ALS
Aboriginal Legal Service (NSW/ACT) Limited

Review of the *Crimes (Serious Sex Offenders) Amendment Act 2013*

Aboriginal Legal Service (NSW/ACT) submission to the NSW Department of Justice

February 2016

About ALS

ALS is an Aboriginal community organisation that provides legal assistance to Aboriginal and Torres Strait Islander men, women, and children in NSW and the ACT.

ALS operates a criminal law, family law, and care and protection law practice providing legal advice and court representation. In addition to legal services, ALS provides information and referral for civil matters, work and development orders and other non-legal matters.

ALS also operates a Custody Notification Service assisting Aboriginal men, women and children taken into police custody with early legal advice and an RU OK welfare check.

ALS has 23 offices across NSW and the ACT, making it the largest private criminal defence practice in NSW.

ALS prides itself on achieving culturally appropriate justice for Aboriginal people and communities.

1. Introduction

The 2013 amendment to the *Crimes (High Risk Offenders) Act 2006*[1] was extremely contentious and received strong opposition.[2]

The amendment extended "the existing scheme of continuing detention and extended supervision of serious sex offenders to high risk violent offenders."[3]

The purpose of this amendment was to ensure the safety and protection of the community, and to encourage high risk violent offenders to undertake rehabilitation.[4]

Section 32 of the Act[5] requires a review of the amendment after three years. In accordance with this provision, this submission will consider:

- Whether the above policy objectives remain valid; and
- Whether the terms of the Act remain appropriate for securing those objectives.

2. Validity of policy objectives

2.1 Background

In the Second Reading Speech, the then Attorney General and Minister for Justice, the Honourable Greg Smith SC, stated:

> *"We want serious violent offenders to undergo treatment, under extensive supervision, that assists them to reintegrate into the community and obey the law. This legislation will help ensure that dangerous offenders who refuse to undertake rehabilitation during their sentence can be properly supervised in the community and detained if necessary."*[6]

The ALS agrees that community protection must be a priority. The ALS does not challenge the validity of this policy objective.

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[1] Previously known as the *Crimes (Serious Sex Offenders) Act 2006* (NSW).
[2] Law Society Criminal Law Committee; Law Society Juvenile Justice Committee.
[3] The Hon Greg Smith SC, *Crimes (Serious Sex Offenders) Amendment Bill 2013,* Second Reading Speech, 20 February 2013, <http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/131a07fa4b8a041cca256e610012de17/c30d6b6ceaf99a7eca257b17001626ff/$FILE/2R%20(Crimes%20(Serious%20Sex%20Offenders).pdf>
[4] Ibid; *Crimes (High Risk Offenders Act) 2006* (NSW), s. 3.
[5] *Crimes (High Risk Offenders) Act 2006* (NSW).
[6] The Hon Greg Smith SC, Second Reading Speech, above n3.

However, the Honourable Greg Smith SC further stated that the *Crimes (High Risk Offenders) Act 2006* represents a 'balanced response'.[7] The Act provides:

> *'Options for ongoing supervision of highly dangerous offenders'… and 'for the assessment of risk, not by a superficial or mathematical exercise, but one undertaken by a judge of the Supreme Court, who will be informed by the reports of clinical experts who have conducted individual examinations of the offender.'*[8]

The ALS disagrees with this claim that the Act represents a balanced response between safeguarding the rights of high risk offenders and protecting the community, as the current legislation in its operation encroaches too far upon the civil liberties of offenders.

2.2 Impact on civil liberties

In a letter to the Attorney General, the Law Society of NSW highlighted the difficulty of assessing whether a violent offender poses a high risk to the community under the current legislation, as a level of prediction is required in assessing the probability of reoffending.[9] The NSW Sentencing Council also reported that predicting the risk of violent reoffending is problematic as it comes down to two factors: the diversity of the cohort, and the fact that high risk violent offenders 'are not generally specialists', but rather engage in violent behaviour as part of a broader criminal career.[10] For example, the offences committed by the 14 violent offenders that were deemed 'high risk' under the new Act varied from robbery, to kidnap and murder.[11]

In *Fardon v Attorney-General for the State of Queensland*,[12] Kirby J came to a similar conclusion stating that the current legislation relies "largely … on the opinions of psychiatrists which can only be, at best, an educated or informed "guess."[13]

The ALS submits that where legislation, such as in this case, has the potential to abrogate civil liberties (right to a fair trial, equality before the law, freedom from indefinite or arbitrary detention and the rule against double jeopardy) a higher

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[7] The Hon Greg Smith SC, *Crimes (Serious Sex Offenders) Amendment Bill 2013,* Second Reading Speech, 20 February 2013, <http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/131a07fa4b8a041cca256e610012de17/c30d6b6ceaf99a7eca257b17001626ff/$FILE/2R%20(Crimes%20(Serious%20Sex%20Offenders).pdf>

[8] Ibid.

[9] J Dobson, Letter to the Attorney General, *Law Society of NSW*, 25 February 2013, <https://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/689052.pdf>

[10] NSW Department of Justice and Attorney-General, *Review of the Crimes (Serious Sex Offenders) Act* 2006 (2010) p. 97 in T Tulich (2015), 'Post-Sentence Preventive Detention and Extended Supervision of High Risk Offenders in New South Wales' *UNSW Law Journal* 38(2), p. 842, <http://www.austlii.edu.au/au/journals/UNSWLJ/2015/29.html>

[11] Ibid.

[12] (2004) 223 CLR 575

[13] Ibid, [125].

threshold should be imposed. Improving this standard is particularly important for Aboriginal people, who have a long history of having their rights violated.[14]

2.3 Impact on fundamental legal principles

In *Veen v R (No. 2)*,[15] the majority emphasised the importance of the principle of proportionality. The majority affirmed the finding in *Veen (No.1)*[16] that:

> *'a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender.'*[17]

The majority further stated that to do so 'would be to punish the offender not for the offence of which he has been convicted but for the potential offences that he may commit in the future.'[18] The ALS is concerned that the current legislation overlooks this fundamental and long-standing principle of our justice system.

Section 18 of the *Crimes (High Risk Offenders) Act 2006* also offends the principle of finality,[19] as it allows a continuing detention order to be made for up to five years for high risk offenders at the end of their sentence. This is problematic as it creates the potential for some offenders to be imprisoned indefinitely. The prospects of not being released may also have a negative impact on an offender's efforts at rehabilitation.

Furthermore, s. 18CA[20] departs from procedural fairness, as it permits applications for emergency detention orders to be made in the absence of offenders. This is problematic as the Court relies solely upon the evidence of the applicant, which is not challenged.[21] The ALS highlights criticisms that the current Act allows orders to

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[14] See H Davidson, 'Northern Territory Youth Justice System risks breaching Human Rights', *The Guardian*, published on 21 September 2015, viewed on 10 February 2016, <http://www.theguardian.com/australia-news/2015/sep/21/northern-territory-youth-justice-system-risks-breaching-human-rights-un-told>; S Irvine, 'UN: Australia is not meeting human rights obligations to First People with Disability, published on 14 October 2013, viewed on 10 February 2016, <http://www.abc.net.au/rampup/articles/2013/10/14/3868347.htm>

[15] [1988] HCA 14.

[16] *Veen v The Queen (No. 1)* [1979] HCA 7.

[17] *Veen v R (No 2)* [1988] HCA 14, [8].

[18] Ibid, [15].

[19] The principle of finality means that '*No one shall be liable to be tried and punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country*'. *International Covenant on Civil and Political Rights* (ICCPR), Article 14(7).

[20] *Crimes (High Risk Offenders) Act 2006* (NSW).

[21] T Tulich (2015), 'Post-Sentence Preventive Detention and Extended Supervision of High Risk Offenders in New South Wales' *UNSW Law Journal* 38(2), p. 848, <http://www.austlii.edu.au/au/journals/UNSWLJ/2015/29.html>

be made that deprive individuals of their liberty without requiring their presence at hearings.[22]

2.4 Creation of a 'Public Interest Monitor'

David Shoebridge, member of the NSW Legislative Council, has suggested that a Public Interest Security Monitor be appointed in NSW to address the above concerns about ex parte hearings for emergency detention orders. He explains that a monitor will be needed to 'test the evidence, to cross-examine deponents of applications and to inject integrity into the system'. [23]

Tulich points out that the idea of a Public Interest Monitor is not new. Public Interest Monitors already exist in Queensland and Victoria, where they appear in court proceedings made for warrants and other orders, testing the strength of the application.[24]

The ALS supports this recommendation as the creation of a Public Interest Monitor would ensure there is an objective third party involved in the process. This will also create greater safeguards for offenders' interests and will promote accountability and transparency.

2.5 The danger of lowering evidential thresholds

The 'high degree of probability' test is applied by the Supreme Court when determining applications for extended supervision orders.[25] "A high degree of probability' is a standard of proof between the criminal and civil standard.'[26]

In all criminal matters, the prosecution burden is 'beyond reasonable doubt', which takes into account the greater resources of the state compared to the individual defendant. When applications are made for extended supervision or detention orders, it presents the same situation - the state against the individual - therefore the same test should be applied. The lower threshold currently applied in these cases unfairly disadvantages high risk offenders and creates inconsistency in the way they are treated, resulting in inequality before the law.

[22] T Tulich (2015), 'Post-Sentence Preventive Detention and Extended Supervision of High Risk Offenders in New South Wales'. *UNSW Law Journal* 38(2), p. 848,
[23] Ibid.
[24] Ibid, pp. 849-850.
[25] *Crimes (High Risk Offenders) Act 2006,* s. 5B(2).
[26] T Tulich (2015), 'Post-Sentence Preventive Detention and Extended Supervision of High Risk Offenders in New South Wales'. *UNSW Law Journal* 38(2), p. 851.

2.6 Practical operation of the legislation

Supervision orders are confusing and complex, leaving high risk offenders unaware of what they can and cannot do.[27] Some supervision orders are up to six pages long and have been quoted as being 'written in language that even lawyers have difficulty understanding.'[28] One Queensland lawyer has stated that 'there is a real risk of people simply not understanding the content of their supervision order, either through a lack of intelligence or a lack of English skills.'[29] Another Queensland Lawyer stated that this is 'particularly the case for Indigenous offenders, whose level of English, which is often their second language, is not good.'[30] All of these factors have been said to result in unintentional breach.[31]

The penalties for non-compliance of extended supervision orders have significantly increased. Prior to the amendments, the penalty for the breach of orders was imprisonment for two years or 100 penalty units or both.[32] The penalty for breach is now imprisonment for five years or 500 penalty units or both.[33] The ALS questions how an increase of 2.5 times the original penalty can be justified. The ALS is also concerned about how this increase may impact upon Aboriginal people, as the Director of the Bureau of Crime Statistics and Research, Dr Don Weatherburn, has commented that 'whenever the justice system gets tougher, as it has in New South Wales and other states, it always has a bigger impact on Aboriginal people than it does on non-Aboriginal people.'[34]

2.7 Impact on Aboriginal and Torres Strait Islander peoples

Violence is a major feature of Indigenous offending.[35] In 2014, the NSW Department of Justice reported that 40% of the Indigenous prison population in that state were

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[27] P Keyzer & B McSherry (2015), 'The Preventative Detention of Sex Offenders: Law and Practice'. *UNSW Law Journal* , 38(2), p. 820,
<http://www.unswlawjournal.unsw.edu.au/sites/default/files/t8_keyzer_mcsherry.pdf>
[28] Ibid
[29] Ibid
[30] Ibid
[31] Ibid.
[32] T Tulich (2015), 'Post-Sentence Preventive Detention and Extended Supervision of High Risk Offenders in New South Wales'. *UNSW Law Journal* 38(2), p. 850.
<http://www.austlii.edu.au/au/journals/UNSWLJ/2015/29.html>
[33] Ibid.
[34] H Aldrich (2014) , 'NSW Bail Laws and Indigenous Australians', *Carroll & O'Dea Lawyers*,
<http://codea.com.au/Publication-1718-nsw-bail-laws-and-indigenous-australians.aspx>
[35]Discussion paper prepared by the Committee Secretariat (2010), 'Indigenous Australians, Incarceration and the Criminal Justice System', *The Senate: Select Committee on Regional and Remote Indigenous Communities*, p. 24.
<http://www.alsnswact.org.au/media/BAhbBlsHOgZmSSJhMjAxMS8wOC8xNS8yM18yNF80Ml80NTRfSW5kaWdlbm91c19BdXN0cmFsaWFuc19JbmNhcmNlcmF0aW9uX2FuZF90aGVfQ0pTX09jdF8yMDEwX1NlbmF0ZS5wZGYGOgZFVA>

serving sentences for violence.[36] An earlier report found that 'rates of hospitalisation as the result of spousal assault are 35 times higher in the Indigenous population.'[37] This higher occurrence of violence in Aboriginal communities has been directly linked to higher levels of social and economic inequality.[38]

Based on these statistics, the ALS highlights the potential for the current legislation to impact disproportionately upon Aboriginal and Torres Strait Islander people, as they come into contact with the justice system more frequently for violent offending, and are therefore more likely to be classified as a 'high risk violent offenders.' This also means that Aboriginal and Torres Strait Islander imprisonment rates, which are already at crisis levels, will continue to increase.

Disproportionate imprisonment rates continue to be a concern. Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, has recently called for the Federal Government to adopt a new justice target given the 'massive overrepresentation of Indigenous people in jail.'[39] These recommendations are supported by Opposition Leader Bill Shorten, who has expressed a desire for the target to be made a key item on the agenda at the next Council of Australia Government meeting.[40] The ALS points out that the potential impact of the current legislation on Aboriginal imprisonment rates is at odds with these recommendations.

Mental health problems are also prevalent among the Indigenous prison population. Last year (2015), it was reported that 86% of Aboriginal women and 73% of Aboriginal men in custody were identified as having some form of mental illness.[41] The ALS is concerned that longer sentences for those Aboriginal people who are classified as 'high risk violent offenders', will have a negative impact on their well-being. The ALS submits that dealing with mentally ill violent offenders in this way is more punitive than rehabilitative.

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[36] NSW Government: Department of Justice (2014), *Criminal Justice Strategy: Strategy 4: Reduce the overrepresentation of Aboriginal people in the criminal justice system: program scoping document, p.4.*

[37] Per 100,000 during 2006-07, Discussion paper prepared by the committee secretariat, 'Indigenous Australians, Incarceration and the Criminal Justice System', *The Senate: Select Committee on Regional and Remote Indigenous Communities*, March 2010, p. (i), <http://www.alsnswact.org.au/media/BAhbBlsHOgZmSSJhMjAxMS8wOC8xNS8yM18yNF80Ml80NTRfSW5kaWdlbm91c19BdXN0cmFsaWFuc19JbmNhcmNlcmF0aW9uX2FuZF90aGVfQ0pTX09jdF8yMDEwX1NlbmF0ZS5wZGYGOgZFVA>

[38] R Wilkinson & K Pickett, Violence (2010), 'Gaining Respect, in The Spirit Level: Why More Equal Societies Almost Always Do Better', Allen Lane, 2009. In Discussion paper prepared by the Committee Secretariat, *Indigenous Australians, Incarceration and the Criminal Justice System*, *The Senate: Select Committee on Regional and Remote Indigenous Communities*, p (ii). <http://www.alsnswact.org.au/media/BAhbBlsHOgZmSSJhMjAxMS8wOC8xNS8yM18yNF80Ml80NTRfSW5kaWdlbm91c19BdXN0cmFsaWFuc19JbmNhcmNlcmF0aW9uX2FuZF90aGVfQ0pTX09jdF8yMDEwX1NlbmF0ZS5wZGYGOgZFVA>

[39] B Brennan, 'Malcolm Turnbull to deliver Close the Gap report card, tipped to show limited progress in key areas', *ABC*, published on 10 February 2016, viewed on 10 February 2016, <http://www.abc.net.au/news/2016-02-10/turnbull-to-deliver-closing-the-gap-report-card/7154042>

[40] Ibid.

[41] 'Deconstructing schizophrenia among Australia's First People', *The Stringer* 9.11.2014
Queensland in Korff, Jens 'Mental health at its worst in prison', *Creative Spirits* 18 November 2015
<http://www.creativespirits.info/aboriginalculture/law/mental-health-at-its-worst-in-prison#axzz3z9MlgYuB>

A more suitable approach for dealing with such offenders and satisfying policy objectives has been identified.[42] The Law Society of NSW has argued that the *Mental Health Act 2007* is sufficiently equipped to deal with high-risk violent offenders, as

> *'Offenders who are due for release who fall within the definition of mentally ill person or mentally disordered person under the [Act] can be involuntarily detained in a mental health facility if they present a risk of serious harm to themselves or others.'*[43]

The ALS agrees with this argument and submits that further treatment at a mental health facility will more effectively rehabilitate high risk violent offenders experiencing mental health problems.

3. Are the terms of the Act appropriate for securing policy objectives?

As previously mentioned, the ALS agrees that the terms of the *Crimes (High Risk Offenders) Act 2006,* improves community safety.

However, the ALS submits that the terms of the Act do not encourage offenders to undertake rehabilitation as more onerous conditions are placed upon those subject to extended supervision or detention orders, making breach more likely.

The imposition of extended orders may also create uncertainty for this group of offenders who are entitled to know what their sentences are and when they will come to an end. This may result in despondency amongst those offenders who could potentially face indefinite detention, impacting negatively upon rehabilitation efforts.

4. Conclusions

The ALS acknowledges that the primary purpose of the *Crimes (High Risk Offenders) Act 2006* is to promote community safety. However, the ALS submits that the end result does not justify the means, with the operation of the legislation encroaching too far upon the civil liberties of high risk violent offenders and overriding fundamental legal principles.

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[42] J Dobson, Letter to the Attorney General, *Law Society of NSW*, 25 February 2013, <https://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/689052.pdf>

[43] Ibid. Note: S. 37(1)(a) of the *Mental Health Act 2007* (NSW) requires a review of a patient's involuntary status at the end of the initial period of detention. S. 38(4) of the same Act permits a further period of detention to be imposed if more treatment is necessary.

The ALS is concerned that the current legislation disregards the important principles from *R v Royal* [44] that *'allowance cannot be made for rehabilitation by lengthening the overall sentence above that which is appropriate to reflect the objective seriousness of the offence'*;[45] and *Veen v R (No. 2)*,[46] where it was stated that *'a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender.'*[47] The ALS emphasises that these findings should be taken into account in the review.

The ALS finally submits that greater accountability needs to be built in to the process, which the ALS believes could be achieved through the introduction of a Public Interest Monitor.

The ALS thanks the NSW Department of Justice for the opportunity to make this submission.

[44] [2003] NSWCCA 275, as cited in T Tulich (2015), 'Post-Sentence Preventive Detention and Extended Supervision of High Risk Offenders in New South Wales' *UNSW Law Journal* 38(2), p. 849.
[45] Judicial Commission of NSW, 'Purposes of sentencing', viewed on 09 February 2016, <http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/purposes_of_sentencing.html>
[46] [1988] HCA 14.
[47] Veen v R (No 2) [1988] HCA 14, [8].