Current in-custody treatment programs in NSW

The Moderate Risk of Violent Reoffending Pathway

3.120 CSNSW has advised that during their time in custody, violent offenders may undertake a number of programs, as part of a rehabilitative pathway, catered to their individual needs.[119]

3.121 Offenders who are identified as medium risk violent offenders progress through the Moderate Risk of Violent re-offending (MRV) Pathway, which utilizes the existing compendium of CSNSW programs, (including those noted below in relation to violent behavior, as well as other programs addressing other needs of the offender), and intervention by the Community Offender Services psychologist, in order to

117. NSW Mental Health Review Tribunal, *Managing Serious Risk, Patients with a Mental Condition or Developmental Disability, A Possible Legislative Response*, Draft Report (2011).

118. NSW Mental Health Review Tribunal, *Managing Serious Risk, Patients with a Mental Condition or Developmental Disability, A Possible Legislative Response*, Draft Report (2011), 4.

119. Corrective Services NSW, *Compendium of Correctional Programs*, *Offender Services and Programs*,(2011); Corrective Services NSW, *Correspondence* (2012).

provide at least 100 hours of intervention to address an individual's criminogenic needs. [120]

3.122 CSNSW has advised that the MRV Pathway can be undertaken at any correctional centre or community offender services office that facilitates the programs identified as necessary for the needs of the particular offender. CSNSW aims to treat at least 200 violent offenders per year, and to commence offenders on the pathway as early as possible in their sentence in order to have time to intensify treatment (for example, the offender may at this point be referred to the VOTP program, discussed below), if the initial phases of the pathway are not adequately meeting the needs of the particular offender.

3.123 Medium-high and high-risk offenders, or medium-risk offenders who, after having commenced on the MRV pathway, are subsequently identified as having more complex treatment needs, are referred to the Violent Offender Therapeutic Program (VOTP), discussed below.

Treatment programs to address violent offending

3.124 We understand that Corrective Services NSW runs four key in-custody treatment programs that address violent behaviour (excluding violent sexual behaviour) through its Offender Programs Unit. These programs are:

- **CALM** – a program aimed at controlling and learning to manage anger in men;
- **Managing Emotions** – to assist men and women to develop an awareness of their emotions on a day-to-day basis;
- **Domestic Abuse Program** – targeted at men convicted of a domestic abuse offence against their spouse; and
- **The Violent Offender Therapeutic Program** (VOTP) – targeted at reducing future violent re-offending in men through cognitive behavioural therapy.

3.125 We have been informed that the key program aimed at reducing future violent re-offending in men, through cognitive behavioural therapy, is VOTP. CALM and Managing Emotions are programs that more broadly address the management of emotions and anger, and are targeted at moderate risk violent offenders rather than serious violent offenders, although they may be recommended for the latter as supplementary programs to VOTP. Depending on the offender's treatment needs, the MRV may consist of a sequence of Managing Emotions, CALM and Domestic Abuse programs to make up 100 hours of intervention. The Domestic Abuse Program is targeted towards violence in the specific context of domestic violence.[121]

3.126 We understand from CSNSW that, generally, an offenders' eligibility for CSNSW programs is based on the Level of Service Inventory—Revised (LSI-R) score.[122] However after assessment using a specific violence risk assessment tool such as the Violence Risk Scale (VRS) it may be determined that a violent offender has

120. Corrective Services NSW, *Compendium of Correctional Programs, Offender Services and Programs*, (2011); Corrective Services NSW, *Correspondence* (2012).

121. Corrective Services NSW, *Compendium of Correctional Programs, Offender Services and Programs*,(2011).

122. See Chapter 2, at [2.82]–[2.84].

higher treatment needs, or that more intensive programming may be required than the LSI-R score reflects. We consider eligibility of VOTP specifically, as the key program aimed at reducing violent re-offending, further below.

Violent Offender Therapeutic Program

3.127 VOTP is the specific therapeutic program in NSW for medium-high and high-risk violent offenders.

3.128 The primary VOTP program is a high intensity residential program, available at one correctional centre, Parklea Correctional Centre, within a 64-bed unit. Approximately 50 offenders will complete VOTP each year. The VOTP high intensity program is also offered at South Coast Correctional Centre delivered in a non-residential setting. The South Coast VOTP offer offenders with the opportunity to participate in therapy groups to address their offending behaviour, whilst also working within the Centre. The VOTP high intensity program is not offered in the community because of community safety factors.

3.129 The VOTP high intensity program has a duration of approximately 12 months, with three treatment sessions per week, and targets core issues common to violent offenders. It is made up of 'treatment' groups, which address treatment issues relating to offending behavior and 'focus' groups, which provide offenders with skills to address issues related to their offending, such as gambling and substance misuse. The program is staffed by a multi-disciplinary team, which includes specialist psychologists, custodial staff, and Offenders Services and Programs staff.[123]

3.130 VOTP maintenance and outreach services are also available to violent offenders who have successfully completed the VOTP program. VOTP maintenance and outreach services are available in group therapy or individually, both in custody and community settings. The program is intended to assist offenders to manage their risk of violent re-offending, to reinforce knowledge and skills learnt in the VOTP high intensity program, to further develop and implement their relapse prevention management plans and to give them access to support networks upon release to the community. VOTP is delivered by VOTP staff that liaise with the offender's case management team, the SORC and parole and probation staff.[124]

3.131 CSNSW has undertaken extensive literature review and preliminary data analysis to form the foundation and program pathway for female violent offenders, however a location for this program is to be determined. A specific program for violent offenders with cognitive impairments is in the planning stages.

3.132 To be eligible to do the program, offenders must meet a number of general eligibility criteria, in addition to a number of immediate suitability criteria. In order to be generally eligible for the program, offenders must;[125]

---

123. Corrective Services NSW, *Information V1, Sex and Violent Offender Therapeutic Programmes*, (2011).
124. Corrective Services NSW, *Information V1, Sex and Violent Offender Therapeutic Programmes* (2011).
125. Corrective Services NSW, *Information V1, Sex and Violent Offender Therapeutic Programmes* (2011).

- be serving a sentence with a NPP of at least 2 years, for a violent offence;
- have a history of committing one or more violent offences or history of committing violence within custodial settings;
- be at medium-high or high risk of recidivism as measured by LRI-R;

and, additionally, there must be sufficient time (at least 12 months) remaining on their sentence to complete VOTP treatment.

3.133 Offenders would not generally be eligible for VOTP if:[126]

- they are appealing against their conviction;
- they have committed a serious violent offence against a child;
- they have an impairment that renders them unable to successfully complete the program on the basis of psychiatric, cognitive or intellectual functioning or physical abilities.

3.134 Examples of violent offenders who may be eligible for the program include:[127]

- violent offenders who are assessed as having high levels of psychopathic tendencies;
- violent offenders with domestic violence convictions;
- violent offenders who have committed a sexual offence; and
- violent offenders appealing against the severity of their sentence.

3.135 Prior to an offender being offered a place in the VOTP, CSNSW conducts an assessment of 'immediate suitability'. An offender will be considered unsuitable if he has;

- been non-compliant with psychiatric medication or methadone regimes within the prior two months;
- been assessed as at risk of suicide or self-harm;
- received aggression or drug related charges while in custody within the preceding 2 months;
- received adverse intelligence reports within the last two months;
- been segregated in custody within the last two months; or
- received additional charges that are subject to court proceedings.

126. Corrective Services NSW, *Information V1, Sex and Violent Offender Therapeutic Programmes* (2011).

127. Corrective Services NSW, *Information V1, Sex and Violent Offender Therapeutic Programmes* (2011).

Serious Offenders Review Council (SORC)

3.136 SORC is an independent statutory authority established under the *Crimes (Administration of Sentences) Act 1999* (NSW). Its membership includes judicial members, officers of CSNSW and community representatives.[128] SORC's functions include:

- to provide advice and make recommendations to the Commissioner with respect to the security classification of serious offenders, the placement of serious offenders, and developmental programs provided for serious offenders;[129]
- to provide reports and advice to the parole authority concerning the release on parole of serious offenders;[130]
- to prepare and submit reports to the Supreme Court with respect to applications under Schedule 1 to the CSPA (in relation to the determination of parole periods in respect of existing life sentences);[131]
- to perform such other functions as may be prescribed by the regulations in relation to the management of serious offenders and other offenders.[132]

3.137 The Act sets out a number of considerations that SORC must take into account when performing its advisory role, including:

- any submissions made by the State and/or the offender's victim (these considerations apply where SORC is providing advice or a recommendation to reduce an offender's security classification and the reduction would allow the offender to become eligible for unescorted leave);[133]
- the public interest (guided by the factors set out in s 198(3)), the offender's classification history, the offender's conduct while in custody (both in relation to sentences being served and prior sentences), the offender's willingness to participate in rehabilitation programs, any medical, psychiatric or psychological reports and any other matters that SORC considers relevant (these considerations apply where SORC is providing a report or advice to the Parole Authority concerning an offender's release on parole).[134]

Parole

3.138 The parole scheme that is in place in NSW specifically addresses the risk of recidivism of offenders, including violent offenders, by supporting their reintegration back into the community during a period of conditional release subject to supervision, while providing a continuing measure of protection to society.

3.139 Section 135 of the Crimes (Administration of Sentences) Act 1999 (NSW) provides:

---

128. *Crimes (Administration of Sentences) Act 1999* (NSW) s 195(2).
129. *Crimes (Administration of Sentences) Act 1999* (NSW) s 197(2)(a).
130. *Crimes (Administration of Sentences) Act 1999* (NSW) s 197(2)(b).
131. *Crimes (Administration of Sentences) Act 1999* (NSW) s 197(2)(c).
132. *Crimes (Administration of Sentences) Act 1999* (NSW) s 197(2)(f).
133. *Crimes (Administration of Sentences) Act 1999* (NSW) s 198(2).
134. *Crimes (Administration of Sentences) Act 1999* (NSW) s 198(2A).

> (1) 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.
>
> (2) In deciding whether or not the release of an offender is appropriate in the public interest, the Parole Authority must have regard to the following matters:
>
> (a) the need to protect the safety of the community,
>
> (b) the need to maintain public confidence in the administration of justice,
>
> (c) the nature and circumstances of the offence to which the offender's sentence relates,
>
> (d) any relevant comments made by the sentencing court,
>
> (e) the offender's criminal history,
>
> (f) the likelihood of the offender being able to adapt to normal lawful community life,
>
> (g) the likely effect on any victim of the offender, and on any such victim's family, of the offender being released on parole,
>
> (h) any report in relation to the granting of parole to the offender that has been prepared by or on behalf of the Probation and Parole Service, as referred to in section 135A,
>
> (i) any other report in relation to the granting of parole to the offender that has been prepared by or on behalf of the Review Council, the Commissioner or any other authority of the State,
>
> …
>
> (k) such other matters as the Parole Authority considers relevant.
>
> …
>
> (3) Except in exceptional circumstances, the Parole Authority must not make a parole order for a serious offender unless the Review Council advises that it is appropriate for the offender to be considered for release on parole.

3.140 This comprehensive list of considerations gives a high priority to public safety. In addition, the State Parole Authority (SPA) Operating Guidelines provide guidance in relation to the requirements that must be met before releasing offenders, including violent offenders. The Operating Guidelines provide that:

> When considering whether a prisoner should be released from custody on parole, the highest priority for the Parole Authority should be the safety of the community and the need to maintain public confidence in the administration of justice.[135]

and

135. State Parole Authority of NSW, *Operating Guidelines* (2005) [1.1].

> Where an inmate is considered a high risk of re-offending, is a high impact offender (particularly sex offenders and violent offenders) and is unlikely to accept assistance and comply with supervision requirements, the interests of the community are unlikely to be served by release on parole, even for a short period of time. Release to parole in these circumstances could render the Authority liable to justified community concern.[136]

3.141 The Guidelines further provide that, factors for consideration before proceeding to grant parole include:

- the likelihood of the inmate accepting and complying with parole supervision requirements;
- the risk of re-offending during the supervision period; and
- the benefits to the community, if any, of granting parole for a short period.[137]

3.142 The difficult balance that the parole scheme aims to strike between encouraging rehabilitation of offenders and ensuring the protection of the community was highlighted in *R v Knight*:

> The statutory scheme of Parole….. is a carefully crafted scheme that attempts, amongst other things to reconcile the undoubted advantages of encouraging rehabilitation – which is both in the public interest and the interest of the offender – with the necessity of ensuring the protection of the public from offenders who still present, at the expiration of the non-parole period, a significant danger to the public, which the conditions of parole and the supervision by such instrumentalities as the Probation and Parole Service might be insufficient to deal with.[138]

3.143 In accordance with s 135(3) of the *Crimes (Administration of Sentences) Act*, SPA must not make a parole order for a Serious Offender unless SORC advises that it is appropriate. The SPA 2010 Annual Report shows that:

- three per cent of all offenders granted parole in that year were serious offenders; and
- twenty-two per cent of offenders who were refused parole were serious offenders.[139]

3.144 While there is scope to decrease the risk of recidivism of violent re-offenders through conditional release on parole, subject to supervision, the nature of the scheme tends to limit the extent to which this can be done, because the decision whether to grant or refuse parole involves a consideration of the risk that the offender poses to the community. If an offender is assessed by SORC or the Commissioner or SPA as continuing to present a high risk of violent re-offending and there are no factors present to mitigate that risk, then it is unlikely that SPA would consider it 'appropriate in the public interest' to grant parole.

3.145 Although no specific legislative requirement exists that would make participation in a program that addresses violence or serious sexual offending as a prerequisite for

136. State Parole Authority of NSW, *Operating Guidelines* (2005) [2.6].
137. State Parole Authority of NSW, *Operating Guidelines* (2005) [2.6].
138. *Knight v The Queen* [2006] NSWCCA 292, (2006) 164 A Crim R 126, at [56].
139. State Parole Authority of NSW, *Annual Report* (2010), at 16.

release, in practice whether or not the offender has participated in such a program, and his or her response to it, are of substantial significance for the decision of SPA whether to grant or refuse release on parole.

3.146 Engagement in such a program will almost inevitably be critical for any application by the Crown that an offender be made the subject of an order for continuing detention or extended supervision under the CSSOA scheme, or under any similar scheme of the kind considered in Chapter 4.[140]

140. *Crimes (Serious Sex Offenders) Act 2006* (NSW), ss 9, 17.

4. Schemes in other jurisdictions aimed at public protection

Introduction **66**
Statutory encroachment on the principle of proportionality 66
Indefinite sentencing schemes **67**
Victoria 69
Queensland 72
Northern Territory 74
South Australia 75
Tasmania 78
Western Australia 79
England and Wales 81
Existing scheme 81
Prospective scheme 84
Scotland 85
Risk assessment 85
Order for lifelong restriction 86
Risk management plans 87
Risk Management Authority 88
New Zealand 89
Canada 90
Disproportionate sentencing **92**
Sentencing Act 1991 (Vic) 92
Criminal Law (Sentencing) Act 1988 (SA) 93
Extended sentences in the United Kingdom 94
Long term offender declarations—Canada *95*
Continuing detention and extended supervision **96**
Introduction 96
Legislative objects and purposes 96
Who may apply for an order, when and where 97
Preliminary stages in establishing ‘dangerousness’ 97
Establishing the grounds for final orders 98
Risk assessment in Queensland 99
Risk assessment in Western Australia 100
Risk assessment in Victoria 101
Risk assessment in New South Wales 102
Effect of detention orders 105
Effect of supervision orders 105
Statutory conditions 105
Discretionary conditions 105
Duration of supervision orders 106
The effect of breaching a supervision order 107
Preventive Detention for the purpose of preventing a terrorist act **108**
Commonwealth 109
States and Territories 109
Release on license schemes **109**
New South Wales 109
Australian Capital Territory 110
Commonwealth 112
South Australia 114

Criminal Law (Sentencing) Act 1988 s 24 114
Young Offenders Act 1993 115
England and Wales 116
Control or prohibition orders 116
Orders aimed at interpersonal violence including domestic violence 117
Victoria 117
Queensland 117
ACT 118
South Australia 118
Western Australia 118
Northern Territory 118
Tasmania 118
Orders aimed at the protection of Children 118
Western Australia 119
Queensland 119
Orders aimed at public protection 119
Commonwealth 120
States and Territories 120
Violent Offender Orders – England and Wales *121*

Introduction

4.1 In this Chapter, we examine a number of models utilised in jurisdictions other than NSW to detain and supervise high-risk offenders. Some of those models relate specifically to HRVOs, while others relate to sexual offenders. In some circumstances the offending behaviour and risk to others may bring the offender into each category.

Statutory encroachment on the principle of proportionality

4.2 Although the common law clearly establishes the primacy of proportionality over community protection, legislatures in a number of jurisdictions have established schemes that elevate the importance of community protection as an aim of sentencing, and provide for the imposition of a sentence that may be disproportionate to the gravity of an index offence.

4.3 These schemes take a number of forms, including:

- indefinite or indeterminate sentencing schemes, where the sentence imposed on the offender has no end date;
- disproportionate sentencing schemes, where the sentence imposed on the offender may be longer than that which would be proportionate to the objective gravity of the offence;
- continuing detention and extended supervision schemes, where an order is made towards the end of a sentence, extending the term of an offender's detention, or the period of post-sentence supervision;
- 'order for restriction' or 'release on licence schemes', which provide a mechanism for monitoring an offender in the community for life and for his or her return to prison;

- control or prohibition order schemes, which restrict the behaviour of certain individuals in the community.

4.4 These schemes, and examples of their operation, are discussed in further detail below.

Indefinite sentencing schemes

4.5 An indefinite sentence is a sentence of imprisonment, imposed at the time of sentencing, which has no specified end-point. This may be a life sentence, but sentencing schemes of this kind usually provide for the indefinite detention of offenders who commit certain serious offences regardless of the maximum sentence otherwise available for the offence. Offenders who receive such sentences are however subject to the possibility of release following review at some future undefined time, that is after they have served what would otherwise have been an appropriate punitive sentence for the serious offence.

4.6 Indefinite sentencing schemes have the benefit of making offenders aware, at the time of sentence, that they may be imprisoned for an indefinite period, subject to later review. The early risk assessment that is necessary in such cases provides an opportunity for correctional facilities to target specific programs towards 'dangerous' offenders. At first glance, these sentencing schemes appear to have the drawback of requiring a court, at the time of sentencing, to assess the risk that an offender might pose to the community at some point in the future if released. However, as a result of the rehabilitation and treatment programs available to offenders in custody, an offender's risk to the community may be significantly different between the time of sentence and the time of release. A number of schemes address this issue by requiring an ongoing review of an offender's risk and only permitting continued detention for as long as an offender *remains* a danger to the community.

4.7 NSW has no scheme for indefinite detention, other than the ability of courts to impose a life sentence for offences attracting that penalty. Release on parole or subject to a licence is not possible in the case of a life sentence imposed for an offence under the laws of NSW. The position is otherwise in the case of offences under laws of the Commonwealth, and in the case of all of the other states and territories in relation to offences under the laws of those jurisdictions.

4.8 In 1996, the NSW LRC examined the desirability of introducing preventive, or 'protective' sentences, such as indefinite sentences, in NSW. The Commission did not support their introduction, arguing that they risked constituting 'a violation of human rights and could be said to amount to 'cruel and unusual punishment'.[1]

4.9 This was prior to the decision of the Supreme Court of Victoria in *Moffatt*,[2] and the communication of the views of the UN Human Rights Committee in *Rameka.*[3]

1. NSW Law Reform Commission, *Sentencing*, Report 79 (1996), 226.
2. *R v Moffat* [1998] 2 VR 229.
3. *Rameka v New Zealand, Communication No. 1090/2002, Views of the Human Rights Committee*, UN Doc CCPR/C/79/D/1090/2002 (2003).

4.10 In *Moffat's* case,[4] the Supreme Court of Victoria upheld the validity of Victoria's indefinite sentencing scheme, established under the *Sentencing Act 1991* (Vic), finding that the scheme did not remove judicial discretion and that the power to impose an indefinite sentence was an additional sentencing option to be utilised in exceptional circumstances following a finding of guilt for a serious act of violence, as distinguished from a preventive detention scheme intended to deprive a person of liberty on the basis of a violent act they may commit in the future.[5] Of importance for the decision was the fact that the legislation invested in the offender the right to have the sentence terminated in accordance with a fair and open process for review exercisable by the Court.

4.11 In *Rameka,* the offenders had been sentenced under New Zealand's *Criminal Justice Act 1985*, which at that time provided for indefinite detention of certain serious offenders where they were considered to present a substantial risk to the public upon release. Under the Act, an indefinite sentence was to be reviewed annually by the Parole Board, with reviews commencing from the expiry of the NPP, which was generally to be 10 years. The UN Human Rights Committee considered that it was permissible, in principle, to have an indefinite sentencing scheme for the purpose of protecting the public, provided that necessary safeguards are incorporated into the scheme.[6]

4.12 In the view of the Committee, in order to be free from arbitrariness, detention under an indefinite sentencing scheme must involve

- regular periodic reviews of each individual case, commencing from at least the expiry of the punitive portion of the sentence, that is, the finite sentence that would have been imposed had indefinite detention not been ordered;
- an independent body with the ability to act in a judicial fashion to conduct the reviews; and
- the existence of compelling reasons for continued detention beyond the punitive portion of the sentence, which remain applicable for as long as the detention continues.[7]

4.13 In *Buckley v R*, the High Court held, in relation to the *Penalties and Sentences Act 1992* (Qld):

> Serious violent offenders will commonly present a danger to the community. Protecting the community may be one of the purposes of the imposition of a lengthy custodial sentence. Such custodial sentences remain the norm for the punishment of offender convicted of serious offences of violence. Indefinite sentences are not the norm. Part 10 of the Act proceeds upon the basis that there may be certain cases where the extraordinary step of imposing an indefinite sentence may be justified as a response to the risk of serious danger to the community. The risk to be weighed is the risk 'if an indefinite sentence were not imposed' (s 163(4)(d)). Where the appropriate finite term, according to ordinary sentencing principles, is 22 years, then it is necessary to consider

4. *R v Moffat* [1998] 2 VR 229.
5. *R v Moffat* [1998] 2 VR 229, at 237–239, 251–253, 260.
6. *Rameka v New Zealand, Communication No. 1090/2002, Views of the Human Rights Committee*, UN Doc CCPR/C/79/D/1090/2002 (2003), at [7.3]–[7.4].
7. *Rameka v New Zealand, Communication No. 1090/2002, Views of the Human Rights Committee*, UN Doc CCPR/C/79/D/1090/2002 (2003), at [7.3]–[7.4].

> whether the protective purpose in contemplation could reasonably be met by such a term. If it were otherwise, the consequence would be the banalisation of indefinite imprisonment.[8]

4.14 The validity of such schemes has thus been accepted, however, courts have also recognised that indefinite sentences depart from the principle of proportionality and, as such, should only be imposed in exceptional circumstances.[9] The power to impose such sentences is 'to be sparingly exercised, and then only in clear cases'.[10] In particular, it has been observed that indefinite sentences should not be used where a finite term could also fulfil the purpose of community protection.[11]

4.15 Further, it has been accepted that the power to order indefinite sentences must only be exercised in cases where there is comprehensive evidence to support the need for a preventive element to the sentence,[12] and where there has been 'a most careful hearing in which all relevant material is before the judge or judges responsible for making such an order. It is not something to be hurried. It is not a course to be dealt with on materials known to be incomplete or otherwise insufficient'.[13]

4.16 The operation of the indefinite sentencing schemes in place in other jurisdictions is outlined below.

Victoria

4.17 Sections 18A–18P of the *Sentencing Act 1991* (Vic) set out Victoria's scheme for indefinite detention. The relevant sections are extracted at Appendix B.

4.18 The scheme enables the Supreme Court to impose an indefinite sentence on an offender convicted of a 'serious offence', regardless of the maximum available penalty for the offence.[14] The Act sets out those offences that constitute a 'serious offence'. These include murder, manslaughter and a number of other violent and sexual offences.[15]

4.19 The Court can impose an indefinite sentence on its own initiative, or on an application by the Director of Public Prosecutions (DPP) 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.[16] The prosecution bears the onus of proving that the offender poses a serious danger to the community.[17]

---

8. *Buckley v The Queen* [2006] HCA 7, (2006) 224 ALR 416; at [42].
9. See *Buckley v The Queen* [2006] HCA 7, (2006) 224 ALR 46, at [42]; *Fardon v Attorney-General (Qld)* [2004] HCA 46, (2004) 223 CLR 575, at [215]–[217]; *R v Moffatt* [1998] 2 VR 229.
10. *R v Moffatt* [1998] 2 VR 229, at 251–252.
11. *Buckley v The Queen* [2006] HCA 7, [42], (2006) 224 ALR 46.
12. *McGarry v The Queen* [2001] HCA 62, at [60]–[67]; (2001) 207 CLR 121.
13. *Thompson v The Queen* [1999] HCA 43, at [19].
14. *Sentencing Act 1991 (*Vic) ss 18A(1), (6).
15. *Sentencing Act 1991* (Vic) s 3.
16. *Sentencing Act 1991* (Vic) s 18A(5), 18B(1).
17. *Sentencing Act 1991* (Vic) s 18B(3).

4.20 If the perceived danger to the public posed by the offender arises because of an apparent mental illness that requires treatment, the Court must initially deal with the offender under the provisions of the Act that relate to offenders with a mental illness, rather than by imposing an indefinite sentence.[18]

4.21 The court can impose an indefinite sentence in the following circumstances, set out in s 18B of the Act:

> (1) 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 because of—
>
> (a) his or her character, past history, age, health or mental condition; and
>
> (b) the nature and gravity of the serious offence; and
>
> (c) any special circumstances.
>
> (2) In determining whether the offender is a serious danger to the community, the court must have regard to—
>
> (a) whether the nature of the serious offence is exceptional;
>
> (b) anything relevant to this issue contained in the certified transcript of any proceeding against the offender in relation to a serious offence;
>
> (c) any medical, psychiatric or other relevant report received by it;
>
> (d) the risk of serious danger to members of the community if an indefinite sentence were not imposed;
>
> (e) the need to protect members of the community from the risk referred to in paragraph (d)—
>
> and may have regard to anything else that it thinks fit.

4.22 Where an indefinite sentence is imposed, the court does not fix a NPP,[19] and the offender is not eligible for release on parole.[20]

4.23 The Act contains a number of safeguards, for example:

- indefinite sentencing does not apply to a young person;[21]
- the DPP can only apply for an indefinite sentence if the Court has filed on the day of conviction, or within 5 working days after the date of conviction, a notice of intention to apply for an order;[22]
- the offender must be advised that an indefinite sentence is being considered, and the impact of such a sentence, on the day of conviction or within 5 days

18. That is, by making an assessment order; or a diagnosis, assessment and treatment order under Part 5 of the Act: *Sentencing Act 1991* (Vic) s 18A(7).
19. *Sentencing Act 1991* (Vic) s 18A(2).
20. *Sentencing Act 1991* (Vic) s 18A(4).
21. *Sentencing Act 1991* (Vic) s 18A(1)
22. *Sentencing Act 1991* (Vic) s 18C(1).

after the date of conviction and the Court must adjourn sentencing until at least 25 days after the date of conviction;[23]

- the prosecution and the offender must be given an opportunity to lead admissible evidence on any matter relevant to imposing an indefinite sentence;[24]
- the Court must set a 'nominal sentence' (which equates to the length of the NPP that would have been imposed, had the court not ordered an indefinite sentence) and conduct a review hearing as soon as possible once the nominal sentence has expired to determine whether the indefinite sentence should continue;[25]
- the Court may order reports to be prepared for the purpose of the review hearing;[26] and the offender has the opportunity to dispute any such report;[27]
- the offender can appeal a decision following a review hearing not to discharge the indefinite sentence;[28]
- if the Court does not discharge the sentence on review, the offender can continue to apply for reviews every three years.[29]

4.24 If, at the time of a review hearing, the Court is not satisfied to a high degree of probability that the offender remains a serious danger to the community, the Court must discharge the sentence and make the offender subject to a 'reintegration program'. This program lasts for 5 years and has the same consequences as if the offender was subject to Parole supervision.[30] If the Court does not make an order discharging the indefinite sentence then it continues in force.[31]

4.25 The warning of the Supreme court in *R v Moffat*,[32] that the power to order indefinite sentences should be used only in exceptional cases,[33] appears to have been respected, with Judges rarely imposing that form of sentence.[34] As at 30 June 2011, there were 4 prisoners in Victoria serving indefinite sentences.[35] As Richardson and Freiberg point out:

> [t]he sentences that have been imposed have been in very clear, exceptional cases where the instant offence(s) have been extremely serious, the offender

23. *Sentencing Act 1991* (Vic) s 18D.
24. *Sentencing Act 1991* (Vic) s 18F.
25. *Sentencing Act 1991* (Vic) ss 18A(3), 18H, 18M.
26. *Sentencing Act 1991* (Vic) s 18I.
27. *Sentencing Act 1991* (Vic) s 18K.
28. *Sentencing Act 1991* (Vic) s 18O.
29. *Sentencing Act 1991* (Vic) s 18H.
30. *Sentencing Act 1991* (Vic) ss 18M, 18N.
31. *Sentencing Act 1991* (Vic) s 18H(2).
32. [1998] 2 VR 229.
33. *R v Moffat* [1998] 2 VR 229, at 234.
34. Sentencing Advisory Council (Victoria), *High-Risk Offenders: Post-Sentence Supervision and Detention*, Discussion and Options Paper (2007), 46.
35. Not including prisoners serving life sentences: Australian Bureau of Statistics, *Prisoners in Australia* (2011) (Prisoner characteristics, states and territories data cube), Table 9.

has a very long history of prior convictions and incarceration, has undergone treatment programmes and attempts at rehabilitation have failed.[36]

4.26 The Sentencing Advisory Council of Victoria has observed that an effective use of options such as indefinite sentences could render continuing detention and extended supervision schemes, such as that contained in the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) unnecessary.[37]

4.27 It is noted that, in addition to indefinite sentences, the Victorian scheme also provides for the imposition of disproportionate sentences under Part 2A of the *Sentencing Act 1991* (Vic). This approach is discussed later in this Chapter.

Queensland

4.28 Sections 162–179 of the *Penalties and Sentences Act 1992* (Qld) (extracted at Appendix B) set out Queensland's indefinite sentencing scheme applicable to offenders convicted of a qualifying offence,[38] in terms similar to the Victorian Act, however, there are some key distinctions, for example:

- the power to impose an indefinite sentence is not limited to the Supreme Court;[39]
- prosecution applications for an indefinite sentence can only be made with the consent in writing of the Attorney General, which can only be given if the offender is convicted of a qualifying offence;[40]
- review by the Court of an indefinite sentence occurs earlier than in Victoria, with the initial review occurring within 6 months after the expiry of 50% of the nominal sentence (or after 15 years if the nominal sentence is one of life imprisonment).[41] Subsequent reviews are conducted at least every 2 years.[42]
- regular reviews do not require an application by the offender; however, the offender can apply for additional reviews with the court's leave if there are exceptional circumstances.[43]
- unless, on review, the court is satisfied that the offender is still a serious danger to the community, it must order that the indefinite sentence is discharged, and impose on the offender, for the qualifying offence, a sentence of imprisonment that must be not less than the nominal sentence, with the term taken to have commenced on the day the original indefinite sentence was imposed. The finite sentence then takes the place of the indefinite sentence;[44]

36. E Richardson and A Freiberg, 'Protecting Dangerous Offenders from the Community' (2004) 4(1) *Criminal Justice* 81, 90–91.
37. Sentencing Advisory Council (Victoria), *High-Risk Offenders: Post-Sentence Supervision and Detention*, Discussion and Options Paper (2007), 46.
38. *Penalties and Sentences Act 1992* (Qld) s 163.
39. *Penalties and Sentences Act 1992* (Qld) s 163.
40. *Penalties and Sentences Act 1992* (Qld) s 165.
41. This is extended to 20 years if the offender has committed more than one murder: *Penalties and Sentences Act 1992* (Qld) s 171.
42. *Penalties and Sentences Act 1992* (Qld) s 171.
43. *Penalties and Sentences Act 1992* (Qld) s 172.
44. *Penalties and Sentences Act 1992* (Qld) s 173.

- once a finite sentence has been imposed, an offender can apply for release on parole under the *Corrective Services Act 2006* (Qld), unless there are less than 6 months of the sentence remaining.[45] The Parole Board may then grant parole and set a parole period, which must not end before the expiry of the sentence.[46] If the offender is not yet on parole when there are only 6 months of the sentence remaining, the Parole Board *must* make a parole order, ordering release of the prisoner at any time before, or at, the end of the 6 month period, with a parole period of 5 years, or less if the Board considers this to be appropriate.[47]

4.29 In *Buckley v R,*[48] the High Court commented on the exceptional nature of indefinite sentencing orders under the *Penalties and Sentences Act 1992*:

> where a judge, sentencing a dangerous offender, is deciding whether the protection of society requires an indefinite sentence, the protective effect of a finite sentence, fixed according to ordinary sentencing principles, including the need to protect the public, is a matter to be weighed carefully. 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.[49]

4.30 Queensland has a separate indefinite sentencing scheme for sex offenders under the *Criminal Law Amendment Act 1945* (see Appendix B). The scheme relates to offenders who are convicted of an offence of a sexual nature upon a child under the age of 16 years, and who, following inquiry into the mental condition of the offender by two or more medical practitioners appointed by the Court for the purpose, are reported to be, 'incapable of exercising proper control over [their] sexual instincts'.[50] In such cases, the judge may make a declaration to that effect and direct that the offender be detained in an institution 'during Her Majesty's pleasure'. The declaration and detention can operate either in addition to or in lieu of any other sentence imposed for the offence.[51]

4.31 On the Attorney General's application, the Supreme Court can also direct that an offender who is already serving a sentence of imprisonment for an offence of a sexual nature continue to be detained 'during Her Majesty's pleasure', if satisfied that the offender is incapable of controlling his sexual instincts, that the incapacity can be cured by continued treatment, and that it is desirable, for the purposes of treatment, that the person continue to be detained in an institution beyond the expiration of their sentence.[52]

4.32 Offenders detained 'during Her Majesty's pleasure' remain in detention, either in a correctional facility or other institution, until the Governor in Council is satisfied, on the report of two medical practitioners, that it is expedient to release the offender.[53]

---

45. *Penalties and Sentences Act 1992* (Qld) s 174.
46. The period is to be 5 years, unless there are more than 5 years of the sentence remaining (in which case the parole period can exceed 5 years); or the board considers that a parole period of less than 5 years is appropriate: *Penalties and Sentences Act 1992* (Qld) s 174.
47. *Penalties and Sentences Act 1992* (Qld) s 174A.
48. [2006] HCA 7, (2006) 224 ALR 46.
49. *Buckley v The Queen* [2006] HCA 7, (2006) 224 ALR 46, at [7], [42].
50. *Criminal Law Amendment Act 1945* (Qld) s 18(1).
51. *Criminal Law Amendment Act 1945* (Qld) s 18(3).
52. *Criminal Law Amendment Act 1945* (Qld) s 18(4).
53. *Criminal Law Amendment Act 1945* (Qld) s 18(5).

Medical examinations must take place every three months.[54] Offenders may apply for parole in accordance with the provisions of the *Corrective Services Act 2006* (Qld), however, parole may only be granted if the Parole Board is satisfied that the offender does not represent an unacceptable risk of safety to others.[55]

4.33 The Court of Appeal has stated that, in order to justify the making of an order under s 18(3) of the *Criminal Law Amendment Act 1945,* a judge must determine whether he or she accepts the opinions of the appointed medical practitioners that the offender is incapable of exercising proper control over their sexual instincts. In making that determination, the judge can rely on any evidence properly before the court.[56]

4.34 This legislation is supplemented by the *Dangerous Prisoners (Sexual Offenders) Act 2003*, which provides for continuing detention or supervision of prisoners subject to the Act. This scheme is discussed later in this Chapter.

4.35 As at 26 April 2012, 5 offenders had been sentenced to indefinite detention under s 163 of the *Penalties and Sentences Act 1992* (Qld).[57]

Northern Territory

4.36 The Territory's scheme, set out in sections 65–78 of the *Sentencing Act 1995* (NT) (extracted at Appendix B) closely mirrors Queensland's provisions.

4.37 As with Victoria, indefinite sentences in the Northern Territory are only available to the Supreme Court, which can impose such a sentence on an offender convicted of:

- a violent offence attracting a life sentence; or
- sexual assault or gross indecency without consent or against a child,[58]

where the Court is satisfied, to a high degree of probability, by acceptable and cogent evidence,[59] that the offender is a serious danger to the community because of:

(a) the offender's antecedents, character, age, health or mental condition;

(b) the severity of the violent offence; or

(c) any special circumstances.[60]

4.38 Initial review by the Court of an indefinite sentence must occur within 6 months after the expiry of 50% of the nominal sentence, which the Court is required to pronounce

54. *Criminal Law Amendment Act 1945* (Qld) s 18(8).
55. *Criminal Law Amendment Act 1945* (Qld) s 18E.
56. *R v Waghorn* (1993) 1 Qd R 563, 569. The Court of Appeal set aside the order detaining Waghorn at Her Majesty's pleasure. The offender later became the subject of a continuing detention order made under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).
57. Department of Justice and Attorney General (Qld), *Correspondence* (2012).
58. *Sentencing Act 1995* (NT) s 65.
59. *Sentencing Act 1995* (NT) s 71.
60. *Sentencing Act 1995* (NT) s 65(8).

when the sentence is imposed, or after 13 years if the nominal sentence is life imprisonment. Subsequent reviews are conducted at least every 2 years.[61] These regular reviews do not require an application by the offender; however, the offender can apply for additional reviews with the Court's leave if there are exceptional circumstances.[62]

4.39 If the Supreme Court is not satisfied, upon reviewing an indefinite sentence, that the offender continues to pose a serious danger to the community, it will re-sentence the offender for the original offence. The new sentence is taken to have commenced on the day the original indefinite sentence was imposed and must be at least as long as the nominal period.[63]

4.40 Release to a re-integration program (as in Victoria), or the making of a parole order (as in Queensland) are not automatically triggered events. After an offender has been re-sentenced following review, he or she must apply to be released to a re-integration program of at least 5 years duration.[64]

4.41 There were 10 NT prisoners serving indefinite terms of imprisonment as at 30 June 2011.[65]

South Australia

4.42 Similarly to Queensland's *Criminal Law Amendment Act,* the *Criminal Law (Sentencing) Act 1988* (SA) (extracted at Appendix B) provides for the indefinite detention of offenders convicted of certain sexual offences who are 'incapable of controlling, or unwilling to control, sexual instincts'.[66]

4.43 The Supreme Court may order that an offender be detained in custody until further order if it is satisfied that the order is appropriate, on the basis of reports into the mental condition of the offender prepared by two medical practitioners (or other relevant evidence if the offender refuses to participate in an evaluation) and any other relevant evidence led by the offender.[67] The legislation does not specify the standard of proof required. However, in *R v England*,[68] the Supreme Court observed:

> [S]atisfaction as to the inability of a person to control their sexual instincts is a matter of assessing the opinions to that effect, their strengths and their weaknesses, to a point where the Court can be satisfied that the incapacity is present. In doing so, the Court will need to take account of the seriousness of the declaration it is asked to make and the gravity of the consequences of giving the direction. To borrow the words of Dixon J in *Briginshaw v Briginshaw* (above), the necessary degree of satisfaction cannot be produced "by inexact proofs, indefinite testimony or indirect inferences". It will require cogent and

61. *Sentencing Act 1995* (NT) s 72.
62. *Sentencing Act 1995* (NT) s 73.
63. *Sentencing Act 1995* (NT) s 74.
64. *Sentencing Act 1995* (NT) s 75.
65. Australian Bureau of Statistics, *Prisoners in Australia* (2011) (Prisoner characteristics, states and territories data cube), Table 9.
66. *Criminal Law (Sentencing) Act 1988* (SA) s 23.
67. *Criminal Law (Sentencing) Act 1988* (SA) s 23(5).
68. *R v England* [2004] SASC 20, (2004) 87 SASR 411.

> acceptable evidence in order to justify the making of the declaration and the giving of the direction. But even then, there is a residual discretion conferred by the use of the word "may" in the subsection. In that respect it may also be appropriate to consider, as in the case of *R v Fahey* (above) and *R v Riley* (above) whether, if a sentence is also imposed, the defendant is likely, at the end of the custodial period, to resume similar sexual activities. This will, in turn, require consideration, among other things, of the defendant's access to and the likely effect of various regimes of treatment, and whether they can be effected in the prison setting or in some other institution contemplated by the section.[69]

4.44 The Court may make an order for indefinite detention either at the time of sentencing or, on application by the Attorney General, during the term of a sentence.[70] Indefinite detention may be ordered either instead of, or in addition to, a sentence of imprisonment.[71]

4.45 The review mechanism in South Australia operates quite differently to that in other states and territories. Regular reviews are undertaken not by the Court, but by the Parole Board, which must consider the progress of offenders detained indefinitely on at least a six-monthly basis.[72] The reports prepared following these reviews do not feed into a judicial review of the indefinite sentence. In *R v Armfield*,[73] it was assumed that the purpose of these reviews was to 'monitor [the offender's] rehabilitation and assist in making him a "priority" for any available sexual offender treatment programs'.[74]

4.46 The DPP or the offender may apply to the Supreme Court for the order to be discharged,[75] but there is no obligation on the DPP to make an application for the Supreme Court to undertake a review, as there is in other states.[76] In contrast to jurisdictions that require the DPP to prove that the offender poses a serious danger,[77] the onus on proving that a South Australian order should be discharged rests on the offender.[78]

4.47 The question for the Court when determining an application for discharge is not the same as that which must be satisfied when initially imposing the order, rather:

> the requirement for the discharge of an order for detention is simply that specified in subs(12). That is, that the court is satisfied that the order should be discharged, after taking into account the interests of the person and of the community. Clearly enough, the court would consider the risk of further offending by the person. The greater the risk, the less likely the court would be to discharge the order. If the court is in fact satisfied that the person is capable of controlling his or her sexual instincts, one would expect the order to be discharged as of course. But, in my opinion, it is not essential that the court be so satisfied before it can discharge the order. Even though the court is not

69. *R v England* [2004] SASC 20, (2004) 87 SASR 411 at [56].
70. *Criminal Law (Sentencing) Act 1988* (SA) s 23(2a), (6).
71. *Criminal Law (Sentencing) Act 1988* (SA) s 23(6).
72. *Criminal Law (Sentencing) Act 1988* (SA) s 23(9).
73. [2005] SASC 108.
74. *R v Armfield* [2005] SASC 108, at [71].
75. *Criminal Law (Sentencing) Act 1988* (SA) s 23(11).
76. See, for example, *Sentencing Act 1991* (Vic) s 18H(2); *Penalties and Sentences Act 1992* (Qld) s 171(2); *Sentencing Act 1995* (NT) s 72(2).
77. See, for example, *Sentencing Act 1991* (Vic) s 18B(3); *Penalties and Sentences Act 1992* (Qld) s 169; *Sentencing Act 1995* (NT) s 70.
78. *R v O'Shea* (No 2) [1997] SASC 6288, (1997) 94 A Crim R 560, 566.

> affirmatively satisfied that the person is capable of controlling his or her sexual instincts, the court might conclude that the risk of further offending was sufficiently slight for it, having considered the interests of the person and of the community, to discharge the order for detention.[79]

4.48 In a later case involving the same offender, the Supreme Court made the following observation:

> the interests of the community does not mean that a person who poses a risk to the community must be detained indefinitely until the risk is removed. The community may also have a legitimate interest in ensuring that persons are not incarcerated for the term of their natural life simply because they happen to be unfortunate enough not to be able to overcome a condition which poses some risk to the community, that detention being far beyond whatever they may have deserved by way of penalty for the crime that has brought them under attention.[80]

4.49 In addition to applying for a discharge of an indefinite sentence, the DPP or offender may also apply for release on licence, which is discussed further below, at p 50.

4.50 South Australia has two additional schemes for dealing with serious offenders.

4.51 Firstly, as noted below, the *Criminal Law (Sentencing) Act 1988* also makes provision for a form of disproportionate sentencing for serious repeat offenders.

4.52 Second, Division 3 of Part 3 of that Act applies in relation to offenders convicted of murder. In South Australia, murder carries a mandatory life sentence,[81] with a mandatory minimum NPP of 20 years.[82] The Division enables the Attorney General, within the 12 month period before an offender becomes eligible for release on parole,[83] to apply to the Supreme Court to have an offender convicted of murder declared a 'dangerous offender',[84] provided that:

> (i) the offence [of murder] was committed in the course of deliberately and systematically inflicting severe pain on the victim; or
>
> (ii) there are reasonable grounds to believe that the offender also committed a serious sexual offence against or in relation to the victim of the offence in the course of, or as part of the events surrounding, the commission of the offence (whether or not the offender was also convicted of the serious sexual offence).[85]

4.53 The Court must declare an offender to be a dangerous offender if it is satisfied, on the balance of probabilities, that 'the release from prison of the person to whom the application relates would involve a serious danger to the community or a member of the community'.[86] If such a declaration is made, the Court must order that the NPP fixed in respect of the sentence be negated,[87] with the result that the offender will

79. *R v O'Shea (No 2)* [1997] SASC 6288, (1997) 94 A Crim R 560, 564.
80. *O'Shea v DPP* [1998] SASC 6644, (1998) 71 SASR 109, 138.
81. *Criminal Law Consolidation Act 1935* (SA) s 11.
82. *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(ab).
83. *Criminal Law (Sentencing) Act 1988* (SA) s 33A(2).
84. *Criminal Law (Sentencing) Act 1988* (SA) s 33A(1).
85. *Criminal Law (Sentencing) Act 1988* (SA) s 33(2).
86. *Criminal Law (Sentencing) Act 1988* (SA) s 33A(9).
87. *Criminal Law (Sentencing) Act 1988* (SA) s 33A(9).

serve the entire term of the sentence imposed, unless the offender subsequently makes a successful application for the fixing of a NPP.[88]

4.54 The primary consideration for the Court in determining whether to declare an offender to be a dangerous offender is the protection of the safety of the community.[89] Other factors that the court may take into account are:

(a) any relevant remarks made by the court in passing sentence;

(b) the degree to which the person has shown contrition for the relevant offence;

(c) the behaviour of the person while in prison;

(d) any rehabilitation of the person while in prison;

(e) the willingness of the person to co-operate with an inquiry (if any) by the Parole Board under this section;

(f) any reports tendered, and submissions made, to the Court under this section;

(g) the likelihood of the person committing a serious sexual offence, an offence of murder or some other serious offence of a violent nature should the person be released from prison;

(h) whether the non-parole period imposed by the court when sentencing the person for the relevant offence was reduced as a consequence of the commencement of the *Statutes Amendment (Truth in Sentencing) Act 1994*;

(i) the character, antecedents, age, means and physical or mental condition of the person;

(j) the probable circumstances of the person after release from prison;

(k) any other matters that the Court thinks are relevant.

4.55 As at 13 April 2012, there were 11 offenders incarcerated under s 23 of the *Criminal Law (Sentencing) Act 1988* (SA). There were no offenders currently detained as 'dangerous offenders' under s 33A of that Act.[90]

Tasmania

4.56 Tasmania's indefinite sentencing scheme, for which provision is made in the *Sentencing Act 1997* (Tas) (extracted at Appendix B), applies to violent offenders over 17 years of age who have previously been convicted of at least one violent offence.[91] A judge who is of the opinion that such an offender should be declared a 'dangerous criminal' for the protection of the public may make such a declaration in

88. Such an application cannot be made for 12 months after an offender is declared to be a 'dangerous offender': *Criminal Law (Sentencing) Act 1988* (SA) s 33A(10).

89. *Criminal Law (Sentencing) Act 1988* (SA) s 33A(7).

90. Department for Correctional Services (SA), *Correspondence* (2012).

91. *Sentencing Act 1997* (Tas) s 19(1).

addition to sentencing the offender and fixing a NPP.[92] Offenders who are declared to be 'dangerous criminals' are not eligible for release from custody until the declaration is discharged.[93]

4.57 An offender may apply to the Supreme Court to have the declaration discharged once he or she has served a term of imprisonment equal to the NPP applicable to the sentence.[94] As in South Australia, the offender bears the onus of satisfying the court that the declaration is no longer warranted for the protection of the public, by demonstrating a change in circumstances, which justifies a change in the opinion of the Court.[95] The Court must make a discharge order if satisfied that the declaration is no longer warranted for the protection of the public.[96]

4.58 If an application to discharge a dangerous criminal declaration is unsuccessful, an offender can appeal to the Court of Criminal Appeal against the refusal,[97] and can also reapply for discharge in two years, or earlier with the permission of the Court.[98] The Attorney General can also appeal against a discharge order.[99]

4.59 If an order to discharge a serious offender declaration would result in the immediate release of an offender, the Court can delay the effect of the order until the offender has participated in a program to prepare him or her for release.[100]

4.60 In 2008, the Tasmania Law Reform Institute considered the introduction of a continuing detention and extended supervision scheme in Tasmania. The Institute did not recommend the introduction of such provisions, noting that a declaration under s 19 of the *Sentencing Act 1997* could be made during a term of imprisonment and, as such, effectively operated as a continuing detention scheme. The Institute did recommend that s 19 be amended to allow an application for a supervision order at the end of an offender's sentence, as an alternative to continued detention.[101] This recommendation does not appear to have been implemented.

4.61 As at 20 March 2012, there were 20 inmates serving indefinite sentences in Tasmania.[102]

Western Australia

4.62 The *Sentencing Act 1995* (WA) does not limit indefinite sentences to a certain class of offence or offender. Instead, the indefinite sentencing scheme applies to offenders sentenced for an indictable offence who, in the view of a superior court, would be "a danger to society, or a part of it", were they to be released at the expiry

92. *Sentencing Act 1997* (Tas) s 19(1)(d), 19(3).
93. *Sentencing Act 1997* (Tas) s 19(4).
94. *Sentencing Act 1997* (Tas) s 20(2).
95. *Read v The Queen*(1997) 94 A Crim R 539, 540.
96. *Sentencing Act 1997* (Tas) s 20(3).
97. *Sentencing Act 1997* (Tas) s 23(2).
98. *Sentencing Act 1997* (Tas) s 20(6).
99. *Sentencing Act 1997* (Tas) s 23(1).
100. *Sentencing Act 1997* (Tas) s 21(10).
101. Tasmania Law Reform Institute, *Sentencing*, Report 11 (2008), 215.
102. Tasmania Prison Service, *Correspondence* (2012).

of their sentence.[103] In such a case, an order for indefinite imprisonment is imposed in addition to the nominal term of imprisonment imposed for the offence.[104] Before making an order for indefinite imprisonment, the Court must be satisfied, on the balance of probabilities, that when the offender would otherwise be released from custody, he or she would be a danger to society or a part of it because of one or more of the following factors:

(a) the exceptional seriousness of the offence;

(b) the risk that the offender will commit other indictable offences;

(c) the character of the offender and in particular —

(i) any psychological, psychiatric or medical condition affecting the offender;

(ii) the number and seriousness of other offences of which the offender has been convicted;

(d) any other exceptional circumstances.[105]

4.63 The Court may rely on any evidence it thinks fit in reaching this conclusion.[106]

4.64 Although the Act lacks further specificity, the High Court clarified the scope of the relevant provisions in *McGarry v R:*

> A fundamental premise of the criminal law is that conduct is regarded as criminal for the very reason that its commission harms society, or some part of it. On that basis, any risk that an offender may commit some further indictable offence poses a danger to society, or some part of it; the extent of the "danger" would depend only upon the likelihood of the offender reoffending.
>
> …
>
> "danger to society, or a part of it" means more than that there is a risk, even a significant risk, that an offender will reoffend.
>
> …
>
> the sub-section requires attention to whether, were the offender to be released at the end of the nominal sentence, the offender would engage in conduct, the consequences of the commission of which would properly be called "grave" or "serious" for society as a whole, or for some part of it. Then, and only then, could it be concluded that the offender would be a "danger to society, or a part of it".[107]

4.65 A sentence of indefinite imprisonment commences the day the offender would, but for the indefinite sentence, be eligible for release, whether or not that release would be under a parole order.[108]

---

103. *Sentencing Act 1995* (WA) s 98.
104. *Sentencing Act 1995* (WA) s 98(1).
105. *Sentencing Act 1995* (WA) s 98(2).
106. *Sentencing Act 1995* (WA) s 98(3).
107. *McGarry v The Queen* [2001] HCA 62; (2001) 207 CLR 121, at [20]–[23].
108. *Sentencing Act 1995* (WA) s 100.

4.66 Once the indefinite sentence commences, the provisions of Part 3 of the *Sentence Administration Act 2003* regulate the release of the offender.[109]

4.67 One year after the commencement of the offender's sentence, and at 3 year intervals thereafter, the Prisoners Review Board must provide a report about the prisoner to the Minister.[110] The report must outline release considerations and may make a recommendation as to whether or not the Governor should exercise the power to release the prisoner.[111] The Minister may also request a report in relation to the prisoner at any time.[112]

4.68 Following receipt of a report from the Board, the Governor may make a parole order, setting the date for release and the parole period. The parole period must be at least 6 months and no more than 5 years in duration.[113]

4.69 As at 8 December 2011, there were 51 prisoners serving indefinite sentences in Western Australia.[114]

4.70 Western Australia also has a scheme for continuing detention and supervision of serious sexual offenders, as set out at later in this Chapter.

England and Wales

4.71 The *Criminal Justice Act 2003* (UK) contains a series of provisions for sentencing 'dangerous offenders'.[115] The *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) received Royal Assent on 1 May 2012. Sections 122–128 of that Act amend the existing dangerous offender provisions, as set out below, however, those provisions have not yet commenced operation.

Existing scheme

4.72 As they currently stand, the dangerous offender provisions apply to offenders convicted of a 'specified offence' (listed in Schedule 15 to the Act) who, in the opinion of the court, present:

> a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.[116]

4.73 Serious harm is defined as 'death or serious personal injury, whether physical or psychological'.[117]

---

109. *Sentencing Act 1995* (WA) s 101.
110. *Sentence Administration Act 2003* (WA) Table to s 12A.
111. *Sentence Administration Act 2003* (WA) ss 12A(3)-(5)
112. *Sentence Administration Act 2003* (WA) s 12.
113. *Sentence Administration Act 2003* (WA) s 27(3).
114. Australian Bureau of Statistics, *Prisoners in Australia* (2011) (Prisoner characteristics, states and territories data cube), Table 9.
115. *Criminal Justice Act 2003* (UK) ss 224–236.
116. *Criminal Justice Act 2003* (UK) s 225(1), 227(1).
117. *Criminal Justice Act 2003* (UK) s 224(3).

4.74 In assessing the risk presented by the offender, the court must take into consideration the nature and circumstances of the offence and may also consider information about the offender and any previous convictions.[118]

4.75 If an offender meets the 'significant risk' test, the court at present has access to a number of sentencing options:

- a sentence of imprisonment for life;[119]
- an indefinite sentence of Imprisonment for Public Protection (IPP);[120]
- an extended sentence of imprisonment;[121]
- any other lawful sentence.

4.76 The availability of these options depends on whether the specified offence is a 'serious offence', that is, whether it is punishable by imprisonment for at least ten years.[122]

4.77 Offenders serving an indefinite sentence of IPP may be released on licence following the expiry of the NPP (the 'notional minimum term'), which the court sets taking into account the seriousness of the offence and, if relevant, other associated offences.[123] Release is dependent on the appproval of the Parole Board, which may only direct that the prisoner be released if it is satisfied that 'it is no longer necessary for the protection of the public that the prisoner should be confined.[124] This test has been understood to mirror the test for imposing an IPP, that is:

> that it is no longer necessary for the protection of the public against a significant risk of serious harm from the commission of further specified offences that the prisoner should be confined.[125]

---

118. *Criminal Justice Act 2003* (UK) s 229.
119. *Criminal Justice Act 2003* (UK) s 225. Presently, the equivalent order for offenders between 18 and 21 is 'custody for life': *The Criminal Justice Act 2003 (Sentencing) (Transitory Provisions) Order 2005* s 3. Once s 61 of the *Criminal Justice and Court Services Act 2000* (UK) comes into force, only offenders aged below 18 will be distinguished from adults. Such offenders are sentenced to 'detention for life' under s 226 of the *Criminal Justice Act 2003* (UK).
120. *Criminal Justice Act 2003* (UK) s 225(3). Currently, for offenders between 18 and 21, the equivalent order is 'detention in a young offender institution for public protection': The *Criminal Justice Act 2003 (Sentencing) (Transitory Provisions) Order 2005* s 3; and for offenders under 18 is 'detention for public protection': *Criminal Justice Act 2003* (UK).
121. *Criminal Justice Act 2003 (*UK) s 227. Currently the equivalent order for offenders under 21 is 'extended sentence of detention in a young offender institution': T*he Criminal Justice Act 2003 (Sentencing) (Transitory Provisions) Order 2005* s 3; and for offenders under 18 is 'an extended sentence of detention': *Criminal Justice Act 2003* (UK) s 228. See p 96 for further information.
122. *Criminal Justice Act 2003* (UK) s 224(2).
123. *Criminal Justice Act 2003* (UK) s 225(3C); *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 82A(2); Crime (Sentences) Act 1997 (UK) s 28(5).
124. *Crime (Sentences) Act 1997* (UK) ss 28(5)(b); 28(6).
125. *R (Bayliss) v Parole Board* [2009] EWCA Civ 1016, at [15]. Although the Court in Bayliss was not required to determine the test as it was conceded by the Secretary of State, the House of Lords has confirmed that:

    > The test to be applied by the Parole Board is provided by section 28(6). A direction that the prisoner should be released cannot be given unless the Parole Board is satisfied that the protection of the public no longer requires his detention. This provision represents a direct link with the predictive judgment made by the sentencing court that the prisoner would continue to represent a danger at the expiry of the period. The sole basis on which a direction that the

4.78 Upon release, a prisoner is subject to the conditions of a licence for at least ten years.[126] After that period, the Parole Board may order that the licence ceases to have effect.[127] Again, the Board must be satisfied that detention is no longer necessary for protection of the public.[128] The offender may apply for reconsideration by the Board annually.[129] If no order is made, the licence will continue for the rest of the offender's life.[130]

4.79 The IPP scheme, as it was originally drafted, was widely criticised for capturing a large number of less serious offenders and exposing them to unreasonably long periods of detention. The broad applicability of the provisions created a large number of offenders who required intensive intervention in order to demonstrate to the Parole Board that they no longer presented a risk to the public. In-custody treatment programs were unable to cope with the increased demand and prisoners 'languish[ed] in local prisons for months and years, unable to access the interventions they would need before the expiry of their often short tariffs'.[131]

4.80 The Court of Appeal, on considering the application of the scheme to a number of prisoners, found that the Secretary of State had unlawfully failed to operate a properly functioning system, stating that:

> the Secretary of State has acted unlawfully by failing to provide for measures to allow and encourage prisoners serving IPPs to demonstrate to the Parole Board by the time of the expiry of their tariff periods or reasonably soon thereafter that it is no longer necessary for the protection of the public that they continue to be detained.
>
> …
>
> There has been a systemic failure on the part of the Secretary of State to put in place the resources necessary to implement the scheme of rehabilitation necessary to enable the relevant provisions of the 2003 Act to function as intended.[132]

4.81 The applicability of the scheme has since been narrowed,[133] however, the amendment was not retrospective. In 2010 the Prisons Minister noted that 2,500 of the 6,000 prisoners serving IPP sentences had exceeded their NPP, noting that

---

prisoner should be released can be given is the conclusion of the Parole Board that he no longer represents that danger: *R (James) v Secretary of State for Justice (Parole Board intervening)* [2009] UKHL 22, at [108].

126. *Criminal Justice Act 2003* (UK) Sch 18, s 2(5).
127. *Criminal Justice Act 2003* (UK) Sch 18, ss 2(2).
128. *Criminal Justice Act 2003* (UK) Sch 18, ss 2(4).
129. *Criminal Justice Act 2003* (UK) Sch 18, ss 2(3).
130. *R (Walker) v Secretary of State for Justice (Parole Board intervening)* [2008] EWCA Civ 30.
131. HM Chief Inspector of Prisons and HM Chief Inspector of Probation, *The Indeterminate Sentence for Public Protection*, Thematic Review (2008).
132. R*egina (Walker) v Secretary of State for Justice (Parole Board intervening)* (2010) 1 AC 553.
133. The *Criminal Justice and Immigration Act 2008* introduced the limitation now found in s 225(3) of the *Criminal Justice Act 2003* (UK), which requires that an offender either have a previous conviction for a listed offence, or that the index offence would attract a notional minimum term of at least 2 years imprisonment.

intervention programs were not available due to overcrowding and that the position was not defensible.[134]

Prospective scheme

4.82 The *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) makes amendments to the *Criminal Justice Act*, including the abolition of IPPs,[135] and the introduction of "two strike" mandatory life sentences for offenders where:

- the offender is over 18 and has committed a violent, sexual or terrorism related offence that is specified in the prospective Schedule 15B to the Act;
- the seriousness of the offence warrants a sentence of imprisonment of at least 10 years; and
- at the time of the offence, the offender had been convicted of an offence listed in prospective Schedule 15B and received a 'relevant' sentence in relation to that offence.[136]

4.83 The proposed scheme is essentially a habitual offender scheme, providing for life sentences for repeat serious offending.

4.84 Although described by the Government as 'mandatory',[137] the new "two strikes" approach retains an element of discretion by requiring that a life sentence be imposed, 'unless the court is of the opinion that there are particular circumstances which relate to the offence, to the previous offence … or to the offender [that] would make it unjust to do so'.[138]

4.85 Former law lord, Lord Lloyd of Berwick, has made the following comments about the proposed scheme:

> Despite the use of the word "must", there is no must about it. For the clause recognises that judges must pass sentence they believe to be just in the particular circumstances. That is what judges always do. Why then does the government persist in calling the sentence mandatory? It cannot surely be to influence the judge's belief as to what is just, or to create some sort of presumption in favour of a life sentence. How would the judge know what weight to give to such a presumption?
>
> Nor can the clause be defended on the ground that it will act as a deterrent. For it is idle to suppose that a hardened criminal weighs up the difference between a life sentence and a long determinate sentence, and decides as a result to go straight. Nor may it be said, as ministers so often do, that the clause will send out "the right message". For we all know that the message will not reach the criminals themselves, until it is too late.

134. UK, *Parliamentary Debates*, House of Commons, 15 June 2010, Column 730 (C Blunt—Parliamentary Under-Secretary of State for Justice).
135. *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) s 123.
136. *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) s 122(1). A relevant sentence means a life sentence with a non-parole period of at least 5 years, an extended sentence with a custodial term of at least 10 years, or a determinate sentence of imprisonment or detention of at least 10 years.
137. D Cameron, *Sentencing reforms*, Press conference transcript (21 June 2011).
138. *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) s 122(1).

> The government estimates that if the clause is passed it will mean another 28 prisoners serving life sentences. But can we justify such an increase? We already have 7,663 life prisoners in England and Wales. If you add to them those serving indeterminate sentences for the protection of the public (IPP), which is a life sentence in all but name, the figure is 13,825. This inordinate use of the life sentence is peculiar to us. Figures from the Council of Europe show that we have more than 12 prisoners serving life sentences per 100,000 of the population. If you include those serving IPP sentences the figure is 21. For France the equivalent figure is 0.85, for Germany 2.4,for the Netherlands 0.14 and for Sweden 1.7. The conclusion is irresistible. We have far too many prisoners serving life sentences when a long determinate sentence would suffice.
>
> Happily the IPP sentence will soon cease to exist. It has proved a disaster. We doubt whether the new so-called mandatory sentence will prove to be a disaster on the same scale. But words in a criminal statute have to be applied by the courts. They should mean what they say, neither more nor less. They should not be used for the purpose of "sending a message" to the public, that the government is being tough on crime.[139]

Scotland

4.86 Scotland's version of an indefinite sentencing scheme is set out in the *Criminal Procedure (Scotland) Act 1995* and in the *Criminal Justice (Scotland) Act 2003*. The relevant provisions are set out in Appendix B.

4.87 There are a number of elements to the scheme concerning:

- risk assessment orders and risk assessment reports;
- the Risk Management Authority (RMA);
- the Order for Lifelong Restriction (OLR); and
- Risk Management Plans.

Risk assessment

4.88 The risk assessment provisions in the *Criminal Procedure (Scotland) Act 2003* have broader application than the indefinite sentencing scheme, however, they play a crucial role in determining whether an offender will be the subject of lifelong restriction pursuant to the provisions of the *Criminal Procedure (Scotland) Act 2003*.

4.89 Offenders convicted of (or who, in the view of the court, have a propensity to commit), a specified sexual offence, or an offence involving personal violence or endangering life, other than murder;[140] and who may meet the risk criteria set out in the *Criminal Procedure (Scotland) Act 2003*, may be the subject of a risk assessment order made by the High Court.[141] Murder is excluded from the

139. A Lloyd, 'Two strikes and then a mandatory life sentence? No', *The Guardian* (online), 19 March 2012, < http://www.guardian.co.uk/commentisfree/2012/mar/19/sentencing-legal-aid-bill-law>.
140. The qualifying offences are set out in the *Criminal Procedure (Scotland) Act 1995* (UK) s 210A(10).
141. With the exception of offenders subject to a interim hospital order or existing OLR: *Criminal Procedure (Scotland) Act 1995* (UK)s 210B.

operation of the scheme, as it attracts a mandatory sentence of imprisonment for life.[142]

4.90 The relevant 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, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large.[143]

4.91 A risk assessment order enables an offender to be taken to and remanded in custody at a specified place for assessment by an accredited assessor, who will then prepare a risk assessment report.[144]

4.92 Risk assessment reports are requested and paid for by the Court.[145]

4.93 The risk assessor undertakes an individual assessment of the offender in order to form an opinion as to whether the risk that the offender presents to the public at large (when at liberty) is high, medium or low.[146] In forming this opinion, the assessor relies on a number of sources of information, including court documents,[147] face-to-face interviews with the offender,[148] multi-disciplinary meetings with community and prison/hospital professionals who are involved in the management of the offender,[149] and details of previous convictions and allegations of past criminal behaviour, even if no conviction followed from those allegations.[150]

4.94 Guidance as to what is meant by high, medium or low risk is provided by the RMA,[151] which is established by s 3 of the *Criminal Justice (Scotland) Act 2003*. The RMA is a body corporate, independent of the Crown, but comprising of members appointed by the Scottish Ministers.[152] No specific risk level is required under the Act in order to enliven the making by the Court of an OLR, however, the Court tends to make orders in cases where there has been a high risk rating.[153]

Order for lifelong restriction

4.95 An OLR constitutes 'a sentence of imprisonment, or as the case may be detention, for an indeterminate period'.[154] Further:

---

142. *Criminal Procedure (Scotland) Act 1995* (UK) s 205.
143. *Criminal Procedure (Scotland) Act 1995* (UK) s 210E.
144. *Criminal Procedure (Scotland) Act 1995* (UK) s 210B.
145. Risk Management Authority, *Risk assessment, Standards and Guidelines* (2006) p11.
146. *Criminal Procedure (Scotland) Act 1995* (UK) s 210C.
147. Risk Management Authority, *Risk assessment, Standards and Guidelines* (2006) p 16–17.
148. Normally an assessor will have at least 6 hours of face-to-face contact, spanning several weeks: Risk Management Authority, *Risk assessment, Standards and Guidelines* (2006) p 7.
149. Risk Management Authority, *Risk assessment, Standards and Guidelines* (2006) p 12.
150. *Criminal Procedure (Scotland) Act 1995* (UK) s 210C.
151. Risk Management Authority, *Risk assessment, Standards and Guidelines* (2006) p 40.
152. *Criminal Justice (Scotland) Act 2003* (UK) Sch 2.
153. I Fyfe and Y Gailey, 'The Scottish Approach to High-Risk Offenders' in B McSherry and P Keyzer (Eds), *Dangerous People* (2011) 201, 209.
154. *Criminal Procedure (Scotland) Act 1995* (UK) s 210F(2).

> It will comprise a series of stages from maximum security through to, where appropriate, supervised release into the community. The key objective is to ensure better continuity of supervision. Thus supervision in the community may be gradually stepped down if appropriate but equally an offender will swiftly move back up a stage or several stages, including return to custody, if the conditions for release are breached and as a result an assessment is made that the offender presents a serious risk to public safety.[155]

4.96 OLRs are a distinct sentence available to the High Court where the Court is satisfied, taking into account the risk assessment report, any objections of the offender, any evidence led by the prosecution and any other information before it, that the risk criteria are met. The standard of proof is satisfaction on a balance of probabilities.[156]

4.97 An OLR equates to an indeterminate sentence of imprisonment;[157] however, an offender is eligible for parole after the 'punishment part' of the sentence has expired.[158] At that stage, the Parole Board will consider whether the prisoner would be likely to cause serious harm to members of the public if not confined.[159] If the Board does not determine that serious harm is likely, it must direct that the prisoner be released on licence and specify conditions of the licence.[160] Whether in custody or subject to release on licence in the community, a prisoner who is sentenced to an OLR will be subject to a risk management plan for the rest of his or her life.

4.98 Unlike the experience with the IPP, for which provision was made in the *Criminal Justice Act 2003* (UK), there has not been a blowout in prisoner numbers as a result of the OLR scheme. There appears to have been a modest but steady uptake of the orders, with 66 offenders subject to the orders as at September 2011 and a forecast of 15-19 additional orders each year.[161]

Risk management plans

4.99 Each offender who is subject to an OLR will have his or her risk assessment report developed into a risk management plan by the Scottish Prison Service. The risk management plan must comply with the standards and guidelines set out by the RMA and each individual plan must be approved by the RMA.[162]

4.100 Under the RMA guidelines, a risk management plan should include:

- establishment of a Risk Management Team – a multi-disciplinary team that will develop and oversee implementation of the plan, monitor progress of the

155. Risk Management Authority, *FAQs—OLR* <www.rmascotland.gov.uk/news-and-information/faq-s/olr> at 9 December 2011.
156. *Criminal Procedure (Scotland) Act 1995* (UK) s 210F.
157. *Criminal Procedure (Scotland) Act 1995* (UK) s 210F.
158. The punishment part of the sentence is the period of imprisonment the court considers appropriate for the purposes of retribution and deterrence, but does not include any period of imprisonment that may be necessary for public protection: *Custodial Sentences and Weapons (Scotland) Act 2007* (UK) s 20.
159. *Custodial Sentences and Weapons (Scotland) Act 2007* (UK) s 22(3).
160. *Custodial Sentences and Weapons (Scotland) Act 2007* (UK) s 23.
161. Audit Scotland, *An overview of Scotland's criminal justice system*, Audit prepared for the Auditor General for Scotland and the Accounts Commission (2011), at [48].
162. Risk Management Authority, *Risk management of offenders subject to an order for lifelong restriction*, Standards and Guidelines (2007) p 117.

offender and review the plan annually. The Team will be led by a Case Manager, who is the central point of contact;[163]

- a risk assessment of the offender, identifying the risk factors that may contribute to offending, factors which diminish the likelihood of offending, details of potential victims, and early warning signs of increased risk of offending;[164]
- proposed actions to address the identified risks, including
  - *preventive strategies*, which involve developing appropriate controls over the offender, for example, through treatment or intervention programs that increase the offender's internal controls, or through supervision and monitoring actions that maintain external control; and
  - *contingency measures*, which set out an agreed course of action in the event of triggers or warning signs that indicate escalating risk, for example, returning the offender to custody.

  Some of the strategies identified in the plan may become conditions of the offender's release licence;[165]
- identification of suitable accommodation, which should not be temporary accommodation;[166]
- details of how the offender's progress will be measured and plans for evaluation and review of risk management strategies.[167]

4.101 Each year, the Risk Management Team must review the implementation of the plan and develop an updated plan for the forthcoming year. This revised plan must be submitted to the RMA for approval.[168] Additional reviews may be necessary, including where there has been, or is likely to be, a significant change in the circumstances of the offender.[169]

Risk Management Authority

4.102 The RMA commissions and undertakes research about risk assessment and minimisation. The RMA also accredits risk assessors and publishes guidelines and standards as to how assessors should conduct risk assessments.[170]

---

163. Risk Management Authority, *Risk management of offenders subject to an order for lifelong restriction*, *Standards and Guidelines* (2007) p 5, 13–15.
164. Risk Management Authority, *Risk management of offenders subject to an order for lifelong restriction, Standards and Guidelines* (2007) p 5, 17–27.
165. Risk Management Authority, *Risk management of offenders subject to an order for lifelong restriction, Standards and Guidelines* (2007) p 6, 31, 40.
166. Risk Management Authority, *Risk management of offenders subject to an order for lifelong restriction, Standards and Guidelines* (2007) p 7.
167. Risk Management Authority, *Risk management of offenders subject to an order for lifelong restriction, Standards and Guidelines* (2007) p 79.
168. *Criminal Justice (Scotland) Act 200 3*(UK) s 9; Risk Management Authority, *Risk management of offenders subject to an order for lifelong restriction, Standards and Guidelines* (2007) p 26.
169. *Criminal Justice (Scotland) Act 2003* (UK) s 9; *Risk Management Authority, Risk management of offenders subject to an order for lifelong restriction, Standards and Guidelines* (2007) p 26.
170. *Criminal Justice (Scotland) Act 2003* (UK) s 4, 5, 8.

4.103 The RMA has an ongoing role in relation to the management of offenders who are subject to an OLR, by providing guidance as to the 'preparation, implementation or review of' risk management plans and by approving and directing revisions to individual risk management plans. Once a risk management plan is in place, the RMA receives annual reports on the implementation of the plan and takes action if there has been a failure to properly implement the plan.[171]

New Zealand

4.104 New Zealand's indefinite detention scheme, established under the *Sentencing Act 2002* (NZ) (extracted at Appendix B) empowers the High Court to impose a sentence of preventive detention on adult offenders who are convicted of a qualifying sexual or violent offence, where the Court is satisfied that the offender is likely to commit another qualifying sexual or violent offence if released upon the expiry of any other sentence that the Court is able to impose.[172] An offender must be notified that the Court is considering the sentence, and given sufficient time to prepare submissions on the sentence.[173]

4.105 The Court can impose the sentence on its own motion, or on application by the prosecutor.[174] The sentence cannot be imposed unless the Court has considered reports from at least two appropriate health assessors in relation to the offender's likelihood of committing a further qualifying offence.[175] When considering whether to impose a sentence of preventive detention, the Court must take into acount:

> (a) any pattern of serious offending disclosed by the offender's history; and
>
> (b) the seriousness of the harm to the community caused by the offending; and
>
> (c) information indicating a tendency to commit serious offences in future; and
>
> (d) the absence of, or failure of, efforts by the offender to address the cause or causes of the offending; and
>
> (e) the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society.[176]

4.106 If the court invokes the preventive detention provisions, it must impose a minimum prison sentence on the offender. The term must be at least 5 years and should equate to whichever is longer of: the minimum period of imprisonment required to reflect the gravity of the offence; or the minimum period of imprisonment required

171. *Criminal Justice (Scotland) Act 2003* (UK) s 9.
172. The scheme is set out in sections 87–90 of the *Sentencing Act 2002* (NZ), under the heading 'preventive detention'. Section 4 of that Act classifies preventive detention as an indeterminate sentence.
173. *Sentencing Act 2002* (NZ) s 88(1)(a).
174. *Sentencing Act 2002* (NZ) s 87(3).
175. *Sentencing Act 2002* (NZ) s 88(1)(b).
176. *Sentencing Act 2002* (NZ) s 87(4).

for the purposes of the safety of the community in the light of the offender's age and risk posed at the time of sentence.[177]

4.107 Review of the sentence is not undertaken by the Court, but dealt with by the Parole Board.[178] After the minimum term expires, the offender is eligible for parole, but the Parole Board must be satisfied that the offender 'will not pose an undue risk to the safety of the community or any person or class of persons' before granting parole.[179]

4.108 Because the offender was sentenced to an indeterminate term, they are subject to parole recall for life.[180] Recall may occur not only as a consequence of re-offending, or breach of parole conditions, but also because 'the offender poses an undue risk to the safety of the community or any person or class of persons'.[181]

4.109 Between 1 July 2002 and 31 December 2007, 95 offenders were sentenced to preventive detention, however, 83% of those sentences related to sexual offences rather than violent offences. The sentence was imposed for violent offending 16 times during that period.[182]

Canada

4.110 Special provision is made in the *Criminal Code 1985* (Canada) in relation to dangerous offenders and long-term offenders. An extract of the provisions is contained in Appendix B.

4.111 On the application of the prosecutor, a court may remand a person found guilty of certain offences to custody for up to 60 days for the purposes of assessment.[183]

4.112 Following assessment, the prosecutor may apply for a finding that the offender is a 'dangerous offender'.[184] The court must make such a finding if the prosecution establishes beyond reasonable doubt[185] that either:

- the offence for which the offender has been convicted is a 'serious personal injury offence' as described in paragraph (a) below, and the offender 'constitutes a threat to the life, safety or physical or mental well-being of other persons' on the basis of evidence establishing the matters prescribed;[186] or
- the offence is a 'serious personal injury offence', as described in paragraph (b) below, and the offender, by his or her conduct in any sexual matter, including that involved in the commission of the index offence, has shown a failure to control his or her sexual impulses' and a likelihood of causing injury, pain or

177. *Sentencing Act 2002* (NZ) s 89.
178. *Parole Act 2002* (NZ) s 8(2).
179. *Parole Act 2002* (NZ) s 28.
180. *Parole Act 2002* (NZ) s 6(4)(d).
181. *Parole Act 2002* (NZ) s 61.
182. C Hurd, 'The changing face of preventive detention in New Zealand' (Paper presented at the Sentencing Conference, Canberra, February 2008).
183. *Criminal Code 1985* (Canada) s 752.1(1).
184. *Criminal Code 1985* (Canada) s 753.
185. *R v Mumford* [2010] ONSC 5624, at [4].
186. In accordance with *Criminal Code 1985* (Canada) s 753(1)(a).

other evil to other persons through failure in the future to control those impulses;[187] or

- the offence in question is a 'primary designated offence' for which it would be appropriate to impose a sentence of at least 2 years imprisonment and the offender has previously been convicted at least twice of a primary designated offence and sentenced to at least 2 years imprisonment on each of those occasions. In such a case, the offender is presumed to be a dangerous offender unless the contrary is proved on the balance of probabilities.[188]

4.113 A serious personal injury offence is:

> (a) an indictable offence, other than high treason, 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).

4.114 An offender may appeal a finding that he or she is a dangerous offender on any ground of law or fact, or mixed law and fact.[189] The Attorney General can appeal any decision made under the relevant Part of the Act on any ground of law.[190]

4.115 Canada's legislation allows for an application for a dangerous offender finding to be made up to six months after the imposition of a sentence, provided that, prior to the sentence being imposed, the prosecutor gave notice of an intention to make such an application. The prosecution must also demonstrate that relevant evidence has become available that was not reasonably available at the time the sentence was imposed. Otherwise the application is to be made before the sentence is imposed.[191]

4.116 If the Court finds an offender to be a dangerous offender, then it is required to:

- impose a sentence of detention for an indeterminate period;
- impose a sentence for the offence for which the offender has been convicted — which must be a minimum punishment of imprisonment for a term of two years — and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or

187. *Criminal Code 1985* (Canada) s 753(1)(b).
188. *Criminal Code 1985* (Canada) s 753(1.1).
189. *Criminal Code 1985* (Canada) s 759(1).
190. *Criminal Code 1985* (Canada) s 759(2).
191. *Criminal Code 1985* (Canada) s 753(2).

- impose a sentence for the offence for which the offender has been convicted.[192]

4.117 The Court will be required to impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied that there is a reasonable expectation that a lesser measure, as stated above, will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.[193]

4.118 Dangerous offenders may be considered for parole by the National Parole Board after 7 years imprisonment. The Act provides for ongoing review where parole is refused.[194] If parole is granted, dangerous offenders who have been sentenced to detention for an indeterminate period are subject to the jurisdiction of the National Parole Board for life, since the sentence has no expiration date.[195]

4.119 What the Canadian system lacks, in comparison to the Scottish OLR scheme, is detailed and individualised risk management planning, oriented towards recognising and preventing future offences, rather than reacting to breaches of parole conditions.

4.120 Separate provisions exist in relation to long-term offenders, that allow for long-term supervision. We discuss these provisions in the next part of this Chapter.

Disproportionate sentencing

4.121 Disproportionate sentencing schemes that apply to serious offenders or serious repeat offenders allow for the imposition of a determinate sentence of imprisonment that is longer than the term that would otherwise be proportionate to the gravity of the offence. These schemes bear some similarity to habitual offender legislation, which is discussed in Chapter 3 of this Report.

4.122 Disproportionate sentencing schemes have been used in relation to serious or repeat offenders in a number of jurisdictions. They suffer from the disadvantage that at the end of the enlarged term of imprisonment, the offender will be released, whether or not the criminogenic behaviour that qualified them for the sentence has been addressed.

4.123 Examples of disproportionate sentencing schemes that apply to serious offenders, or serious repeat offenders, can be found in Victoria, South Australia, the United Kingdom and Canada. A brief outline of these schemes is set out below.

Sentencing Act 1991 (Vic)

4.124 Part 2A of the *Sentencing Act* applies when a court is sentencing serious offenders convicted of specified sexual, violent, drug and arson offences.[196]

192. *Criminal Code 1985* (Canada) s 753(4).
193. *Criminal Code 1985* (Canada) s 753(4.1).
194. *Criminal Code 1985* (Canada) s 761.
195. *Corrections and Conditional Release Act 1992* (Canada) ss 128.
196. *Sentencing Act 1991* (Vic) s 6A.

4.125 A serious violent offender in this context is an offender who has been convicted of a serious violent offence, as defined in Schedule 1 to the Act, for which a term of imprisonment has been imposed.[197]

4.126 If the court considers that a period of imprisonment is justified in relation to a 'serious offender', the court when determining the length of the sentence *must* regard the protection of the community from the offender as the principle purpose in sentencing the offender, and may, in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence in the light of its objective circumstance.[198]

4.127 The meaning of this requirement was considered by the Court of Appeal in *R v LD*,[199] where it was held that:

> nothing in s 6D(a) justifies the imposition of a sentence longer than is necessary to protect the community against the risk which the offender actually presents. Thus, if the risk of re-offending is assessed as low – as it was in the present case – the protection of the community will weigh less heavily as a consideration than if the risk had been assessed as high.
>
> Since protection of the community is always a relevant consideration in sentencing, the directive in s 6D(a) will ordinarily have little impact on the determination of the appropriate sentence. Its main purpose, we would think, is to make sure that sentencing judges give proper consideration to the question of community protection, and undertake the requisite risk assessment. Seemingly, the only circumstance in which compliance with the directive might directly affect sentence would be where protection of the community required a longer sentence but where mitigating factors called for a shorter sentence. In that circumstance, it would seem, s 6D(a) contemplates that the dictates of protection should take precedence.[200]

Criminal Law (Sentencing) Act 1988 (SA)

4.128 Under the Act, courts may declare an offender to be a 'serious repeat offender' if the person:

- has, on at least 3 separate occasions, committed a serious offence as defined by the Act, for which the maximum prescribed penalty was at least 5 years imprisonment;[201] and has been convicted of each of those offences and sentenced to imprisonment in respect of them, or, if no sentence has yet been imposed, a sentence of imprisonment is appropriate;[202] or
- has, on at least 2 separate occasions, committed a serious sexual offence, as defined, against a person or persons under the age of 14 years and been convicted of those offences.[203]

4.129 If a person is convicted of a serious offence and is liable to a serious repeat offender declaration, then the court must consider whether to make that declaration.

197. *Sentencing Act 1991* (Vic) s 6B(2).
198. *Sentencing Act 1991* (Vic) s 6D.
199. [2009] VSCA 311.
200. *R v LD* [2009] VSCA 311 at [26].
201. *Criminal Law (Sentencing) Act 1988* (SA) ss 20A(2), 20B(1)(a)(i).
202. *Criminal Law (Sentencing) Act 1988* (SA) ss 20A(3), 20B(1)(a)(ii).
203. *Criminal Law (Sentencing) Act 1988* (SA) s 20B(1)(b).

It must do so if it is 'of the opinion that the person's history of offending warrants a particularly severe sentence in order to protect the community'.[204]

4.130 If such a declaration is made, then the court is not bound to ensure that the sentence it imposes is proportional to the offence; and the NPP fixed in relation to the sentence must be at least 80% of the total term.[205]

Extended sentences in the United Kingdom

4.131 Extended sentences in England and Wales form part of the scheme for dealing with dangerous offenders, set out in Chapter 5 of the *Criminal Justice Act 2003.* If the significant risk criteria set out in paragraph 4.72–4.73 above are met in relation to an offender who is convicted of an offence specified in Schedule 15 to the Act, an extended sentence is available as an alternative to an IPP, where the court is not required to impose a life sentence and where either:

- the offender had previously been convicted of a scheduled offence at the time the instant offence was committed; or
- the court would ordinarily impose a term of imprisonment of at least 4 years.[206]

4.132 If an extended sentence is imposed, the term of imprisonment will consist of the 'appropriate custodial term', that is, the term that would ordinarily be imposed; and the 'extension period', which is to be no more than 5 years for a violent offence.[207] The 'extension period' is to be of the length the court considers necessary for the protection of the public from serious harm, and is to be served in the community under licence.[208] The total term, including the 'appropriate custodial term' and the 'extension period', cannot exceed the maximum sentence available for the offence.[209]

4.133 Under the current provisions, once an offender has served one half of the 'appropriate custodial term', they must be released on license.[210]

4.134 The *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK), which received Royal Assent on 1 May 2012, but the majority of which has not yet commenced, amends the provisions relating to extended sentences by requiring offenders to serve two-thirds of the 'appropriate custodial term' before being eligible for release on licence; and by requiring Parole Board approval for the release of offenders who have been sentenced to an 'appropriate custodial term' of at least 10 years, or who have committed an offence listed in Schedule 15B, Part 1–3.[211]

4.135 A similar extended sentence model exists in Scotland under the *Criminal Procedure (Scotland) Act 1995.* There the court can impose an extension period of up to ten years for offences involving personal violence, provided that the total sentence does

204. *Criminal Law (Sentencing) Act 1988* (SA) s 20B(3).
205. *Criminal Law (Sentencing) Act 1988* (SA) s 20B(4).
206. *Criminal Justice Act 2003* (UK) s 153(2), 227(2), (2A), (2B), (3).
207. *Criminal Justice Act 2003* (UK) s 227(2C), (4).
208. *Criminal Justice Act 2003* (UK) s 227(2C)(b).
209. *Criminal Justice Act 2003* (UK) s 227(5).
210. *Criminal Justice Act 2003* (UK) s 247.
211. *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) s 125.

not exceed the maximum term available for the offence.[212] Such a sentence can be imposed in relation to a violent offence if the court intends to pass a sentence for a term of at least 4 years, and the period for which the offender would be released on licence would not be adequate to protect the public from serious harm.[213]

Long term offender declarations—Canada

4.136 The *Criminal Code 1985* enables courts to declare an offender to be a 'long-term offender' following filing of an expert assessment report, if satisfied that:

> (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
>
> (b) there is a substantial risk that the offender will reoffend; and
>
> (c) there is a reasonable possibility of eventual control of the risk in the community.[214]

4.137 The Court is to be satisfied that there is a substantial risk that the offender will re-offend if:

- the offender has been convicted of a specified offence and has shown a pattern of repetitive behaviour, of which the index offence forms a part, that shows a likelihood of him causing death, injury or severe psychological damage to others,
- the offender has been convicted of a specified offence and the offender's conduct in a sexual matter, including that involved in the index offence, has shown a likelihood of causing injury, pain or other evil to others in the future through similar offences.[215]

4.138 Following a declaration that an offender is a long-term offender, the court must impose a sentence of imprisonment for a term of at least two years in respect of the offence, and make an order that the offender be subject to long-term supervision for a period not exceeding 10 years.[216] A breach of the conditions of long-term supervision is an offence and is punishable by a term of imprisonment of up to 10 years.[217] Application can be made by the offender to a Supreme Court for an order reducing the period of long-term supervision, or terminating it on the ground that the offender no longer presents a substantial risk of re-offending and thereby being a danger to the community.[218]

212. *Criminal Procedure (Scotland) Act 1995* (UK) s 210A(3),(5).
213. *Criminal Procedure (Scotland) Act 1995* (UK) s 210A(1).
214. *Criminal Code 1985* (Canada) s 753.1(1).
215. *Criminal Code 1985* (Canada) s 753.1(2).
216. *Criminal Code 1985* (Canada) s 753.1(3).
217. *Criminal Code 1985* (Canada) s 753.3(1).
218. *Criminal Code 1985* (Canada) s 753.2(3).

Continuing detention and extended supervision

Introduction

4.139 Unlike indefinite or disproportionate detention, or other schemes giving rise to lifelong restrictions, which impact on an offender at the time of sentencing for an index offence, continuing detention and extended supervision schemes allow orders to be made towards the *end* of an offender's sentence. Four Australian jurisdictions have enacted schemes of this nature that apply only to serious sexual offenders. The schemes exist pursuant to the following Acts:

- *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld);
- *Dangerous Sexual Offenders Act 2006* (WA);
- *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic); and
- *Crimes (Serious Sex Offenders) Act 2006* (NSW).

4.140 This section examines the operation of the schemes that exist in Queensland, Western Australia, Victoria and NSW.

Legislative objects and purposes

4.141 Legislation in Queensland and WA provides for the continued detention in prison or supervised release into the community of 'a particular class' of prisoners, that is, those who have been convicted and sentenced to imprisonment for a serious sexual offence, to 'ensure' adequate protection of the community, and to facilitate the prisoner's rehabilitation by providing 'continuing control, care or treatment'.[219] In Queensland, these aims are understood disjunctively, so that a prisoner may be subject to detention or supervision for any single aim of community protection, control, care or treatment.[220] In WA, the court must treat the protection of the community as paramount when determining whether to grant an order.[221]

4.142 Corresponding Victorian and NSW legislation ranks the aim of enhancing community protection by detaining and supervising certain sexual offenders above that of facilitating treatment and rehabilitation.[222] In the NSW context, these statutory purposes have been interpreted as weighing 'against any strong presumption' in favour of the offender's liberty post-sentence.[223]

219. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 3; *Dangerous Sexual Offenders Act 2006* (WA) s 4.

220. *Attorney-General (Qld) v Lawrence* [2009] QCA 136, [18]–[19]; *Attorney-General (Qld) v Francis* [2006] QCA 324; (2007) 1 Qd R 396, at [28]–[29].

221. *Dangerous Sexual Offenders Act 2006* (WA) s 17.

222. *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 1; *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 3.

223. At least in relation to interim orders: *Attorney General (NSW) v Tillman* [2007] NSWCA 119 at [44]-[45]. Cf *Yeo v Attorney General* (Qld) [2011] QCA 170, at [54].

Who may apply for an order, when and where

4.143 In Queensland, NSW and WA, the Attorney General may apply for continuing detention or extended supervision orders during the last six months of a prisoner's term of imprisonment.[224] In WA the DPP may also make an application.[225]

4.144 In WA, the application may still be heard despite the offender's sentence being discharged after the application was filed.[226]

4.145 The Victorian Act envisages a pre-application assessment process, after which the Secretary to the Department of Justice or the delegate of the Secretary may make an application for a supervision order, or refer the matter to the DPP who may apply for a continuing detention order.[227] Victorian proceedings may continue despite the sentence being discharged following the application.[228]

4.146 In Queensland,[229] WA[230] and NSW,[231] all applications are made to the Supreme Court of that state. Victorian applications are lodged with the Victorian Supreme Court unless a County or Magistrate's Court initially sentenced the relevant offender, in which case the application is lodged with the County Court.[232]

Preliminary stages in establishing 'dangerousness'

4.147 In Queensland,[233] WA,[234] and NSW,[235] preliminary hearings are required for both supervision and detention orders. In Queensland, the Court must be satisfied there are 'reasonable grounds for believing' that in the absence of such an order, the prisoner poses a 'serious danger to the community'.[236] In WA, the threshold is lower,[237] namely, whether there are 'reasonable grounds for believing that the Court *might* … find that the offender is a serious danger to the community.'[238] Despite the low, 'doubly predictive' threshold in the WA legislation, the judicial task of determining whether the evidence meets the threshold is a 'very significant and

224. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ss 5, 13(5)(a), (b); *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 6(1), 14(1), 24A; *Dangerous Sexual Offenders Act 2006* (WA) ss 6, 8(1), (3).
225. *Dangerous Sexual Offenders Act 2006* (WA) s 8.
226. *Dangerous Sexual Offenders Act 2006* (WA) s 10. See, for example, *Western Australia v Latimer* [2006] WASC 235, [6]–[7]; *DPP v Mangolamara* [2006] WASC 172, [4].
227. See *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) s 196.
228. *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) ss 7(5), 33(4).
229. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) Sch (definition of 'Court').
230. *Dangerous Sexual Offenders Act 2006* (WA) s 8(1).
231. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 6(1), 14(1).
232. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 7(3), 33(2).
233. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ss 5(3)–(4), 8(1).
234. *Dangerous Sexual Offenders Act 2006* (WA) s 11.
235. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 7, 15.
236. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ss 5(3)–(4), 8(1).
237. *DPP v Williams* [2006] WASC 140, [28]; *DPP v Allen* [2006] WASC 160 [41]–[42].
238. *Dangerous Sexual Offenders Act 2006* (WA) s 14(1) (emphasis added).

serious' one.[239] The applicable standard of proof is that necessary for a final order,[240] rather than a strict criminal law standard.[241]

4.148 In NSW, the threshold test is whether the matters alleged in documentation accompanying the application 'would, if proved, justify' making an order.[242] In contrast to the predictive Queensland and WA approaches, the NSW Court 'is not involved in weighing … [the] documentation or predicting the ultimate result'.[243] The decision whether to proceed to final hearing therefore occurs without consideration of evidence called by the offender,[244] and has been likened to the 'prima facie case' test in Magistrates Court committal proceedings.[245] The Court must satisfy itself the statutory threshold is met even when the order sought is not opposed.[246]

4.149 Once satisfied the application may proceed to final hearing, the Queensland Court has discretion to order a risk assessment requiring independent psychiatric reports on the prisoner's likeliness of re-offending,[247] and/or interim orders for the prisoner's detention or supervision until final hearing.[248] The WA Court *must* make a risk assessment order and may order the offender be detained until final hearing,[249] however it lacks the power to order interim supervision in the community. The inability for the Court to order interim supervision even where no continuing detention order is sought, and the inapplicability of the *Bail Act*, has been described as a 'weakness' of the WA scheme.[250] If the statutory test is met, the NSW court *must* make a risk assessment order.[251] The NSW Court's discretion to order interim supervision or detention depends on the order that is sought, although the Court retains discretion to choose between the two when both orders are sought in the alternative.[252]

4.150 The Victorian scheme does not contain a preliminary hearing stage, due to the operation of the pre-application assessment process.[253]

Establishing the grounds for final orders

4.151 In all four jurisdictions, the applicant bears the onus of proving that the offender poses an 'unacceptable risk' to the community at the final hearing. In each

239. *DPP v Williams* [2006] WASC 140, [29]–[30].
240. Namely, a high level of probability, based on acceptable, cogent evidence: see *Dangerous Sexual Offenders Act 2006* (WA) s 7(2).
241. *DPP v Allen* [2006] WASC 160 [38]–[46]. Cf *Western Australia v Latimer* [2006] WASC 235, [8].
242. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 7(4).
243. *Attorney General (NSW) v Tillman* [2007] NSWCA 119, [98].
244. *Attorney General (NSW) v Tillman* [2007] NSWCA 119, [98].
245. *Attorney General (NSW) v Hayter* [2007] NSWSC 983, [6].
246. *New South Wales v Manners* [2008] NSWSC 1242, [4].
247. See *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ss 9, 11–12, Sch.
248. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 8(2).
249. *Dangerous Sexual Offenders Act 2006* (WA) s 14(2).
250. *Western Australia v Latimer* [2006] WASC 235, [7]. In practice, personal undertakings may be used in place of interim supervision orders: see, eg, DPP v Allen [2006] WASC 160 [12]–[13].
251. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 7(4), 15(4).
252. The Court also retains discretion not to make an interim order: *Attorney General (NSW) v Tillman* [2007] NSWCA 119, [24]–[42].
253. See *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) s 196.

jurisdiction the court must be satisfied to a 'high degree of probability … by acceptable, cogent evidence'.[254] Additionally, the Queensland and Victorian legislation requires this evidence to be that of 'sufficient weight' to justify a decision that places the offender in jeopardy of indefinite detention or supervision.[255]

4.152 Each legislative scheme effectively contains a 'two stage' process whereby the applicant must prove firstly that the offender poses a 'serious danger' to the community. In Queensland, Victoria and NSW, the applicant seeking a continuing detention order must demonstrate that a supervision order would be insufficient. The position on this point is more equivocal in WA. The Queensland and Victorian Courts retain a discretion *not* to make an order once the applicant has satisfied the offender is a 'serious danger', whereas the WA Court must make an order once the offender's dangerousness is established.

Risk assessment in Queensland

4.153 In Queensland, the Attorney General bears the onus of proving both that the prisoner poses a 'serious danger',[256] and that an order should be made.[257] In this context, a serious danger means an 'unacceptable risk' that the prisoner will commit a serious sexual offence if no order is made.[258] This risk assessment is ultimately a judicial, rather than psychiatric, task requiring qualitative assessment of what the community considers 'acceptable'.[259] While the risk of re-offending need not be 'watertight',[260] the case itself need not be 'unusual' to attract the extraordinary orders of supervision or continued detention.[261] In assessing what is 'acceptable', the Court must consider the likeliness of the risk eventuating, along with the nature of the risk and the consequences of its manifestation.[262] For example, 'moderate' risks of murder,[263] or offences against a particularly vulnerable class of victims,[264] are 'unacceptable' risks.

4.154 Once satisfied that the offender is a serious danger, the Queensland Court has discretion to make, or refuse to make, an order.[265] In practice, the applicant who can satisfy the Court that the offender poses an unacceptable risk will 'almost invariably' be able to persuade the Court to exercise its discretion to make an

254. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(3);
255. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(3); *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) ss 9(2), 37.
256. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(7).
257. *Attorney-General (Qld) v* Lawrence [2009] QCA 136, [30].
258. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(1)–(2). A serious sexual offence is a violent sexual offence or a sexual offence against a child: See *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) definitions.
259. *Attorney General (Qld) v Lawrence* [2011] QCA 347, [57]; *Attorney General (Qld) v Sutherland* [2006] QSC 268, [30].
260. Attorney-General (Qld) v Francis [2006] QCA 324; [2007] 1 Qd R 396, [39].
261. Yeo v Attorney-General (Qld) [2007] QCA 32.
262. *Attorney-General (Qld) v Lawrence* [2011] QCA 347, [86], [90]; *Attorney-General (Qld) v Beattie* [2007] QCA 96, [19].
263. *Attorney-General (Qld) v Lawrence* [2011] QCA 347, [85].
264. *Attorney-General (Qld) v Beattie* [2007] QCA 96, [19].
265. *Attorney-General (Qld) v Lawrence* [2009] QCA 136 [28]–[30], quoting *Fardon v Attorney-General (Qld)* [2004] HCA 46; (2004) 233 CLR 575, [19], [34].

order.[266] However, the Attorney General seeking a continuing detention order bears the burden of proving that a supervision order would be insufficient to ensure adequate community protection.[267] In deciding which order is appropriate, the Court must consider the '*particular* nature of the risk' posed by the offender,[268] and whether there is an 'unacceptable risk that the ordered supervision would not achieve the purpose of identifying conduct likely to result in re-offending'.[269] The Attorney General may produce a report to the Court outlining proposed supervision conditions and the capacity of Corrective Services to supervise the prisoner,[270] however, the Court is entitled to proceed on the basis that any supervision conditions ordered would be provided by Corrective Services.[271]

4.155 If the Attorney General produces a report regarding supervision conditions, the Court must consider that report along with psychiatric and other risk assessment reports.[272] The Court must also have regard to information indicating whether the prisoner has a propensity to commit relevant offences in future; whether there is a pattern to the prisoner's past offending; whether their participation in rehabilitation programs has had a positive effect; and the prisoner's efforts to address the cause/s of their 'offending behaviour'.[273] More generally, the court must consider the prisoner's criminal history, the risk they will commit future offences, and 'the need to protect members of the community from that risk'.[274] If the Court makes an order, it must provide 'detailed reasons' for doing so.[275]

Risk assessment in Western Australia

4.156 A 'two stage' process also applies in WA. The applicant must first prove that there is an 'unacceptable risk' that the offender would commit a serious sexual offence if released unconditionally. This risk assessment is to occur *before* the Court may find that the offender is a 'serious danger to the community', which is determined according to a number of factors including but not limited to the risk of re-offending.[276] The assessment of what is unacceptable requires the Court to balance the nature of the risk and the likeliness it will manifest against the serious consequences for the offender of making an order.[277] Further, an unacceptable risk is a 'real risk of substance, not merely a remote possibility.'[278] The assessment of dangerousness is an 'evaluative and predictive finding of fact', on which 'minds may

266. *Attorney-General (Qld) v Lawrence* [2009] QCA 136 [31].
267. Attorney-General (Qld) v Francis [2006] QCA 324; [2007] 1 Qd R 396, [39]. This requirement has been consistently upheld: see, eg, Attorney-General (Qld) v Downs [2008] QSC 87, [28]; *Attorney-General (Qld) v Perkins* [2009] QSC 53, [3].
268. *Yeo v Attorney-General (Qld)* [2011] QCA 170, [68] (emphasis added).
269. *Yeo v Attorney-General (Qld)* [2011] QCA 170, [68]. See also *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(6).
270. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 8A.
271. Attorney-General (Qld) v WW [2007] QCA 334, [16].
272. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(4)(aa)–(b).
273. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(4)(c)–(f).
274. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(4)(g)–(i).
275. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 17.
276. *Dangerous Sexual Offenders Act 2006* (WA) ss 7(1)–(3).
277. *DPP v Williams* [2007] WASCA 206; (2007) 35 WAR 297, [63]; *Italiano v Western Australia* [2009] WASC 116, [46].
278. *Western Australia v Latimer* [2006] WASC 235, [16].

differ'.[279] In practice, the finding of dangerousness 'inevitably follows' a finding of unacceptable risk.[280]

4.157 In considering whether to make a supervision or detention order, the WA Court must prioritise 'the need to ensure adequate protection of the community'.[281] This and other statutory language has caused judicial disagreement as to whether the WA Court has any discretion *not* to make an order once satisfied the offender is a 'serious danger'. The prevailing judicial opinion is that the WA Court only has discretion to choose between orders,[282] however, the distinction between the extent of discretion in Queensland and WA appears to be largely academic. In deciding between orders, there is some suggestion that a judge in doubt as to whether proposed supervision conditions would adequately protect the community must order continuing detention.[283] This would appear to reverse the Queensland position noted above. The Court is entitled to disregard submissions to the effect that funding is not available to supervise the offender in the community, if supervision would otherwise be appropriate.[284]

Risk assessment in Victoria

4.158 The more recent Victorian Act[285] is clearer, and also more prescriptive, than either the Queensland or WA Acts. To consider making a supervision order, the Court must be satisfied the offender poses an 'unacceptable risk' of committing a serious sexual offence if released. The threshold is the same for a detention order, however the question is then whether the risk would remain unacceptable if the person were released subject to supervision.[286] In determining whether the offender poses an unacceptable risk, the Court 'must not consider … the likely impact of [an order]'.[287] In this way, the Victorian position differs from the approach in WA, where the serious consequences for an offender of an order being made are relevant factor in determining a risk's 'acceptability'.[288] It also 'must not consider … the means of managing the risk', which appears to differ from the Queensland position described above.

4.159 While the Court must be satisfied 'to a high degree of probability' that the risk exists, it may be satisfied that a risk with less than 50% likeliness of manifesting is nonetheless unacceptable.[289] The applicant bears the onus of proving that the

279. For this reason, the *House v R* appeal rules apply: see *Italiano v Western Australia* [2009] WASC 116, [6]–[7]. The same position has been recently confirmed in the Qld context: see *Attorney General (Qld) v Lawrence* [2011] QCA 347, [29].
280. *DPP v Williams* [2007] WASCA 206; (2007) 35 WAR 297, [66].
281. *Dangerous Sexual Offenders Act 2006* (WA) s 17(1)–(2).
282. *Western Australia v Latimer* [2006] WASC 235, [20]–[21]; *DPP v Williams* [2007] WASCA 206; (2007) 35 WAR 297, [66], [89], cf at [39], [43].
283. *DPP v Williams* [2007] WASCA 206; (2007) 35 WAR 297, [86].
284. *DPP v Williams* [2007] WASCA 206; (2007) 35 WAR 297 [81].
285. Incorporating amendments as at 1 March 2012.
286. *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) s 36.
287. *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) ss 9(4), 35(3).
288. *DPP v Williams* [2007] WASCA 206; (2007) 35 WAR 297, [63]; *Italiano v Western Australia* [2009] WASC 116, [46].
289. *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) ss 9(1)–(2), (5), 35(1), (4), 36(1)–(2). This statutory test reflects judicial interpretation of the previous legislative test: see *Secretary to the Department of Justice v Fletcher* [2010] VSC 170, [49]–[51].

statutory threshold test is met. In making the risk assessment, the Court must take into account any reports filed by the applicant or the offender.[290] Once the Court is satisfied the offender poses an unacceptable risk, the Act clearly provides discretion for the Court to make, or not make, a supervision or detention order.[291]

Risk assessment in New South Wales

4.160 The statutory NSW risk assessment threshold was 'updated' in 2010,[292] when the previous quantitative assessment of 'likeliness' that the offender would commit a further offence was supplemented with a qualitative assessment of the 'acceptability' of the risk.[293] This brings the NSW legislation broadly in line with the three other jurisdictions.[294] The combined effect of the statutory provisions is that the Court:

(a) must assess the probability of re-offending, however, need not be satisfied that the offender is 'more likely than not' to commit further relevant offences;[295] and

(b) must determine, to a 'high degree of probability', whether the risk of re-offending is 'unacceptable'.

The statute does not define 'unacceptable risk',[296] therefore, the issue of what test should be applied to determine 'acceptability' has received much recent judicial attention. The various judicial approaches are summarised below, as the position is currently unsettled.

4.161 In *NSW v Thomas (Preliminary)*,[297] the first case to consider the new statutory formula, RA Hulme J provisionally accepted that an unacceptable risk is one that 'does not ensure the adequate protection of the community'.[298]

4.162 In *NSW v Darrego (Preliminary)*,[299] McCallum J doubted Hulme J's provisional interpretation. Her Honour considered it put 'a gloss on the precise words … in the section'.[300] Her Honour considered it 'preferable not to dilate upon the circumstances that would satisfy the statutory test, even in terms that mirror the language adopted in the statement and objects of the Act.' Without expressing a concluded a view on the issue, her Honour considered a test might be developed

290. *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) ss 9(1), (3)–(6), 35(1)–(2), (4)–(5), 36(2).
291. *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) ss 9(7), 36(3)–(5)
292. Explanatory Memorandum, *Crimes (Serious Sex Offenders) Amendment Bill* 2010
293. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 9(2), 17(2)–(3), as amended by *Crimes (Serious Sex Offenders) Amendment Act 2010* (NSW) sch 1[5].
294. See *New South Wales v Richardson (No 2)* [2011] NSWSC 276, [20]–[26].
295. See *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 9(2A), 17(3A); *New South Wales v Thomas (Preliminary)* [2011] NSWSC 118, [16]; quoted with approval in *New South Wales v Richardson (No 2)* [2011] NSWSC 276, [30].
296. *New South Wales v Bastien* [2011] NSWSC 641, [69].
297. [2011] NSWSC 118.
298. *NSW v Thomas* [2011] NSWSC 118, at [18]–[21].
299. [2011] NSWSC 360.
300. *NSW v Darrego* [2011] NSWSC 360, at [8].

with assistance from the medical negligence jurisprudence.[301] More particularly, she suggested the first task is to define the risk in question, before considering the 'circumstances in which … [the future offence] could occur, the likelihood of the … [offence] occurring and the extent or severity of the potential injury if it does occur.'[302]

4.163 Considering these two approaches in *NSW v Conway (Preliminary)*, Simpson J expressed a preference (also provisional) for Hulme J's view. Her Honour preferred that view because it drew 'closely upon the objects and the language of the Act itself, and not upon a different area of legal discourse.'[303]

4.164 In *NSW v Thomas (Final)* – the first final hearing on the issue – Hulme J declined to adopt a conclusive view, concluding the case did not call for 'a detailed analysis of the new formulation.' His Honour was satisfied that, '[g]iving the words their ordinary meaning, … [in] context …, and having regard to the objects of the Act,' it was plain 'on any view' that the offender posed an unacceptable risk.[304]

4.165 In *Richardson (No 2)* – also a final hearing – Davies J referred to Hulme J's provisional approach, before adopted a 'balancing' formulation developed in the WA courts.[305] He held that to determine whether a risk is 'unacceptable' the court must balance the negative impacts and likelihood of a further serious sexual offence, against the serious consequences for the offender 'either because he will be detained beyond the period of his sentence although he has not committed any further offence or he will be subject to an onerous supervision order'.[306]

4.166 In a further provisional hearing, *NSW v Reed (Preliminary),* the applicant argued against considering 'the impact of an order on the offender' as a relevant factor to any balancing exercise. It was submitted that a balancing exercise should assess only those factors 'relevant to the content of the risk itself'.[307] McCallum J did not express a view on this point, as she implicitly rejected the 'balancing' test in favour of the 'ordinary meaning' test that she had adopted in *Darrego* and that Hulme J had adopted in *Thompson (Final)*. In so deciding, McCallum J highlighted the provisional nature of the proceedings before her, which did not require her to 'assess the probative weight of the matters alleged.'[308]

4.167 In the final hearing of *NSW v Bastien*, Hoeben J adopted Davies J's 'balancing' test. However, in so doing, his Honour did not refer to the alternative tests described above.[309] It is probable, although unclear, that his Honour also applied the balancing test in the preliminary hearing of *NSW v Scerri*.[310]

---

301. She did not, however, mean to import the concept of 'material risk' as later suggested by Simpson J. See *New South Wales v Reed* [2011] NSWSC 625 [12].
302. *New South Wales v Reed* [2011] NSWSC 625 [9]–[11]. (**Darrego**)
303. [2011] NSWSC 588, [26]–[30].
304. *NSW v Thomas* [2011] NSWSC 307, at [58].
305. *New South Wales v Richardson (No 2)* [2011] NSWSC 276, [26]–[30].
306. *New South Wales v Richardson (No 2)* [2011] NSWSC 276[90].
307. *New South Wales v Reed* [2011] NSWSC 625, [15].
308. *New South Wales v Reed* [2011] NSWSC 625[16].
309. *NSW v Bastien* [2011] NSWSC 641, [68]–[73].
310. [2011] NSWSC 683, [12].

4.168 In *NSW v Conway (Final)*, Davies J reiterated his 'balancing' test approach without reference to the alternative formulations.[311]

4.169 In the most recent case, the final hearing of *NSW v Darrego*, Fullerton J noted the divergent judicial approaches listed above. Her Honour adopted Hulme J's 'ordinary meaning' approach.[312]

4.170 The cumulative result of these cases is:

(a) Hulme J's early interpretation of an unacceptable risk as one that 'does not ensure the adequate protection of the community' has garnered some support in the context of preliminary hearings, although it has been criticised as 'glossing' the statutory language.

(b) Despite the fact that RA Hulme J explicitly declined to express an opinion on the interpretation of 'unacceptable risk' in the final hearing of *Thomas*, his 'ordinary meaning' approach in that case was adopted by McCallum J in the preliminary hearing context and by Fullerton J in a final hearing.

(c) The 'balancing' test adapted by Davies J from the WA jurisprudence has been rejected in the preliminary hearing context, however, adopted in the final hearing context by Hoeben J.

4.171 Despite the confusion over what an 'unacceptable' risk *is*, there is relative clarity about *how* certain the Court must be that it exists. The Court must be satisfied 'to a high degree of probability',[313] which is a standard of proof lower than the criminal standard but higher than the civil standard.[314] The Court must satisfy itself that the statutory threshold for a final order is met, despite the application not being opposed.[315]

4.172 In determining whether to make an order, the NSW Court is directed to consider a range of factors, including: community safety; information contained in risk assessment reports and other psychiatric examinations of the offender; actuarial risk assessments; reports about CSNSW's capacity to manage the offender in the community; the availability and appropriateness of treatment facilities in the community; the offender's level of past participation in examinations and treatment, willingness to undergo future treatment in the community, and past compliance with obligations; the offender's criminal history and patterns of offending behaviour; and the views of the sentencing court.[316]

4.173 Once the Court is satisfied that the prisoner would pose an unacceptable risk if released, it must determine whether that risk can be ameliorated by supervision in the community. If it can, the Court may make a supervision order, and if it cannot the Court may make a detention order.[317]

---

311. *NSW v Conway (Final)* [2011] NSWSC 976, [24]–[26].
312. *NSW v Darrego* [2011] NSWSC 1449, [14]–[28].
313. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 9(2), 17(2)–(3).
314. *Cornwall v Attorney-General (NSW)* [2007] NSWCA 374 [21].
315. *New South Wales v Thomas (Final)* [2011] NSWSC 307, [51].
316. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 9(3), 17(4)–(4A).
317. See *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 9(1), 17(1)–(2).

Effect of detention orders

4.174 In all jurisdictions, the practical effect of detention orders is that the prisoner is detained in prison.[318] In Queensland and WA, the prisoner is detained in custody for an *indefinite* period.[319] In Victoria and NSW, detention is for a *definite* period stated in the order, not exceeding three or five years respectively.[320] On expiry of Victorian and NSW orders, the relevant courts may make subsequent orders.[321] Queensland, WA and Victoria provide for periodic (generally annual) reviews of the detention,[322] whereas there is no requirement to review the detention in NSW. Rather, CSNSW must furnish the Attorney General with an annual report about the offender, so that the Attorney may consider whether to apply for a variation or revocation of the order.[323]

Effect of supervision orders

4.175 The first effect of supervision orders is that the prisoner is released into the community, subject to the conditions contained in the order.[324] The second effect is that the prisoner remains, for the duration of the order, in jeopardy of being returned to custody for breaching the supervisory conditions.

Statutory conditions

4.176 The Queensland, WA and Vic statutes contain mandatory conditions that include a condition not to commit further offences; travel restrictions; reporting and notification requirements for personal details; compliance with directions and supervision; and a condition to receive visits from supervising personnel.[325] The NSW statute does not contain mandatory conditions.[326]

Discretionary conditions

4.177 Courts in Queensland and WA may also include other supervisory conditions they 'consider appropriate' for community protection or rehabilitation.[327]

---

318. See *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) s 42; *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 20; *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ss 13; *Dangerous Sexual Offenders Act 2006* (WA) s 17.
319. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ss 13(5)(a), 14(1); *Dangerous Sexual Offenders Act 2006* (WA) s 17(1)(a);
320. *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) ss 40; *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 18(1)(b).
321. *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) s 41; *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 18(3).
322. See *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) pt 3; *Dangerous Sexual Offenders Act 2006* (WA) pt 3; *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) pt 5.
323. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 19(1), (2).
324. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ss 13, 16, 16A–D; *Dangerous Sexual Offenders Act 2006* (WA) s 18; *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) ss 15(1)–(2), 19; *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 11.
325. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ss 16(1), 16A–16D; *Dangerous Sexual Offenders Act 2006* (WA) s 18(1); *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) s 16(2).
326. See *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 11.
327. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ss 13(5)(b), 16(2); *Dangerous Sexual Offenders Act 2006* (WA) s 18.

4.178 Again, the Victorian legislation is relatively prescriptive. In determining the content of a supervision order, the Court's primary purpose is to reduce the risk of re-offending. Pursuant to that purpose, the supervision conditions may promote the offender's rehabilitation and treatment. A secondary purpose is to 'provide for the reasonable concerns of the victim or victims of the offender in relation to their own safety and welfare'. However, any conditions the Court imposes in addition to the statutory conditions must 'constitute the minimum interference with the offender's liberty, privacy or freedom of movement that is necessary' to ensure the two purposes are fulfilled. Such extra conditions must also be 'reasonably related to the gravity of the risk of the offender re-offending'.[328] In contrast to the risk assessment phase of the Victorian proceedings the Court *must* consider the government resources that are available to carry out supervision orders, and *must not* make an order inconsistent with the government's stated capacity to supervise the offender.[329] This marks a departure from the position in Queensland and WA noted above, and appears to increase executive control over whether offenders will, in practice, be subject to continuing detention orders.

4.179 The NSW Act contains a non-exhaustive list of conditions that the Court may order, including those that are essentially similar to the mandatory statutory conditions noted above. The Court may further order that the offender: give CSNSW officers access to their residential premises and computing equipment; participate in treatment programs; submit to electronic monitoring; disassociate with certain persons; disengage from certain activities; and reside as directed.[330]

Duration of supervision orders

4.180 Queensland supervision orders are effective for a stated period of not less than five years, and may be varied or extended on application. Orders cannot be varied to remove the requisite statutory conditions, and may only be rescinded on appeal. Given the short timeframe for appeal, the cumulative effect of the Queensland provisions is that once an order is made, the statutory minimum requirements must be complied with for the entire duration of the original order.[331] In WA, the length of the order is at the Court's absolute discretion. The terms of the order may be varied, and a new order made on expiry, however, subject to the offender's limited right to appeal there is no provision to revoke a supervision order.[332] Victorian supervision orders operate for a determinate period not exceeding 15 years. The Supreme Court may revoke, vary or renew the order on application. Supervision orders are also subject to periodic review.[333] NSW supervision orders may not exceed five years in duration, however subsequent orders may be made. The review (variation

328. *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) ss 15(3)–(6). See further detail at ss 17–20.

329. *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) s 22.

330. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 11.

331. Assuming it is not set aside on appeal. See *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ss 13A, pt 2 div 4–4A, pt 4.

332. See *Dangerous Sexual Offenders Act 2006* (WA) s 17(1)(b), pt 2 div 3, pt 4.

333. *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) ss 12–13, pt 2 div 4–5, pt 5 Div 2, ss 65, 71.

and revocation) procedure described above – initiated at the discretion of the executive or by the offender – also applies for NSW supervision orders.[334]

The effect of breaching a supervision order

4.181 In Queensland, WA and NSW, breaching the conditions of a supervision order is a summary offence punishable by two years imprisonment.[335] In Victoria, a breach is punishable by five years imprisonment.[336]

4.182 Perhaps more importantly, any breach may bring the offender back before the Court for the purpose of redetermining whether their supervised release sufficiently ensures the adequate protection of the community. If the Court is satisfied that the offender is, or is likely to be in breach of a supervision condition, the Court *must* rescind the order and substitute a detention order *unless* the offender can satisfy the Court that the supervision order ensures the safety of the community, notwithstanding the breach.[337] In circumstances of actual or apprehended breach of WA orders, an offender can similarly be brought back before the Court for redetermination of the appropriateness of the order.[338] The WA Court has discretion to either revoke the order and substitute a detention order, or vary the supervision conditions.[339]

4.183 In Victoria, the Parole Board monitors compliance with supervision orders and deals with allegations of breach at the first instance. The Board may hold an inquiry, and in so doing need not give the offender information about allegations where it considers that to do so would be contrary to the public interest. The Board may conclude its inquiry with or without a hearing, and may make a finding as to the seriousness of the breach. Once the Board has concluded its inquiry, and considering the seriousness of the breach, it may take actions including: no action; formally warning the offender; referring the matter to the Secretary to consider applying for a review of the order; referring the matter to the DPP to consider applying for a detention order; or recommending that the Secretary prosecute the breach as an offence.[340] The process for review and application noted above may therefore be triggered.

4.184 In NSW, for a breach to trigger an application for a continuing detention order, it must first be prosecuted as an offence. Further, the Attorney General may apply for a continuing detention order where altered circumstances render the provision of supervision impossible. In either of these two situations, the application process described above applies.[341]

---

334. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 10, 13.
335. *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) ss 43AA, 43AC; *Dangerous Sexual Offenders Act 2006* (WA) s 40A(1); *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 12.
336. *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) s 160. See also pt 11 Div 4.
337. The Court must be satisfied on the balance of probabilities in both respects. See *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) pt 2 div 5.
338. The WA legislation contains a different procedure for arrest and initial consideration by a Magistrate: see *Dangerous Sexual Offenders Act 2006* (WA) ss 21–23A.
339. *Dangerous Sexual Offenders Act 2006* (WA) s 23.
340. *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) pt 11 div 2.
341. *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 14(2), (2B)–(4).

4.185 The UN Human Rights Committee has considered the scope of the provisions of the International Covenant on Civil and Political Rights (ICCPR) in relation to legislation allowing the continued detention of serious sex offenders. In its opinion, this form of detention is arbitrary and contrary to the ICCPR. The Committee observed:

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

4.186 Notwithstanding the expression of this opinion by the UN Human Rights Committee, the NSW legislation, and comparable legislation in other states, has been retained on the basis that it is justified by its protective purpose. Critical in this respect were the decisions of the High Court in *Buckley*,[342] and also in *Fardon*, where the High Court observed, in relation to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), that:

> 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. 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.[343]

Preventive Detention for the purpose of preventing a terrorist act

4.187 In addition to the above laws that allow for the preventive detention of sex offenders, legislation exists both at the Commonwealth level and in all of the States and Territories, enabling the preventive detention of persons for the purposes of preventing a terrorist act.

342. *Buckley v The Queen* [2006] HCA 7, (2006) 224 ALR 416, at [42].

343. *Fardon v Attorney-General (Qld)* [2004] HCA 46, (2004) 223 CLR 575, at 217.

Commonwealth

4.188 Division 105 of the Criminal Code sets out the Commonwealth regime for preventive detention.[344]

4.189 Division 105 allows the preventive detention of a person for a maximum period of up to 48 hours; for the purpose of either preventing an imminent terrorist act from occurring, or to preserve evidence of, or relating to, a recent terrorist act.[345]

4.190 Division 105 does not apply to people under 16, and special rules apply for people aged between 16 and 18 and for people 'incapable of managing their own affairs'.[346]

States and Territories

4.191 All of the States and Territories have also enacted legislation to preventively detain a person for up to 14 days for the purposes of preventing a terrorist act. The relevant legislation in each State and Territory is as follows:

- Tasmania – *Terrorism (Preventative Detention) Act 2005;*
- NSW – *Part 2A of Terrorism (Police Powers) Act 2002;*
- Queensland – *Terrorism (Preventative Detention) Act 2005;*
- SA - *Terrorism (Preventative Detention) Act 2005;*
- WA - *Terrorism (Preventative Detention) Act 2005;*
- Victoria – *Terrorism (Community Protection) (Amendment) Act 2006;*
- ACT – *Terrorism (Extraordinary Temporary Powers) Act 2006;*
- NT – *Part 2B, Terrorism (Emergency Powers) Act*.

Release on license schemes

4.192 Several jurisdictions have addressed the risks posed by offenders convicted of serious offences through the operation of what amounts to a conditional release on licence, in some cases confined to those who have received life sentences. Such schemes currently exist in respect of offenders sentenced pursuant to legislation passed by the ACT, the Commonwealth, South Australia and England and Wales.

New South Wales[347]

4.193 In NSW, a system for release on licence of offenders, exercisable by the Executive government, existed until 1990.[348] This had a particular application at a time when

344. *Criminal Code Act 1995 (Cth) Schedule*, Div 105.
345. *Criminal Code Act 1995 (Cth) Schedule*, cls 105.1; 105.9.
346. *Criminal Code Act 1995 (Cth) Schedule*, cls105.8(7).
347. See Chapter 5 for an in-depth discussion of the history of legislation dealing with life sentences in NSW.

a life sentence was mandatory in relation to the offence of murder and commonly, in such a case, led to a release on licence after the offender had served 10 to 11 years of imprisonment.[349] The availability of a potential release on licence was effectively replaced in 1990 by provisions that provide for the redetermination by the Supreme Court of sentences of imprisonment for life.[350] These provisions allow the fixing of a NPP and (with the exception of the limited group of offenders in respect of whom a non-release recommendation, or observation or expression of opinion by the sentencing court that the offender never be released was made) a determinate sentence, in the place of the pre-existing life sentence. In the exercise of this function, regard is to be had by the Court to the findings of the court that had imposed the life sentence, the offender's record while in custody and any report provided by the Serious Offenders Review Board. The redetermination scheme only applies to 'existing life sentences', where committal proceedings were instituted before the commencement of the *Crimes (Life Sentences) Amendment Act 1989* (NSW). Since that Act commenced, all life sentences in NSW are 'natural life' sentences,[351] which are not eligible for redetermination.[352]

4.194 Offenders with a life sentence that comes within the redetermination provisions can still make a single application to the Court for redetermination of their sentence,[353] which, if the application is refused, becomes a 'natural life' sentence.[354]

Australian Capital Territory

4.195 The *Crimes (Sentence Administration) Act 2005* (ACT) ('*Sentence Administration Act*') provides that prisoners serving a life sentence[355] may be released on licence after serving at least 10 years in custody.[356] The offender released on licence is taken to be serving the remainder of their sentence in the community[357] under conditions imposed by the *Sentence Administration Act* and the Executive.[358]

4.196 The *Sentence Administration Act* vests the executive branch of the ACT Government with two discretionary powers in this respect. First, the Attorney General has a discretionary power to initiate the formal process of reviewing a life

348. The system existed pursuant to the *Crimes Act 1900* (NSW) s 463, since repealed by the *Prisons (Serious Offenders Review Board) Amendment Act 1989* (NSW) sec 5, which commenced 12 January 1990.
349. An exception to the requirement for mandatory life sentences was introduced by the *Crimes (Homicide) Amendment Act 1982* (NSW) for cases where culpability was significantly diminished.
350. The redetermination scheme was inserted at s 13A of the *Sentencing Act 1989* (since repealed), by the *Sentencing (Life Sentences) Amendment Act 1989*, which commenced 12 January 1990.
351. Life sentences are now only available in relation to section 19A, 61JA or 66A (2) of the *Crimes Act 1900* or section 33A of the *Drug Misuse and Trafficking Act 1985*.
352. *Crimes (Sentencing Procedure) Act 1999* (NSW) Sch 1, cl 1.
353. Unless the initial application was made prior to, but not finally disposed of by, 17 June 2008 and no direction prohibiting future applications has been given, in which case further applications may be made every 3 years until the Court either sets a non-parole period or gives a direction prohibiting future applications: *Crimes (Sentencing Procedure) Act 1999* (NSW) Sch 1, cl 6.
354. *Crimes (Sentencing Procedure) Act 1999* (NSW) Sch 1, cl 2, 2A.
355. For example, for murder: see *Crimes Act 1900* (ACT) s 12.
356. *Crimes (Sentence Administration) Act 2005* (ACT) Pt 13.1.
357. *Crimes (Sentence Administration) Act 2005* (ACT) s 303.
358. *Crimes (Sentence Administration) Act 2005* (ACT) ss 295(3), 300.

sentence.[359] Secondly, the discretionary decision-making power to release, or refuse to release, an offender is vested in the ACT Executive.[360] No statutory guidance is provided for exercising the Attorney General's discretionary power. However, in exercising its discretionary power to grant or refuse to grant a license, the Executive must consider any recommendations made by the Sentence Administration Board (SAB) following inquiry by it, and may consider 'anything else it considers appropriate'.[361]

4.197 The *Sentence Administration Act* specifies a mandatory SAB inquiry process for developing recommendations about releasing the offender.[362] Before conducting an inquiry, the SAB must invite the offender, the Director General of the Justice and Community Safety Directorate (DG), the DPP, and victims to make submissions.[363] In developing recommendations on the appropriateness of releasing the offender, the SAB is required to prioritise 'the public interest'.[364] In so doing, it must consider a range of written materials,[365] the offender's behaviour in custody,[366] the offender's 'preparedness' to undertake post-custodial management activities, and any special circumstances particular to the offender.[367] It must also make three prospective risk assessments: the likelihood of the offender committing 'further offences'; the likelihood they will comply with licence conditions; and the likely effect of the release on any victim and the victim's family.[368] It may also consider other matters.[369] Following the inquiry, the SAB must recommend whether the offender should be released, and provide reasons. It may also recommend licence conditions, and 'anything else it considers appropriate.'[370] Following an Executive decision to grant, or refuse to grant, a licence for release, the DG must notify the offender, the SAB, the DPP, and the chief police officer.[371] The SAB must 'take all reasonable steps' to inform relevant victims of the Executive decision, and any resulting release date and licence obligations.[372] Victims may also be informed in general terms about where the released offender will live.[373]

4.198 Once released, the offender becomes subject to 'core' statutory obligations and any licence conditions the Executive 'considers appropriate'.[374] By statute, the offender is obliged not to commit any offences punishable by imprisonment; not to change

359. *Crimes (Sentence Administration) Act 2005* (ACT) s 290.
360. *Crimes (Sentence Administration) Act 2005* (ACT) s 295.
361. *Crimes (Sentence Administration) Act 2005* (ACT) s 295(1).
362. See *Crimes (Sentence Administration) Act 2005* (ACT) ss 290–5.
363. *Crimes (Sentence Administration) Act 2005* (ACT) ss 291(1)–(2), 292.
364. *Crimes (Sentence Administration) Act 2005* (ACT) s 293(1).
365. Namely, sentencing remarks, victim submissions to the inquiry (including those expressing concerns about the need for victim protection from violence or harassment), and relevant reports: *Crimes (Sentence Administration) Act 2005* (ACT) s 293(2)(a)–(e).
366. Including conduct and participation in activities while in custody, and acceptance of responsibility for the offence: *Crimes (Sentence Administration) Act 2005* (ACT) s 293(2)(f), (g), (k).
367. *Crimes (Sentence Administration) Act 2005* (ACT)ss 293(2)(h)–(l).
368. *Crimes (Sentence Administration) Act 2005* (ACT) ss 293(2)(c), (i)–(j).
369. *Crimes (Sentence Administration) Act 2005* (ACT) s 293(3).
370. *Crimes (Sentence Administration) Act 2005* (ACT) s 294.
371. *Crimes (Sentence Administration) Act 2005* (ACT) s 298(1)–(2).
372. *Crimes (Sentence Administration) Act 2005* (ACT) s 298(4).
373. *Crimes (Sentence Administration) Act 2005* (ACT) s 298(5).
374. *Crimes (Sentence Administration) Act 2005* (ACT) ss 295(3), 300.

contact details without approval from the DG; to comply with the DG's directions relating to the licence; and to appear before the SAB as required.[375] The SAB may review, vary or revoke the licence conditions on request of the offender or the DG, on its own initiative.[376] Aside from notice requirements, the *Sentence Administration Act* does not place restrictions on the SAB process for conducting a review.

4.199 The consequences for breach of licence conditions are twofold. If the offender is suspected to have breached the licence conditions, he or she may be arrested with or without a warrant.[377] Such an arrest triggers an SAB review (see above at paragraph 4.195) into the appropriateness of the licence and its conditions.[378] Secondly, if the offender breaches the obligation not to commit further offences punishable by imprisonment, the licence is automatically revoked and the offender is re-committed into custody.[379] Further, any finding of guilt or conviction that occurs during the licence period for a *past* offence also results in automatic cancellation of the licence.[380]

Commonwealth

4.200 Offenders serving federal sentences may apply to the Cth Attorney-General (AG) to be released on licence. The AG may grant a release on licence in relation to that sentence whether or not a parole period has been set or a recognizance release order made. The application must specify the 'exceptional circumstances' that the offender maintains justify their grant of release. To make a grant the AG must be satisfied, firstly, that such circumstances exist, and secondly, that they justify release.[381] Once the AG is satisfied that the circumstances justify release, a discretion is reserved to grant, or not grant, a licence.[382] This discretion may be exercised so as to deny a licence at the time of the application, leaving open the consideration of a future licence.[383] In exercising discretion, the AG is entitled to determine the weight given to any particular relevant factor.[384] Further, if the applicant is refused a licence, the AG is not required to consider any subsequent applications within 12 months of the first application.[385]

4.201 The difficulties that can arise when the responsibility for deciding whether to release a person on licence is reserved to the Executive are well demonstrated in the case of *Cornwell*, where there was opposition from the media, and by the State government, to the making of a release decision by the Federal Minister.[386]

375. *Crimes (Sentence Administration) Act 2005* (ACT) s 301.
376. *Crimes (Sentence Administration) Act 2005* (ACT) ss 306–08, 311.
377. *Crimes (Sentence Administration) Act 2005* (ACT) ss 304, 305.
378. See *Crimes (Sentence Administration) Act 2005* (ACT) s 306.
379. *Crimes (Sentence Administration) Act 2005* (ACT) ss 309–10, 312.
380. See *Crimes (Sentence Administration) Act 2005* (ACT) s 309(2), 310(1).
381. *Crimes Act 1914* (Cth) ss 19AP(1)–(4); *Cornwell v Attorney-General* (Cth) (1993) 45 FCR 492, 506.
382. *Jackson v Minister for Justice (*Cth) [2011] FCA 831, at [24].
383. See, eg, *Jackson v Minister for Justice* (Cth) [2011] FCA 831.
384. *Jackson v Minister for Justice* (Cth) [2011] FCA 831 [35], citing *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24, 40–2.
385. *Crimes Act 1914* (Cth) s 19AP(5).
386. *Cornwell v Attorney-General* (Cth) (1993) 45 FCR 492, 506, 494–508.

4.202 The Commonwealth release on licence provisions apply to offenders sentenced to both determinate and indeterminate periods of imprisonment. If the offender is subject to a federal *life sentence*, the grant of licence must specify the day on which the licence period ends, being a day not earlier than 5 years after the person is released on licence. If the offender is subject to supervision conditions, these must also be for a fixed time period.

4.203 The practical effect of the grant of a licence is that the offender is released from prison, subject to compliance with statutory conditions, and any other conditions specified in the licence. Statutory conditions are to be of good behaviour for the duration of the licence and to comply with supervision requirements should they be granted. The legal effect of the licence is that the offender remains under sentence for the licence period, during which he or she is taken '*not to have served* the part of any sentence that remained to be served at the beginning of the … licence period'.[387]

4.204 If the licence period ends without revocation, the remaining part of the sentence is discharged.[388]

4.205 If the released offender commits an offence during the licence period and is sentenced to more than three months imprisonment, the licence is taken to have been revoked when the new sentence is imposed. If the sentence is not imposed until after the licence period has already ended, the revocation is taken to have occurred immediately before the end of the licence period.[389] Upon revocation, the offender becomes liable to serve the part of the sentence that remained at the time of their release on licence.[390]

4.206 During the licence period, the AG may amend or revoke licence conditions, and may impose additional conditions.[391] The AG may also revoke the licence at any time before its expiry if the offender has failed to comply, or there are reasonable grounds for suspecting the offender has failed to comply, with licence conditions. Before the licence is revoked the AG must provide the offender with an opportunity to demonstrate why that should not occur, although the AG retains the discretion to accept or reject the offender's reasons.[392] Revocation does not prevent a further application for release on licence from being granted.[393]

387. This may be distinguished from the ACT provision, where the offender is taken to be serving the sentence while the licence period runs. However, the ACT restriction of release on licence to offenders serving life sentences means that there is no practical difference between the jurisdictions in this respect.

388. *Crimes Act 1914* (Cth) s 19AZC(1) (emphasis added).

389. *Crimes Act 1914* (Cth) ss 19AQ(3), (4).

390. *Crimes Act 1914* (Cth) ss 19AQ(5), 19AZC(2)

391. *Crimes Act 1914* (Cth) ss 19AP(6)–(10).

392. *Crimes Act 1914* (Cth) s 19AU. See also ss 19AV–19AZA.

393. *Crimes Act 1914* (Cth) s 19AZB.

South Australia

Criminal Law (Sentencing) Act 1988 s 24

4.207 As noted earlier in this Chapter, certain 'habitual criminals' and sex offenders may be subject to indeterminate sentencing under the *Criminal Law (Sentencing) Act 1988* (SA) ('*Sentencing Act*').[394] The *Sentencing Act* provisions concerning the release of these offenders on licence is noted in this section of the report to provide comparative perspective with other release on licence schemes. The South Australian release on licence provisions do not, however, apply to offenders subject to a life sentence.

4.208 On application by the DPP or the offender, the Supreme Court may order that an offender subject to an indeterminate sentence be released on licence.[395] There are no specified statutory criteria for making an order, and the Court retains a broad discretion.[396] In deciding whether to make an order, the Court is essentially engaged in a balancing exercise between the interests of the offender and those of the community.[397] In making the normative assessment as to whether the offender should be released on licence, it has been held that the risk of re-offending is 'particularly important'[398] but not determinative.[399] It may be appropriate for an offender to be released on licence despite the risk being more than 'slight',[400] or even 'causing considerable pause'.[401] When considering a release on licence, the weight given to the risk of re-offending will be less than when considering a discharge.[402] The community interest in ensuring that offenders are not incarcerated for life 'simply because they happen … not to be able to overcome a condition which poses some risk to the community' has also been judicially recognised.[403] Further relevant considerations include the length of detention,[404] and the availability of treatment services in custody or the community.[405] Release on licence may be ordered despite 'uncertainties' about the practical post-release arrangements at the time the order is made.[406]

4.209 An offender whose application for release on licence is refused may not make a further application for six months, or for any other period specified by the Court on refusing the application.[407]

4.210 If released, the offender remains subject to licence conditions determined by the parole board[408] as it 'thinks fit'.[409] In contrast, a Court ordering a sentence to be

394. See pt 2 div 3.
395. *Criminal Law (Sentencing) Act 1988* (SA) s 24(1).
396. *R v O'Shea (No 2)* (1997) 94 A Crim R 560, 565; *R v Schuster* [2008] SASC 367, [12].
397. *R v O'Shea* (No 2) (1997) 94 A Crim R 560, 565; *R v Schuster* [2008] SASC 367, [67].
398. *R v Schuster* [2008] SASC 367, [63].
399. *R v O'Shea* (No 2) (1997) 94 A Crim R 560, 564.
400. *R v Schuster* [2008] SASC 367, [12].
401. *R v Schuster* [2008] SASC 367, [68].
402. *R v O'Shea* (No 2) (1997) 94 A Crim R 560, 565.
403. *O'Shea v DPP* (1998) 71 SASR 109, 138.
404. *O'Shea v DPP* (1998) 71 SASR 109, 138–9.
405. *R v Schuster* [2008] SASC 367, [12].
406. See, eg, *R v Schuster* [2008] SASC 367, [65] (White J).
407. *Criminal Law (Sentencing) Act 1988* (SA) s 24(4).

discharged must do so unconditionally. The lack of post-custodial 'supervision or assistance' options for a discharged sentence has been considered 'unfortunate' and led to orders for release on licence where the case for discharge was otherwise made out.[410] The parole board may vary or revoke a licence on application by DPP, offender, or on its own motion.[411] If satisfied that the offender 'has contravened, or is likely to contravene' a licence condition, the parole board may cancel the licence on application of the DPP or on its own motion.[412] If an offender is sentenced to a further period of imprisonment for an offence committed while on licence, the parole board must cancel the licence.[413] Because only offenders subject to indefinite detention may be released on licence, it is practically irrelevant whether the sentence continues to run during the licence period or not.

4.211 Where an offender has been released on licence and served a continuous period of three years in the community, the sentence is discharged unless the Court orders otherwise on application by the DPP.[414] In considering whether to order the discharge provision inoperable, the risk of re-offending and the existence of 'viable' alternatives to supervised post-custodial management under licence are relevant.[415] The Court may be disallow the discharge even where it constitutes a deprivation of liberty 'much longer' than any sentence for the original offence/s might have been.[416]

Young Offenders Act 1993

4.212 The *Young Offenders Act 1993* (SA) enables a young person serving a life sentence in a training centre to apply to the Supreme Court for release on licence.[417] The Court's previously broad discretion to order release on licence is now structured by a number of policy considerations that the court is to take into account when determining an application for release.[418] For example, if the young person is a recidivist offender, the 'paramount consideration' must be community safety, notwithstanding other provisions of the *Young Offenders Act* that demand a balance between community safety and the young person's rehabilitation.[419] Further, the Court is encouraged to consider sentencing remarks; relevant reports; the effect the release is likely to have on the victim or their family; the young person's behaviour while in detention; and their probable circumstances on release. The release is subject to conditions imposed by the Training Review Board, which may also vary or revoke licence conditions on application by the offender or the

408. Or the Training Centre Review Board if the person is detained in a training centre: *Criminal Law (Sentencing) Act 1988* (SA) s 24(12).
409. *Criminal Law (Sentencing) Act 1988* (SA) s 24(3).
410. *O'Shea v DPP* (1998) 71 SASR 109, 139–40.
411. *Criminal Law (Sentencing) Act 1988* (SA) s 24(5)(a). See also ss 24(5a)–(9), 25.
412. *Criminal Law (Sentencing) Act 1988* (SA) s 24(5)(b).
413. *Criminal Law (Sentencing) Act 1988* (SA) s 24(10).
414. *Criminal Law (Sentencing) Act 1988* (SA) s 24(11).
415. *R* v *Deering* [2006] SASC 77, [15].
416. *R v Deering* [2006] SASC 77 [14].
417. For example, a young person convicted of murder: see *Young Offenders Act 1993* (SA) ss 29, 37(1).
418. *Young Offenders Act 1993* (SA) s 37(2), as amended by the *Statutes Amendment (Recidivist Young Offenders and Youth Parole Board) Act 2009* (SA) s 16.
419. *Young Offenders Act 1993* (SA) ss 3(2a)(b)(ii), 37(1a)(a).

DPP. On application by the relevant Minister or the DPP, the Training Review Board may also cancel the licence if satisfied the young person has breached a licence condition. The licence remains effective until the Court, on application by the young person or the DPP, orders that the sentence be discharged absolutely.[420]

England and Wales

4.213 The release on licence provisions in England and Wales, as they relate to IPPs, are discussed at paragraph 4.77–4.78 above.

4.214 The provisions operate in the same way for ordinary life sentences, except that there is no capacity to order the cessation of a licence for offenders serving life sentences.

4.215 A licence can be revoked by the Secretary of State, either on the recommendation of the Parole Board, or because it appears to the Secretary that 'it is expedient in the public interest to recall that person before [a recommendation by the Parole Board] is practicable.[421]

4.216 Offenders who have been sentenced to an IPP or lifetime imprisonment and who are released on licence are monitored under Multi-Agency Public Protection Arrangements (MAPPA),[422] which require the 'Responsible Authority' (consisting of police, probation and prison services) in each local area in England and Wales to make arrangements for the assessment and management of risks posed by sexual and violent offenders.[423]

4.217 As at 31 March 2011 there were 51,489 MAPPA-eligible offenders, the vast majority of whom were managed under ordinary arrangements by the appropriate agency. Additional management strategies, involving multiple agencies, were used in relation to 8,696 MAPPA-eligible offenders.[424]

Control or prohibition orders

4.218 Control or prohibition orders are orders that impose restrictions on a person's behaviour in order to protect individuals or the public at large from that person. Such orders may be targeted towards the protection of children, the prevention of violence or the prevention of serious criminal activity. We discussed the types of control or prohibition orders that exist in NSW pursuant to the *Child Protection (Offenders Prohibition Orders) Act 2004* and the *Crimes (Domestic and Personal Violence) Act 2007* in Chapter 3.

4.219 These orders are preventive orders, that is, they are not granted upon proof of commission of an offence, but rather are imposed upon an assessment that an offender poses a future risk to an individual or individuals, which justifies the making

420. *Young Offenders Act 1993* (SA) ss 37(1a)(c), (3), (5), (6), (12). See also ss 37(7)–(9a), (10)–(11), (13)–(20).

421. *Crime (Sentences) Act 1997* (UK) s 32.

422. *Criminal Justice Act 2003* (UK) s 327.

423. *Criminal Justice Act 2003* (UK) s 325.

424. Ministry of Justice (UK) *Multi-Agency Public Protection Arrangements Annual Report* (2010/11)

of the order. However, prior offending may assist in the identification of the future risk that the victim requires protection from and increase the likelihood that a court would ultimately grant the order. Additionally, prior offending is a pre-requisite in relation to certain types of orders in some jurisdictions.

4.220 In this section we identify the types of control or prohibition orders that exist in other jurisdictions for the protection of persons from violence.

Orders aimed at interpersonal violence including domestic violence

4.221 All Australian jurisdictions have legislation enabling a court to make orders aimed at the prevention of interpersonal violence. In some jurisdictions the relevant legislation relates specifically to domestic violence while in other jurisdictions it also extends to non-domestic interpersonal violence.

4.222 Orders of this kind are aimed at the protection of individuals from various forms of violence including for example, assault, sexual assault, harassment, property damage, stalking and threats.

4.223 Orders of this kind generally empower the relevant court to make orders that place a number of restrictions on persons in order to prevent violence, or further violence, from occurring. For example, such orders may place restrictions on the person's behaviour by prohibiting the person from contacting, harassing, threatening or intimidating the other person, they may prevent the person from attending certain places or events (for example, the person's home or work place), or they may prohibit the person from approaching within a specified distance of the protected person.

4.224 The legislation governing the making of orders to prevent interpersonal violence in other Australian jurisdictions are noted below:

Victoria

4.225 In Victoria, the *Personal Safety Intervention Orders Act 2010* enables the Victorian Magistrates' Court or Children's Court to make Intervention Orders in order to protect the safety of victims of assault, sexual assault, harassment, property damage or interference with property, stalking and serious threats.[425]

4.226 Similarly, the *Family Violence Protection Act 2008* (Vic) creates a system for the making of family violence intervention orders by the Victorian Magistrates' Court or Children's Court and is aimed at reducing and preventing family violence.[426]

Queensland

4.227 In Queensland, the *Domestic and Family Violence Protection Act 1989* (Qld) allows the Magistrates' Court to make domestic violence orders for the protection of persons against further domestic violence. It extends to violence in the context of

425. *Personal Safety Intervention Orders Act 2010* (Vic) ss 1, 2, 12.

426. *Family Violence Protection Act 2008* (Vic) s 1.

spousal relationships, intimate personal relationships, family relationships and informal care relationships.[427]

ACT

4.228 In the ACT, the *Domestic Violence and Protection Orders Act 2008* (ACT), enables the ACT Magistrates' Court to make domestic violence orders for the protection of people from domestic violence; workplace orders for the protection of employees and other people from personal violence at the workplace; and personal protection orders for protection from other violence.[428]

South Australia

4.229 In South Australia, the *Intervention Orders (Prevention of Abuse) Act 2009* (SA), empowers the Magistrates' Court to issue intervention orders to assist in preventing domestic and non-domestic abuse, including physical injury, emotional or psychological harm, unreasonable and non-consensual denial of financial, social or personal autonomy or damage to property.[429]

Western Australia

4.230 In Western Australia, the *Restraining Orders Act 1997* (WA) empowers a court to make orders with respect to both domestic and non-domestic personal violence.[430]

Northern Territory

4.231 In the Northern Territory, the *Domestic and Family Violence Act 2007* (NT) enables the making of orders aimed at preventing domestic violence in the context of domestic relationships, which includes family, intimate personal and carers relationships.[431]

Tasmania

4.232 In Tasmania, the *Family Violence Act 2004* (Tas) enables courts of summary jurisdiction to make family violence orders to prevent domestic violence against a person's spouse or partner.[432]

Orders aimed at the protection of Children

4.233 In addition to interpersonal violence orders, WA and Queensland have introduced legislation specifically aimed at the control of persons for the purposes of the protection of a child or children from sexual offending (in the case of Queensland), or both sexual and violent offending (in the case of WA). The relevant legislation that exists in these States is noted briefly below.

---

427. *Domestic and Family Violence Protection Act 1989* (Qld) s 3A.
428. *Domestic Violence and Protection Orders Act 2008* (ACT) ss 6, 10, 11.
429. *Intervention Orders (Prevention of Abuse) Act 2009* (SA) ss 5, 8.
430. *Restraining Orders Act 1997* (WA),s 6.
431. *Domestic and Family Violence Act 2007* (NT) ss 3, 9.
432. *Family Violence Act 2004* (Tas) s 7.

Western Australia

4.234 In WA, the *Community Protection (Offender Reporting) Act 2004* empowers the WA District Court and the WA Children's Court, in respect of young offenders, to make:

- *Past Offender Reporting Orders*, requiring a person to comply with reporting obligations as set out in the Act, if the court is satisfied that the person poses 'a risk to the lives or sexual safety of one or more persons, or persons generally';[433] and
- *Child Protection Prohibition Orders*, prohibiting a person from engaging in conduct specified in the order only if the court is satisfied that the person is a reportable offender and that the person poses a risk to the lives or sexual safety or one or more children or children generally and that making the order will reduce that risk.[434]

4.235 The Act applies to 'reportable offenders', or offenders who have previously been sentenced for 'reportable offences', or offences that include a number sexual offences against children as well as murder (where the victim is a child).[435]

Queensland

4.236 In Queensland, the *Child Protection (Offender Prohibition Order) Act 2008* and the *Child Protection (Offender Reporting) Act 2004* similarly empower the Queensland Magistrates' Court and the Queensland Children's Court (in respect of child offenders) to make orders requiring the reporting of 'reportable offenders' who have previously been sentenced for certain reportable offences and the prohibition of certain conduct by reportable offenders. These Acts do not apply to violent offending other than sexual violent offending.[436]

Orders aimed at public protection

4.237 The Commonwealth and a number of States and Territories have introduced legislation which allows a court to impose control orders to restrict the behaviour and activities of persons for the purposes of protecting the public from serious criminal activity and /or terrorism. This legislation is noted briefly below.

4.238 Such orders operate similarly to domestic and personal violence orders, in that they impose certain obligations, prohibitions or restrictions on the person the subject of the order; however their purpose is targeted towards violence directed at the broader community rather than towards a specific individual or individuals. Common restrictions that may be imposed by such orders may, for example, include:

- not associating with a specified person or persons;
- not being present at specified premises;

433. *Community Protection (Offender Reporting) Act 2004* (WA) s 19.
434. *Community Protection (Offender Reporting) Act 2004* (WA) s 90.
435. *Community Protection (Offender Reporting) Act 2004* (WA) ss 6, 9.
436. *Child Protection (Offender Prohibition Order) Act 2008*, (Qld) ss 3, 8; *Child Protection (Offender Reporting) Act 2004* (Qld) ss 3, 13.

- not attending specified events;
- not possessing specified articles; or
- not possessing firearms.

Commonwealth

4.239 Division 104 of the *Criminal Code* (Cth) provides for a control order regime that empowers the Federal Court to make an order imposing obligations, prohibitions and restrictions on people for the purpose of protecting the public from a terrorist act.[437]

4.240 Such applications can be initiated by the AFP and require the consent of the Attorney-General.[438]

4.241 Each obligation, prohibition or restriction must be 'reasonably necessary and reasonably appropriate' for the purpose of protecting the public from a terrorist act.[439] The order itself has a maximum duration of 12 months.[440]

4.242 Control orders cannot be made in respect of people under 16 years of age and apply in a modified way to people between 16 and 18 years of age.

4.243 The Commonwealth Attorney-General must report to Parliament annually on the operation of control orders.[441]

States and Territories

4.244 A number of the States and Territories have also enacted legislation to allow courts to impose control orders on persons for the purposes of preventing and restricting the activities of criminal groups or organisations. The relevant legislation is as follows:

- *Crimes (Criminal Organisations Control) Act 2012* (NSW);[442]
- *Serious and Organised Crime (Control) Act 2008* (SA);[443]
- *Criminal Organisation Act 2009* (Qld);[444]
- *Serious Crime Control Act 2009* (NT).[445]

437. *Criminal Code Act 1995* (Cth), Schedule, Division 104.
438. *Criminal Code Act 1995* (Cth), cl 104.2.
439. *Criminal Code Act 1995* (Cth), cl 104.4.
440. *Criminal Code Act 1995* (Cth), cl 104.16.
441. *Criminal Code Act 1995* (Cth), cl 104.29.
442. *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 19.
443. *Serious and Organised Crime (Control) Act 2008* (SA) s 14.
444. *Criminal Organisation Act 2008* (Qld) s 3.
445. *Serious Crime Control Act 2009* (NT) s 3.

Violent Offender Orders – England and Wales

4.245 In England and Wales, the *Criminal Justice and Immigration Act 2008* (s 100(1)) allows for the Police Service to make applications a magistrates' court for a Violent Offender Order (VOO).[446]

4.246 As noted in the DAGJ Statutory Review in relation to the CSSOA, the Home Office's Guide to VOOs describes the orders as follows:

> (VOOs) are a risk management tool. They are designed to help the Police Service protect the public from violent offenders who have been released from prison and are no longer subject to the statutory supervision available under licence or Hospital Order/supervision Order but who continue to pose a risk of serious violent harm. A VOO places certain restrictions on the activities of those offenders to help the Police Service reduce and mange that risk.[447]

4.247 VOOs operate similarly to interpersonal violence orders and control orders that exist under Australian Law, however they are targeted towards the risk that violent offenders pose to the public at large. The are therefore different to Control Orders under Australian law in that they are targeted towards interpersonal violence rather than serious criminal activities or criminal organisations, and they also differ from interpersonal violence orders that currently exist under Australian law in that the person the subject of the order may pose a risk to the public at large rather than to a specific individual or individuals (although they may also pose a risk to an individual or individuals).

4.248 A VOO can restrict an offender by preventing the offender from:

- going to any specified premises or any other specified place (whether at all, or at or between any specified time or times);
- attending any specified event; and
- having any, or any specified description of, contact with any specified individual.[448]

4.249 VOOs can be from 2–5 years in duration and are required to have 6 monthly reviews.[449]

4.250 They are only available to offenders over the age of 18, who have either:

- been sentenced to 12 months imprisonment or more for a prescribed offence; or
- have received a Hospital Order;
- or the person has been found not guilty of a prescribed offence by reason of insanity or the person has been found to have a disability and as a

446. Criminal Justice and Immigration Act 2008 (s 100(1)).

447. Department of Attorney General and Justice (Criminal Law Review Division), *Review of the Crimes (Serious Sex Offenders) Act 2006 (NSW)*, (2010) 92, quoting Home Office (UK), *A Guide to Violent Offender Orders* (2009), 7.

448. *Criminal Justice and Immigration Act 2008* (UK) s 102.

449. Home Office (UK), *A Guide to Violent Offender Orders* (2009), 8.

consequence the court imposed either a Hospital order or a Supervision order.[450]

4.251 Once a person is eligible for a VOO, they remain eligible for the remainder of their lives, however police must apply to a magistrates' court and satisfy the court of the required risk to the public on each occasion.[451]

450. *Criminal Justice and Immigration Act 2008* (UK).

451. Home Office (UK), *A Guide to Violent Offender Orders* (2009), 10, 18.

5. OPTIONS FOR REFORM AND RECOMMENDATIONS

Introduction **123**
Preliminary matters **123**
Terminology 124
Identifying the gap in the existing framework in NSW: is there a need for a SPCMO in NSW? 124
The HRVO cohort - previous attempt to classify Dangerous Offenders in NSW 125
Defining the cohort for the purposes of any scheme 126
Minimum safeguards applicable to any SPCMO 128
Support structures required for a SPCMO in NSW 129
Interagency cooperation 129
Independent risk management authority 130
Options for a SPCMO for HRVOs in NSW **131**
Option 1: Introduce a continuing detention and/or extended supervision scheme for HRVOs .. 131
Option 2: Introduce an indefinite detention scheme for HRVOs 134
Option 3: Introduce a scheme permitting the imposition of a disproportionate sentence for HRVOs 136
Option 4: Introduce a scheme based on the lifelong restriction model that exists in Scotland... 138
Option 5: Introduce a scheme for prohibition or control orders for HRVOs 140
The Council's preferred SPCMO 141
Additional reform options **142**
Improve existing treatment / rehabilitation options for HRVOs 143
Response to HRVOs with mental health or cognitive impairments 145
Reform or Repeal of Habitual Criminals Act 146
Introduce parole in relation to life sentences 148
Legislative background 148
Current concerns relating to whole of life sentences 152
Introduce parole in relation to life sentences 153

Introduction

5.1 In this Chapter we discuss:

- preliminary considerations in relation to the nature of SPCMOs and whether or not a SPCMO should be introduced in NSW;
- possible options for the introduction of a new SPCMO in relation to HRVOs in NSW;
- the thrust of the submissions received by the Council in relation to the options for reform; and
- the Council's views in relation to the options for reform.

Preliminary matters

5.2 In this part, we set out a number of preliminary matters that we have considered in the course of reaching our recommendations, including:

- the nature of SPCMOs generally;
- whether there is a need for a SPCMO in NSW;
- the nature of the HRVO cohort; and
- safeguards and support structures required for HRVOs generally, regardless of the preferred SPCMO.

Terminology

5.3 We note at the outset that a number of Council Members have expressed concerns about the critical distinction between:

- **sentencing options**; that is, options which are concerned with sentencing offenders in respect of specific crimes that they have committed, on the one hand; and
- **post-custody management options**; that is options which lie outside of the ordinary sentencing process and relate to supervision or detention of persons on the basis of predicted risk of violent re-offending in the future, and/or crimes committed in the past in respect of which sentences have already been served.

5.4 This distinction between post-custody management and sentencing is critical, because some Council Members expressed concerns that considering and making recommendations in relation to post-custody management was outside the scope of the Council's mandate, which specifically relates to sentencing.

5.5 We note that we have referred to both types of options in this report, when viewed as alternatives for dealing with HRVOs, as 'SPCMOs'. However, it is important to recognise that this is not intended to detract from the fact that post-custody management options and sentencing options are fundamentally different in nature.

Identifying the gap in the existing framework in NSW: is there a need for a SPCMO in NSW?

5.6 An important factor in determining whether or not an additional SPCMO for HRVOs is desirable in NSW is whether a gap now exists.

5.7 There is not a consensus amongst Council Members in relation to whether or not any gap exists which requires the introduction of a SPCMO.

5.8 The Council's research and consultation process has not given rise to any demonstrable failure of the current framework, as it is outlined in Chapter 3, which requires reform by way of legislative response.

5.9 A number of the stakeholders who provided written submissions considered that the existing legislative framework in NSW is sufficiently equipped to deal with this group of offenders, whose numbers are unlikely to be large.

5.10 A majority of the Council, however, considered that there is a gap that might justify an additional SPCMO.

5.11 Council Members who considered that there is a need for a new SPCMO, were of the view that:

- NSW does not currently have an adequate legislative response to HRVOs; and
- an additional SPCMO for HRVOs is necessary to protect the community.

5.12 A minority on the other hand, considered that there is not a gap, and that:

- the identification of the relevant cohort in Chapter 2,[1] and the number of people captured by legislation to manage HRVOs in other jurisdictions,[2] suggests that any scheme based on risk-assessment rather than on offences committed can lead to inconsistent consequences; and that
- there is no discernible failure of the existing system, which justifies the introduction of a SPCMO, particularly where the legal basis for such an option falls outside traditional sentencing principles.

The HRVO cohort - previous attempt to classify Dangerous Offenders in NSW

5.13 It is noted that a previous private members Bill, the *Community Protection (Dangerous Offenders) Bill 1999* (NSW), was introduced into the NSW Parliament in 1999 by the Hon MJ Richardson MP.

5.14 While it was never passed into law, it constituted an attempt to better cater for HRVOs in the context of the *Sentencing Act 1989* and sentencing law, as it existed at that time.[3]

5.15 It proposed a scheme that would:

- provide for the classification of dangerous offenders;
- restrict the grounds on which the Parole Board could make parole orders in relation to such persons under the (then) *Sentencing Act 1989*, and require it to publicly state its reasons when deciding whether or not to make a parole order;[4] and
- provide for a register of 'protected persons' in respect of whom the dangerous offender would be restricted from contacting or approaching.[5]

5.16 The DPP could make an application to the Court for a person to be classified as a dangerous offender where that person has been convicted of a 'serious violent offence' in Australia, i.e. an offence of:

- murder;
- attempted murder; or

1. In Table 1.
2. In Table 2.
3. *Sentencing Act 1989* (NSW), (now repealed).
4. *Community Protection (Dangerous Offenders) Bill 1999* (NSW) Sch 1.
5. *Community Protection (Dangerous Offenders) Bill 1999* (NSW) cl 6–8.

- an act of violence that caused serious injury to another person, or that involved sexual assault in the nature of an offence referred to in ss 61I (sexual assault), 61J (aggravated sexual assault), 61K (assault with intent to have sexual intercourse), 61M (aggravated indecent assault), 66C (sexual intercourse with a child between 10 and 16), 66F (sexual offences – cognitive impairment), 78A (incest) or 78H (now repealed) of the *Crimes Act 1900*.

5.17 This Bill was similar to one that had been introduced in 1996. Although supported by the opposition, it was opposed by the government and as a consequence lapsed.

5.18 We do not favour the adoption of a scheme of the kind proposed by this Bill. Amongst other things, its reach would be confined to the protection of a limited class of persons, and it adds little, if anything, to the powers that are currently exercisable by the NSW Parole Authority.

Defining the cohort for the purposes of any scheme

5.19 There is a need to define the cohort so that the complex and costly task of making orders and managing these offenders is focussed on those in respect of whom it is justified.

5.20 Defining the cohort is however a difficult and imprecise task. HRVOs differ from serious sex offenders in respect of whom a CDO or ESO may be made pursuant to the CSSOA. HRVOs offend across the criminal spectrum, are influenced by a multiplicity of factors, and have differing underlying characteristics and complex criminogenic needs. The definitional issues in relation to violence have been considered in further depth than the Council has scope to consider in this report, in academic literature, some of which has been referred to in Chapter 2.[6]

5.21 Chapter 2 discusses the difficulty in defining the cohort and identifies its key characteristics. The Council has in preparing this Chapter kept in mind the need to define the class:

- to limit the application of the orders to those in respect of whom they are justified;
- in a way that can be applied by the decision maker without undue harm to victims;
- in a way which utilises expert risk assessment as a component and not the sole determining feature of the definition. Risk assessment has always formed part of the sentencing decision and management of an offender. SPCMOs elevate this aspect of the exercise. An expert's risk assessment can be a determining factor, particularly if the decision is not made in the context of the original sentence. Any SPCMO that is based on risk of future offending therefore risks

6. See, for example, J McGuire, 'A review of effective interventions for reducing aggression and violence' (2008) 363 *Philosophical Transactions of the Royal Society* 2577, 2578; D. Polashek, 'Violent Offender Programmes: Concept, Theory and Practice' in C Hollin and E Palmer (Eds), *Offending Behaviour Programmes: Development, Application, and Controversies* (2006) 113; K Howells et al, 'Anger Management and Violence Prevention: Improving Effectiveness' (2002) *Trends & Issues in Crime and Criminal Justice* 227; J Chambers et al, 'Treatment readiness in violent offenders: The influence of cognitive factors on engagement in violence programs' (2008) 13 *Aggression and Violent Behaviour* 276.

locking up people who may not in actual fact commit such crimes if released; and

- in a way which does not classify HRVOs based solely on the commission of specified violent offences, as such an approach provides an insufficient basis for predicting future violent behaviour. What is required is a broader assessment that the offender poses a risk of engaging in serious violence in the future, in respect of which his or her record of previous violent offending will need to be taken into account.

5.22 Earlier,[7] we have noted that:

- the characteristics of HRVOs are too disparate to enable them to be defined in a way that would allow them to be sentenced or managed post-sentence as a single cohort;
- HRVOs should be identified on an individual case-by-case basis using risk assessment tools; and
- any SPCMO for HRVOs should only apply to:
    - an offender who is convicted of an indictable offence that involves the use of, attempted use of, or shows a propensity towards, serious interpersonal violence; and who
    - meets stringent risk criteria that require a court to be satisfied that he or she would be highly likely to commit an act of serious interpersonal violence if released at the end of their sentence.

5.23 We note that, of the 14 inmates identified in the CSNSW Audit in 2010, all were assessed by CSNSW as presenting a high risk of violent re-offending on the basis of a number of risk-assessment tools that were considered to provide the most accurate current means of determining that risk, including:

- the psychopathy assessment measurement, PCL-SV; and
- at least one other violence assessment measurement (either LSI-R, VRS-SV or HCR-20).

5.24 We consider that any SPCMO should apply specifically to HRVOs who have been assessed as presenting a high risk of violent re-offending in accordance with the most accurate risk-assessment tools available at the time of assessment, in conjunction with an individual case-by-case clinical assessment.

7. Chapter 2, [2.68].

Recommendation 1

Any SPCMO for HRVOs should apply a two stage process to defining HRVOs, defining them as offenders who:

a) are convicted of a serious indictable offence that involves the use of, attempted use of, or shows a propensity towards, serious interpersonal violence; and

b) have been assessed as presenting a high risk of violent re-offending in accordance with the most accurate risk-assessment tools available at the time of assessment, in conjunction with an individual case-by-case clinical assessment.

5.25 In our discussion of each of the options below we identify a number of issues for resolution. The application of the above definition is one such issue that may need to be refined depending on which and how options are to be implemented. The broad considerations noted above should however always be relevant.

Minimum safeguards applicable to any SPCMO

5.26 If it is determined that it is necessary to introduce a SPCMO for HRVOs, in order to achieve community protection, we are of the view that it is essential to minimise any undue incursion into individual rights. We therefore consider that the following minimum safeguards should be incorporated in any SPCMO that is introduced:

- it should be narrowly confined by definition, in accordance with Recommendation 1;
- it should balance community protection against the right of a person who has served their sentence to be released from custody;
- it should require review, at specified regular intervals, of each individual case to re-assess the nature of the risk that the HRVO poses. This is necessary because the risk of violent re-offending is changeable rather than static. If the basis for the SPCMO is no longer relevant (for example, because of the offender's rehabilitation, a change in circumstances, or a new and better risk-assessment modelling becomes available), then the HRVO should be able to have those matters taken into account upon review;
- in the event that an indefinite sentencing option is introduced, this should also make provision for a review prior to the expiry of the punitive portion or the set nominal portion of the sentence to determine whether the indefinite sentence is still appropriate or whether a finite term with a parole or re-integration period should be substituted;
- it should form part of a broader management framework for HRVOs, which includes targeted rehabilitation. In extraordinary cases, lifelong detention or supervision may be justified; however, the aim of any new scheme should be to protect the community, not only by detaining or supervising the offender but also by endeavouring to resolve the risk. Detention alone without treatment is akin to a lifelong sentence. It does nothing to reduce the risk that the offender poses to the community and may do no more than defer that risk to a later time; and

- there should be a requirement to review the SPCMO after a period of three years of operation.

Recommendation 2

a) Any SPCMO for HRVOs should:

- **be subject to periodic review;**
- **be subject to review on application by the offender, at any time, on the basis that as a result of a change in circumstances, the offender is no longer a HRVO;**
- **form part of a broader management framework for HRVOs, which includes targeted rehabilitation.**

b) Any legislation implementing a SPCMO should be subject to a requirement that it be reviewed as soon as possible after 3 years of operation.

Support structures required for a SPCMO in NSW

Interagency cooperation

5.27 Whether or not it is determined that it is necessary to introduce a new SPCMO for HRVOs, we are of the view that it is essential to maximise the support of HRVOs in the community, to reduce any risk that HRVOs pose.

5.28 The Council is concerned about the possible difficulty that HRVOs who are subject to supervision in the community may have in gaining access to the full range of support services that they require. It is important to recognise that the effectiveness of supervision and compliance monitoring of HRVOs will be compromised if basic sustainable services including accommodation, mental health and alcohol and other drug services etc are not available. CSNSW have advised that accessing these services has been a significant problem for serious sex offenders currently managed on Extended Supervision Orders.

5.29 We are of the view that consideration should be given to adopting some of the features of the MAPPA model that is in operation in various forms in the United Kingdom, and that we have outlined in Chapter 4.[8]

5.30 In particular, we are of the view that the obligations in relation to cooperation with other agencies and disclosure of information between agencies for that purpose would be valuable in NSW.

5.31 The MAPPA arrangements in England and Wales involve the National Probation Directorate, HM Prison Service and the England and Wales Police Forces in the management of offenders who pose a serious risk of harm to the public.

5.32 While aspects of the MAPPA are already reflected in the arrangements in force in NSW that provides for the management of sex offenders (for example, Child Protection Watch Teams and ad hoc arrangements between CSNSW Community

8. Chapter 4, [4.216]–[4.217].

Compliance and Monitoring Group and NSW Police Force Local Area Commands for the management of offenders subject to Extended Supervision orders), the MAPPA legislation makes it **a duty** for a number of named agencies to co-operate with the responsible MAPPA authority in the provision of services to high risk offenders in the community. This is set out in Section 325(3) of the *Criminal Justice Act 2003* (UK):

> **Arrangements for assessing etc risks posed by certain offenders**
>
> (2) The responsible authority for each area must establish arrangements for the purpose of assessing and managing the risks posed in that area by—
>
> (a) relevant sexual and violent offenders, and
>
> (b) other persons who, by reason of offences committed by them (wherever committed), are considered by the responsible authority to be persons who may cause serious harm to the public.
>
> (3) In establishing those arrangements, the responsible authority must act in co-operation with the persons specified in subsection (6); and ***it is the duty of those persons to co-operate in the establishment by the responsible authority of those arrangements, to the extent that such co-operation is compatible with the exercise by those persons of their relevant functions***.
>
> (4) ***Co-operation under subsection (3) may include the exchange of information***.
>
> (5) ***The responsible authority for each area ("the relevant area") and the persons specified in subsection (6) must together draw up a memorandum setting out the ways in which they are to co-operate***.

5.33 We would support the introduction of a similar obligation on agencies involved in the support and supervision of HRVOs in NSW.

Independent risk management authority

5.34 In Chapter 4 we have set out the legislative approach to indefinite sentencing and preventive detention schemes in other jurisdictions, which rely on risk assessment, and have summarised the manner in which risk assessment is undertaken. In Chapter 2 we have more specifically considered the various approaches to risk-assessment and risk-management and their limitations.

5.35 As outlined in Chapter 2, there are strong opponents to the use of risk assessment in sentencing. They point to the high rates of false positives in relation to the prediction of violent reoffending, and the fact that this significantly diminishes the basis for any form of preventive detention.[9] Furthermore, the diversity of the cohort means that the exercise of risk-assessment in relation to violent offenders is particularly difficult.

5.36 If a SPCMO is introduced then, given the inherent difficulty of risk management, and its fundamental importance to the proper operation of SPCMOs, we consider that an independent risk-management authority should be set-up to undertake the exercise of risk-management and risk-assessment.

5.37 We understand that currently (to the extent that it is relevant under current laws in relation to predicted risk of future violent and sexual re-offending); there is a limited

9. Chapter 2,[2.87].

pool of experts who provide evidence in these matters. An independent risk-management body would facilitate best practice in relation to risk-prediction, by:

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

Recommendation 3

a) The Government should introduce legislation whereby State Government agencies are required to:

- **cooperate with other agencies to provide appropriate services to HRVOs subject to community supervision orders; and**
- **share information with other agencies to facilitate such support;**

and such a scheme should be extended to offenders managed under the *Crimes (Serious Sex Offenders) Act 2006* (NSW).

b) As part of any new SPCMO for HRVOs, an independent risk-management body should be established, to facilitate and regulate best-practice in relation to risk-assessment and risk-management.

Options for a SPCMO for HRVOs in NSW

5.38 In this part, we set out the options for introducing a SPCMO in NSW.

Option 1: Introduce a continuing detention and/or extended supervision scheme for HRVOs

5.39 Current schemes exist for serious sex offenders, which have been summarised in Chapter 4, that allow for orders to be made by the Supreme Court, for continued detention and extended supervision for either a definite period (for example as in

Victoria and NSW) or for an indefinite period (for example as in Queensland and WA).[10]

5.40 The key features of a continuing detention and supervision scheme are that:

- orders can be sought against a) serious sex offenders who b) pose an unacceptable risk of danger to the community;
- community safety and protection is the dominant purpose;
- another object is to encourage offenders to undertake rehabilitation;
- the offender must present an unacceptable risk of re-offending, established to a high degree of probability in proceedings before a court that are conducted according to law, that ensure a fair hearing and that preserve a right of appeal;
- periodic review mechanisms exist so that, where the risk that the offender poses to the community reduces to an extent that the offender is no longer considered a threat to the community, the offender may be released from the detention or supervision; or conversely, if the extended period of detention or supervision is about to expire and the offender is still considered a danger to the community, a further application can be made for either continuing detention or extended supervision;
- the offender can be released on conditions which, if breached, constitute an offence; and
- ESOs and CDOs for serious sex offenders apply to offenders who have already been sentenced and are currently serving sentences of imprisonment or are nearing the expiration of their sentences.

5.41 An approach similar to the CSSOA in the case of a HRVO would effectively enable the Supreme Court to make such an order where the offender is serving a sentence for a serious violent offence, if it is satisfied 'to a high degree of probability' that the offender poses an unacceptable risk of committing a further serious violent offence if he or she is not kept in further detention or under supervision.

5.42 If an approach similar to the CSSOA is taken, the Supreme Court would be able to have regard to a number of matters in order to determine whether the offender would qualify for an order for continuing detention or extended supervision, including:

- the safety of the community;
- opinions expressed in reports and assessments of psychologists and psychiatrists who have examined the offender as to the likelihood of the offender reoffending;
- the contents of reports prepared by CSNSW regarding the risk provided by the offender and the extent to which the offender can reasonably and practicably be managed in the community;

10. Chapter 4, from [4.139].

- information provided by CSNSW concerning the offender's access to and participation in treatment and rehabilitation programs while in custody or in the community;
- 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 previous supervision orders;
- 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;
- the views of the sentencing court at the time that the sentence of imprisonment was imposed on the offender;
- any other information regarding the likelihood that the offender will in future commit offences of a violent nature.

5.43 If an extended supervision and/or continued detention scheme is favoured, further consideration will need to be given to:

- the legal test and standard of proof;
- who should be able to make an application;
- the matters that the relevant court may take into account when considering an application;
- which court(s) may hear applications;
- the length of orders;
- the process that should be followed upon breach of an ESO;
- the role of CSNSW, the Parole Authority and, if introduced, the new risk-management authority, in supervising and reporting to the court;
- how frequently periodic review hearings should be conducted; and
- the mechanism for appeal.

5.44 It is noted that, of the submissions that were received by the Council to this review, the majority did not support this option. Any form of preventive detention was in fact opposed by NSW Young Lawyers, Justice Action, NSW Legal Aid, the NSW Law Society, the NSW Bar Association and the Public Defenders Office.[11]

5.45 The NSW Department of Family and Community Services and NSW Police however supported an extension of the CSSOA model for HRVOs.[12]

5.46 The DPP, and Dr Olav Nielssen, supported the introduction of extended supervision for HRVOs but not continued detention.[13] While not supportive of this option, NSW

11. Submission SVO5, *NSW Young Lawyers*, 7–9; Submission SVO7, *Justice Action*, 2; Submission SVO8, *Legal Aid*, 4; Submission SVO11, *NSW Law Society*, 5; Submission SVO12, *NSW Bar Association*, 1–2; Submission SVO17, *Public Defenders Office*, 4.
12. Submission SVO6, *NSW Department of Family and Community Services*, 1; Submission SVO14: *NSW Police Force*, 1.

Legal Aid submitted that if any scheme for extended supervision in the community was introduced, it should be based on parole supervision.[14]

5.47 The Council notes that legislation providing for continuing detention or extended supervision exists in Queensland, WA and Victoria in addition to NSW, but in each case it is targeted at serious sex offenders. Continuing Detention Orders and Extended Supervision Orders are not currently available in respect of offenders who are considered to present a high risk of committing serious violent offences (other than violent sexual offences) in Australia.[15]

5.48 In 2007, the Victorian Sentencing Advisory Council was requested by the then Attorney-General, the Hon. Rob Hulls MP, to advise on the merits of introducing a scheme that would allow for the continued detention of offenders who were considered to pose a serious danger to the community at the end of their custodial sentence. A narrow majority of the Victorian Advisory Council ultimately considered that, in light of the existence of the schemes already in place in that State to protect the community from dangerous offenders (including indefinite detention for dangerous offenders which had operated in Victoria since 1993), the inherent dangers involved in a continuing detention scheme outweighed its potential benefits.[16]

Option 2: Introduce an indefinite detention scheme for HRVOs

5.49 This option involves the introduction of a legislative provision that would allow a court, at the time of sentencing, to impose a term of imprisonment without a specified end-point, in respect of specified serious violent offences.

5.50 Examples of indefinite detention schemes in place in other jurisdictions are provided in Chapter 4.[17]

5.51 The key features of an indefinite detention scheme are that:

- the offender is made aware of the indefinite nature of the term of imprisonment at the time of sentencing;

13. Submission SVO9, *Office of the Director of Public Prosecutions*, 3–4, Submission SVO15, *Dr Olav Nielssen*.
14. Submission SVO8, *NSW Legal Aid*, 2–4.
15. Chapter 4, [4.139]–[4.186].
16. Sentencing Advisory Council (Victoria), *High Risk Offenders: Post-Sentence Supervision and Detention,* Final Report (2007), at ix, 47, 193. The Council's advice was given in the context of the existing schemes that existed in that jurisdiction, including indefinite detention for dangerous offenders including violent offenders (which has operated in that jurisdiction since 1993 (see Chapter 4), and extended supervision orders under the *Serious Sex Offenders Monitoring Act 2005*, which enables the Victorian Adult Parole Board to direct offenders to live on land within the perimeter of Ararat Prison. The Council in making its recommendations noted that its extended supervision scheme had at that time only been operating for a short period of time and as such there had not been sufficient time to evaluate its effectiveness, however made a number of recommendations to improve that scheme.
17. Chapter 4, from [4.5].

- although community protection is a purpose of indefinite sentencing, it is not the sole purpose; the purposes of punishment and rehabilitation are also considered at the time the indefinite sentence is imposed;
- the court sets a 'nominal sentence', similar to the NPP that would have been set if a determinate sentence with a NPP had been imposed;
- at or near the expiration of the nominal sentence, the court conducts a review of the indefinite sentence and the risk that the offender poses to the community; if the offender is no longer considered a serious risk to the community, the offender is discharged to a community re-integration program, or parole. If the court considers that the offender is still a serious risk to the community, the indefinite sentence remains in place, however the offender may apply for review at specified intervals;
- when an offender who is discharged to a community re-integration program, or to parole, successfully completes the program or parole conditions, then he or she ceases to be subject to any form of order;
- such an order needs to be made at the time of sentencing for an offence of which the offender has been convicted. It is not available for:
    - HRVOs who are already in custody and who may be due for release in the future; or
    - former forensic patients who have been released from custody, and whose risk to the community has become unacceptable at a subsequent time.

5.52 If an indefinite detention model were favoured, consideration would need to be given to:

- the legal test and standard of proof;
- who should be able to make an application for an indefinite sentence;
- which court(s) could hear applications;
- the length of the re-integration or parole period fixed upon discharge;
- the process that should be followed upon breach during the re-integration or parole period;
- the role of the Parole Authority in supervising and reporting to the court;
- if Recommendation 3(b) above is accepted, the role of any new risk-management authority in supervising and reporting to the court;
- how frequently periodic review hearings should be conducted if the offender is not discharged following the nominal period;
- the mechanism for appeal; and
- the matters that the relevant court may take into account when considering an application.

5.53 We note that, in considering the matters listed in 5.52 above, it will be critical to ensure that the scope of the scheme is sufficiently confined to ensure that the

issues encountered with the UK IPP scheme outlined in Chapter 4 are avoided. We consider that the safeguards outlined at 5.26 above are essential in this regard.

5.54 Indefinite sentencing schemes have been in place in a number of jurisdictions for a lengthy period and its legality has been accepted. Amongst other things, it has the advantage of allowing the offender to become aware at the time of sentencing, of the nature of the sentence, and in providing a periodic review mechanism the availability of which can act as an encouragement to the offender to engage in appropriate treatment and violence management programs. This aspect of indefinite sentencing therefore has a similar effect to parole.

5.55 Of the written submissions that were received by the Council, only CSNSW favoured the introduction of an indefinite detention scheme, although the DPP also acknowledged that an indefinite sentencing scheme of the kind that exists in Victoria and in Queensland may have some utility.[18]

5.56 The NSW Law Society submitted that it did not support such a model.[19] The submissions of the State Parole Authority and Justice Action noted that caution should be exercised when considering its introduction. The State Parole Authority submitted that with very few exceptions, offenders should be released at a pre-determined date, otherwise there may be a risk that the offender will be less motivated to complete treatment and address the offending behaviour.[20] The Public Defenders Office noted that, while it did not support the introduction of an indeterminate sentencing model, it recognised that it was appropriate that such a model be examined and evaluated.[21]

Option 3: Introduce a scheme permitting the imposition of a disproportionate sentence for HRVOs

5.57 Disproportionate sentencing schemes allow for the imposition of a determinate sentence of imprisonment that is longer than the term that would otherwise be proportionate to the gravity of the offence, so as to elevate the safety and protection of the community as a primary consideration.[22]

5.58 The option outlined in this section would effectively involve extending disproportionate sentencing in NSW beyond those areas where current laws provide for an enlargement of the maximum sentence for repeat offenders or permit the imposition of an additional period of imprisonment for habitual criminals.[23]

5.59 If a form of disproportionate sentencing were favoured, a number of questions arise for consideration, including:

18. Submission SVO9, *Office of the Director of Public Prosecutions*, 4, Submission SVO20, *Corrective Services NSW*, 2.
19. Submission SVO11, *NSW Law Society*, 5–6.
20. Submission SVO3, *State Parole Authority*, 4.
21. Submission SVO17, *Public Defenders Office*, 5.
22. Chapter 4, [4.121]–[4.138].
23. Chapter 3, [3.37]–[3.45].

- whether such a scheme should be confined to those who are convicted of second or subsequent offences. Different approaches are taken, for example, in Victoria, Queensland and Canada; and
- whether any scheme should take the form of simply increasing the maximum sentence available in respect of certain offences, or whether it should specifically permit the imposition of a sentence that is disproportionate to the gravity of the offence, without setting specific limitations for the court.

5.60 In summary, the key features of a disproportionate sentencing scheme are that:

- the decision whether to apply the scheme is made at the time of sentencing an offender;
- community protection is the dominant purpose;
- orders may be applied to offenders based on the offence committed, previous convictions, and /or the risk of the offender to the community;
- the objective of public protection is given greater weight than the principle of proportionality.

5.61 We note that the NSW LRC has recommended against this form of sentencing in the past.[24]

5.62 We also note that in essence such a scheme seeks to achieve the object of community protection through incapacitation and personal deterrence and does not directly address the possibility of achieving risk reduction through management or rehabilitation.

5.63 Of the submissions that were received by the Council, the majority did not support any further extension of gradated sentencing laws or disproportionate sentencing.[25] NSW Young Lawyers noted that such a scheme would provide a disincentive to rehabilitation and that increasing prison sentences might lead to the increase of violent behaviours and the reduction of motivation to reform.[26] The Public Defenders Office noted that the existing disproportionate sentencing scheme that exists under s 115 of the *Crimes Act* is rarely used and constitutes a form of punishing offenders for their past.[27]

24. NSW Law Reform Commission, *Sentencing,* Report 79 (1996), Recommendation 53, at [10.20].
25. Submission SVO5, *NSW Young Lawyers*, 6; Submission SVO7, *Justice Action;* Submission SVO8, *NSW Legal Aid*, 2; Submission SVO9, *Office of the Director of Public Prosecutions*, 3; Submission SVO11, *NSW Law Society*, 3; Submission SVO12, *NSW Bar Association*, 1–2; Submission SVO17, *Public Defenders Office*, 4; Submission SVO13, *NSW Police Association*; Submission SVO18, *Chief Judge of the District Court*, 1.
26. Submission SVO5, *NSW Young Lawyers*, 8–9.
27. Submission SVO17, *Public Defenders Office*, 4.

Option 4: Introduce a scheme based on the lifelong restriction model that exists in Scotland

5.64 This option involves two key parts:

- firstly, the imposition at the time of sentencing, of an order of 'life-long restriction', which is akin to a natural life sentence with a parole period (or 'nominal sentence'), and applies to certain offences; and
- secondly, the development of a risk-management plan, tailored to the particular needs of the offender, by a specialist, independent risk management authority.

5.65 The key features of a life-long restriction or indeterminate parole scheme, based on the Scottish model, are as follows:[28]

- if the offender has committed an offence that falls within the scope of the scheme, the sentencing court can order that the offender's risk for violent re-offending be assessed prior to sentencing;
- if assessed as suitable for an order, the offender is made aware of the indefinite nature of the restriction at the time of sentencing;
- similarly to the indefinite sentence model described above, the court specifies a 'nominal sentence', (or NPP), of the kind that would have been set if a determinate sentence had been imposed;
- at or near the expiration of the nominal sentence, a review is carried out in relation to the risk that the offender poses to the community. If the offender is no longer considered a serious risk to the community, he or she is released on indeterminate parole, subject to the conditions set by the Parole Board. If the offender is considered to still present a serious risk to the community, then he or she will remain in full-time custody subject to periodic review, at which time the risk level will be re-assessed;
- in contrast to the indefinite sentence option considered above, once the offender has been sentenced to life-long restriction, the Scottish model does not provide for any possibility of a review by a court to remove the order. The order remains in place for the remainder of the offender's life;
- in contrast to life sentences as they currently exist in NSW, these types of orders allow for supervision on parole once the 'punishment' or nominal part of the sentence has been served. That supervision can at any time be increased to the point where, following breach or non-compliance, the offender is returned to full-time custody, or decreased to a point of minimal supervision.

5.66 As with indeterminate sentences, these orders have no application to HRVOs who are already serving a sentence in custody for other offences.

5.67 If such a model were favoured, consideration would need to be given to the matters outlined in paragraph 5.51 above in relation to indefinite sentences. We note in this regard, our view, as outlined at 5.26 above, that a review mechanism by which an offender is able to make an application to a court and to have the order discharged upon a change in circumstances, is a fundamental safeguard that should be applied

28. Risk Management Authority (Scotland), *Standards and Guidelines, Risk Management of Offenders Subject to an Order for Lifelong Restriction* (2007).

to any SPCMO. The 'life-long restriction' aspect of this model is inconsistent with this safeguard. While there is provision for ongoing review in relation to the nature of the risk that the offender poses at any particular time, which may result in an increase or decrease in the level of supervision, there is no review mechanism that enables the offender to have that that order removed.

5.68 A model which provides for lifelong restriction or indeterminate parole could, however, by reason of the fact that it cannot be removed, potentially provide a useful mechanism for offenders, with mental health or cognitive impairments, who are released from custody following an improvement in their condition, but who are subsequently assessed as posing an unacceptable risk to the community. It would permit their ongoing supervision and return to custody if appropriate.

5.69 A key element of this model would be the establishment of a specialist, independent risk-management authority that is able to develop a risk management plan tailored to the particular needs of the offender. This has the benefit of catering for a broad range of offenders whose violent offending may have arisen from different underlying causes. For example, a risk-management plan could be tailored to offenders with cognitive or mental impairments, to offenders with a psychopathic personality disorder, or to serious sex offenders.

5.70 We note that, the cost of developing an independent risk management authority that promotes best practice in the management of HRVOs, accredits assessors to undertake risk assessments of offenders and monitors offenders who are subject to supervision or parole would require a significant commitment of resources by government.

5.71 We have not sought the views of stakeholders specifically in relation to the Scottish model and are, at this stage, unaware of any independent review as to whether it has successfully addressed its objectives.

5.72 To some extent the introduction of such a scheme could mimic the past practice in NSW by which life sentences were imposed subject to possible release on licence.

5.73 There was some support in the submissions for extending the scope of the current parole provisions to better enable the State Parole Authority to supervise HRVOs,[29] although a number of stakeholders also submitted that while they supported supervision of HRVOs on parole, this should be done within the scope of the current parole system.[30]

5.74 An option that is focused on supervision in the community rather than requiring full-time custody is relatively less restrictive for the HRVO and potentially more palatable. Additionally, as the lifetime restriction is imposed at the time of sentencing, issues of retrospectivity and double punishment do not arise.[31]

---

29. Submission SVO3, *State Parole Authority*, 2–3; Submission SVO9, *Office of the Director of Public Prosecutions*, 3–4; Submission SVO15, *Dr Olav Nielssen*, 6; Submission SVO20, *Corrective Services NSW*, 23.
30. Submission SVO11, *NSW Law Society*, 4; Submission SVO17, *Public Defenders Office*, 4; Submission SVO8, *NSW Legal Aid*, 2–5.
31. B McSherry, *Risk Assessment by Mental Health Professionals and the Prevention of Future Violent Behaviour*, Report for the Criminology Research Council (2002) 37–46.

Option 5: Introduce a scheme for prohibition or control orders for HRVOs

5.75 An alternative to parole based control or detention and supervision in the community, is a control order.

5.76 This option involves an order made by a court either near, or at the time of, the expiry of a sentence, or at a later time, to protect the community at large from the HRVO.

5.77 As we have noted,[32] there are already a number of forms of control or prohibition order available in NSW in order to restrict the behaviour or activities of violent offenders, namely:

- the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) that provides for the making of Apprehended Violence Orders restricting the behaviour and activities of HRVOs for the protection of specific individuals;[33]
- the *Crimes (Criminal Organisations Control) Act 2012* (NSW) that allows for the making of control orders on persons for the purposes of preventing and restricting the activities of criminal groups or organisations;[34] and
- the *Child Protection (Offenders Prohibition Orders) Act 2004* that provides for the making of *child protection prohibition orders* and *contact prohibition orders*, in respect of 'registrable persons', being persons whom a court has previously sentenced in respect of a registrable offence, in accordance with s 3A of the *Child Protection (Offenders Registration) Act 2000.*[35]

5.78 The existing forms of control orders that are available in NSW do not allow for:

- the imposition of reporting requirements on HRVOs, for example, such as exist pursuant to the *Community Protection (Offender Reporting) Act 2004* (WA); [36] or
- save for the criminal organisations control provisions and child protection orders referred to above, the imposition of an order protecting not only a specific individual or individuals, but a larger group within the community or the public at large from the HRVO's violent offending, such as is provided for by VOOs in the UK.[37]

In the case of AVOs and orders under the *Crimes (Criminal Organisations Control) Act*, they are limited to individuals.[38]

5.79 This option, as it exists in the UK, operates somewhat akin to an extended supervision order. The Police Service may apply for an order towards the end of the violent offender's sentence, to take effect immediately upon release, in order to provide for additional post-sentence control or supervision (although it can also be imposed on an offender at any time following the offender's sentence).

32. Chapter 3, from [3.50]–[3.71].
33. Chapter 3, [3.50].
34. Chapter 3, [3.67].
35. Chapter 3, [3.57].
36. Chapter 4, [4.234].
37. Chapter 4, [4.245].
38. Chapter 3, [3.50]–[3.71].

5.80 However, this option differs from an extended supervision order in that; it is not part of a continuing detention scheme.

5.81 If this option were favoured, consideration would need to be given to:

- the prerequisites for eligibility for such an order, including specification of the minimum length of jail time that must have been imposed in respect of a prescribed violence offence;
- the jurisdiction in which an application should be determined;
- the maximum length of time for which such an order may be imposed; and
- how frequently judicial reviews of the order should be conducted.

The Council's preferred SPCMO

5.82 If it is accepted that a gap exists in the current framework applicable to HRVOs in NSW, which justifies the introduction of a SPCMO, it is then necessary to determine the best method or methods of managing the risk that HRVOs pose.

5.83 In addition to a lack of unanimity amongst Council Members in relation to whether or not an additional SPCMO should be introduced in NSW, there was also a lack of unanimity in relation to the nature that any such option should take.

5.84 A majority of Council Members, who voted, considered that a post-custody management scheme is preferable to an indefinite sentencing option. These Council Members considered that:

- the risk that an offender poses to the community cannot be accurately identified at the time of sentencing of the offender, which may be many years before release, and prior to any engagement in rehabilitation or treatment programs. Rather, the risk that an offender poses to the community is much more accurately identifiable at a time proximate to the release of the offender;
- because of the fact that any risk assessment done towards the end of an offender's sentence is likely to be more accurate, this also makes it more likely that such a scheme would apply only to a very small cohort who present a high-risk of serious violent re-offending immediately prior to their release; and
- it is unsatisfactory that NSW alone, of the Australian States and Territories, does not have any clear legislative mechanism to deal with HRVOs.

5.85 The Council Members who supported this approach did not favour the introduction of an indefinite sentencing scheme, since it risks:

- a larger group of offenders being captured by the scheme, if a risk averse approach was adopted in its implementation; and
- giving rise to a situation in which offenders would be disinclined to plead guilty if they were exposed to the possibility of receiving an indeterminate sentence.

5.86 A majority of Council Members considered that, if a post-custody management scheme is introduced, it should include both continuing detention and extended supervision.

5.87 In this regard, however, it was noted that:

- there is a concern that, in some instances, continued detention may be preferable to extended supervision, as a result of issues surrounding the practical implementation of any potential extended supervision scheme. It was observed that while the Victorian scheme envisaged the post-sentence supervision of offenders in the community, in practice, those administering the ESO legislation faced significant difficulties in finding appropriate accommodation for some offenders, resulting in their housing within the perimeter of Ararat prison in conditions that were less favourable than those available if they remained in full-time custody;[39]

- as a consequence it would be necessary to ensure that sufficient resources were available to cater for the management of suitable offenders in the community; and that

- an important safeguard with respect to continuing detention is that it should only be available in cases where the offender cannot be managed in the community.[40]

5.88 It is noted that a minority of Council Members considered that an indefinite sentencing option would be preferable to a post-custody management option. These Council Members considered that an option which requires consideration at the time of sentencing has the benefit of:

- providing an independent judicial review of the offender's risk to the community at that early stage; and

- providing the offender with notice at the time of sentencing of the fact that they may not be released if they do not address their risk to the community by way of rehabilitation and treatment programs.

5.89 These Council Members considered that there is a risk with post-custody management that, offenders who engage badly with the justice system will be more likely to be subject to such a scheme, whether or not they are a higher risk of violent re-offending than other offenders who adapt more successfully to the prison environment.

Recommendation 4

By majority, it is recommended that the Government should introduce a continuing detention and extended supervision scheme for HRVOs, subject to the safeguards and support structures outlined in this Report.

Additional reform options

5.90 In this section we examine some incidental issues or areas for possible reform that arise in relation to the existing sentencing regime in NSW.

39. Sentencing Advisory Council (Victoria), *High Risk Offenders: Post-Sentence Supervision and Detention,* Final Report (2007), at ix, 47, 198.

40. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 17(3).

Improve existing treatment / rehabilitation options for HRVOs

5.91 As a general principle, we consider that any SPCMO should not be imposed on an offender, unless adequate attempts can be made or have been made, as the case may require, to secure that person's rehabilitation during the term of the sentence.

5.92 Where means less intrusive than detention are available to promote a person's rehabilitation then they should be used. Moreover, any such form of sentencing should not be introduced merely to compensate for any failure of the corrections system to manage serious offenders or to provide access to suitable rehabilitative or treatments programs.

5.93 As we have noted earlier, there are some programs within the corrections system that are directed in particular to HRVOs. The academic literature available suggests that both these and other programs that exist internationally are relatively new,[41] and that limited information is available in relation to their effectiveness and in particular, their ability to address the multifaceted treatment needs of different HRVOs. Howells and Day in their study on the treatment and rehabilitation of violent offenders noted:

> It is still somewhat remarkable that the treatment of violent offending per se remains as poorly developed as it is, given the massive and unquestioned personal and social costs of violence and the reasonable theoretical and empirical base that is available within psychological science.
>
> …Work conducted so far suggests violent offending is heterogeneous, with a broad range of causal influence. It follows that interventions need to be broad-based, diverse in therapeutic targets, and tailored to the characteristics, risk levels and demonstrable needs of participants, and to their readiness to address their behaviour.[42]

5.94 We note that, while the academic literature that we have reviewed states that the research in relation to the reduction of violent recidivism is new and underdeveloped, it also states that the research that is available suggests that proper treatment can reduce the rate of occurrence of violent conduct by individuals.[43]

5.95 Of particular concern in relation to the VOTP program that is currently in use in NSW is that, on the Council's understanding:

- it is not yet available for female offenders;
- it is only available for HRVOs in one corrections facility and can cater, on the most recent advice of CSNSW, for 50 offenders per year;

---

41. K Howells and A Day, 'Grasping the nettle: Treating and Rehabilitating the Violent Offender' (2002) 37(3) *Australian Psychologist* 222, 222.
42. K Howells and A Day, 'Grasping the Nettle: Treating and Rehabilitating the Violent Offender' (2002) 37(3) *Australian Psychologist* 222, 226.
43. K Howells and A Day, 'Grasping the Nettle: Treating and Rehabilitating the Violent Offender' (2002) 37(3) *Australian Psychologist* 222, 226; D Polashek and B Dixon, 'The violence prevention project: The development and evaluation of a treatment programme for violent offenders' (2001) 7 *Psychology, Crime & Law* 1; D Polashek and R Collie, 'Rehabilitating serious violent adult offenders: An empirical and theoretical stocktake' (2004) 10(3) *Psychology, Crime & Law* 321; J McGuire, 'A review of effective interventions for reducing aggression and violence (2008) 363 *Philosophical Transactions of the Royal Society* 2577.

- the suitability criteria are stringent and may result in some HRVOs being excluded from participation.[44]

5.96 There was support in the submissions received for extension of the reach of the program,[45] for some relaxation of the eligibility criteria,[46] for an increase in the resources and staffing provided,[47] and for the program to be broadened so as to include all who have been convicted of extreme violence.

5.97 NSW Legal Aid submitted that SORC should have a greater role in recommending changes to classification and placement of offenders that would facilitate the participation of serious violent offenders in the program.[48] CSNSW advised that the program could be further developed to cater for dangerous offenders and offenders with severe personality disorders.[49]

5.98 We are of the view that it would be desirable for there to be a review of the VOTP to assess whether it effectively targets the diverse therapeutic needs of HRVOs, and whether it is sufficiently accessible to those who may benefit from it. Without sufficient funding and evaluation it is difficult to determine with any degree of certainty whether VOTP, or any alternative, provides a sufficient means of preparing offenders for possible release, or of otherwise assisting decision making in relation to whether extended supervision or continued detention is appropriate.

5.99 In addition to rehabilitation during the custodial portion of an offender's sentence, we also note the critical role of parole in the rehabilitation and reintegration of violent offenders into the community. In this respect, we are of the view that it would be desirable for there to be ongoing monitoring of the operation of parole in order to examine whether there are any discernible trends in relation to parole eligibility and post-release conduct of those within this group.

Recommendation 5

a) An independent review of VOTP should be conducted to assess whether it effectively targets the diverse therapeutic needs of HRVOs, and whether it is sufficiently accessible to those who may benefit from it, and if not, how it should be reformed or what other programs or resources should be introduced in order for the therapeutic needs of HRVOs to be met.

b) In-custody treatment programs for HRVOs should be expanded to cater for all HRVOs, including women and offenders with mental or cognitive impairments.

c) BOCSAR should review and monitor the grant of parole to gauge trends in relation to parole eligibility and post-release conduct of serious violent offenders.

44. Chapter 3, [3.132]–[3.135]
45. Submission SVO3, *State Parole Authority*, 4; Submission SVO6, *Department of Family and Community Services (NSW)*, 1; Submission SVO8, *NSW Legal Aid*, 2–3; Submission SVO11, *NSW Law Society*, 4; Submission SVO20, *Corrective Services NSW*, 24.
46. Submission SVO11, *NSW Law Society*, 4; Submission SVO6, *Department of Family and Community Services (NSW)*, 1.
47. Submission SVO8, *NSW Legal Aid*, 2–3; Submission SVO20, *Corrective Services NSW*, 24.
48. Submission SVO8, *NSW Legal Aid*, 2–3.
49. Submission SVO20, *Corrective Services NSW*, 24.

Response to HRVOs with mental health or cognitive impairments

5.100 If a scheme for HRVOs is introduced, consideration should be given to whether and how it should also apply to HRVOs with mental health or cognitive impairments.

5.101 There are two key groups of persons with mental health and cognitive impairments that are relevant for the purposes of this Report:

(1) forensic patients, whose risk of violent re-offending is found to increase at a time after they are released from a mental health facility; and

(2) persons who have not been dealt with under the NGMI or fitness provisions of the MHA or MHFPA, but whose status as a HRVO is based on the existence of a mental health or cognitive impairment, for example, offenders who do not fit within the definition of 'mentally ill persons', or who become mentally ill during their term of imprisonment.

5.102 In relation to the first category, as we observed in Chapter 3,[50] the only recourse (unless the person commits another offence) is civil detention or an involuntary community treatment order under the MHA , if the person meets the relevant criteria for such detention.

5.103 The NSW LRC is currently looking at proposals for the management of those offenders with mental health and cognitive impairments who come into contact with the criminal law. Those within this group, who are potentially dangerous, present a particular challenge for the criminal law, both in terms of the assessment of their level of risk and their ongoing management.

5.104 At this stage, we consider that it is better, because of the special challenges that arise in relation to this group, to allow the NSW LRC to develop appropriate proposals for persons in this category, who are HRVOs, and either NGMI or subject to a limiting term, in accordance with the provisions of the MHA and MHFPA. As part of this process, we are of the view that the Draft Report of the MHRT may also warrant further consideration.[51]

5.105 This does not however exclude the possibility of legislation being introduced, in accordance with the option that we prefer, as outlined below, that would have a more general application. For example, were a community supervision or risk management option to be introduced it may have application to forensic patients as well as to those who receive a sentence of imprisonment.

5.106 The second group that comprise HRVOs with cognitive or mental impairments who do not fall within the scope of the provisions of the MHA and MHFPA, would be covered by the option for continuing detention or extended supervision preferred by the majority of the Council. However, we are of the view that consideration should be given to the Draft Report of the MHRT to determine whether the model

50. At [3.106]–[3.118].

51. NSW Mental Health Review Tribunal, *Managing Serious Risk, Patients with a Mental Condition or Developmental Disability, A Possible Legislative Response*, Draft Report (2011).

developed in that Report more effectively deals with HRVOs who fall within this second group.[52]

5.107 We note that in the UK, a specific program has been developed to cater for prisoners who suffer from a severe personality disorder, and who, as a result of that disorder are assessed as dangerous. In any review of existing rehabilitative programs for HRVOs, consideration should be given to this program and to any comparable programs that exist in other jurisdictions.[53]

Reform or Repeal of Habitual Criminals Act

5.108 Currently an option exists for sentencing HRVOs who are repeat offenders under the *Habitual Criminals Act 1957* (NSW),[54] the terms of which we summarised earlier in the Report.[55]

5.109 However, the Act has been significantly criticised in recent times.

5.110 The Second Reading speech to the *Habitual Criminals Bill* records that:

> The principles underlying the declaration and detention of persons classified conveniently under the heading 'habitual criminal' have been in operation in this State since 1905. It is important for hon. Members to understand, from the outset, exactly what is conveyed by the term 'habitual criminal'. Dr Norval Norris (sic)…describes an habitual criminal as 'one who possesses criminal qualities inherent or latent in his mental constitution (but who is not insane or mentally deficient); who has manifested a settled practice in crime; and who presents a danger to the society in which he lives (but is not merely a prostitute, vagrant, habitual drunkard or habitual petty delinquent)'. The three elements which are included in this definition are: (a) criminal qualities inherent or latent in the mental constitution; (b) settled practice in crime; and (c) public danger.[56]

5.111 The NSW LRC recommended repeal of the Act along with the *Inebriates Act 1912* (NSW) in 1996 for the following reasons:

> 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.

52. NSW Mental Health Review Tribunal, *Managing Serious Risk, Patients with a Mental Condition or Developmental Disability, A Possible Legislative Response*, Draft Report (2011).
53. For example, see T Seddon, 'Risk, Dangerousness and the DSPD units', (2007) 177 *Prison Service Journal* 27.
54. See Chapter 3, [3.37].
55. See Chapter 3, [3.37]–[3.45].
56. NSW, *Parliamentary Debates*, Legislative Assembly, 14 March 1957, 4070 (B Sheahan) 4070.

> More generally, the beliefs which underpin the Acts in question are no longer appropriate or are provided for in other ways. For example, the *Habitual Criminals Act 1957* (NSW) was passed in the belief that there was a class of habitual criminals who possessed, 'criminal qualities inherent or latent in their mental constitution'; The procedures under the Acts are archaic and do not correspond with current practice. For example, the *Inebriates Act 1912* (NSW) and the *Habitual Criminals Act 1957* (NSW) both allow for a system of, "release on license" for persons declared under their provisions.[57]

5.112 This recommendation has not been acted upon, even though the Australian Law Reform Commission (ALRC) similarly recommended repeal of the equivalent provision contained in the *Crimes Act 1914 (Cth*), as a provision out of keeping with the modern approach to sentencing, and as amounting to an unfair means of preventive detention.[58] The Commonwealth provision was repealed in 1990 by the *Crimes Legislation Amendment Bill (No 2) 1989* (Cth). Clause 4 of the Explanatory Memorandum to that Bill provides:

> This clause repeals section 17 of the Principal Act which relates to habitual criminals because indeterminate detention is considered inappropriate…[59]

5.113 In its earlier Discussion Paper,[60] the ALRC had suggested that legislation of this kind was objectionable as providing for punishment in advance of crimes that might never be committed.

5.114 The submissions received by the Council to the current reference, were not supportive of retention of the Act. The DPP, the Bar Association, Public Defenders and CSNSW, each indicated that they did not support its continued existence.[61] The NSW Young Lawyers submitted that the Act can be useful but does not necessarily reflect modern views of criminal behaviour, punishment and rehabilitation.[62] The NSW Law Society submitted that the legislation could be relied on by a sentencing judge in an appropriate case however suggested that the terminology may require updating;[63] and Dr Olav Nielssen submitted that blanket sentencing such as 'three strikes' type legislation is generally unhelpful.[64]

5.115 All Members of the Council agreed that the beliefs that underpin this Act are no longer appropriate or are provided for in other ways, and are of the view that the Act should be repealed.

Recommendation 6
We recommend that the *Habitual Criminals Act 1957* be repealed.

57. NSW Law Reform Commission, *Sentencing,* Report 79 (1996), [10.19]–[10.20].
58. Australian Law Reform Commission, *Sentencing*, Report 44 (1988), [230].
59. *Crimes Legislation amendment Bill (No 2) 1989* (Cth), cl 6.
60. Australian Law Reform Commission, *Sentencing*, Discussion Paper 30 (1987).
61. Submission SVO9, *Office of the Director of Public Prosecutions*, 3; Submission SVO12, *NSW Bar Association*, 2, Submission SVO17, *Public Defenders Office*, 3; Submission SVO20, *Corrective Services NSW*, 20.
62. Submission SVO5, *NSW Young Lawyers*, 5.
63. Submission SVO11, *NSW Law Society*, 3.
64. Submission SVO15, *Dr Olav Nielssen*, 3.

Introduce parole in relation to life sentences

5.116 The nature of a sentence of life imprisonment in NSW has changed over time and its legislative history is somewhat complex. As this form of sentence will commonly be appropriate for HRVOs, we provide the following summary of that history and note the current availability of life sentences in NSW.

Legislative background

5.117 Before the *Crimes (Homicide) Amendment Act 1982* (NSW), in accordance with s 19 of the *Crimes Act 1900* (NSW) the sentence for murder was a mandatory sentence of life imprisonment (as opposed to the sentence for manslaughter which was a maximum of life imprisonment).

5.118 The 1982 amendment added an exception to the mandatory sentence - 'unless it appears to the Judge that the person's culpability for the crime is significantly diminished by mitigating circumstances, whether disclosed by the evidence in the trial or otherwise'.[65]

5.119 Before and after the 1982 amendment, offenders sentenced to life imprisonment could be released in accordance with the ticket-of-leave provisions in s 463 of the *Crimes Act 1900* (NSW) (referred to commonly as 'release on licence').

5.120 The *Sentencing Act 1989* (NSW), which introduced 'truth in sentencing' in NSW (by abolishing remissions), commenced on 25 September 1989. Provisions dealing with life sentences under the new regime were introduced three months later (commencing on 12 January 1990):

- section 431A was inserted in the *Crimes Act 1900* (NSW) making all offences, that attracted sentences of penal servitude for life (under an Act, an Imperial Act (in so far as it applied to NSW) or a rule of law), liable to penal servitude for 25 years, except for the offence of murder or an offence carrying that punishment under the *Drug Misuse and Trafficking Act 1985* (NSW);
- section 19 of the *Crimes Act 1900* (NSW) was repealed and replaced by s 19A by *Crimes (Life Sentences) Amendment Act 1989* (NSW) which provides that a life sentence for the crime of murder is to be served for the term of the offender's life;
- section 33A was inserted into the *Drug Misuse and Trafficking Act 1985* (NSW) which similarly provides that a life sentence imposed for an offence under that Act is one for the term of the offender's life;
- the Ticket-of-leave provisions were repealed from the *Crimes Act 1900* (NSW) by the *Prisons (Serious Offenders Review Board) Amendment Act 1989* (NSW);
- section 13A was inserted into the *Sentencing Act 1989* (NSW) to provide for a system whereby offenders sentenced to life imprisonment under the previous regime (subject to release on licence) could apply to the Supreme Court to have their sentence redetermined according to the new regime established by the *Sentencing Act 1989* (NSW).

65. On the application of this proviso, see *R v Bell* (1985) 2 NSWLR 466.

5.121 Section 13A of the *Sentencing Act 1989* (NSW), as originally enacted, provided that:

- a person serving an 'existing life sentence' could apply to the Supreme Court for the determination of a minimum term and an additional term for the sentence (s 13A(2));
- the person was not eligible to apply unless he or she had served at least 8 years of the sentence (s 13A(2));
- the Court could either set the minimum and additional term or decline to make such a determination (s 13A(4));
- the person could not apply again for 2 years, or such shorter period as specified by the Court (s 13A(8));
- in setting the minimum and additional terms the Court could have regard to any relevant matter including:
    - the knowledge of the original court of the operation of the release on licence scheme;
    - any report of the Serious Offenders Review Board or other reports made available to the Court; and
    - any relevant comments made by the original sentencing court (s 13A(9)).

5.122 Sentences imposed under the newly enacted s 19A of the *Crimes Act 1900* (NSW) and s 33A of the *Drug Misuse and Trafficking Act 1985* (NSW) were excepted from the redetermination provisions in s 13A. Since then, the life sentence provisions in s 61JA and s 66A(2) of the *Crimes Act 1900* (NSW),[66] added since the enactment of s 13A, have been included in the list of exceptions.

5.123 Two other provisions have been enacted since 1990 that relate to the imposition of life sentences:

- section 61 of the CSPA,[67] which requires the sentencing court to impose a sentence of life imprisonment on offenders convicted of murder in circumstances where 'the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence', and similarly in relation to a serious heroin or cocaine trafficking offence where the offence involved a number of factors including a high degree of planning and organisation, the use of other people, heroin or cocaine of a high degree of purity and the fact that the offender was solely or principally responsible for planning, organising and financing the offence, and committed the offence solely for financial reward;

66. *Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001* (NSW) sch 2.3; *Crimes Amendment (Sexual Offences) Act 2008* (NSW) sch 2.4[6].

67. Originally inserted as *Crimes Act 1900* (NSW) s 431B by *Crimes Amendment (Mandatory Life Sentences) Act 1996* (NSW) sch 1.

- section 19B of the *Crimes Act 1900* (NSW) which provides for mandatory life sentences for the murder of police officers in certain circumstances.[68]

5.124 Section 61 of the CSPA relates to life sentences imposed in relation to s 19A of the Crimes Act 1900 (NSW) and s 33A of the *Drug Misuse and Trafficking Act 1985* (NSW), which are excepted from the redetermination provisions. Section 19B of the *Crimes Act 1900* (NSW) specifically provides that nothing 'authorises a court to impose a lesser or alternative sentence',[69] thereby rendering it exempt from the redetermination provisions.

5.125 A number of amendments have been made to the provisions for the redetermination of life sentences over the course of the past 22 years.

5.126 Amendments made by the *Sentencing (Life Sentences) Amendment Act 1993* (NSW) commenced on 21 November 1993.[70] They provided that:

- the Court could order that the offender never reapply (in effect confirming the life sentences originally imposed) or not reapply for a specified period. (s 13A(8)); however

- the Court could only order that the offender never reapply if he or she was sentenced for the crime of murder and that 'it is a most serious case of murder and it is in the public interest that the determination be made' (s 13A(8C)).

5.127 Amendments made by the *Sentencing Legislation Further Amendment Act 1997* (NSW) commenced on 9 May 1997. They made provision for offenders concerning whom the sentencing court had made a 'non-release recommendation'. A 'non-release recommendation' meant a 'recommendation or observation, or an expression of opinion, by the original sentencing court that (or to the effect that) the person should never be released from imprisonment'.

5.128 The amendments provided, in respect of 'non-release' offenders:

- an offender the subject of a 'non-release recommendation' was not eligible to apply for a redetermination until he or she had served at least 20 years of the sentence concerned (s 13A(3));

- an offender the subject of a 'non-release recommendation' was not eligible for the determination of a minimum and an additional term unless the Court was 'satisfied that special reasons exist that justify making the determination' (s 13A(3A));

- in considering such an application, the Court must have regard to all the circumstances surrounding the offence and all other offences of which the person had been convicted at any time (s 13A(4A)).

5.129 Some general amendments were also made:

- a person, whose application had been declined by the Court, could not reapply for three years (s 13A(8), (8C));

68. Inserted by *Crimes Amendment (Murder of Police Officers) Act 2011* (NSW).
69. *Crimes Act 1900* (NSW) s 19B(4).
70. *Sentencing (Life Sentences) Amendment Act 1993* (NSW) sch 1[1]-[4].

- the Court was required, in making a determination, to take into account 'the need to preserve the safety of the community'.

5.130 The provisions in s 13A were relocated to Schedule 1 of the CSPA with effect from 3 April 2000. These provisions were in substantially the same terms as s 13A, adjusted to take account of the new requirements of the CSPA with respect to the setting of NPPs and specified terms.

5.131 It should be noted that Sch 1, cl 4(1)(b), which allows for the Court to decline to set a specified term but to set a NPP (that is, a sentence of life imprisonment with parole), had no equivalent in s 13A(4) of the *Sentencing Act 1989* (NSW).

5.132 Amendments made by the *Crimes Legislation Amendment (Existing Life Sentences) Act 2001* (NSW) commenced on 20 July 2001.[71] These amendments provided that:

- non-release offenders would only be eligible to apply for a redetermination after serving 30 years (rather than 20 years) of their sentence (cl 2(2)(b));
- non-release offenders were denied the possibility of the court setting a specified term of years, less than life, for their sentence (cl 4(3)).

5.133 In relation to the continuing possibility that the Court could redetermine a non-release offender's sentence by fixing a NPP (under cl 4(3)(a)), amendments were also made to the *Crimes (Administration of Sentences) Act 1999* (NSW) which excluded non-release offenders from automatic consideration for parole and made them only eligible for release on parole if their death was imminent or they were permanently incapacitated to the extent that they were unable to harm any person (with provision made for return to prison if they recovered).[72]

5.134 Amendments made by the *Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Act 2005* (NSW) commenced on 6 May 2005.[73] This amendment aimed to ensure that the quashing, or setting aside on appeal, of a never to be released recommendation would not remove a non-release offender from the scheme introduced in 1997.[74]

5.135 Amendments made by the *Crimes (Sentencing Procedure) Amendment (Life Sentences) Act 2008* (NSW) commenced on 1 July 2008.[75] These amendments provided that:

- an offender could not make more than one application for redetermination on or after 17 June 2008. The Court declining an application in those circumstances would in effect result in a natural life sentence for the offender;
- an offender could withdraw an application but only with the leave of the Court.

71. *Crimes Legislation Amendment (Existing Life Sentences) Act 2001* (NSW) sch 1 [1]–[4].
72. *Crimes (Administration of Sentences) Act 1999* (NSW) s 154A.
73. *Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Act 2005* (NSW) Sch 1 [1]–[2].
74. Following the decision in *R v Blessington* [2005] NSWSC 340, 153 A Crim R 205.
75. *Crimes (Sentencing Procedure) Amendment (Life Sentences) Act 2008* (NSW) sch 1 [1]–[7].

Current concerns relating to whole of life sentences

5.136 Earlier in this report we summarised the law concerning the current reach of life sentences.[76] In this section of the Report we note the concerns that arise in relation to whole of life sentences.

5.137 In *R v Petroff*, prior to the enactment of s 19A of the *Crimes Act 1900*, Justice Hunt noted:

> The indeterminate nature of a life sentence has long been the subject of criticism by penologists and others concerned with the prison system and the punishment of offenders generally. Such a sentence deprives a prisoner of any fixed goal to aim for, it robs him of any incentive and it is personally destructive of his morale. The life sentence imposes intolerable burdens upon most prisoners because of their incarceration for an indeterminate period, and the result of that imposition has been an increased difficulty in their management by the prison authorities.[77]

5.138 In *R v Harris*, reference was made to the existence of serious concerns in relation to natural life sentences and invited a review of the preclusion of the ability to set a NPP:

> The concern that exists in this regard, particularly for those persons who may face potential life sentences in their twenties or early thirties, with the problems of institutionalisation, and the risk of the establishment of a significant population of geriatric prisoners, are such that this area of sentencing, in my view, warrants reconsideration.[78]

5.139 Additionally, it was noted that a sentence of natural life does not necessarily cater for legitimate concerns about the 'dangerousness' of an offender:

> It may be that after a lengthy period of imprisonment, counselling and simple maturing, that an offender sentenced to life ceases to be dangerous.
>
> Lengthy experience with the life sentence redetermination procedure has graphically demonstrated that to be the case, and has seen a controlled and safe return to society of offenders once considered hopelessly violent and dangerous.
>
> …
>
> The later release of the prisoner can be decided by the Parole Board, which is in a position to act in the light of its accumulated experience and current information concerning the prisoner's mental state and progress towards rehabilitation. Moreover, it is to have regard to the principle that the public interest is of primary importance.[79]

5.140 In *R v Ngo*,[80] Dunford J noted that although he was satisfied that the level of culpability in the commission of the murder of which Phuong Ngo was convicted was so extreme that the community interest as defined in s 61(1) of the CSPA could only be adequately met by a sentence of life imprisonment, it was not a case where

76. Chapter 3, [3.10]–[3.29].
77. *R v Petroff* (unreported NSWSC 12 November 1991).
78. *R v Harris* [2000] NSWCCA 469 (20 December 2000), at [131].
79. *R v Harris* [2000] NSWCCA 469 (20 December 2000), [126]–[130]
80. *R v Ngo [2001] NSWSC,* at 1021.

he believed that Ngo needed to be kept in custody for the whole of that time. He added:

> …if I had the power to do so, I would fix a non-parole period, but it would be a very long one. I echo the remarks of Wood CJ at CL in Harris … that Parliament might usefully give consideration to whether the Court should have power to fix a non-parole period in cases to which s 61(1) applies.

5.141 We note that the position in NSW with respect to parole (or release on licence) being unavailable in respect of a life sentence is contrary to the position under Commonwealth law,[81] and under the laws of the other States and Territories,[82] (although in most State jurisdictions, the court has the discretion not to set a NPP).[83]

5.142 In some circumstances however, a life sentence with a NPP could be a useful response for an offender who, for example, committed a murder but whose future dangerousness cannot be properly measured until he or she has served an appropriate period in detention. If the person has demonstrated a satisfactory response to rehabilitation then any risk of future dangerousness could be addressed through lifetime parole.

5.143 None of the submissions received in response to this reference supported any extension of the availability of life sentences beyond those for which it is currently available, as an appropriate mechanism for the sentencing of 'serious violent offenders'. The Bar Association submitted that it was 'strongly opposed' to any extension of the availability of life sentences. The Law Society, Public Defenders, CSNSW and NSW Young Lawyers also submitted that they did not support such an extension. Dr Olav Nielssen however submitted that the creation of a special category of lifetime parole might provide the framework for the long-term supervision of people whose mental condition is strongly associated with acts of violence and for whom indefinite continued treatment might reduce the likelihood of a further offence.[84]

Introduce parole in relation to life sentences

5.144 All Council Members are agreed that parole should be available with respect to life sentences, subject however to the court having the power to decline setting a NPP in an appropriate case, and being precluded from doing so in the case of a s 19B murder.

5.145 We acknowledge that any extension of the availability of life sentences as a response to the sentencing of HRVOs would constitute too blunt an approach, and that widening the category of offences for which a life sentence would be available (whether with or without the capacity to specify a NPP) could result in unintended

---

81. *Crimes Act 1914* (Cth) s 19AB.
82. See *Sentencing Act 1991* (Vic) s 11; *Corrective Services Act 2006* (Qld) s 181; *Sentencing Act* (NT) ss 53, 54; *Criminal Law (Sentencing Act) 1988* (SA) s 32(5)(ab); *Sentencing Act 1995* (WA) ss 90, 96; *Sentencing Act 1997* (Tas) ss 18, 19.
83. *Sentencing Act 1991* (Vic) s 11(1); *Sentencing Act* (NT) s 53(1)(b); *Criminal Law (Sentencing Act) 1988* (SA) s 32(5)(c); *Sentencing Act 1995* (WA) ss 89(4), 90(1)(b); *Sentencing Act 1997* (Tas) s 18(1).
84. Submission SVO15, *Dr Olav Nielssen*.

and inappropriate increase in sentencing non-HRVO offenders. However, we are of the view that it would be desirable, for the reasons outlined in the decisions cited above and in the submissions, for the court to have a power to impose a life sentence with a NPP, in appropriate cases. In that event, it would be appropriate for the balance of the term to continue for the remainder of the offender's life, that is, 'lifetime parole'.

5.146 This would not preclude the court from imposing a whole of life sentences without parole, nor would it preclude the legislature from requiring such a sentence to be imposed, for example, in a worst case murder or one of the kind contemplated by s 61 of the CSPA, or involving the murder of a police officer as required by s 19B of the *Crimes Act 1900* (NSW).

5.147 We note that, if the Council's recommendation were adopted, consideration would need to be given to amendment of s 54 of the CSPA, which currently excludes life sentences from the parole regime. Attention would also need to be given to the formula for applying a NPP in relation to a life sentence and to amendment of s 44(2), which provides that:

> The balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence, unless the court decides that there are special circumstances for it being more (in which case the court must make a record of its reasons for that decision).

5.148 It would also be necessary to ensure that the *Crimes Act* and the CSPA were suitably amended to allow the imposition of a whole of life sentence without the fixing of a NPP.

Recommendation 7

a) The *Crimes (Sentencing Procedure) Act 1999* (NSW) should be amended so as to make it clear that, subject to (d) below, the court can, from the commencement of that amendment, impose a life sentence for any offence that attracts life as a maximum sentence and specify in respect of that sentence, a non-parole period.

b) The exclusion of life sentences from the general requirement to set a non-parole period under s 54 of the Crimes (Sentencing Procedure) Act 1999 (NSW) should be removed.

c) Section 44(2) of the Crimes (Sentencing Procedure) Act 1999 (NSW) should be amended so as to exclude life sentences from its reach.

d) Provision should be made for the court in appropriate circumstances, including where required by s 19B of the Crimes Act, s 61 of the CSPA, or otherwise by law, to impose a 'whole of life sentence', that is, a life sentence without the option of release on parole.

e) The offences for which a life sentence may be imposed should not be expanded.

APPENDIX A: LIST OF SUBMISSIONS

Submission number	Stakeholder
SVO1	Community Relations Commission
SVO2	NSW Ombudsman
SVO3	NSW State Parole Authority
SVO4	Justice Health, NSW
SVO5	NSW Young Lawyers
SVO6	Department of Family and Community Services, NSW
SVO7	Justice Action
SVO8	NSW Legal Aid
SVO9	Office of the Director of Public Prosecutions
SVO10	Royal Australian and New Zealand College of Psychiatrists, NSW Branch
SVO11	NSW Law Society
SVO12	NSW Bar Association
SVO13	Police Association of NSW
SVO14	NSW Police Force
SVO15	Dr Olav Nielssen
SVO16	Department of Attorney General and Justice, Victims Services
SVO17	Public Defenders Office
SVO18	Chief Judge of the District Court of NSW
SVO19	Serious Offenders Review Council
SVO20	Corrective Services NSW

APPENDIX B: EXTRACTS OF LEGISLATION

Indefinite Sentencing Schemes **157**
Sentencing Act 1991 (Vic) 157
Criminal Code Act 1899 (Qld) 164
Penalties and Sentences Act 1992 (Qld) 164
Criminal Law Amendment Act 1945 (Qld) 173
Sentencing Act 1995 (NT) 179
Criminal Law (Sentencing) Act 1988 (SA) 184
Sentencing Act 1997 (Tas) 190
Sentencing Act 1995 (WA) 193
Criminal Justice Act 2003 (UK) 195
Criminal Procedure (Scotland) Act 1995 202
Criminal Justice (Scotland) Act 2003 211
Sentencing Act 2002 (NZ) 216
Criminal Code 1985 (Canada) 218
Disproportionate Sentencing Schemes **230**
Sentencing Act 1991 *(Vic)* 230
Criminal Law (Sentencing) Act 1988 (SA) 233

Indefinite Sentencing Schemes

Sentencing Act 1991 (Vic)

3 Definitions

(1) In this Act—

serious offence, for the purposes of Subdivision (1A) of Division 2 of Part 3 (indefinite sentences) and Subdivision (3) of that Division (suspended sentences of imprisonment), means—

(a) murder; or

(b) manslaughter; or

(baa) child homicide; or

(ba) defensive homicide; or

(c) an offence against any of the following sections of the *Crimes Act 1958*

(i) section 16 (causing serious injury intentionally);

(ii) section 20 (threats to kill);

(iii) section 38 (rape);

(iv) section 40 (assault with intent to rape);

(v) section 44(1), (2) or (4) (incest) in circumstances other than where both people are aged 18 or older and each consented (as defined in section 36 of the *Crimes Act 1958*) to engage in the sexual act;

(vi) section 45 (sexual penetration of child under the age of 16);

(viii) section 47A (persistent sexual abuse of child under the age of 16);

(ix) section 55 (abduction or detention);

(x) section 56 (abduction of child under the age of 16);

(xi) section 63A (kidnapping);

(xii) section 75A (armed robbery); or

(ca) an offence against section 45(1) (sexual penetration of child under the age of 10) (as amended) of the *Crimes Act 1958* inserted in the *Crimes Act 1958* on 5 August 1991 by section 3 of the *Crimes (Sexual Offences) Act 1991* and repealed by section 5 of the *Crimes (Amendment) Act 2000*; or

(cb) an offence against section 46(1) (sexual penetration of child aged between 10 and 16) (as amended) of the *Crimes Act 1958* inserted in the *Crimes Act 1958* on 5 August 1991 by section 3 of the *Crimes*

(Sexual Offences) Act 1991 and repealed by section 5 of the *Crimes (Amendment) Act 2000*; or

(d) an offence against a provision of the *Crimes Act 1958* which was *repealed* before the commencement of section 4(e) of the *Sentencing (Amendment) Act 1993* and which the presiding judge is satisfied beyond reasonable doubt, having regard to thefacts in evidence, could have been charged as an offence against a provision mentioned in paragraph (c) had it been committed while that provision was in force; or

(da) an offence that, at the time it was committed, was a serious offence; or

(e) any of the following common law offences—

(i) rape;

(ii) assault with intent to rape; or

(f) an offence of conspiracy to commit, incitement to commit or attempting to commit, an offence referred to in any of the preceding paragraphs;

18A Indefinite sentence

(1) If a person (other than a young person) is convicted by the Supreme Court or the County Court of a serious offence, the court may sentence him or her to an indefinite term of imprisonment.

(2) A court must not fix a non-parole period in respect of an indefinite sentence.

(3) The court must specify in the order imposing an indefinite sentence a nominal sentence of a period equal in length to the non-parole period that it would have fixed had the court sentenced the offender to be imprisoned in respect of the serious offence for a fixed term.

(4) An offender serving an indefinite sentence is not eligible to be released on parole.

(5) A court may impose an indefinite sentence—

(a) on its own initiative; or

(b) on an application made by the Director of Public Prosecutions.

(6) A court may impose an indefinite sentence in respect of a serious offence regardless of the maximum penalty prescribed for the offence.

(7) If a court is considering imposing an indefinite sentence on an offender it must also consider whether section 90 or 91 applies and, if it considers that one of those sections applies, the court must make an assessment order under section 90 or a diagnosis, assessment and treatment order under section 91, as the case requires.

18B When court may impose indefinite sentence in respect of serious offence

(1) 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 because of—

(a) his or her character, past history, age, health or mental condition; and

(b) the nature and gravity of the serious offence; and

(c) any special circumstances.

(2) In determining whether the offender is a serious danger to the community, the court must have regard to—

(a) whether the nature of the serious offence is exceptional;

(b) anything relevant to this issue contained in the certified transcript of any proceeding against the offender in relation to a serious offence;

(c) any medical, psychiatric or other relevant report received by it;

(d) the risk of serious danger to members of the community if an indefinite sentence were not imposed;

(e) the need to protect members of the community from the risk referred to in paragraph (d)—

and may have regard to anything else that it thinks fit.

(3) The prosecution has the onus of proving that an offender is a serious danger to the community.

18C Application for indefinite sentence

(1) An application for an indefinite sentence by the Director of Public Prosecutions—

(a) may only be made if the Director has filed with the court on the day of the conviction or within 5 working days after that day a notice of intention to make the application;

(b) must be made within 10 working days after the day of the conviction or within any longer period fixed by the court during that 10 working day period.

(2) On the filing of a notice under subsection (1)(a), the court must revoke any order made for the offender's release pending sentencing and remand him or her in custody.

18D Adjournment of sentencing

If a court is considering imposing an indefinite sentence on an offender, whether on its own initiative or because of a notice filed under section 18C(1)(a), it must on the day of the conviction or within 5 working days after that day explain, or cause to be explained, to the offender in language likely to be readily understood by him or her—

(a) the fact that it is considering imposing an indefinite sentence; and

(b) the effect of an order for an indefinite sentence—

and adjourn sentencing until at least 25 working days after the day of the conviction.

18E Hospital security orders

(1) If a court imposes an indefinite sentence on an offender as mentioned in section 92(b) after the expiry of an order made under section 90 or 91, it

must deduct from the nominal sentence the period of time that the offender was detained under that order.

(2) Section 93A applies if a person is found guilty of a serious offence and a court imposes an indefinite sentence in the same way it applies on any other finding of guilt but as if—

(a) section 93A(4) provided that the duration of the hospital security order was for an indefinite period;

(b) section 93A(6) did not require the fixing of a non-parole period but instead required the court to specify a nominal sentence as if the hospital security order were an indefinite sentence;

(c) in section 93A(7), the words "before the end of the period specified in a hospital security order" were omitted;

(d) section 93A(7) referred to—

(i) an indefinite term instead of the unexpired portion of the hospital security order;

(ii) release under a re-integration program instead of release on parole.

(3) A hospital security order made under section 93A (as applied by subsection (2) of this section) has effect for all purposes as an indefinite sentence.

18F Sentencing hearing

Before imposing an indefinite sentence, a court must—

(a) give both the prosecution and the defence the opportunity to lead admissible evidence on any matter relevant to imposing such a sentence;

(ab) subject to Division 1C of Part 3, take into consideration any victim impact statement made, or other evidence given, under that Division;

(b) subject to Division 1A of Part 3, take into consideration any pre-sentence report filed with the court;

(c) have regard to any submissions on sentence made to it.

18G Reasons for indefinite sentence

A court that imposes an indefinite sentence on an offender must, at the time of doing so—

(a) state the reasons for its decision; and

(b) cause those reasons to be entered in the records of the court.

18H Review of indefinite sentence

(1) A court that imposes an indefinite sentence on an offender must review the sentence—

(a) on the application of the Director of Public Prosecutions, as soon as practicable after the offender has served the nominal sentence;

(b) on the application of the offender, at any time after the expiry of three years from the carrying out of the review under paragraph (a) and thereafter at intervals of not less than three years.

(2) The Director of Public Prosecutions must make the application to the court necessary for it to carry out the review required by subsection (1)(a) within the time specified in that subsection.

(3) The court must cause a copy of an application by an offender under subsection (1)(b) to be provided to the Director of Public Prosecutions as soon as practicable after it has been filed with the court.

(4) Within 10 working days after the date of filing of an application by an offender under subsection (1)(b), the court must give directions for its hearing and, subject to those directions, must hear the application within 25 working days after the date of filing.

(5) A court on a review need not be constituted by the same judge who constituted the court when it imposed the sentence.

18I Court may order reports

(1) At any time after the making of an application under section 18H(1)(a) or b) the court may order the Secretary to the Department of Health, the Secretary to the Department of Human Services or the Secretary or any other person or body to prepare a report in respect of the offender and file it with the court within the time directed by it.

(2) The author of a report must conduct any investigation that the author thinks appropriate or that is directed by the court.

(3) A report must relate to the period since the indefinite sentence was imposed or last reviewed, as the case requires.

18J Distribution of reports

(1) The court must, a reasonable time before the review is to take place, cause a copy of a report ordered by it under section 18I(1) to be provided to—

(a) the Director of Public Prosecutions; and

(b) the legal practitioners representing the offender; and

(c) if the court has so directed, the offender.

(2) If the prosecution or the defence has caused a report in respect of the offender to be prepared for the purposes of the review, it must, a reasonable time before the review is to take place, file it with the court and provide a copy to the Director of Public Prosecutions or the legal practitioners representing the offender, as the case requires.

18K Disputed report

(1) The Director of Public Prosecutions or the offender may file with the court a notice of intention to dispute the whole or any part of a report provided under section 18J.

(2) If a notice is filed under subsection (1) before the review is to take place, the court must not take the report or the part in dispute (as the case requires) into consideration on the hearing of the review unless the party that filed the notice has been given the opportunity—

(a) to lead evidence on the disputed matters; and

(b) to cross-examine the author of the report on its contents.

18L Review hearing

On the hearing of a review under section 18H(1)(a) or (b), a court must—

(a) give both the Director of Public Prosecutions and the offender the opportunity to lead admissible evidence on any relevant matter;

(b) subject to section 18K, take into consideration any report in respect of the offender that is filed with the court;

(c) have regard to any submissions on the review made to it.

18M Outcome of review

(1) On a review under section 18H(1)(a) or (b) the court, unless it is satisfied (to a high degree of probability) that the offender is still a serious danger to the community, must by order—

(a) discharge the indefinite sentence; and

(b) make the offender subject to a 5 year re integration program administered by the Adult Parole Board and issue a warrant to imprison in the same way as if it had sentenced the offender to a term of imprisonment for 5 years.

(2) The indefinite sentence continues in force if the court does not make an order under subsection (1).

18N Re-integration program

The provisions of Division 5 of Part 8 (parole) and of section 112 (regulations) of the *Corrections Act 1986* apply to a re-integration program in the same way that they apply to parole but as if—

(a) references in those provisions to parole or release on parole were references to a re-integration program or release under a re-integration program;

(b) persons made subject to a re-integration program were serving a prison sentence of 5 years during the whole of which they were eligible to be released under the re-integration program;

(c) references in those provisions to a parole order were references to an order made by the Adult Parole Board releasing an offender under a re-integration program;

(d) references in those provisions to a non-parole period were omitted;

(e) references in those provisions to the parole period were references to the period of release under the re-integration program.

18O Appeal

(1) An offender may appeal to the Court of Appeal against the refusal of a court to make an order under section 18M(1).

(2) The Director of Public Prosecutions may appeal to the Court of Appeal against an order made under section 18M(1).

(3) On an appeal under this section the Court of Appeal may—

(a) in the case of an appeal under subsection (1), confirm the refusal and dismiss the appeal or uphold the appeal and make the order that it thinks ought to have been made; or

(b) in the case of an appeal under subsection (2), confirm the order and dismiss the appeal or uphold the appeal and set aside the order made.

(4) An indefinite sentence revives on the setting aside of an order under section 18M(1) and the original warrant to imprison or other authority for the offender's imprisonment is to be regarded as again in force.

18P Offender to be present during hearings

(1) Subject to this section, the offender must be present—

(a) during the hearing of evidence under section 18F;

(b) during the hearing of a review under section 18H(1)(a) or (b).

(2) The court may order the officer in charge of the prison or other institution in which the offender is detained to cause the offender to be brought before the court for a hearing referred to in subsection (1).

(3) Subsection (2) is additional to, and does not limit, the court's powers under section 332 of the *Criminal Procedure Act 2009*.

(4) If the offender acts in a way that makes the hearing in the offender's presence impracticable, the court may order that the offender be removed and the hearing continue in his or her absence.

(5) If the offender is unable to be present at a hearing because of illness or for any other reason, the court may proceed with the hearing in his or her absence if it is satisfied that—

(a) doing so will not prejudice the offender's interests; and

(b) the interests of justice require that the hearing should proceed even in the absence of the offender.

Criminal Code Act 1899 (Qld)

Schedule 2 Qualifying offences

Section	Section heading or description of offence
54A	Demands with menaces upon agencies of government
208	Unlawful sodomy
210	Indecent treatment of children under 16
213	Owner etc. permitting abuse of children on premises
215	Carnal knowledge with or of children under 16
216	Abuse of persons with an impairment of the mind
217	Procuring young person etc. for carnal knowledge
218	Procuring sexual acts by coercion etc.
219	Taking child for immoral purposes
221	Conspiracy to defile
222	Incest
229B	Maintaining a sexual relationship with a child
302, 305	Murder
303, 310	Manslaughter
306	Attempt to murder
309	Conspiring to murder
311	Aiding suicide
313	Killing unborn child
315	Disabling in order to commit indictable offence

(Schedule 2 also includes offences under a number of repealed instruments).

Penalties and Sentences Act 1992 (Qld)

162 Definitions

In this part—

indefinite sentence means a sentence of imprisonment for an indefinite term that—

(a) must be reviewed under this part; and

(b) is to continue until a court orders that the indefinite term of imprisonment is discharged.

nominal sentence has the meaning given by section 163(2).

qualifying offence means an indictable offence—

(a) against a provision of the Criminal Code mentioned in schedule 2, as in force at any time (a *relevant Code provision*); or

(b) that involved counselling or procuring the commission of, or attempting or conspiring to commit, a relevant Code provision.

163 Indefinite sentence—imposition

(1) A court may, instead of imposing a fixed term of imprisonment, impose an indefinite sentence on an offender convicted of a qualifying offence on—

(a) its own initiative; or

(b) an application made by counsel for the prosecution.

(2) In imposing sentence under subsection (1), the court must state in its order the term of imprisonment (the ***nominal sentence***) that it would have imposed had it not imposed an indefinite sentence.

(3) Before a sentence is imposed under subsection (1), the court must be satisfied—

(a) that the *Mental Health Act 2000*, chapter 7, part 6, does not apply; and

(b) that the offender is a serious danger to the community because of—

(i) the offender's antecedents, character, age, health or mental condition; and

(ii) the severity of the qualifying offence; and

(iii) any special circumstances.

(4) In determining whether the offender is a serious danger to the community, the court must have regard to—

(a) whether the nature of the offence is exceptional; and

(b) the offender's antecedents, age and character; and

(c) any medical, psychiatric, prison or other relevant report in relation to the offender; and

(d) the risk of serious harm to members of the community if an indefinite sentence were not imposed; and

(e) the need to protect members of the community from the risk mentioned in paragraph (d).

(5) Subsection (4) does not limit the matters to which a court may have regard in determining whether to impose an indefinite sentence.

164 Counsel for prosecution to inform court

(1) If counsel for the prosecution intends to make an application under section 163(1)(b), counsel must inform the court after the offender has been convicted of the offence.

(2) The application must be made within 15 business days after the conviction.

(3) The court must allow any necessary adjournment to allow a consent under section 165(1) to be obtained.

(4) On being informed under subsection (1), the court must remand the offender in custody and must not grant the offender bail.

165 Attorney-General's consent

(1) An application under section 163(1)(b) may be made only if the Attorney-General has consented, in writing, to the making of the request.

(2) Consent must not be given under subsection (1) before the offender is convicted of the qualifying offence.

166 Adjournment

A court may impose an indefinite sentence on the offender only if—

(a) the offender is advised at, or shortly after, the time of conviction that the court may consider imposing an indefinite sentence on—

(i) its own initiative; or

(ii) an application made by counsel for the prosecution; and

(b) the court has, after advising the offender under paragraph (a), adjourned the offender's sentencing for not less than 20 business days from the day of conviction of the qualifying offence so that evidence on sentence may be received by the court.

166A Reports about offender

(1) This section applies when the court adjourns the offender's sentencing.

(2) The court must make an order that the chief executive (corrective services) must—

(a) prepare for the court a report about the offender; and

(b) give the court the report within a stated period.

(3) The court may also order the chief executive (corrective services) to provide or obtain any other report that the court considers appropriate to enable it to impose the proper sentence.

(4) In this section—

report includes an assessment of, or information about, the prisoner.

166B Distribution of reports

(1) On receipt of a report under section 166A the court must give a copy to—

(a) the prosecution; and

(b) the offender's lawyers.

(2) The court must ensure the prosecution and the offender's lawyers have sufficient time before the sentencing to consider and respond to the report.

(3) The court may order the report, or part of the report, not be shown to the offender.

166C Use of reports

(1) The offender's lawyers may, before the offender's sentencing is to take place, file with the court a notice of intention to dispute the whole or any part of a report given under section 166A.

(2) If a notice is filed under subsection (1), the court must not take the report or the part in dispute into consideration on the sentencing unless the offender's lawyers have been given the opportunity—

(a) to lead evidence on the disputed matters; and

(b) to cross-examine the author of the report on its contents.

167 Evidence

(1) Subject to the admissibility of the evidence, before a court imposes an indefinite sentence it must—

(a) hear evidence called by the prosecution; and

(b) hear evidence given or called by the offender, if the offender elects to give or call evidence.

(2) Subject to subsection (3), ordinary rules of evidence apply to evidence given or called under subsection (1).

(3) In deciding whether the offender is a serious danger to the community, the court may have regard to anything relevant to the issue contained in the certified transcript of, or any medical or other report tendered in, any proceeding against the offender for a qualifying offence.

(4) Subsections (1) and (2) do not affect the admissibility of a report given under section 166A or any matter contained in the report.

168 Court to give reasons

(1) If a court imposes an indefinite sentence, it must give detailed reasons for imposing the sentence.

(2) The reasons must be given at the time the indefinite sentence is imposed.

169 Onus of proof

The prosecution has the onus of proving that an offender is a serious danger to the community.

170 Standard of proof

A court may make a finding that an offender is a serious danger to the community only if it is satisfied—

(a) by acceptable, cogent evidence; and

(b) to a high degree of probability;

that the evidence is of sufficient weight to justify the finding.

171 Review—periodic

(1) A court that imposes an indefinite sentence, or a court of like jurisdiction—

(a) must for the first time review the indefinite sentence within 6 months after an offender has served—

(i) if the offender's nominal sentence is other than life imprisonment—50% of the offender's nominal sentence; or

(ii) if the offender's nominal sentence is life imprisonment and the Criminal Code, section 305(2) does not apply—15 years; or

(iii) if the offender's nominal sentence is life imprisonment and the Criminal Code, section 305(2) applies—20 years; and

(b) must review the indefinite sentence at subsequent intervals of not more than 2 years from when the last review was made.

(2) Subject to section 172, the director of public prosecutions must make any application that is required to be made to cause the reviews mentioned in subsection (1) to be carried out.

(3) Subsection (1)(a), as in force immediately before the commencement of this subsection, continues to apply in relation to an indefinite sentence that

was imposed in relation to an offence committed before the commencement.

172 Review—application by offender imprisoned

(1) An offender imprisoned on an indefinite sentence may apply to the court for the indefinite sentence to be reviewed at any time after the court makes its first review under section 171(1)(a) if a court gives leave to apply on the ground that there are exceptional circumstances that relate to the offender.

(2) The court must immediately forward a copy of the application to the director of public prosecutions. (3) Within 10 business days after the making of the application, the court must give directions to enable the application to be heard.

(4) Subject to any directions given by the court, the application must be heard within 20 business days from the day on which it is made.

172A Distribution of reports

(1) The court must, a reasonable time before a review under section 171 or 172 is to take place, cause a copy of a report ordered by it under section 176 to be provided to—

(a) the director of public prosecutions; and

(b) the legal practitioner representing the offender; and

(c) the offender, if the court has so directed; and

(d) any victim, within the meaning of the *Victims of Crime Assistance Act 2009*, section 5, of the offence for which the indefinite sentence was imposed, if the court has so decided.

(2) If the prosecution or the defence has caused a report about the offender to be prepared for a review under section 171 or 172, it must, a reasonable time before the review is to take place—

(a) file the report with the court; and

(b) provide a copy of the report to the director of public prosecutions or the legal practitioner representing the offender, as the case requires.

172B Disputed report

(1) The director of public prosecutions or the offender may file with the court a notice of intention to dispute the whole or any part of a report provided under section 172A.

(2) If a notice is filed under subsection (1) before the review is to take place, the court must not take the report or the part in dispute into consideration on the hearing of the review unless the party that filed the notice has been given the opportunity—

(a) to lead evidence on the disputed matters; and

(b) to cross-examine the author of the report on its contents.

172C Review hearing

On the hearing of a review under section 171 or 172, a court must—

(a) give both the director of public prosecutions and the offender the opportunity to lead admissible evidence on any relevant matter; and

(b) subject to section 172B, take into consideration any report in respect of the offender that is filed with the court; and

(c) have regard to any submissions on the review made to it; and

(d) have regard to the fundamental principles of justice for victims of crime declared by the *Victims of Crime* Assistance Act 2009, chapter 2.

172D Court not to have regard to possible order under Dangerous Prisoners (Sexual Offenders) Act 2003

A court hearing a review under section 171 or 172 must not have regard to whether or not the offender—

(a) may become, or is, the subject of a dangerous prisoners application; or

(b) may become subject to an order because of a dangerous prisoners application.

Note—See also section 9(8) (Sentencing guidelines).

173 Indefinite sentence discharged

(1) Unless it is satisfied that the offender is still a serious danger to the community when a review is made under section 171 or 172, the court must—

(a) order that the indefinite sentence is discharged; and

(b) impose a sentence (a ***finite sentence***) on the offender under this Act for the qualifying offence for which the indefinite sentence was imposed.

(2) If a court does not make an order under subsection (1)(a), the indefinite sentence continues in force.

(3) A finite sentence—

(a) is taken to have started on the day the indefinite sentence was originally imposed; and

(b) takes the place of the indefinite sentence; and

(c) must be not less than the nominal sentence.

174 Parole application if finite sentence imposed

(1) An offender on whom a finite sentence has been imposed may apply under the *Corrective Services Act 2006* for release on parole under that Act.

(2) However, an application under subsection (1) can not be made less than 6 months before the relevant period of imprisonment for the offender ends.

(3) Despite the *Corrective Services Act 2006*, section 187 the Queensland board must hear and decide the application.

(4) If the decision on the application is to grant the parole, the Queensland board must decide the parole period.

(5) The board can not on the application decide a parole period that ends before the relevant period of imprisonment ends.

(6) The board may decide a parole period that ends after the relevant period of imprisonment ends.

(7) The parole period decided by the board must be 5 years, subject to subsections (8) and (9).

(8) The parole period may be more than 5 years if—

(a) the rest of the offender's period of imprisonment immediately before deciding the parole period is more than 5 years (the ***remaining period***); and

(b) the parole period is the remaining period.

(9) The parole period may be less than 5 years only if the board considers that period is appropriate having regard to any relevant board guidelines.

(10) In this section—

relevant period of imprisonment, for the offender, means a period of imprisonment for the offender consisting of or including a finite term of imprisonment, whether or not the finite term has ended.

174A When parole order must be made

(1) This section applies if an offender on whom a finite sentence has been imposed is not currently on parole 6 months before the relevant period of imprisonment for the offender ends (the ***6-month period***).

(2) To remove any doubt, it is declared that this section applies even if the offender made an application under section 174 (an ***offender application***) that has not been not decided.

(3) The Queensland board must, within the 6-month period, make a parole order under the *Corrective Services Act 2006*, section 194.

(4) If the offender has made an offender application, subsection (3) applies even if the decision on the application was not or would not have been to grant the parole.

(5) If the offender has not made an offender application, subsection (3) applies as if the offender had lawfully made an offender application.

Note—The word 'lawfully' is necessary because ordinarily an offender application within the 6-month period would be prevented under section 174(2).

(6) The parole order may order the offender's release at any time during or at the end of the 6-month period for a parole period ending after the relevant period of imprisonment ends.

(7) The board must decide the parole period which is to start from the release.

(8) The parole period decided by the board must be 5 years, subject to subsection (9).

(9) The parole period may be less than 5 years only if the board considers that period is appropriate having regard to any relevant board guidelines.

(10) In this section—

relevant period of imprisonment, for the offender, see section 174(10).

174B Provisions for parole orders under part

(1) This section applies if a parole order is made under section 174 or 174A.

(2) The *Corrective Services Act 2006*, chapter 5, part 1, divisions 5 and 6 apply to the parole order.

(3) The *Dangerous Prisoners (Sexual Offenders) Act 2003* continues to apply to a prisoner, within the meaning of section 5(6) of that Act, who is or has been subject to the application of section 174 or 174A.

Note—See also the Dangerous Prisoners (Sexual Offenders) Act 2003, section 51 (Parole).

(4) During the parole period decided under section 174 or 174A, the offender must be under the authority of the Queensland board and the supervision of an authorised corrective services officer.

(5) Subsections (6) and (7) apply if (other than for this section) there would exist a period (the ***gap period***) between the end of the relevant period of imprisonment for the offender and the last day of the parole period.

(6) The finite term included in the relevant period of imprisonment is taken to be extended by the gap period. (7) Any term of imprisonment ordered to be served cumulatively with the finite term is taken to be ordered to be served cumulatively with the finite term as extended.

(8) In this section—

relevant period of imprisonment, for the offender, see section 174(10).

174C Parole provisions on cancellation of parole order

(1) This section applies if a parole order under section 174 or 174A is made for an offender and the order is cancelled.

(2) No further parole order may be made under either section against the offender.

(3) Any extension of the finite term under section 174B(6) continues to apply and is not affected by the cancellation.

(4) To remove any doubt, it is declared that this section does not limit the offender's ability under the *Corrective Services Act 2006* to apply for, or to be granted, further parole.

(5) The Queensland board must hear and decide any application for the further parole.

(6) Subsection (5) applies despite the *Corrective Services Act 2006*, section 187.

176 Registrar of court to give report

(1) For a review under section 171 or 172, the court may direct the registrar of the court to give to the court—

(a) reports provided by the chief executive (corrective services) or the chief executive of the department in which the *Health Services Act 1991* is administered or such other similar persons or bodies as the court considers appropriate; and

(b) such other reports as the court considers appropriate.

(2) A person who is requested by the registrar to give to the registrar reports mentioned in subsection (1) must comply with the request.

(3) Reports mentioned in subsection (1)(a) are to be relevant to the period from the time the indefinite sentence was imposed on the offender or the last review was made by the court.

(4) The *Health Services Act 1991*, section 62A(1), does not apply to a designated officer under part 7 of that Act who gives a report or information to a court or the registrar of the court for this part.

(5) Reports mentioned in subsection (1) are in addition to any other evidence that may be placed before the court.

177 Appeals—general

For the purposes of the Criminal Code, chapter 67—

(a) an indefinite sentence imposed under section 163; and

(b) if a court, on making a review under section 171 or 172—

(i) refuses to act under section 173—the refusal; or

(ii) acts under section 173—the sentence imposed; is taken to be a sentence imposed on conviction.

178 Appeals—Attorney-General

The Attorney-General may appeal to the Court of Appeal against—

(a) the making of an order under section 173(1)(a); and

(b) a sentence imposed under section 173(1)(b).

179 Hearings—offender to be present

(1) Subject to this section, the offender must be present during the hearing of—

(a) evidence under section 167; and

(b) an application made under section 171 or 172.

(2) A court may order that, at the time evidence under section 167 is to be heard, the chief executive (corrective services) bring the offender before the court.

(3) On the hearing of an application made under section 171 or 172, the court may order the chief executive (corrective services) to bring the offender before the court.

(4) If the offender acts in a way that makes the hearing of the evidence or application in the offender's presence impracticable, the court may order that—

(a) the offender be removed; and

(b) the hearing of the application continue in the offender's absence.

(5) If the court is satisfied that the offender is unable to be present during the hearing of the evidence or application because of the offender's illness or

another reason, the court may allow the offender to be absent during the whole or a part of the hearing if it is satisfied that—

(a) the offender's interests will not be prejudiced by the hearing continuing in the offender's absence; and

(b) the interests of justice require that the hearing should continue in the offender's absence.

Criminal Law Amendment Act 1945 (Qld)

18 Detention of persons incapable of controlling sexual instincts

(1) In any case where a person has been found guilty of an offence of a sexual nature committed upon or in relation to a child under the age of 16 years—

(a) if such person was found so guilty on indictment—the judge presiding at the trial of such person for that offence may at the judge's discretion direct that 2 or more medical practitioners named by the judge (of whom 1 shall be a person registered under the Health Practitioner Regulation National Law as a specialist registrant in the specialty of psychiatry where the judge is of opinion that the services of such a person are reasonably available), inquire as to the mental condition of the offender, and in particular whether the offender's mental condition is such that the offender is incapable of exercising proper control over the offender's sexual instincts; or

(b) if such person was found so guilty on summary conviction—the Magistrates Court before which the charge was heard, in addition to or before sentencing such person to any lawful punishment, may order that such person be brought before a judge of the Supreme Court with a view to such person being dealt with by such judge as prescribed by paragraph (a).

(1A) In the case of an order made under subsection (1)(b) before sentence, the Magistrates Court shall make such adjournments as are necessary and shall commit the convicted person to a corrective services facility or watch-house, until such person has been dealt with by a judge as hereinafter prescribed in this section and thereafter may (in the cases provided for in subsection (3B) or (6)(d) or in cases where the judge refuses to direct detention under either of the subsections), sentence such person to any lawful punishment.

(2) The medical practitioners shall conduct the inquiry by means of personal examination and observation of the offender and by reference to the depositions and such other records relating to the offender as they think necessary, and shall give their report on oath to the judge.

(3) If the medical practitioners report to the judge that the offender is incapable of exercising proper control over the offender's sexual instincts the judge may, either in addition to or in lieu of imposing any other sentence where the offender was convicted on indictment, or in addition to the punishment (if any) imposed or to be imposed by the Magistrates Court where the offender was summarily convicted, declare that the offender is so incapable and direct that the offender be detained in an institution during Her Majesty's pleasure.

(3A) However, the offender shall be entitled to cross-examine such medical practitioners in relation to and to call evidence in rebuttal of such report,

and no such order shall be made unless the judge shall consider the matters reported to be proved.

(3B) When an offender whom a judge directs under subsection (3) to be detained was summarily convicted and the decision with respect to the lawful punishment to be awarded was reserved, such offender shall, unless the judge when so directing otherwise orders (which order is hereby authorised to be made by the judge) again be brought before the Magistrates Court in terms of the adjournment made by that court for sentence.

(4) In any case where 2 medical practitioners, 1 of whom is registered under the Health Practitioner Regulation National Law as a specialist registrant in the specialty of psychiatry, report to the Attorney-General that any person who is serving a sentence of imprisonment imposed upon the person for an offence of a sexual nature (whether committed upon or in relation to a child under the age of 16 years or upon or in relation to a person over that age)—

(a) is incapable of exercising proper control over the person's sexual instincts; and

(b) that such incapacity is capable of being cured by continued treatment; and

(c) that for the purposes of such treatment it is desirable that such person be detained in an institution after the expiration of the person's sentence of imprisonment;

the Attorney-General may cause an application to be made to a judge of the Supreme Court for a declaration and direction in respect of such person as prescribed by subsection (3).

(4A) Upon such application the medical practitioners shall report to the judge upon oath and the prisoner shall be entitled to cross-examine such medical practitioners in relation to and to call evidence in rebuttal of such report, and no such order shall be made unless the judge shall consider the matters reported to be proved.

(5) Every offender or prisoner in respect of whom a direction is given under subsection (3) or (4)—

(a) shall be detained in such institution as the Governor in Council directs, and until the Governor in Council gives a direction as to such institution, in a corrective services facility or watch-house; and

(b) shall not be released until the Governor in Council is satisfied on the report of 2 medical practitioners that it is expedient to release the offender or prisoner.

(6) If the medical practitioners report to the judge that the offender or, in the case of an application made under subsection (4) the judge is of the opinion that the prisoner, is not incapable of exercising proper control over his or her sexual instincts, but that his or her 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, and the judge after considering the report and any evidence submitted in rebuttal thereof is of opinion that the offender requires such care, supervision, and control, the judge may—

(a) direct that the offender or prisoner be detained in an institution either for such period as the judge directs or during Her Majesty's pleasure; or

(b) where the offender was convicted on indictment—pass sentence on the offender and in addition direct as mentioned in paragraph (a); or

(c) where the offender was summarily convicted and lawful punishment imposed by a Magistrates Court in addition direct as mentioned in paragraph (a); or

(d) where the offender was summarily convicted and the decision with respect to the lawful punishment to be awarded was reserved—direct, as mentioned in paragraph (a), but in such case the prisoner shall, unless the judge when so directing otherwise orders (which order is hereby authorised to be made by the judge), again be brought before the Magistrates Court in terms of the adjournment made by that court for sentence.

(6A) Every offender or prisoner in respect of whom such a direction is given—

(a) shall be detained in such institution as the Governor in Council directs, and, until the Governor in Council gives a direction as to such institution, in a corrective services facility or watch-house; and

(b) where the detention ordered is during Her Majesty's pleasure—shall not be released until the Governor in Council is satisfied, on the report of 2 medical practitioners, that the offender or prisoner is fit to be at liberty.

(7) Where the judge orders detention during Her Majesty's pleasure in addition to imprisonment or in the case of a prisoner the detention shall commence forthwith upon the expiration of the term of imprisonment.

(7A) In all other cases it shall commence forthwith upon the making of such order.

(8) An offender or prisoner detained under this section, other than a detainee released under part 3A, must be examined at least once in every 3 months by the director of mental health or by a medical practitioner appointed by the director of mental health (who is hereby authorised to make such appointment) to conduct examinations under this subsection, either generally or of a particular offender or prisoner.

(8A) A medical practitioner making an examination under subsection (8) shall forthwith furnish a report of the examination to the chief executive of the department in which the *Health Services Act 1991* is administered.

(9) An offender or prisoner detained in an institution pursuant to this section may be removed at any time to another institution by order of the chief executive of the department in which the *Health Services Act 1991* is administered.

(9A) Moreover, the provisions of the *Corrective Services Act 2006*, section 68, shall, subject to all necessary modifications, apply to and in respect of any such offender or prisoner.

(11) The provisions of this section may by order of a judge made on the application of a Crown law officer be applied in any or every respect to any offender who, before the passing of this section, was found guilty either on summary conviction or on indictment, of an offence of a sexual

nature committed upon or in relation to a child under the age of 16 years and who, at the passing of this section, is undergoing, or subject to be sentenced to, imprisonment for such offence.

(12) The Governor in Council may from time to time make all such regulations as appear necessary for giving effect to this section and particularly for giving effect to the provisions of this section as respects orders made under this section by Magistrates Courts.

(13) For the purposes of the Criminal Code, chapter 67—

(a) an offender or prisoner directed to be detained in an institution pursuant to this section shall be deemed to be a person convicted on indictment and such direction shall be deemed to be a sentence; and

(b) a refusal by a judge of the Supreme Court to direct any offender or prisoner to be detained in an institution pursuant to this section shall, as respects the right of appeal had by the Attorney-General under chapter 67, be deemed to be a sentence.

(14) In this section—

corrective services facility see the Corrective Services Act 2006, schedule 4.

institution means—

(a) a corrective services facility or watch-house; or

(b) another institution prescribed under a regulation to be an institution for this section.

release means unconditional release and does not include release under part 3A.

18A Definitions for pt 3A
In this part—

corrective services officer means a person who holds an appointment as a corrective services officer under the *Corrective Services Act 2006*, section 275.

detainee means an offender or prisoner who is detained in an institution during Her Majesty's pleasure under a direction under section 18(3), (4) or (6).

institution see section 18.

parole order see the *Corrective Services Act 2006*, schedule 4.

Queensland board see the *Corrective Services Act 2006*, schedule 4.

18B Parole orders under Corrective Services Act 2006
(1) The *Corrective Services Act 2006*, chapter 5 applies to a detainee, subject to this part, as if—

(a) instead of being detained at Her Majesty's pleasure, the detainee were a prisoner serving a term of life imprisonment (a ***notional term of life imprisonment***) to whom the Criminal Code, section 305(2) does not apply;[1] and

(b) for a detainee whose detention began under section 18(7) at the end of a term of imprisonment (an ***original term of imprisonment***)—the detainee began to serve the notional term of life imprisonment when the detainee began to serve the original term of imprisonment; and

(c) for a detainee whose detention began under section 18(7A) when the judge ordered the detention—the detainee began to serve the notional term of life imprisonment when the judge ordered the detention.

(2) If a detainee committed the relevant offence before 1 July 1997, the *Corrective Services Act 2006*, chapter 5 applies to the detainee as if the period of 15 years mentioned in section 181(2) of that Act were a period of 13 years.

(3) In this section—

relevant offence means—

(a) for a detainee dealt with by a judge under section 18(1)—the offence mentioned in section 18(1) of which the detainee was found guilty; or

(b) for a detainee about whom an application was made under section 18(4)—the offence mentioned in section 18(4) for which the detainee was serving a sentence of imprisonment.

18C No exceptional circumstances parole order
A detainee may not apply for or be granted an exceptional circumstances parole order under the *Corrective Services Act 2006*, chapter 5.

18D Submissions by Attorney-General
(1) If a detainee applies to the Queensland board for a parole order, the Queensland board must give the Attorney-General a copy of the application.

(2) The Attorney-General may make written submissions to the Queensland board in relation to the application.

(3) The Queensland board must consider any submissions by the Attorney-General when deciding whether to grant the application.

18E Additional test for conditional release
The Queensland board must not grant a detainee a parole order unless, in addition to any other matter of which the Queensland board must be satisfied under the *Corrective Services Act 2006*, the Queensland board is satisfied the detainee does not represent an unacceptable risk to the safety of others.

18F Additional conditions may be imposed
A parole order for a detainee may, in addition to any other conditions, contain conditions the Queensland board considers reasonable requiring the detainee to—

(a) submit to medical, psychiatric or psychological treatment; or

(b) report for drug testing to a corrective services officer.

18G Detainee deemed a prisoner for offence of being unlawfully at large
To remove any doubt, it is declared that a detainee released under this part is a prisoner for the *Corrective Services Act 2006*, section 124(k).

18H Effect on unconditional release

(1) This section applies to a detainee who has been released under this part, whether before or after the commencement of this section.

(2) The detainee can not be released under section 18(5)(b) or (6A)(b).

Sentencing Act 1995 (NT)

65 Indefinite sentence – imposition

(1) In this section, *violent offence* means:

(a) a crime:

(i) that, in fact, involves the use, or attempted use, of violence against a person; and

(ii) for which an offender may be sentenced to imprisonment for life; or

(c) an offence against section 127, 128 or 192 of the Criminal Code.

(2) The Supreme Court may sentence an offender convicted of a violent offence or violent offences to an indefinite term of imprisonment.

(3) An order under this section may be made on the Supreme Court's initiative or on an application made by the prosecutor.

(4) The Supreme Court must not fix a non-parole period in respect of an indefinite sentence.

(5) The Supreme Court must specify in the order imposing an indefinite sentence a nominal sentence of a period equal to the period that it would have fixed had it not imposed an indefinite sentence.

(6) Where the Supreme Court imposes more than one indefinite sentence on an offender convicted of more than one violent offence in the same proceeding, the Court must specify one nominal sentence that must apply to all the indefinite sentences.

(7) Where an offender is serving an indefinite sentence and the offender is convicted of another violent offence, the Supreme Court must, if it imposes an indefinite sentence on the offender for the other violent offence, specify one nominal sentence that applies to all the indefinite sentences.

(8) The Supreme Court must not impose an indefinite sentence on an offender unless it is satisfied that the offender is a serious danger to the community because of any of the following:

(a) the offender's antecedents, character, age, health or mental condition;

(b) the severity of the violent offence;

(c) any special circumstances.

(9) In determining whether the offender is a serious danger to the community, the Supreme Court must have regard to the following:

(a) whether the nature of the offence is exceptional;

(b) the offender's antecedents, age and character;

(c) any medical, psychiatric, prison or other relevant report in relation to the offender;

(d) the risk of serious physical harm to members of the community if an indefinite sentence were not imposed;

(e) the need to protect members of the community from the risk referred to in paragraph (d).

(10) Subsection (9) does not limit the matters to which the Supreme Court may have regard in determining whether to impose an indefinite sentence.

(11) For subsection (9), the Supreme Court may order the preparation and provision to the Court of such medical, psychiatric, prison and other reports as the Court considers relevant.

66 Prosecution to inform Court

(1) Where a prosecutor intends to make an application under section 65(3), the prosecutor must inform the Supreme Court after the offender has been convicted of the offence.

(2) An application under section 65(3) must be made not later than 14 days after the conviction.

(3) On being informed under subsection (1), the Supreme Court must remand the offender in custody and must not admit the offender to bail.

67 Adjournment

The Supreme Court may impose an indefinite sentence on the offender only where:

(a) the offender is advised at, or shortly after, the time of conviction that the court may consider imposing an indefinite sentence on:

(i) its own initiative; or

(ii) an application made by counsel for the prosecution; and

(b) the court has, after advising the offender under paragraph (a), adjourned the offender's sentencing for not less than 28 days or such shorter period where the offender and counsel for the prosecution agree, from the day of conviction of the violent offence so that evidence on sentence may be called by the prosecution and the offender.

68 Evidence

(1) Subject to the admissibility of the evidence, before the Supreme Court imposes an indefinite sentence it must hear evidence:

(a) called by the prosecutor; and

(b) given or called by the offender, if the offender elects to give or call evidence.

(2) Subject to subsection (3), the rules of evidence apply to evidence given or called under subsection (1).

(3) In proving the severity of a violent offence, the transcript of the trial and submissions made on sentence are admissible.

69 Court to give reasons

(1) Where the Supreme Court imposes an indefinite sentence it must give reasons for imposing the sentence.

(2) Reasons referred to in subsection (1) must be given at the time an indefinite sentence is imposed.

70 Onus of proof
The prosecution has the onus of proving that an offender is a serious danger to the community.

71 Standard of proof
The Supreme Court may make a finding that an offender is a serious danger to the community only if it is satisfied:

(a) by acceptable and cogent evidence; and

(b) to a high degree of probability;

that the evidence is of sufficient weight to justify the finding.

72 Review – periodic
(1) Where the Supreme Court imposes an indefinite sentence, it:

(a) must for the first time review the indefinite sentence not later than 6 months after an offender has served:

(i) 50% of the offender's nominal sentence; or

(ii) if the offender's nominal sentence is imprisonment for life, 13 years of the nominal sentence; and

(b) must review the indefinite sentence at subsequent intervals of not more than 2 years from when the last review was made.

(2) Subject to section 73, the Director of Public Prosecutions must make the application that is required to be made to cause the reviews referred to in subsection (1) to be carried out.

73 Review – application by offender
(1) An offender imprisoned on an indefinite sentence may apply to the Supreme Court for the indefinite sentence to be reviewed at any time after the Supreme Court makes its first review under section 72(1)(a), if the Supreme Court gives leave to apply, on the ground that there are exceptional circumstances that relate to the offender.

(2) The court must immediately forward a copy of the application to the Director of Public Prosecutions.

(3) Not later than 14 days after the making of the application, the court must give directions to enable the application to be heard.

(4) Subject to any directions given by the court, the application must be heard not later than 28 days from the day on which it is made.

74 Discharge of indefinite sentence
(1) Unless it is satisfied to a high degree of probability that the offender is still a serious danger to the community when a review is made under section 72 or 73, the Supreme Court must:

(a) order that the indefinite sentence is discharged; and

(b) sentence the offender under this Act for the violent offence for which the indefinite sentence was imposed.

(2) Where the Supreme Court does not make an order under subsection (1)(a), the indefinite sentence continues in force.

(3) A sentence imposed under subsection (1)(b):

(a) is taken to have started on the day the indefinite sentence was originally imposed; and

(b) takes the place of the indefinite sentence; and

(c) must be not less than the nominal sentence.

75 Re-integration programs

(1) An offender sentenced under section 74(1)(b) may apply to be released to a prescribed program, of not less than 5 years duration, that is designed to assist the offender to re-integrate into the community.

(2) Where a term of imprisonment imposed under section 74(1)(b) ends within 5 years after the offender's release to a program mentioned in subsection (1), the term of imprisonment is taken, for subsection (1), to extend until the end of the 5 years.

(3) An offender may apply, in the prescribed manner, to be discharged from a program to which the offender was released under subsection (1) at any time after the end of the term of imprisonment imposed under section 74(1)(b).

76 Proper officer to give report

(1) On the hearing of a review under section 72 or 73, the Supreme Court may direct the proper officer of the Supreme Court to give to the Court such reports, as the Court considers appropriate, to assist the Court in conducting the review.

(2) A person who is requested to give a report referred to in subsection (1) must comply with the request.

(3) A report referred to in subsection (1) must be relevant to the period from the time the indefinite sentence was imposed on the offender or the last review was made by the Supreme Court.

(4) A report referred to in subsection (1) is in addition to any other evidence that may be placed before the Supreme Court.

(5) An offender is entitled to:

(a) cross examine a person who made a report referred to in subsection (1) and any other witnesses; and

(b) call evidence in rebuttal of a report and any other evidence.

77 Appeals

(1) An offender may appeal to the Court of Criminal Appeal against the refusal of the Supreme Court to make an order under section 74(1).

(2) The Director of Public Prosecutions may appeal to the Court of Criminal Appeal against an order of the Supreme Court made under section 74(1).

(3) On an appeal under this section, the Court of Criminal Appeal may, in the case of an appeal under:

(a) subsection (1), confirm the refusal and dismiss the appeal or uphold the appeal and make the order that it thinks ought to have been made; or

(b) subsection (2), confirm the order and dismiss the appeal or uphold the appeal and quash the order made.

(4) An indefinite sentence revives on the quashing of an order under subsection (1) and the original warrant to commit or other authority for the offender's imprisonment is to be regarded as again in force.

78 Hearings – offender to be present

(1) Subject to this section, the offender must be present during the hearing of:

(a) evidence under section 68; and

(b) an application made under section 72 or 73.

(2) The Supreme Court may order that, at the time evidence under section 68 is to be heard, the person in charge of the place where the offender is imprisoned must bring the offender before the Supreme Court.

(3) On the hearing of an application made under section 72 or 73, the Supreme Court may order the person in charge of the place where the offender is imprisoned to bring the offender before the Supreme Court.

(4) Where the offender acts in a way that makes the hearing of the evidence or application in the offender's presence impracticable, the Supreme Court may order that:

(a) the offender be removed; and

(b) the hearing of the application continue in the offender's absence.

(5) Where the Supreme Court is satisfied that the offender is unable to be present during the hearing of the evidence or application because of the offender's illness or another reason, the Supreme Court may allow the offender to be absent during the whole or a part of the hearing if it is satisfied that:

(a) the offender's interests will not be prejudiced by the hearing continuing in the offender's absence; and

(b) the interests of justice require that the hearing should continue in the offender's absence.

Criminal Law (Sentencing) Act 1988 (SA)

23—Offenders incapable of controlling, or unwilling to control, sexual instincts

(1) In this section—

institution means—

(a) a prison; and

(b) a place declared by the Governor by proclamation to be a place in which persons may be detained under this section; and

(c) in relation to a youth, includes a training centre;

person to whom this section applies means—

(a) a person convicted by the Supreme Court of a relevant offence; or

(b) a person remanded by the District Court or the Magistrates Court under subsection (2) to be dealt with by the Supreme Court under this section; or

(c) a person who is the subject of an application by the Attorney-General under subsection (2a);

relevant offence means—

(a) an offence under section 48, 48A, 49, 50, 56, 58, 59, 63, 63A, 63B, 69 or 72 of the *Criminal Law Consolidation Act 1935*;

(b) an offence under section 23 of the *Summary Offences Act 1953*;

(ba) an offence against a corresponding previous enactment substantially similar to an offence referred to in either of the preceding paragraphs;

(c) any other offence where the evidence indicates that the defendant may be incapable of controlling, or unwilling to control, his or her sexual instincts;

unwilling—a person to whom this section applies will be regarded as unwilling to control sexual instincts if there is a significant risk that the person would, given an opportunity to commit a relevant offence, fail to exercise appropriate control of his or her sexual instincts.

(2) If, in proceedings before the District Court or Magistrates Court, a person is convicted of a relevant offence and—

(a) the court is of the opinion that the defendant should be dealt with under this section; or

(b) the prosecutor applies to have the defendant dealt with under this section,

the court will, instead of sentencing the defendant itself, remand the convicted person, in custody or on bail, to appear before the Supreme Court to be dealt with under this section.

(2a) If a person has been convicted of a relevant offence, the Attorney-General may, while the person remains in prison serving a sentence of imprisonment, apply to the Supreme Court to have the person dealt with under this section.

(2b) The Attorney-General may make an application under subsection (2a) in respect of a person serving a sentence of imprisonment whether or not an application to the Supreme Court to have the person dealt with under this section has previously been made (but, if a previous application has been made, a further application cannot be made more than 12 months before the person is eligible to apply for release on parole).

(3) The Supreme Court will direct at least 2 legally qualified medical practitioners nominated by the Court to inquire into the mental condition of a person to whom this section applies and report to the Court on whether the person is incapable of controlling, or unwilling to control, his or her sexual instincts.

(4) For the purpose of an inquiry under subsection (3), each medical practitioner—

(a) must carry out an independent personal examination of the person; and

(b) may have access to any evidence before the court by which the person was convicted; and

(c) may obtain the assistance of a psychologist, social worker, community corrections officer or any other person.

(5) The Court may order that a person to whom this section applies be detained in custody until further order if—

(a) the Court, after considering the medical practitioners' reports and any relevant evidence or representations that the person may desire to put to the Court, is satisfied that the order is appropriate; or

(b) the person refuses to cooperate with an inquiry or examination under this section and the Court, after considering any relevant evidence and representations that the person may desire to put to the Court, is satisfied that the order is appropriate.

(6) If a person to whom this section applies has not been sentenced for a relevant offence, the Supreme Court will deal with the question of sentence at the same time as it deals with the question whether an order is to be made under this section and, if the Court decides to make such an order, the order may be made in addition to, or instead of, a sentence of imprisonment.

(7) If the detention is in addition to a sentence of imprisonment, the detention will commence on the expiration of the term of imprisonment, or of all terms of imprisonment that the person is liable to serve.

(8) A person detained in custody under this section will be detained—

(a) if the defendant is under 18 years of age—in such institution (not being a prison) as the Minister for Family and Community Services from to time directs;

(b) in any other case—in such institution as the Minister for Correctional Services from time to time directs.

(9) The progress and circumstances of a person subject to an order under this section (whether in custody or not) must be reviewed at least once in each period of six months by—

(a) in the case of a person detained in, or released on licence from, a training centre—the Training Centre Review Board;

(b) in any other case—the Parole Board.

(10) The results of a review under subsection (9) must be embodied in a written report, a copy of which must be furnished to the person the subject of the report and—

(a) in the case of a report of the Training Centre Review Board—to the Minister for Family and Community Services;

(b) in the case of a report of the Parole Board—to the Minister for Correctional Services.

(11) Subject to this Act, a person will not be released from detention under this section until the Supreme Court, on application by the Director of Public Prosecutions or the person, discharges the order for detention.

(12) The Supreme Court may not discharge an order for detention under this section unless—

(a) it has first obtained and considered the report of at least two legally qualified medical practitioners each of whom has independently examined the person; and

(b) 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.

24—Release on licence

(1) The Supreme Court may, on application by the Director of Public Prosecutions or the person, authorise the release on licence of a person detained in custody under this Division.

(2) On the Court authorising the release of a person under subsection (1), the appropriate board must order the release of the person on licence on the day specified by the Court.

(3) The release of a person on licence under this section will be subject to such conditions as the appropriate board thinks fit and specifies in the licence.

(4) Where the Supreme Court has refused a person's application for release on licence, the person may not further apply for release for a period of six months, or such lesser or greater period as the Court may have directed on refusing the application.

(5) The appropriate board may—

(a) on application by the Director of Public Prosecutions or the person, or of its own motion, vary or revoke a condition of a licence or impose further conditions; or

(b) on application by the Director of Public Prosecutions, or of its own motion, cancel the release of a person on licence, if satisfied that

the person has contravened, or is likely to contravene, a condition of the licence.

(5a) A board cannot exercise its powers under subsection (5) of its own motion in relation to a person released on licence unless the person and the Crown have been afforded a reasonable opportunity to make submissions to the board on the matter, and the board has considered any submissions so made.

(6) For the purposes of proceedings under subsection (5), a member of the appropriate board may—

(a) summon the person the subject of the proceedings to appear before the board; or

(b) in the case of proceedings for cancellation of release—

(i) with the concurrence of a second member of the board—issue a warrant for the apprehension and detention of the person pending determination of the proceedings; or

(ii) apply to a justice for a warrant for the apprehension and detention of the person pending determination of the proceedings.

(7) Where a person who has been summoned to appear before the appropriate board fails to attend in compliance with the summons, the board may—

(a) determine the proceedings in his or her absence; or

(b) direct a member of the board to—

(i) issue a warrant; or

(ii) apply to a justice for a warrant,

for the apprehension and detention of the person for the purpose of bringing him or her before the board.

(8) A member of the appropriate board may apply to a justice for a warrant for the apprehension and return to custody of a person whose release on licence has been cancelled by the board.

(8a) A justice must, on application under this section, issue a warrant for the apprehension and detention of a person or for the apprehension and return to custody of a person, as the case may require, unless it is apparent, on the face of the application, that no reasonable grounds exist for the issue of the warrant.

(9) The appropriate board may, if it thinks good reason exists for doing so, cancel a warrant issued under this section at any time before its execution.

(10) Where a person who has been released on licence commits an offence while subject to that licence and is sentenced to imprisonment for the offence, the release on licence is, by virtue of this subsection, cancelled.

(11) Where a person has been subject to a licence under this section for a continuous period of three years, the order for his or her detention under this Division will, unless the Supreme Court, on application by the Director

of Public Prosecutions, orders otherwise, be taken to have been discharged on the expiration of that period.

(12) For the purposes of this section—

the appropriate board, in relation to proceedings under this section, means—

(a) if the person the subject of the proceedings is being detained in a training centre, or has been released on licence from a training centre—the Training Centre Review Board;

(b) in any other case—the Parole Board.

25—Court may obtain reports

(1) A court may, for the purpose of obtaining assistance in making a determination under this Division, require the Parole Board, the Training Centre Review Board or any other body or person to furnish the court with a report on any matter.

(2) A copy of any report furnished to a court under subsection (1) must be given to each party to the proceedings or to counsel for those parties.

26—Parties

Both the Director of Public Prosecutions and the person to whom an application under this Division relates are parties to the application.

27—Service on guardian

Where the person to whom an application under this Division relates is under 18 years of age, a copy of the application must be served on a guardian of the child, unless—

(a) it is not practicable to do so; or

(b) the whereabouts of all of the guardians of the child cannot, after reasonable inquiries, be ascertained.

27A—Appeals

(1) An appeal lies to the Full Court against—

(a) a decision of the Supreme Court on an application to discharge an order for detention under this Division;

(b) a decision of the Supreme Court on an application to release a person on licence under this Division;

(c) a decision of the Supreme Court on an application by the Director of Public Prosecutions under section 24(11).

(2) An appeal under this section may be instituted by the Director of Public Prosecutions or by the person to whom the particular decision relates.

(3) Subject to a contrary order of the Full Court, an appeal cannot be commenced after 10 days from the date of the decision against which the appeal lies.

(4) On an appeal, the Full Court may—

(a) confirm, reverse or annul the decision subject to appeal;

(b) make any order that it considers should have been made in the first instance;

(c) make any consequential or ancillary orders.

(5) Subject to subsection (6), where—

(a) the Supreme Court decides—

(i) to discharge an order for detention under this Division; or

(ii) to release a person on licence under this Division; or

(iii) to refuse an application by the Director of Public Prosecutions under section 24(11); and

(b) counsel appearing on behalf of the Director of Public Prosecutions gives immediate notice that an appeal against the decision will be instituted,

the decision has no force or effect pending the outcome of the appeal.

(6) If the Director of Public Prosecutions gives notice under subsection (5) of an appeal against a decision of the Supreme Court but then a person acting on behalf of the Director subsequently files with the Supreme Court a notice that the Director does not desire to proceed with the appeal, the decision will take effect.

28—Proclamations

The Governor may, by proclamation, vary or revoke a proclamation under this Division.

29—Regulations

The Governor may make regulations—

(a) providing for the care, treatment, rights and duties of persons detained in custody under this Division in consequence of being found to be incapable of controlling his or her sexual instincts;

(b) providing for the granting of periods of leave for persons so detained;

(c) providing for any other related matter.

Sentencing Act 1997 (Tas)

19. Court may declare violent offender to be dangerous criminal

(1) A judge before whom an offender is convicted or brought up for sentence after being convicted may declare the offender to be a dangerous criminal if –

(a) the offender has been convicted for a crime involving violence or an element of violence; and

(b) the offender has at least one previous conviction for a crime involving violence or an element of violence; and

(c) the offender has apparently attained the age of 17 years; and

(d) the judge is of the opinion that the declaration is warranted for the protection of the public.

(2) In determining whether to declare an offender a dangerous criminal a judge may have regard to all or any of the following:

(a) the nature and circumstances of the crimes referred to in subsection (1);

(b) the offender's antecedents or character;

(c) any medical or other opinion;

(d) any other matter that the judge considers relevant.

(3) A judge who declares an offender to be a dangerous criminal must, in addition to making that declaration, sentence that offender to a term of imprisonment for the crime referred to in subsection (1)(a).

(4) An offender in respect of whom a declaration under subsection (1) has been made is not eligible to be released from custody until that declaration is discharged.

(5) Subsection (4) has effect whether or not the sentence of imprisonment imposed on that offender under subsection (3) has expired.

(6) In subsection (1), a reference to a previous conviction is to be read as a reference to –

(a) any conviction, either in this State or in some other State or a Territory, on indictment or complaint; or

(b) any conviction, either in this State or in some other State or a Territory, as a consequence of which a sentence is imposed by a court, being a court before which offences may be tried on indictment or complaint, on the committal of the accused to that court for sentence.

20. Dangerous criminal may apply for discharge of status

(1) In this section and in sections 21, 22 and 23 –

applicant means a dangerous criminal who applies to have the declaration by which he or she acquired the status of a dangerous criminal discharged;

dangerous criminal means an offender in respect of whom –

(a) a declaration under section 19(1) is in force; or

(b) a declaration under section 392(1) of the *Criminal Code*, as in force immediately before the commencement of this Act, is in force;

sentence means the sentence of imprisonment imposed on an offender in respect of the offence by reason of which the offender was declared to be a dangerous criminal.

(2) A dangerous criminal who has served a term of imprisonment equal to the non-parole period applicable to his or her sentence may apply to the Supreme Court to have the declaration by which he or she acquired the status of a dangerous criminal discharged.

(3) On an application under subsection (2), the Supreme Court must make an order discharging the relevant declaration if the court is satisfied that the declaration is no longer warranted for the protection of the public.

(4) An order under subsection (3) does not take effect until –

(a) if no appeal is lodged under section 23(1), the end of the appeal period or, in a case to which section 21(10) applies, such later date as may be specified by the court; or

(b) if an appeal is lodged under section 23(1), the dismissal of the appeal.

(5) An application under subsection (2) may be withdrawn or discontinued by leave of the court.

(6) An applicant whose application under subsection (2) is unsuccessful may submit a further application under that subsection after the expiration of a period of 2 years, or such lesser period as the court may allow, from the date on which the unsuccessful application was filed with the court.

(7) The discharge of a declaration under section 19(1) does not affect a sentence of imprisonment imposed on the offender to whom the declaration related.

21. Procedure

(1) An application under section 20(2) is to be in writing.

(2) A copy of the application is to be served on the DPP.

(3) The DPP, or counsel on the DPP's behalf, must appear for the Crown at the hearing of the application.

(4) The applicant is entitled to be present at the hearing of the application unless the court hearing the application, in its discretion, orders otherwise.

(5) The court may order the DCS or any other person or body to prepare a report in respect of the applicant, addressing such matters as the court specifies in the order, and the court may have regard to the report for the purpose of determining the application.

(6) A copy of a report prepared pursuant to an order of the court under subsection (5) is to be provided to the DPP and the applicant.

(7) The DPP or the applicant may adduce evidence in relation to the application.

(8) If the DPP or the applicant causes a report to be prepared in relation to the application, a copy of the report is to be provided to the other party to the application if it is proposed to use the report at the hearing of the application.

(9) If either party to the application puts a report in evidence –

(a) the other party to the application is entitled to cross-examine the author of the report; and

(b) if the author of the report is cross-examined, the party putting the report in evidence is entitled to examine the author of the report by way of reply.

(10) If the discharge of the declaration 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 DCS.

22. Preliminary procedure

(1) At any time after an application is made under section 20(2), but before the hearing of the application, a judge may require the parties to attend a conference for the purpose of ensuring a proper consideration of the application.

(2) At a conference under subsection (1) the judge may –

(a) give any directions to either or both of the parties to the application as the judge considers necessary or expedient for a proper consideration of the application; and

(b) determine any question of law or procedure that has arisen or is expected to arise in the hearing; and

(c) give such directions as the judge thinks fit in order to resolve any issue or matter that the judge considers necessary or convenient to resolve before the hearing.

23. Appeals

(1) The Attorney-General may appeal to the Court of Criminal Appeal against an order of the court under section 20(3) as if that order were a sentence imposed on conviction.

(2) An applicant may appeal to the Court of Criminal Appeal against the refusal of the court to make an order under section 20(3) as if that refusal were a sentence imposed on conviction.

(3) It is not necessary to obtain the leave of the Court of Criminal Appeal for an appeal under subsection (1) or (2).

Sentencing Act 1995 (WA)

98. Indefinite imprisonment, superior court may impose

(1) If a superior court —

(a) sentences an offender for an indictable offence to a term of imprisonment; and

(b) does not suspend that imprisonment; and

(c) does not make a parole eligibility order under Part 13 in respect of that term,

it may in addition to imposing the term of imprisonment for the offence (the ***nominal sentence***), order the offender to be imprisoned indefinitely.

(2) Indefinite imprisonment must not be ordered unless the court is satisfied on the balance of probabilities that when the offender would otherwise be released from custody in respect of the nominal sentence or any other term, he or she would be a danger to society, or a part of it, because of one or more of these factors:

(a) the exceptional seriousness of the offence;

(b) the risk that the offender will commit other indictable offences;

(c) the character of the offender and in particular —

(i) any psychological, psychiatric or medical condition affecting the offender;

(ii) the number and seriousness of other offences of which the offender has been convicted;

(d) any other exceptional circumstances.

(3) In deciding whether an offender is a danger to society, or a part of it, the court —

(a) is not bound by section 6 but is bound by any guidelines on the imposition of indefinite imprisonment in a guideline judgment given under section 143; and

(b) may have regard to such evidence as it thinks fit.

99. Other terms not precluded by indefinite imprisonment

The fact that a person is sentenced to be imprisoned indefinitely does not preclude the person from being sentenced for another offence or from serving another sentence.

100. Commencement of indefinite imprisonment

A sentence of indefinite imprisonment begins on the day when the offender would, but for that sentence, be eligible to be released from custody, whether or not under a parole order or a re-entry release order made under the *Sentence Administration Act 2003*, while or after serving —

(a) the nominal sentence; or

(b) any other term imposed on the offender.

101. Release from indefinite imprisonment

A prisoner sentenced to indefinite imprisonment may be released at any time after the sentence of indefinite imprisonment begins by means of a parole order made under Part 3 of the *Sentence Administration Act 2003*.

Criminal Justice Act 2003 (UK)

224 Meaning of "specified offence" etc.

(1) An offence is a "specified offence" for the purposes of this Chapter if it is a specified violent offence or a specified sexual offence.

(2) An offence is a "serious offence" for the purposes of this Chapter if and only if—

(a) it is a specified offence, and

(b) it is, apart from section 225, punishable in the case of a person aged 18 or over by—

(i) imprisonment for life, or

(ii) imprisonment for a determinate period of ten years or more.

(3) In this Chapter—

"serious harm" means death or serious personal injury, whether physical or psychological;

"specified violent offence" means an offence specified in Part 1 of Schedule 15;

"specified sexual offence" means an offence specified in Part 2 of that Schedule.

225 Life sentence or imprisonment for public protection for serious offences

(1) This section applies where—

(a) a person aged 18 or over is convicted of a serious offence committed after the commencement of this section, and

(b) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.

(2) If—

(a) the offence is one in respect of which the offender would apart from this section be liable to imprisonment for life, and

(b) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life,

the court must impose a sentence of imprisonment for life.

(3) In a case not falling within subsection (2), the court may impose a sentence of imprisonment for public protection if the condition in subsection (3A) or the condition in subsection (3B) is met.

(3A) The condition in this subsection is that, at the time the offence was committed, the offender had been convicted of an offence specified in Schedule 15A.

(3B) The condition in this subsection is that the notional minimum term is at least two years.

(3C) The notional minimum term is the part of the sentence that the court would specify under section 82A(2) of the Sentencing Act (determination of tariff) if it imposed a sentence of imprisonment for public protection but was required to disregard the matter mentioned in section 82A(3)(b) of that Act (crediting periods of remand).]

(4) A sentence of imprisonment for public protection is a sentence of imprisonment for an indeterminate period, subject to the provisions of Chapter 2 of Part 2 of the Crime (Sentences) Act 1997 (c. 43) as to the release of prisoners and duration of licences.

(5) An offence the sentence for which is imposed under this section is not to be regarded as an offence the sentence for which is fixed by law.

226 Detention for life or detention for public protection for serious offences committed by those under 18

(1) This section applies where—

(a) a person aged under 18 is convicted of a serious offence committed after the commencement of this section, and

(b) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.

(2) If—

(a) the offence is one in respect of which the offender would apart from this section be liable to a sentence of detention for life under section 91 of the Sentencing Act, and

(b) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of detention for life,

the court must impose a sentence of detention for life under that section.

(3) In a case not falling within subsection (2), the court may impose a sentence of detention for public protection if the notional minimum term is at least two years.

(3A) The notional minimum term is the part of the sentence that the court would specify under section 82A(2) of the Sentencing Act (determination of tariff) if it imposed a sentence of detention for public protection but was required to disregard the matter mentioned in section 82A(3)(b) of that Act (crediting periods of remand).]

(4) A sentence of detention for public protection is a sentence of detention for an indeterminate period, subject to the provisions of Chapter 2 of Part 2 of the Crime (Sentences) Act 1997 (c. 43) as to the release of prisoners and duration of licences.

(5) An offence the sentence for which is imposed under this section is not to be regarded as an offence the sentence for which is fixed by law.

227 Extended sentence for certain violent or sexual offences: persons 18 or over

(1) This section applies where—

(a) a person aged 18 or over is convicted of a specified offence F4... committed after the commencement of this section, and

(b) the court considers that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences but

(c) the court is not required by section 225(2) to impose a sentence of imprisonment for life.

(2) The court may impose on the offender an extended sentence of imprisonment, if the condition in subsection (2A) or the condition in subsection (2B) is met.

(2A) The condition in this subsection is that, at the time the offence was committed, the offender had been convicted of an offence specified in Schedule 15A.

(2B) The condition in this subsection is that, if the court were to impose an extended sentence of imprisonment, the term that it would specify as the appropriate custodial term would be at least 4 years.

(2C) An extended sentence of imprisonment is a sentence of imprisonment the term of which is equal to the aggregate of—

(a) the appropriate custodial term, and

(b) a further period ("the extension period") for which the offender is to be subject to a licence and which is of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by him of further specified offences.

(3) In subsections (2B) and (2C) "the appropriate custodial term" means a term of imprisonment (not exceeding the maximum term permitted for the offence) which—

(a) is the term that would (apart from this section) be imposed in compliance with section 153(2), or

(b) where the term that would be so imposed is a term of less than 12 months, is a term of 12 months.

(4) The extension period must not exceed—

(a) five years in the case of a specified violent offence, and

(b) eight years in the case of a specified sexual offence.

(5) The term of an extended sentence of imprisonment passed under this section in respect of an offence must not exceed the maximum term permitted for the offence.

(6) The Secretary of State may by order amend subsection (2B) so as to substitute a different period for the period for the time being specified in that subsection.

228Extended sentence for certain violent or sexual offences: persons under 18

(1) This section applies where—

(a) a person aged under 18 is convicted of a specified offence committed after the commencement of this section, and

(b) the court considers—

(i) that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences, and

(ii) where the specified offence is a serious offence, that the case is not one in which the court is required by section 226(2) to impose a sentence of detention for life under section 91 of the Sentencing Act F11... .

(2) The court may impose on the offender an extended sentence of detention, if the condition in subsection (2A) is met.

(2A) The condition in this subsection is that, if the court were to impose an extended sentence of detention, the term that it would specify as the appropriate custodial term would be at least 4 years.

(2B) An extended sentence of detention is a sentence of detention the term of which is equal to the aggregate of—

(a) the appropriate custodial term, and

(b) a further period ("the extension period") for which the offender is to be subject to a licence and which is of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by him of further specified offences.

(3) In subsections (2A) and (2B)"the appropriate custodial term" means such term as the court considers appropriate, which—

(a) . . . . . .

(b) must not exceed the maximum term of imprisonment permitted for the offence.

(4) The extension period must not exceed—

(a) five years in the case of a specified violent offence, and

(b) eight years in the case of a specified sexual offence.

(5) The term of an extended sentence of detention passed under this section in respect of an offence must not exceed the maximum term of imprisonment permitted for the offence.

(6) Any reference in this section to the maximum term of imprisonment permitted for an offence is a reference to the maximum term of imprisonment that is, apart from section 225, permitted for the offence in the case of a person aged 18 or over.

(7) The Secretary of State may by order amend subsection (2A) so as to substitute a different period for the period for the time being specified in that subsection.

229The assessment of dangerousness

(1) This section applies where—

(a) a person has been convicted of a specified offence, and

(b) it falls to a court to assess under any of sections 225 to 228 whether there is a significant risk to members of the public of serious harm occasioned by the commission by him of further such offences.

(2)..., the court in making the assessment referred to in subsection (1)(b)—

(a) must take into account all such information as is available to it about the nature and circumstances of the offence,

(aa) may take into account all such information as is available to it about the nature and circumstances of any other offences of which the offender has been convicted by a court anywhere in the world,

(b) may take into account any information which is before it about any pattern of behaviour of which any of the offences mentioned in paragraph (a) or (aa) forms part, and

(c) may take into account any information about the offender which is before it.

(2A) The reference in subsection (2)(aa) to a conviction by a court includes a reference to—

(a) a conviction of an offence in any service disciplinary proceedings, and

(b) a conviction of a service offence within the meaning of the Armed Forces Act 2006 ("conviction" here including anything that under section 376(1) and (2) of that Act is to be treated as a conviction).

(2B) For the purposes of subsection (2A)(a) "service disciplinary proceedings" means—

(a) any proceedings under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 (whether before a court-martial or any other court or person authorised under any of those Acts to award a punishment in respect of any offence), and

(b) any proceedings before a Standing Civilian Court;

and "conviction" includes the recording of a finding that a charge in respect of the offence has been proved.

(3) . . . . . .

(4). . . . . .

230Imprisonment or detention for public protection: release on licence
Schedule 18 (release of prisoners serving sentences of imprisonment or detention for public protection) shall have effect.

231Appeals where previous convictions set aside
(1) This section applies where—

(a) a sentence has been imposed on any person under section 225(3) or 227(2),

(b) the condition in section 225(3A) or (as the case may be) 227(2A) was met but the condition in section 225(3B) or (as the case may be) 227(2B) was not, and

(c) any previous conviction of his without which the condition in section 225(3A) or (as the case may be) 227(2A) would not have been met has been subsequently set aside on appeal.]

(2) Notwithstanding anything in section 18 of the Criminal Appeal Act 1968 (c. 19), notice of appeal against the sentence may be given at any time within 28 days from the date on which the previous conviction was set aside.

232Certificates of convictions for purposes of sections 225 and 227
Where—

(a) on any date after the commencement of Schedule 15A a person is convicted in England and Wales of an offence specified in that Schedule, and

(b) the court by or before which he is so convicted states in open court that he has been convicted of such an offence on that date, and

(c) that court subsequently certifies that fact,

that certificate shall be evidence, for the purposes of sections 225(3A) and 227(2A) , that he was convicted of such an offence on that date.

233Offences under service law
F31. . . . . .

234Determination of day when offence committed
F32. . . . . .

235Detention under sections 226 and 228
A person sentenced to be detained under section 226 or 228 is liable to be detained in such place, and under such conditions, as may be determined by the Secretary of State or by such other person as may be authorised by him for the purpose.

236Conversion of sentences of detention into sentences of imprisonment
For section 99 of the Sentencing Act (conversion of sentence of detention and custody into sentence of imprisonment) there is substituted—

99Conversion of sentence of detention to sentence of imprisonment
(1) Subject to the following provisions of this section, where an offender has been sentenced by a relevant sentence of detention to a term of detention and either—

(a) he has attained the age of 21, or

(b) he has attained the age of 18 and has been reported to the Secretary of State by the board of visitors of the institution in which he is detained as exercising a bad influence on the other inmates of the institution or as behaving in a disruptive manner to the detriment of those inmates,

the Secretary of State may direct that he shall be treated as if he had been sentenced to imprisonment for the same term.

(2) Where the Secretary of State gives a direction under subsection (1) above in relation to an offender, the portion of the term of detention

imposed under the relevant sentence of detention which he has already served shall be deemed to have been a portion of a term of imprisonment.

(3) Where the Secretary of State gives a direction under subsection (1) above in relation to an offender serving a sentence of detention for public protection under section 226 of the Criminal Justice Act 2003 the offender shall be treated as if he had been sentenced under section 225 of that Act; and where the Secretary of State gives such a direction in relation to an offender serving an extended sentence of detention under section 228 of that Act the offender shall be treated as if he had been sentenced under section 227 of that Act.

(4) Rules under section 47 of the Prison Act 1952 may provide that any award for an offence against discipline made in respect of an offender serving a relevant sentence of detention shall continue to have effect after a direction under subsection (1) has been given in relation to him.

(5) In this section "relevant sentence of detention" means—

(a) a sentence of detention under section 90 or 91 above,

(b) a sentence of detention for public protection under section 226 of the Criminal Justice Act 2003, or

(c) an extended sentence of detention under section 228 of that Act."

Criminal Procedure (Scotland) Act 1995

210A Extended sentences for sex and violent offenders.

(1) Where a person is convicted on indictment of a sexual or violent offence, the court may, if it−

(a) intends, in relation to−

(i) a sexual offence, to pass a determinate sentence of imprisonment; or

(ii) a violent offence, to pass such a sentence for a term of four years or

(b) considers that the period (if any) for which the offender would, apart from this section, be subject to a licence would not be adequate for the purpose of protecting the public from serious harm from the offender, pass an extended sentence on the offender.

(2) An extended sentence is a sentence of imprisonment which is the aggregate of−

(a) the term of imprisonment ("the custodial term") which the court would have passed on the offender otherwise than by virtue of this section; and

(b) a further period ("the extension period") for which the offender is to be subject to a licence and which is, subject to the provisions of this section, of such length as the court considers necessary for the purpose mentioned in subsection (1)(b) above.

(3) The extension period shall not exceed, in the case of−

(a) a sexual offence, ten years; and

(b) a violent offence, years.

(4) A court shall, before passing an extended sentence, consider a report by a relevant officer of a local authority about the offender and his circumstances and, if the court thinks it necessary, hear that officer.

(5) The term of an extended sentence passed for a statutory offence shall not exceed the maximum term of imprisonment provided for in the statute in respect of that offence.

(6) Subject to subsection (5) above, a sheriff may pass an extended sentence which is the aggregate of a custodial term not exceeding the maximum term of imprisonment which he may impose and an extension period not exceeding five years.

(7) The Secretary of State may by order−

(a) amend paragraph (b) of subsection (3) above by substituting a different period, not exceeding ten years, for the period for the time being specified in that paragraph; and

(b) make such transitional provision as appears to him to be necessary or expedient in connection with the amendment.

(8) The power to make an order under subsection (7) above shall be exercisable by statutory instrument; but no such order shall be made unless a draft of the order has been laid before, and approved by a resolution of, each House of Parliament.

(9) An extended sentence shall not be imposed where the sexual or violent offence was committed before the commencement of section 86 of the Crime and Disorder Act 1998.

(10) For the purposes of this section−

"licence" and "relevant officer" have the same meaning as in Part I of the Prisoners and Criminal Proceedings (Scotland) Act 1993;

"sexual offence" means−

(i) rape at common law;

(ii) clandestine injury to women;

(iii) abduction of a woman or girl with intent to rape or ravish;

(iv) abduction with intent to commit the statutory offence of rape;

(iv) assault with intent to rape or ravish;

(v) assault with intent to commit the statutory offence of rape;

(vi) indecent assault;

(vii) lewd, indecent or libidinous behaviour or practices;

(ix) . . . . . .

(x) sodomy;

(xi) an offence under section 170 of the M16Customs and Excise Management Act 1979 in relation to goods prohibited to be imported under section 42 of the M17Customs Consolidation Act 1876, but only where the prohibited goods include indecent photographs of persons;

(xii) an offence under section 52 of the M18Civic Government (Scotland) Act 1982 (taking and distribution of indecent images of children);

(xiii) an offence under section 52A of that Act (possession of indecent images of children);

(xiv) an offence under section 1 of the M19Criminal Law (Consolidation) (Scotland) Act 1995 (incest);

(xv) an offence under section 2 of that Act (intercourse with a stepchild);

(xvi) an offence under section 3 of that Act (intercourse with child under 16 by person in position of trust);

(xvii) an offence under section 5 of that Act (unlawful intercourse with girl under 16);

(xviii) an offence under section 6 of that Act (indecent behaviour towards girl between 12 and 16);

(xix) an offence under section 8 of that Act (abduction of girl under 18 for purposes of unlawful intercourse);

(xx) an offence under section 10 of that Act (person having parental responsibilities causing or encouraging sexual activity in relation to a girl under 16);

(xxi) an offence under subsection (5) of section 13 of that Act (homosexual offences);

(xxii) an offence under section 3 of the Sexual Offences (Amendment) Act 2000 (abuse of position of trust);

(xxiii) an offence under section 311(1) of the Mental Health (Care and Treatment)(Scotland) Act 2003 (asp 13)(non-consensual sexual acts).

(xxiv) an offence under section 1 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) (meeting a child following certain preliminary conduct);

(xxv) an offence under section 9 of that Act (paying for sexual services of a child);

(xxvi) an offence under section 10 of that Act (causing or inciting provision by child of sexual services or child pornography);

(xxvii) an offence under section 11 of that Act (controlling a child providing sexual services or involved in pornography);

(xxviii) an offence under section 12 of that Act (arranging or facilitating provision by child of sexual services or child pornography) and

(xxix) an offence which consists of a contravention of any of the following provisions of the Sexual Offences (Scotland) Act 2009;

(1) section 1 (rape),

(2) section 2 (sexual assault by penetration),

(4) section 4 (sexual coercion),

(5) section 5 (coercing a person into being present during a sexual activity),

(6) section 6 (coercing a person into looking at a sexual image),

(7) section 7(1) (communicating indecently),

(8) section 7(2) (causing a person to see or hear an indecent communication),

(9) section 8 (sexual exposure),

(10) section 9 (voyeurism),

(11) section 11 (administering a substance for sexual purposes),

(12) section 18 (rape of a young child),

(13) section 19 (sexual assault on a young child by penetration),

(14) section 20 (sexual assault on a young child),

(15) section 21 (causing a young child to participate in a sexual activity),

(16) section 22 (causing a young child to be present during a sexual activity)

(17) section 23 (causing a young child to look at a sexual image),

(18) section 24(1) (communicating indecently with a young child),

(19) section 24(2) (causing a young child to see or hear an indecent communication),

(20) section 25 (sexual exposure to a young child),

(21) section 26 (voyeurism towards a young child),

(22) section 28 (having intercourse with an older child),

(23) section 29 (engaging in penetrative sexual activity with or towards an older child),

(24) section 30 (engaging in sexual activity with or towards an older child),

(25) section 31 (causing an older child to participate in a sexual activity),

(26) section 32 (causing an older child to be present during a sexual activity),

(27) section 33 (causing an older child to look at a sexual image),

(28) section 34(1) (communicating indecently with an older child),

(29) section 34(2) (causing an older child to see or hear an indecent communication),

(30) section 35 (sexual exposure to an older child),

(31) section 36 (voyeurism towards an older child),

(32) section 37(1) (engaging while an older child in sexual conduct with or towards another older child),

(33) section 37(4) (engaging while an older child in consensual sexual conduct with another older child),

(34) section 42 (sexual abuse of trust),

(35) section 46 (sexual abuse of trust of a mentally disordered person);

210AA Extended sentences for certain other offenders

Where a person is convicted on indictment of abduction but the offence is other than is mentioned in paragraph (iii) of the definition of "sexual offence" in subsection (10) of section 210A of this Act, that section shall apply in relation to the person as it applies in relation to a person so convicted of a violent offence.

210B Risk assessment order

(1) This subsection applies where it falls to the High Court to impose sentence on a person convicted of an offence other than murder and that offence−

(a) is (any or all)−

(i) a sexual offence (as defined in section 210A(10) of this Act);

(ii) a violent offence (as so defined);

(iii) an offence which endangers life; or

(b) is 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 such offence as is mentioned in sub-paragraphs (i) to (iii) of paragraph (a) above.

(2) Where subsection (1) above applies, the court, at its own instance or (provided that the prosecutor has given the person notice of his intention in that regard) on the motion of the prosecutor, if it considers that the risk criteria may be met, shall make an order under this subsection (a "risk assessment order") unless−

(a) the court makes an interim compulsion order by virtue of section 210D(1) of this Act in respect of the person; or

(b) the person is subject to an order for lifelong restriction previously imposed.

(3) A risk assessment order is an order−

(a) for the convicted person to be taken to a place specified in the order, so that there may be prepared there−

(i) by a person accredited for the purposes of this section by the Risk Management Authority; and

(ii) in such manner as may be so accredited, a risk assessment report (that is to say, a report as to what risk his being at liberty presents to the safety of the public at large); and

(b) providing for him to be remanded in custody there for so long as is necessary for those purposes and thereafter there or elsewhere until such diet as is fixed for sentence.

(4) On making a risk assessment order, the court shall adjourn the case for a period not exceeding ninety days.

(5) The court may on one occasion, on cause shown, extend the period mentioned in subsection (4) above by not more than ninety days; and it may exceptionally, where by reason of circumstances outwith the control of the person to whom it falls to prepare the risk assessment report (the "assessor"), or as the case may be of any person question has not been completed, grant such further extension as appears to it to be appropriate.

(6) There shall be no appeal against a risk assessment order or against any refusal to make such an order.

210C Risk assessment report

(1) The assessor may, in preparing the risk assessment report, take into account not only any previous conviction of the convicted person but also any allegation that the person has engaged in criminal behaviour (whether or not that behaviour resulted in prosecution and acquittal).

(2) Where the assessor, in preparing the risk assessment report, takes into account any allegation that the person has engaged in criminal behaviour, the report is to−

(a) list each such allegation;

(b) set out any additional evidence which supports the allegation; and

(c) explain the extent to which the allegation and evidence has influenced the opinion included in the report under subsection (3) below.

(3) The assessor shall include in the risk assessment report his opinion as to whether the risk mentioned in section 210B(3)(a) of this Act is, having regard to such standards and guidelines as are issued by the Risk Management Authority in that regard, high, medium or low.

(4) The assessor shall submit the risk assessment report to the High Court by sending it, together with such documents as are available to the assessor and are referred to in the report, to the Principal Clerk of Justiciary, who shall then send a copy of the report and of those documents to the prosecutor and to the convicted person.

(5) The convicted person may, during the period of his detention at the place specified in the risk assessment order, himself instruct the preparation (by a person other than the assessor) of a risk assessment report; and if such a report is so prepared then the person who prepares it shall submit it to the court by sending it, together with such documents as are available to him (after any requirement under subsection (4) above is met) and are referred to in the report, to the Principal Clerk of Justiciary, who shall then send a copy of it and of those documents to the prosecutor.

(6) When the court receives the risk assessment report submitted by the assessor a diet shall be fixed for the convicted person to be brought before it for sentence.

(7) If, within such period after receiving a copy of that report as may be prescribed by Act of Adjournal, the convicted person intimates, in such form, or as nearly as may be in such form, as may be so prescribed−

(a) that he objects to the content or findings of that report; and

(b) what the grounds of his objection are, the prosecutor and he shall be entitled to produce and examine witnesses with regard to−

(i) that content or those findings; and

(ii) the content or findings of any risk assessment report instructed by the person and duly submitted under subsection (5) above.

210D Interim hospital order and assessment of risk

(1) Where subsection (1) of section 210B of this Act applies, the High Court, if–

(a) it may make an interim compulsion order in respect of the person under section 53 of this Act; and

(b) it considers that the risk criteria may be met, shall make such an order unless the person is subject to an order for lifelong restriction previously imposed.

(2) Where an interim compulsion order is made by virtue of subsection (1) above, a report as to the risk the convicted person's being at liberty presents to the safety of the public at large shall be prepared by a person accredited for the purposes of this section by the Risk Management Authority and in such manner as may be so accredited.

(3) Section 210C(1) to (4) and (7)(except paragraph (ii)) of this Act shall apply in respect of any such report as it does in respect of a risk assessment report.

210E The risk criteria

For the purposes of sections 195(1), 210B(2), 210D(1) and 210F(1) and (3) of this Act, the 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, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large.

210EA Application of certain sections of this Act to proceedings under section 210C(7)

(1) Sections 271 to 271M, 274 to 275C and 288C to 288F of this Act (in this section referred to as the "applied sections") apply in relation to proceedings under section 210C(7) of this Act as they apply in relation to proceedings in or for the purposes of a trial, references in the applied sections to the "trial" and to the "trial diet" being construed accordingly.

(2) But for the purposes of this section the references–

(a) in sections 271(1)(a) and 271B(1)(b) to the date of commencement of the proceedings in which the trial is being held or is to be held; and

(b) in section 288E(2)(b) to the date of commencement of the proceedings, are to be construed as references to the date of commencement of the proceedings in which the person was convicted of the offence in respect of which sentence falls to be imposed (such proceedings being in this section referred to as the "original proceedings").

(3) And for the purposes of this section any reference in the applied sections to–

(a) an "accused" (or to a person charged with an offence) is to be construed as a reference to the convicted person except that the reference in section 271(2)(e)(iii) to an accused is to be disregarded;

(b) an "alleged" offence is to be construed as a reference to any or all of the following−

(i) the offence in respect of which sentence falls to be imposed;

(ii) any other offence of which the convicted person has been convicted;

(iii) any alleged criminal behaviour of the convicted person; and

(c) a "complainer" is to be construed as a reference to any or all of the following

(i) the person who was the complainer in the original proceedings;

(ii) in the case of any such offence as is mentioned in paragraph (b)(ii) above, the person who was the complainer in the proceedings relating to that offence;

(iii) in the case of alleged criminal behaviour if it was alleged behaviour directed against a person, the person in question.

(4) Where−

(a) any person who is giving or is to give evidence at an examination under section 210C(7) of this Act gave evidence at the trial in the original proceedings; and

(b) a special measure or combination of special measures was used by virtue of section 271A, 271C or 271D of this Act for the purpose of taking the person's evidence at that trial, that special measure or, as the case may be, combination of special measures is to be treated as having been authorised, by virtue of the same section, to be used for the purpose of taking the person's evidence at or for the purposes of the examination.

(5) Subsection (4) above does not affect the operation, by virtue of subsection (1) above, of section 271D of this Act.

210F Order for lifelong restriction or compulsion order

(1) The High Court, at its own instance or on the motion of the prosecutor, if it is satisfied, having regard to−

(a) risk assessment report submitted under section 210C(4) or (5) of this Act;

(b) any report submitted by virtue of section 210D of this Act;

(c) any evidence given under section 210C(7) of this Act; and

(d) any other information before it, that, on a balance of probabilities, the risk criteria are met, shall, in a case where it may make a compulsion order in respect of the convicted person under section 57A of this Act, either make such an order or make an order for

lifelong restriction in respect of that person and in any other case make an order for lifelong restriction in respect of that person.

(2) An order for lifelong restriction constitutes a sentence of imprisonment, or as the case may be detention, for an indeterminate period.

(3) The prosecutor may, on the grounds that on a balance of probabilities the risk criteria are met, appeal against any refusal of the court to make an order for lifelong restriction.

210G Disposal of case where certain orders not made

(1) Where, in respect of a convicted person−

(a) a risk assessment order is not made under section 210B(2) of this Act, or (as the case may be) an interim compulsion order is not made by virtue of section 210D(1) of this Act, because the court does not consider that the risk criteria may be met; or

(b) the court considers that the risk criteria may be met but a risk assessment order, or (as the case may be) an interim compulsion order, is not so made because the person is subject to an order for lifelong restriction previously imposed, the court shall dispose of the case as it considers appropriate.

(2) Where, in respect of a convicted person, an order for lifelong restriction is not made under section 210F of this Act because the court is not satisfied (in accordance with subsection (1) of that section) that the risk criteria are met, the court, in disposing of the case, shall not impose on the person a sentence of imprisonment for life, detention for life or detention without limit of time.

Criminal Justice (Scotland) Act 2003

(3) The Risk Management Authority

(1) There is established an authority (to be known as the "Risk Management Authority") whose functions under this Act and any other enactment are to be exercised for the purpose of ensuring the effective assessment and minimisation of risk.

(2) For the purposes of subsection (1) and sections 4 to 6, "risk" means, as regards−

(a) a person convicted of an offence; or

(b) a person who is subject to a disposal under section 57 (disposal of case where accused found to be insane) of the 1995 Act, the risk the person's being at liberty presents to the safety of the public at large.

(3) Schedule 2 has effect with respect to the Authority.

(4) Policy and research

In, or as the case may be in relation to, the assessment and minimisation of risk−

(a) the Risk Management Authority is to−

(i) compile and keep under review information about the provision of services in Scotland;

(ii) compile and keep under review research and development;

(iii) promote effective practice; and

(iv) give such advice and make such recommendations to the Scottish Ministers as it considers appropriate;

(b) the Authority may−

(i) carry out, commission or co-ordinate research and publish the results of such research; and

(ii) undertake pilot schemes for the purposes of developing and improving methods.

(5) Guidelines and standards

(1) The Risk Management Authority is to−

(a) prepare and issue guidelines as to the assessment and minimisation of risk; and

(b) set and publish standards according to which measures taken in respect of the assessment and minimisation of risk are to be judged.

(2) Any person having functions in relation to the assessment and minimisation of risk is to have regard to such guidelines and standards in the exercise of those functions.

(6) Risk management plans

(1) A plan (a "risk management plan") must be prepared in respect of−

(a) any offender who is subject to an order for lifelong restriction made under section 210F (order for lifelong restriction) of the 1995 Act; and

(b) any offender falling within such other category as may be prescribed.

(2) Before making an order by virtue of subsection (1)(b), the Scottish Ministers are to consult−

(a) the Risk Management Authority; and

(b) such other persons as they consider appropriate.

(3) The risk management plan must−

(a) set out an assessment of risk;

(b) set out the measures to be taken for the minimisation of risk, and how such measures are to be co-ordinated; and

(c) be in such form as is specified under subsection (5).

(4) The risk management plan may provide for any person who may reasonably be expected to assist in the minimisation of risk to have functions in relation to the implementation of the plan.

(5) The Risk Management Authority is to specify and publish the form of risk management plans.

(6) The Risk Management Authority may issue guidance (either generally or in a particular case) as to the preparation, implementation or review of any risk management plan.

(7) Preparation of risk management plans

(1) Where the offender is serving a sentence−

(a) of imprisonment in a prison;

(b) of detention in a young offenders institution; or

(c) by virtue of section 208 (detention of children convicted on indictment) of the 1995 Act, of detention in some other place,

the risk management plan is to be prepared by the Scottish Ministers.

(2) Where the offender is detained (or liable to be detained) in a hospital by virtue of−

(a) a hospital order under section 58 (order for hospital admission or guardianship) of the 1995 Act;

(b) a hospital direction under section 59A (hospital directions) of the 1995 Act;

(c) an application for admission under Part V (admission to hospital etc.) of the Mental Health (Scotland) Act 1984 (c. 36) ("the 1984 Act"); or

(d) a transfer direction under section 71 (removal to hospital of prisoners) of the 1984 Act, the risk management plan is to be prepared by the managers of the hospital in which the offender is detained (or liable to be detained).

(3) Where the risk management plan does not require to be prepared by the Scottish Ministers or the managers of a hospital under subsections (1) and (2), the plan is to be prepared by the local authority in whose area the offender resides.

(4) In this section, the expressions "managers of a hospital" and "hospital" are to be construed in accordance with section 125 (interpretation) of the 1984 Act.

(5) Whoever is required by virtue of this section to prepare the risk management plan is referred to in sections 8 and 9 as the "lead authority".

(8) Preparation of risk management plans: further provision

(1) Preparation of the risk management plan is to be completed no later than 9 months after the offender is sentenced or detained (or becomes liable to be detained) in hospital; but if there is an appeal under subsection (7), it may be completed within such longer period as the Risk Management Authority may reasonably require.

(2) In preparing the risk management plan, the lead authority is to consult−

(a) any person on whom, by virtue of section 6(4), the lead authority is considering conferring functions; and

(b) such other persons as it considers appropriate.

(3) Any person so consulted is to provide such assistance to the lead authority as it may reasonably require for the purposes of preparing the plan.

(4) The lead authority is to submit the risk management plan to the Risk Management Authority and the Risk Management Authority is to−

(a) approve it; or

(b) where it considers that a plan does not comply with section 6(3) or that the lead authority has, in preparing the plan, disregarded any guideline or standard under section 5 or any guidance under section 6(6), reject it.

(5) Where any plan is rejected, the lead authority is to prepare a revised plan and submit it to the Risk Management Authority by such time as the Authority may reasonably require.

(6) Where the Risk Management Authority−

(a) rejects a revised plan; and

(b) considers that, unless it exercises its power under this subsection to give directions, subsection (1) would not be complied with, the Authority may give directions to the lead authority and any other person having functions under the plan as to the preparation of a revised plan; and the lead authority and such other person must, subject to subsection (7), comply with any such direction.

(7) The lead authority or any other person to whom any direction is given under subsection (6) may appeal to the sheriff against the direction on the grounds that it is unreasonable.

(9) Implementation and review of risk management plans

(1) The lead authority and any other person having functions under the risk management plan are to implement the plan in accordance with their respective functions.

(2) Where the Risk Management Authority considers that the lead authority or any such other person is failing, without reasonable excuse, to implement the plan in accordance with those functions, the Authority may give directions to the lead authority or, as the case may be, the person as to the implementation of the plan; and the lead authority and the person must, subject to subsection (3), comply with any such direction.

(3) The lead authority or any other person to whom any direction is given under subsection (2) may appeal to the sheriff against the direction on the grounds that it is unreasonable.

(4) The lead authority is to report annually to the Risk Management Authority as to the implementation of the plan.

(5) Where there has been, or there is likely to be, a significant change in the circumstances of the offender, the lead authority is to review the plan.

(6) Where a review has been carried out under subsection (5), and the lead authority considers that the plan for the time being in force is, or is likely to become, unsuitable, either−

(a) the lead authority is to prepare an amended plan; or

(b) if it is not appropriate for it to continue as lead authority, a different lead authority (determined in accordance with section 7) is to prepare an amended plan, within such period as the Risk Management Authority may reasonably require.

(7) Sections 6(3) and (4), 8(2) to (7) and this section apply to the preparation of an amended plan under subsection (6) as they do to the preparation of a plan under sections 6 to 8 but as if, in subsection (6)(b) of section 8, the reference to subsection (1) of that section were a reference to subsection (6).

(10) Grants to local authorities in connection with risk management plans

(1) The Scottish Ministers may make to any local authority grants of such amount, and subject to such conditions, as they may determine in respect of expenditure incurred by the authority in preparing and implementing any risk management plan.

(2) Before making any such grant, the Scottish Ministers must consult such local authorities and such other persons as they consider appropriate.

(11) Accreditation, education and training

(1) The Scottish Ministers may by order make a scheme of accreditation as to−

(a) any manner of assessing and minimising risk (being accreditation in recognition of the effectiveness of any methods and practices which may be employed in the assessment and minimisation of risk); and

(b) persons having functions in relation to the assessment and minimisation of risk (being accreditation in recognition of education or training received, or of any expertise relevant to those functions otherwise held or acquired, by them).

(2) The Risk Management Authority−

(a) is to administer any scheme of accreditation made under subsection (1) (including awarding, generally or for any particular purpose, suspending or withdrawing accreditation where it considers that to be appropriate); and

(b) may provide, or secure the provision of, education and training in relation to the assessment and minimisation of risk for any person having functions in that regard.

Sentencing Act 2002 (NZ)

87 Sentence of preventive detention

(1) The purpose of preventive detention is to protect the community from those who pose a significant and ongoing risk to the safety of its members.

(2) This section applies if—

(a) a person is convicted of a qualifying sexual or violent offence (as that term is defined in subsection (5)); and

(b) the person was 18 years of age or over at the time of committing the offence; and

(c) the court is satisfied that the person is likely to commit another qualifying sexual or violent offence if the person is released at the sentence expiry date (as specified in subpart 3 of Part 1 of the Parole Act 2002) of any sentence, other than a sentence under this section, that the court is able to impose.

(3) The High Court may, on the application of the prosecutor or on its own motion, impose a sentence of preventive detention on the offender.

(4) When considering whether to impose a sentence of preventive detention, the court must take into account—

(a) any pattern of serious offending disclosed by the offender's history; and

(b) the seriousness of the harm to the community caused by the offending; and

(c) information indicating a tendency to commit serious offences in future; and

(d) the absence of, or failure of, efforts by the offender to address the cause or causes of the offending; and

(e) the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society.

(5) In this section and in sections 88 and 90, **qualifying sexual or violent offence** means—

(a) a sexual crime under Part 7 of the Crimes Act 1961 punishable by 7 or more years' imprisonment; and includes a crime under section 144A or section 144C of that Act; or

(b) an offence against any of sections 171, 173 to 176, 188, 189(1), 191, 198 to 199, 208 to 210, 234, 235, or 236 of the Crimes Act 1961.

88 Offender must be notified that sentence of preventive detention will be considered, and reports must be obtained

(1) A sentence of preventive detention must not be imposed unless—

(a) the offender has been notified that a sentence of preventive detention will be considered, and has been given sufficient time to prepare submissions on the sentence; and

(b) the court has considered reports from at least 2 appropriate health assessors about the likelihood of the offender committing a further qualifying sexual or violent offence.

(2) Despite anything in section 38(1) and (5) of the Criminal Procedure (Mentally Impaired Persons) Act 2003,—

(a) the court may, for the purposes of obtaining the report referred to in subsection (1)(b), exercise all or any of the powers conferred by section 38(2) of the Criminal Procedure (Mentally Impaired Persons) Act 2003; and

(b) section 38(4) and sections 40 to 46 of that Act apply, so far as they are applicable and with any necessary modifications, to the offender and any report so obtained.

(3) To avoid doubt, a health assessor's report under subsection (1)(b) may take into account any statement of the offender or any other person concerning any conduct of the offender, whether or not that conduct constitutes an offence and whether or not the offender has been charged with, or convicted of, an offence in respect of that conduct.

89 Imposition of minimum period of imprisonment

(1) If a court sentences an offender to preventive detention, it must also order that the offender serve a minimum period of imprisonment, which in no case may be less than 5 years.

(2) The minimum period of imprisonment imposed under this section must be the longer of—

(a) the minimum period of imprisonment required to reflect the gravity of the offence; or

(b) the minimum period of imprisonment required for the purposes of the safety of the community in the light of the offender's age and the risk posed by the offender to that safety at the time of sentencing.

(2A) In any case where a sentence of preventive detention is imposed for a stage-3 offence (within the meaning of section 86A), subsections (1) and (2) are subject to section 86D(7).

(3) For the purposes of Part 13 of the Crimes Act 1961, an order under subsection (1) is a sentence.

Procedure if offender convicted in District Court and court believes offender could be sentenced to preventive detention

(1) This section applies if a person is convicted by a District Court of a qualifying sexual or violent offence, and the court has reason to believe, from a report of a probation officer or otherwise, that a sentence of preventive detention may be appropriate.

(2) Section 44 of the Summary Proceedings Act 1957 or (as the case may require) section 28G of the District Courts Act 1947 applies, and the court must endorse on the information a statement to the effect that the court has declined jurisdiction on the ground that it has reason to believe that the offender should be considered for a sentence of preventive detention.

Criminal Code 1985 (Canada)

PART XXIV DANGEROUS OFFENDERS AND LONG-TERM OFFENDERS

Definitions

752. In this Part,

"court" means the court by which an offender in relation to whom an application under this Part is made was convicted, or a superior court of criminal jurisdiction;

"designated offence" means

(a) a primary designated offence,

(b) an offence under any of the following provisions:

(i) paragraph 81(1)(a) (using explosives),

(ii) paragraph 81(1)(b) (using explosives),

(iii) section 85 (using firearm or imitation firearm in commission of offence),

(iv) section 87 (pointing firearm),

(iv.1) section 98 (breaking and entering to steal firearm),

(iv.2) section 98.1 (robbery to steal firearm),

(v) section 153.1 (sexual exploitation of person with disability),

(vi) section 163.1 (child pornography),

(vii) section 170 (parent or guardian procuring sexual activity),

(viii) section 171 (householder permitting sexual activity by or in presence of child),

(ix) section 172.1 (luring child),

(x) paragraph 212(1)(i) (stupefying or overpowering for purpose of sexual intercourse),

(xi) subsection 212(2.1) (aggravated offence in relation to living on avails of prostitution of person under 18),

(xii) subsection 212(4) (prostitution of person under 18),

(xiii) section 245 (administering noxious thing),

(xiv) section 266 (assault),

(xv) section 269 (unlawfully causing bodily harm),

(xvi) section 269.1 (torture),

(xvii) paragraph 270(1)(a) (assaulting peace officer),

(xviii) section 273.3 (removal of child from Canada),

(xix) subsection 279(2) (forcible confinement),

(xx) section 279.01 (trafficking in persons),

(xx.1) section 279.011 (trafficking of a person under the age of eighteen years),

(xxi) section 279.1 (hostage taking),

(xxii) section 280 (abduction of person under age of 16),

(xxiii) section 281 (abduction of person under age of 14),

(xxiv) section 344 (robbery), and

(xxv) section 348 (breaking and entering with intent, committing offence or breaking out),

(c) an offence under any of the following provisions of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 1, 1988:

(i) subsection 146(2) (sexual intercourse with female between ages of 14 and 16),

(ii) section 148 (sexual intercourse with feeble-minded),

(iii) section 166 (parent or guardian procuring defilement), and

(iv) section 167 (householder permitting defilement), or

(d) an attempt or conspiracy to commit an offence referred to in paragraph (b) or (c);

"long-term supervision" means long-term supervision ordered under subsection 753(4), 753.01(5) or (6) or 753.1(3) or subparagraph 759(3)(a)(i);

"primary designated offence" means

(a) an offence under any of the following provisions:

(i) section 151 (sexual interference),

(ii) section 152 (invitation to sexual touching),

(iii) section 153 (sexual exploitation),

(iv) section 155 (incest),

(v) section 239 (attempt to commit murder),

(vi) section 244 (discharging firearm with intent),

(vii) section 267 (assault with weapon or causing bodily harm),

(viii) section 268 (aggravated assault),

(ix) section 271 (sexual assault),

(x) section 272 (sexual assault with weapon, threats to third party or causing bodily harm),

(xi) section 273 (aggravated sexual assault), and

(xii) subsection 279(1) (kidnapping),

(b) an offence under any of the following provisions of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 4, 1983:

(i) section 144 (rape),

(ii) section 145 (attempt to commit rape),

(iii) section 149 (indecent assault on female),

(iv) section 156 (indecent assault on male),

(v) subsection 245(2) (assault causing bodily harm), and

(vi) subsection 246(1) (assault with intent) if the intent is to commit an offence referred to in any of subparagraphs (i) to (v) of this paragraph,

(c) an offence under any of the following provisions of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as enacted by section 19 of An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof, chapter 125 of the Statutes of Canada, 1980-81-82-83:

(i) section 246.1 (sexual assault),

(ii) section 246.2 (sexual assault with weapon, threats to third party or causing bodily harm), and

(iii) section 246.3 (aggravated sexual assault),

(d) an offence under any of the following provisions of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 1, 1988:

(i) subsection 146(1) (sexual intercourse with female under age of 14), and

(ii) paragraph 153(1)(a) (sexual intercourse with step-daughter), or

(e) an attempt or conspiracy to commit an offence referred to in any of paragraphs (a) to (d);

“serious personal injury offence” means

(a) an indictable offence, other than high treason, 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).

Prosecutor's duty to advise court

752.01 If the prosecutor is of the opinion that an offence for which an offender is convicted is a serious personal injury offence that is a designated offence and that the offender was convicted previously at least twice of a designated offence and was sentenced to at least two years of imprisonment for each of those convictions, the prosecutor shall advise the court, as soon as feasible after the finding of guilt and in any event before sentence is imposed, whether the prosecutor intends to make an application under subsection 752.1(1).

Application for remand for assessment

752.1 (1) On application by the prosecutor, if the court is of the opinion that there are reasonable grounds to believe that an offender who is convicted of a serious personal injury offence or an offence referred to in paragraph 753.1(2)(a) might be found to be a dangerous offender under section 753 or a long-term offender under section 753.1, the court shall, by order in writing, before sentence is imposed, remand the offender, for a period not exceeding 60 days, to the custody of a person designated by the court who can perform an assessment or have an assessment performed by experts for use as evidence in an application under section 753 or 753.1.

Report

(2) The person to whom the offender is remanded shall file a report of the assessment with the court not later than 30 days after the end of the assessment period and make copies of it available to the prosecutor and counsel for the offender.

Extension of time

(3) On application by the prosecutor, the court may extend the period within which the report must be filed by a maximum of 30 days if the court is satisfied that there are reasonable grounds to do so.

Application for finding that an offender is a dangerous offender

753. (1) On application made under this Part after an assessment report is filed under subsection 752.1(2), the court shall find the offender to be a dangerous offender if it is satisfied

(a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing

(i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a

likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,

(ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or

(iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; or

(b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and 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.

Presumption

(1.1) If the court is satisfied that the offence for which the offender is convicted is a primary designated offence for which it would be appropriate to impose a sentence of imprisonment of two years or more and that the offender was convicted previously at least twice of a primary designated offence and was sentenced to at least two years of imprisonment for each of those convictions, the conditions in paragraph (1)(a) or (b), as the case may be, are presumed to have been met unless the contrary is proved on a balance of probabilities.

Time for making application

(2) An application under subsection (1) must be made before sentence is imposed on the offender unless

(a) before the imposition of sentence, the prosecutor gives notice to the offender of a possible intention to make an application under section 752.1 and an application under subsection (1) not later than six months after that imposition; and

(b) at the time of the application under subsection (1) that is not later than six months after the imposition of sentence, it is shown that relevant evidence that was not reasonably available to the prosecutor at the time of the imposition of sentence became available in the interim.

Application for remand for assessment after imposition of sentence

(3) Notwithstanding subsection 752.1(1), an application under that subsection may be made after the imposition of sentence or after an offender begins to serve the sentence in a case to which paragraphs (2)(a) and (b) apply.

Sentence for dangerous offender

(4) If the court finds an offender to be a dangerous offender, it shall

(a) impose a sentence of detention in a penitentiary for an indeterminate period;

(b) impose a sentence for the offence for which the offender has been convicted — which must be a minimum punishment of imprisonment for a term of two years — and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or

(c) impose a sentence for the offence for which the offender has been convicted.

Sentence of indeterminate detention

(4.1) The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

If application made after sentencing

(4.2) If the application is made after the offender begins to serve the sentence in a case to which paragraphs (2)(a) and (b) apply, a sentence imposed under paragraph (4)(a), or a sentence imposed and an order made under paragraph 4(b), replaces the sentence that was imposed for the offence for which the offender was convicted.

If offender not found to be dangerous offender

(5) If the court does not find an offender to be a dangerous offender,

(a) the court may treat the application as an application to find the offender to be a long-term offender, section 753.1 applies to the application and the court may either find that the offender is a long-term offender or hold another hearing for that purpose; or

(b) the court may impose sentence for the offence for which the offender has been convicted.

(6) [Repealed, 2008, c. 6, s. 42]

Application for remand for assessment — later conviction

753.01 (1) If an offender who is found to be a dangerous offender is later convicted of a serious personal injury offence or an offence under subsection 753.3(1), on application by the prosecutor, the court shall, by order in writing, before sentence is imposed, remand the offender, for a period not exceeding 60 days, to the custody of a person designated by the court who can perform an assessment or have an assessment performed by experts for use as evidence in an application under subsection (4).

Report

(2) The person to whom the offender is remanded shall file a report of the assessment with the court not later than 30 days after the end of the assessment period and make copies of it available to the prosecutor and counsel for the offender.

Extension of time

(3) On application by the prosecutor, the court may extend the period within which the report must be filed by a maximum of 30 days if the court is satisfied that there are reasonable grounds to do so.

Application for new sentence or order

(4) After the report is filed, the prosecutor may apply for a sentence of detention in a penitentiary for an indeterminate period, or for an order that

the offender be subject to a new period of long-term supervision in addition to any other sentence that may be imposed for the offence.

Sentence of indeterminate detention

(5) If the application is for a sentence of detention in a penitentiary for an indeterminate period, the court shall impose that sentence unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a sentence for the offence for which the offender has been convicted — with or without a new period of long-term supervision — will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

New long-term supervision

(6) If the application is for a new period of long-term supervision, the court shall order that the offender be subject to a new period of long-term supervision in addition to a sentence for the offence for which they have been convicted unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that the sentence alone will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

Victim evidence

753.02 Any evidence given during the hearing of an application made under subsection 753(1) by a victim of an offence for which the offender was convicted is deemed also to have been given during any hearing held with respect to the offender under paragraph 753(5)(a) or subsection 753.01(5) or (6).

Application for finding that an offender is a long-term offender

753.1 (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that

(a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;

(b) there is a substantial risk that the offender will reoffend; and

(c) there is a reasonable possibility of eventual control of the risk in the community.

Substantial risk

(2) The court shall be satisfied that there is a substantial risk that the offender will reoffend if

(a) the offender has been convicted of 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), or has engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted; and

(b) the offender

(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.

Sentence for long-term offender

(3) If the court finds an offender to be a long-term offender, it shall

(a) impose a sentence for the offence for which the offender has been convicted, which must be a minimum punishment of imprisonment for a term of two years; and

(b) order that the offender be subject to long-term supervision for a period that does not exceed 10 years.

Exception — if application made after sentencing

(3.1) The court may not impose a sentence under paragraph (3)(a) and the sentence that was imposed for the offence for which the offender was convicted stands despite the offender's being found to be a long-term offender, if the application was one that

(a) was made after the offender begins to serve the sentence in a case to which paragraphs 753(2)(a) and (b) apply; and

(b) was treated as an application under this section further to the court deciding to do so under paragraph 753(5)(a).

(4) and (5) [Repealed, 2008, c. 6, s. 44]

If offender not found to be long-term offender

(6) If the court does not find an offender to be a long-term offender, the court shall impose sentence for the offence for which the offender has been convicted.

Long-term supervision

753.2 (1) Subject to subsection (2), an offender who is subject to long-term supervision shall be supervised in the community in accordance with the *Corrections and Conditional Release Act* when the offender has finished serving

(a) the sentence for the offence for which the offender has been convicted; and

(b) all other sentences for offences for which the offender is convicted and for which sentence of a term of imprisonment is imposed on the offender, either before or after the conviction for the offence referred to in paragraph (a).

Sentence served concurrently with supervision

(2) A sentence imposed on an offender referred to in subsection (1), other than a sentence that requires imprisonment, is to be served concurrently with the long-term supervision.

Application for reduction in period of long-term supervision

(3) An offender who is required to be supervised, a member of the National Parole Board, or, on approval of that Board, the parole supervisor, as that expression is defined in subsection 134.2(2) of the *Corrections and Conditional Release Act*, of the offender, may apply to a superior court of criminal jurisdiction for an order reducing the period of long-term supervision or terminating it on the ground that the offender no longer presents a substantial risk of reoffending and thereby being a danger to the community. The onus of proving that ground is on the applicant.

Notice to Attorney General

(4) The applicant must give notice of an application under subsection (3) to the Attorney General at the time the application is made.

Breach of long-term supervision

753.3 (1) An offender who, without reasonable excuse, fails or refuses to comply with long-term supervision is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years.

Where accused may be tried and punished

(2) An accused who is charged with an offence under subsection (1) may be tried and punished by any court having jurisdiction to try that offence in the place where the offence is alleged to have been committed or in the place where the accused is found, is arrested or is in custody, but if the place where the accused is found, is arrested or is in custody is outside the province in which the offence is alleged to have been committed, no proceedings in respect of that offence shall be instituted in that place without the consent of the Attorney General of that province.

New offence

753.4 (1) If an offender who is subject to long-term supervision commits one or more offences under this or any other Act and a court imposes a sentence of imprisonment for the offence or offences, the long-term supervision is interrupted until the offender has finished serving all the sentences, unless the court orders its termination.

Reduction in term of long-term supervision

(2) A court that imposes a sentence of imprisonment under subsection (1) may order a reduction in the length of the period of the offender's long-term supervision.

Hearing of application

754. (1) With the exception of an application for remand for assessment, the court may not hear an application made under this Part unless

(a) the Attorney General of the province in which the offender was tried has, either before or after the making of the application, consented to the application;

(b) at least seven days notice has been given to the offender by the prosecutor, following the making of the application, outlining the basis on which it is intended to found the application; and

(c) a copy of the notice has been filed with the clerk of the court or the provincial court judge, as the case may be.

By court alone

(2) An application under this Part shall be heard and determined by the court without a jury.

When proof unnecessary

(3) For the purposes of an application under this Part, where an offender admits any allegations contained in the notice referred to in paragraph (1)(b), no proof of those allegations is required.

Proof of consent

(4) The production of a document purporting to contain any nomination or consent that may be made or given by the Attorney General under this Part and purporting to be signed by the Attorney General is, in the absence of any evidence to the contrary, proof of that nomination or consent without proof of the signature or the official character of the person appearing to have signed the document.

Exception to long-term supervision — life sentence

755. (1) The court shall not order that an offender be subject to long-term supervision if they have been sentenced to life imprisonment.

Maximum length of long-term supervision

(2) The periods of long-term supervision to which an offender is subject at any particular time must not total more than 10 years.

756. [Repealed, 1997, c. 17, s. 5]

Evidence of character

757. Without prejudice to the right of the offender to tender evidence as to their character and repute, if the court thinks fit, evidence of character and repute may be admitted

(a) on the question of whether the offender is or is not a dangerous offender or a long-term offender; and

(b) in connection with a sentence to be imposed or an order to be made under this Part.

Presence of accused at hearing of application

758. (1) The offender shall be present at the hearing of the application under this Part and if at the time the application is to be heard

(a) he is confined in a prison, the court may order, in writing, the person having the custody of the accused to bring him before the court; or

(b) he is not confined in a prison, the court shall issue a summons or a warrant to compel the accused to attend before the court and the provisions of Part XVI relating to summons and warrant are applicable with such modifications as the circumstances require.

Exception

(2) Notwithstanding subsection (1), the court may

(a) cause the offender to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible; or

(b) permit the offender to be out of court during the whole or any part of the hearing on such conditions as the court considers proper.

Appeal — offender

759. (1) An offender who is found to be a dangerous offender or a long-term offender may appeal to the court of appeal from a decision made under this Part on any ground of law or fact or mixed law and fact.

(1.1) [Repealed, 2008, c. 6, s. 51]

Appeal — Attorney General

(2) The Attorney General may appeal to the court of appeal from a decision made under this Part on any ground of law.

Disposition of appeal

(3) The court of appeal may

(a) allow the appeal and

(i) find that an offender is or is not a dangerous offender or a long-term offender or impose a sentence that may be imposed or an order that may be made by the trial court under this Part, or

(ii) order a new hearing, with any directions that the court considers appropriate; or

(b) dismiss the appeal.

(3.1) and (3.2) [Repealed, 2008, c. 6, s. 51]

Effect of decision

(4) A decision of the court of appeal has the same force and effect as if it were a decision of the trial court.

(4.1) to (5) [Repealed, 2008, c. 6, s. 51]

Commencement of sentence

(6) Notwithstanding subsection 719(1), a sentence imposed on an offender by the court of appeal pursuant to this section shall be deemed to have commenced when the offender was sentenced by the court by which he was convicted.

Part XXI applies re appeals

(7) The provisions of Part XXI with respect to procedure on appeals apply, with such modifications as the circumstances require, to appeals under this section.

Disclosure to Correctional Service of Canada

760. Where a court finds an offender to be a dangerous offender or a long-term offender, the court shall 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.

Review for parole

761. (1) Subject to subsection (2), where a person is in custody under a sentence of detention in a penitentiary for an indeterminate period, the National Parole Board shall, as soon as possible after the expiration of seven years from the day on which that person was taken into custody and not later than every two years after the previous review, review the condition, history and circumstances of that person for the purpose of determining whether he or she should be granted parole under Part II of the *Corrections and Conditional Release Act* and, if so, on what conditions.

Idem

(2) Where a person is in custody under a sentence of detention in a penitentiary for an indeterminate period that was imposed before October 15, 1977, the National Parole Board shall, at least once in every year, review the condition, history and circumstances of that person for the purpose of determining whether he should be granted parole under Part II of the *Corrections and Conditional Release Act* and, if so, on what conditions.

Disproportionate Sentencing Schemes

Sentencing Act 1991 *(Vic)*

Part 2A—Serious Offenders

6A Application of Part
This Part applies to a court in sentencing—

(a) a serious sexual offender for a sexual offence or a violent offence;

(b) a serious violent offender for a serious violent offence;

(c) a serious drug offender for a drug offence;

(d) a serious arson offender for an arson offence.

6B Definitions for purposes of this Part
(1) In this Part—

arson offence means an offence to which clause 5 of Schedule 1 applies;

drug offence means an offence to which clause 4 of Schedule 1 applies;

serious violent offence means an offence to which clause 3 of Schedule 1 applies;

sexual offence means an offence to which clause 1 of Schedule 1 applies;

violent offence means an offence to which clause 2 of Schedule 1 applies.

(2) In this Part—

serious arson offender means an offender (other than a young offender) who has been convicted of an arson offence for which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre;

serious drug offender means an offender (other than a young offender) who has been convicted of a drug offence for which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre;

serious sexual offender means an offender (other than a young offender)—

(a) who has been convicted of 2 or more sexual offences for each of which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre; or

(ab) who has been convicted of an offence to which clause 1(a)(viii) of Schedule 1 applies for which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre; or

(b) who has been convicted of at least one sexual offence and at least one violent offence arising out of the one course of conduct for each of which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre;

serious violent offender means an offender (other than a young offender) who has been convicted of a serious violent offence for which he or she has

been sentenced to a term of imprisonment or detention in a youth justice centre.

(3) In this Part—

relevant offence, in relation to a serious offender, means—

(a) an arson offence in the case of a serious arson offender;

(b) a drug offence in the case of a serious drug offender;

(c) a sexual offence or a violent offence in the case of a serious sexual offender;

(d) a serious violent offence in the case of a serious violent offender;

serious offender means—

(a) serious arson offender; or

(b) serious drug offender; or

(c) serious sexual offender; or

(d) serious violent offender.

6C Factors relevant to consideration of whether offender is a serious offender

(1) In considering whether an offender being sentenced is a serious offender, a court must have regard to a conviction or convictions for a relevant offence irrespective of whether recorded—

(a) in the current trial or hearing; or

(b) in another trial or hearing; or

(c) in different trials or hearings held at different times; or

(d) in separate trials of different charges in the one indictment.

(2) In sentencing an offender a court may only treat a conviction for an offence as a conviction for a relevant offence if it is satisfied beyond reasonable doubt that it is.

(3) Despite subsection (2), in sentencing an offender a court must have regard to a conviction for an offence against a law of the Commonwealth or of a place outside Victoria (whether or not in Australia) and must treat it as a conviction for a relevant offence if it is satisfied beyond reasonable doubt that—

(a) the offence is substantially similar to an arson offence, drug offence, serious violent offence, sexual offence or violent offence (as the case requires); and

(b) the offender was for that offence sentenced to a term of imprisonment or detention.

(4) Division 2 of Part 5.8 of Chapter 5 of the **Criminal Procedure Act 2009** applies for the purposes of subsection (3) in relation to the proof of a previous conviction within the meaning of that section.

6D Factors relevant to length of prison sentence

If under section 5 the Supreme Court or the County Court in sentencing a serious offender for a relevant offence considers that a sentence of imprisonment is justified, the Court, in determining the length of that sentence—

(a) must regard the protection of the community from the offender as the principal purpose for which the sentence is imposed; and

(b) may, in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence considered in the light of its objective circumstances.

6E Sentences to be served cumulatively

Every term of imprisonment imposed by a court on a serious offender for a relevant offence must, unless otherwise directed by the court, be served cumulatively on any uncompleted sentence or sentences of imprisonment imposed on that offender, whether before or at the same time as that term.

6F Serious offender status to be noted on record

(1) A court that sentences a serious offender for a relevant offence must, at the time of doing so, cause to be entered in the records of the court in respect of that offence the fact that the offender was sentenced for it as a serious offender.

(2) Despite anything to the contrary in the **Evidence Act 2008** or the **Criminal Procedure Act 2009**, a statement of the fact that an offender was sentenced for a relevant offence as a serious offender may be included in a certificate issued under section 178 of the **Evidence Act 2008** or in a criminal record filed under Division 2 of Part 5.8 of Chapter 5 of the **Criminal Procedure Act 2009**.

Criminal Law (Sentencing) Act 1988 (SA)

Division 2A—Serious repeat adult offenders and recidivist young offenders

20A—Interpretation and application

(1) In this Division—

home invasion means a criminal trespass committed in a place of residence while a person is lawfully present in the place and the trespasser knows of the person's presence or is reckless about whether anyone is in the place;

serious drug offence means—

(a) an offence against Part 5 Division 2 or 3 of the *Controlled Substances Act 1984* or a substantially similar offence against a corresponding previous enactment; or

(b) a conspiracy to commit, or an attempt to commit, such an offence;

serious offence means—

(a) a serious drug offence; or

(ab) an offence against a law of the Commonwealth dealing with the unlawful importation of drugs into Australia; or

(b) one of the following offences:

(i) an offence under Part 3 of the *Criminal Law Consolidation Act 1935*;

(ii) an offence of robbery or aggravated robbery;

(iii) home invasion;

(iv) an offence of damage to property by fire or explosives;

(v) an offence of causing a bushfire;

(vi) an offence against a corresponding previous enactment substantially similar to an offence referred to in any of the preceding subparagraphs;

(vii) a conspiracy to commit, or an attempt to commit, an offence referred to in any of the preceding subparagraphs; or

Note— A person who acts as an accessary to the commission of an offence described in paragraph (b) is, by virtue of section 267 of the *Criminal Law Consolidation Act 1935*, guilty of the principal offence and has, therefore, committed a serious offence.

(c) an offence that is committed in circumstances in which the offender uses violence or a threat of violence for the purpose of committing the offence, in the course of committing the offence, or for the purpose of escaping from the scene of the offence; or

(d) an offence against the law of another State or a Territory that would, if committed in this State, be a serious offence;

serious sexual offence means—

(a) any of the following serious offences:

(i) an offence against section 48, 48A, 49, 50, 56, 58, 59, 60, 63, 63B, 66, 67, 68 or 72 of the *Criminal Law Consolidation Act 1935*;

(ia) an offence against a corresponding previous enactment substantially similar to an offence referred to in subparagraph (i);

(ii) an attempt to commit or an assault with intent to commit any of those offences; or

(b) an offence against the law of another State or a Territory corresponding to an offence referred to in paragraph (a).

(2) For the purposes of this Division, an offence will not be regarded as a serious offence unless the maximum penalty prescribed for the offence is, or includes, imprisonment for at least 5 years.

(3) An offence is one to which this Division applies if the offence is a serious offence and—

(a) a sentence of imprisonment (other than a suspended sentence) has been imposed for the offence; or

(b) if a penalty is yet to be imposed—a sentence of imprisonment (other than a suspended sentence) is, in the circumstances, the appropriate penalty.

20B—Declaration that person is serious repeat offender

(1) A person is liable to be declared a serious repeat offender if the following conditions apply:

(a) the person (whether as an adult or as a youth)—

(i) has committed on at least 3 separate occasions an offence to which this Division applies (whether or not the same offence on each occasion); and

(ii) has been convicted of those offences; or

(b) the person (whether as an adult or as a youth)—

(i) has committed on at least 2 separate occasions a serious sexual offence against a person or persons under the age of 14 years (whether or not the same offence on each occasion); and

(ii) has been convicted of those offences.

(3) 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 a declaration that he or she is a serious repeat offender, the court—

(a) must consider whether to make such a declaration; and

(b) if of the opinion that the person's history of offending warrants a particularly severe sentence in order to protect the community—should make such a declaration.

(4) 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—

(a) the court is not bound to ensure that the sentence it imposes for the offence is proportional to the offence; and

(b) any non-parole period fixed in relation to the sentence must be at least four-fifths the length of the sentence.

Division 3—Dangerous offenders

33—Interpretation

(1) In this Division—

serious sexual offence means any of the following offences where the maximum penalty prescribed for the offence is, or includes, imprisonment for at least 5 years:

(a) —

(i) an offence under section 48, 49, 56, 58, 59, 60, 63, 63B, 66, 67, 68, 72 or 74 of the *Criminal Law Consolidation Act 1935*;

(ia) an offence against a corresponding previous enactment substantially similar to an offence referred to in subparagraph (i);

(ii) an attempt to commit or an assault with intent to commit any of the offences referred to in either of the preceding subparagraphs;

(b) an offence against the law of another State or a Territory corresponding to an offence referred to in paragraph (a).

(2) For the purposes of this Division—

(a) an offence will be taken to have been committed in ***prescribed circumstances*** if, in the opinion of the Attorney-General—

(i) the offence was committed in the course of deliberately and systematically inflicting severe pain on the victim; or

(ii) there are reasonable grounds to believe that the offender also committed a serious sexual offence against or in relation to the victim of the offence in the course of, or as part of the events surrounding, the commission of the offence (whether or not the offender was also convicted of the serious sexual offence); and

(b) a reference to an ***offence of murder*** includes—

(i) an offence of conspiracy to murder; and

(ii) an offence of aiding, abetting, counselling or procuring the commission of murder.

(3) No proceeding for judicial review or for a declaration, injunction, writ, order or other remedy may be brought to challenge or question a decision of the Attorney-General under subsection (2).

33A—Dangerous offenders

(1) If a person has been convicted, whether before or after the commencement of this Division, of an offence of murder and the offence was committed in prescribed circumstances, the Attorney-General may, while the person remains in prison serving a sentence of imprisonment, apply to the Supreme Court to have the person declared to be a dangerous offender.

(2) An application cannot be made under subsection (1) more than 12 months before the person is eligible to apply for release on parole.

(3) The Court must give the person at least 14 days written notice of the date on which it intends to conduct the proceedings to determine the application.

(4) If the Court is of the opinion that a report from the Parole Board may assist the Court in determining an application under this section, the Court may direct the Board to hold an inquiry and report to the Court.

(5) The Parole Board may exercise such powers as are conferred on the Board under Part 6 of the *Correctional Services Act 1982* as are necessary or expedient for, or incidental to, the purposes of an inquiry under subsection (4).

(6) Each of the following persons is entitled to appear and be heard in proceedings under this section and must be afforded a reasonable opportunity to call and give evidence, to examine or cross-examine witnesses, and to make submissions to the Court:

(a) the person (personally or by counsel);

(b) the Director of Public Prosecutions;

(c) the Commissioner for Victims' Rights.

(7) The paramount consideration of the Court when determining an application under this section must be to protect the safety of the community (whether as individuals or in general).

(8) The Court may also take the following matters into consideration when determining an application under this section:

(a) any relevant remarks made by the court in passing sentence;

(b) the degree to which the person has shown contrition for the relevant offence;

(c) the behaviour of the person while in prison;

(d) any rehabilitation of the person while in prison;

(e) the willingness of the person to co-operate with an inquiry (if any) by the Parole Board under this section;

(f) any reports tendered, and submissions made, to the Court under this section;

(g) the likelihood of the person committing a serious sexual offence, an offence of murder or some other serious offence of a violent nature should the person be released from prison;

(h) whether the non-parole period imposed by the court when sentencing the person for the relevant offence was reduced as a consequence of the commencement of the *Statutes Amendment (Truth in Sentencing) Act 1994*;

(i) the character, antecedents, age, means and physical or mental condition of the person;

(j) the probable circumstances of the person after release from prison;

(k) any other matters that the Court thinks are relevant.

(9) If the Court is satisfied, on the balance of probabilities, that the release from prison of the person to whom the application relates would involve a serious danger to the community or a member of the community, the Court must—

(a) declare the person to be a dangerous offender; and

(b) order that the non-parole period fixed in respect of the sentence of imprisonment for the murder be negated.

(10) A person who has been declared to be a dangerous offender under this section—

(a) will serve his or her sentence of imprisonment as if the fixing of a non-parole period in respect of that sentence of imprisonment had been declined by order of the court under section 32; and

(b) may not make an application under that section for the fixing of a non-parole period for at least 12 months after having been so declared.

33AB—Appeal

(1) An appeal lies to the Full Court against a decision by the Supreme Court—

(a) to make a declaration and order under this Division; or

(b) not to make a declaration and order under this Division.

(2) An appeal under this section may be instituted by the Attorney-General or by the person to whom the particular decision relates.

(3) Subject to a contrary order of the Full Court, an appeal cannot be commenced after 10 days from the date of the decision against which the appeal lies.

(4) On an appeal, the Full Court may—

(a) confirm or annul the decision subject to appeal;

(b) remit the decision subject to appeal to the Supreme Court for further consideration or reconsideration;

(c) make consequential or ancillary orders.

33B—Division does not affect Governor's powers etc in relation to parole
Nothing in this Division has any effect on the powers and authorities conferred on, or vested in, the Governor in relation to parole.