

OUR REFERENCE

DIRECTOR'S CHAMBERS

YOUR REFERENCE

DATE



11 February 2016

Director, Offender Strategy
NSW Department of Justice
GPO Box 31
Sydney NSW 2001

By email: policy@justice.nsw.gov.au

Dear Director,

Review of 2013 Amendments to the *Crimes (High Risk Offenders) Act 2006*

I refer to a letter sent to Mr Lloyd Babb SC, Director of Public Prosecutions received on 20th January 2016, seeking submissions with respect to changes made in 2013 to the *Crimes (High Risk Offenders) Act 2006* (the "Act").

I am responding on behalf of the Director.

As you would be aware, this Office's role in the application of the Act is limited but nonetheless I provide the following comments concerning the amendments introduced into Parliament in the *Crimes (Sex Offenders) Amendment Act 2013 No 4*. I note that submissions have not been sought in relation to the 2014 amendments to the same Act.

1. Amendments introduced in 2013

The main amendments introduced in 2013 were:

- 1.1 The addition of high risk violent offenders to the existing scheme which previously only covered high risk sexual offenders.
- 1.2 The introduction of continuing detention orders and extended supervision orders for high risk violent offenders, similar to the previous arrangements for high risk sex offenders.
- 1.3 The introduction of interim supervision orders and interim detention orders for both high risk sex offenders and high risk violent offenders [sections 10A – 10C and 18A -18C].
- 1.4 Clarification of the power of the Supreme Court to revoke an extended supervision order or a continuing detention order where there has been a change in circumstances which renders the order unnecessary [sections 13(1B) and 19(1B)] .
- 1.5 The introduction of a mandatory court warning about the existence of the Act and its application, to be delivered to a person being sentenced for a serious violent offence [section 25C].
- 1.6 Extension of the scheme to offenders who are now adults but were convicted of and imprisoned for a serious sex or violence offence as a child. This does not include a sentence imposed under section 33 of the *Children (Criminal Proceedings) Act 1987*.

2. Submissions on the 2013 Amendments

- 2.1 In our view the amendments were a necessary improvement to the previous scheme in which high risk violent offenders were excluded. The extension of the scheme to offences committed as a child by an offender who is now an adult was also necessary to ensure coverage of all potentially high risk offenders. In this context, the safeguard that the scheme does not apply to offences committed as child which were not sufficiently serious to be dealt with at law, i.e. those which resulted in a control order rather than imprisonment, is appropriate.
- 2.2 We also agree with the introduction of interim orders is a welcome addition to the scheme, as it provides a mechanism for ensuring the safety of the community where proceedings are underway to secure the extended supervision or continuing detention of a high risk offender, however those proceedings are unlikely to conclude before the offender's existing supervision or detention expires.
- 2.3 In order to achieve the aim of encouraging high risk violent offenders to undertake rehabilitation, the 2013 amendments introduced the mandatory warning which is to be given by a sentencing judge. The Judicial Commission has included the following paragraph in the Sentencing Bench Book in the section entitled "Procedural Fairness":

[1-070] Warning under Crimes (High Risk Offenders) Act 2006

A court that sentences a person for a serious violence offence is to cause the person to be advised of the existence of the *Crimes (High Risk Offenders) Act 2006* and of its application to the offence: s 25C. Serious violence offence is defined in s 5A. In the Local Court, a warning will be required for offences under ss 35, 35A(1), 39 and 49 *Crimes Act 1900*.

The following suggested form of words also includes a brief explanation of the operation of the Act and an encouragement to the offender to undertake rehabilitation (see s 3, which sets out the objects to the Act):

I am obliged to tell you of the existence of the Crimes (High Risk Offenders) Act 2006, which applies to 'serious violence offences' including the offence for which you have been sentenced.

In summary, this means that the State can apply to the Supreme Court for an order that you continue to receive supervision or be held in detention at the end of your sentence if the court considers you would be a 'high risk offender' who poses an unacceptable risk of committing a serious violence offence.

It is therefore in your interests to engage in rehabilitation opportunities that may be offered to you in the course of your sentence.

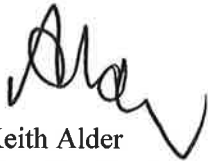
See also *R v ZZ* [2013] NSWCCA 83 at [149].

- 2.4 It is difficult to gauge how universally this warning is being made. Anecdotally it would appear that some judicial officers are not administering the warning, probably through oversight. DPP lawyers and defence legal representatives have a clear role in bringing the requirement to give this warning to the attention of the court where it has been overlooked.

2.5 The failure of a court to give the warning has the result that offenders are not being alerted to the adverse consequences for them which can flow from failure to meaningfully engage in rehabilitation. Many of the offenders to whom this warning would be given under the Act will not ultimately become high risk offenders. This may be affecting the less than universal adherence to the mandatory requirement found in section 25C. Nevertheless it is submitted that despite the low numbers of offenders who ultimately might fall foul of the provisions in the Act, the warning in section 25C can be of benefit to any offender to whom it is given, in terms of encouraging a positive attitude to rehabilitation. Thus a more stringent adherence to the section is necessary. In our view ongoing training of judicial officers and legal practitioners is needed.

If you require further information, please contact Ms Marianne Carey, Policy and Legal Adviser on 9285 8679.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Keith Alder', written in a cursive style.

Keith Alder

Deputy Director of Public Prosecutions