

Statutory Review of the Crimes (High Risk Offenders) Act 2006

**Legal Aid NSW submission to the
NSW Department of Justice**

February 2016

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance to socially and economically disadvantaged people across NSW.

Legal Aid NSW provides information, community legal education, advice, assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 Community Legal Centres (CLCs) and 28 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW provides statewide criminal law services through the in-house Criminal Law Practice and through

legal aid funding to private practitioners. The Criminal Law Practice services cover the full range of criminal matters before the Local Courts, District Court, Supreme Court of NSW and the Court of Criminal Appeal as well as the High Court of Australia.

Legal Aid NSW thanks the NSW Department of Justice for the opportunity to attend the round table that took place at the NSW Department of Justice on 4 February 2016 and for the opportunity to make a submission to the statutory review.

Should you require any further information please contact Nicholas Ashby, Solicitor, Strategic Policy and Planning, Legal Aid NSW, telephone 02 47254608 or Nicholas.ashby@legalaid.nsw.gov.au.

Defining the high risk violent offender cohort

Legal Aid NSW is opposed to expansion of the scope of qualifying behaviours contained within section 5A(1) of the Act. However, Legal Aid NSW does not oppose clarification of what should constitute qualifying behaviour pursuant to section 5A(2) of the Act, for example, clarification that wounding to a degree consistent with grievous bodily harm would qualify as the appropriate degree of harm.

Legal Aid NSW is opposed to expanding the cohort to include offenders who are serving sentences for offences of 'lesser' violence but who have a historic conviction for an offence that would otherwise qualify under section 5A(1). We refer to the NSW Sentencing Council Report (May 2012) and share the concerns expressed that capturing a wider range of offences risks a broader reach than intended. The experience of England and Wales was referenced in this regard, at paragraph 2.50 of the report.

The intention of Extended Supervision Orders (EDOs) and Continuing Detention Orders (CDOs), which are extraordinary measures, is to protect the community from reoffending by those offenders who present with the most serious risk to the community. Legal Aid NSW submits that this cohort should be no wider than necessary and that the existing provisions appropriately define qualifying offending behaviour.

Warnings

Post the 2013 reforms, the court sentencing an offender for a qualifying offence must warn the offender about the existence of the Act and its application to the offence.

Legal Aid NSW submits that for the scheme to be effective as intended, and for the offender to engage in meaningful pre-release rehabilitative courses such as the Violent Offender Treatment Program (VOTP), the warning scheme should be more robust.

Legal Aid NSW submits that for the scheme to be balanced fairly, there must be mechanisms in place to ensure that the violent offenders likely to be subject to applications under the Act are fully aware of the implications of failing to address their offending behaviour from the commencement of the sentence. In addition we submit that current prisoners who may be the subject of applications and who were not warned prior to commencement of the 2013 amendments should be properly informed about the Act and rehabilitation options in custody.

We would also support a review of the operation of the VOTP. In our experience, willing participants in the program, which requires a timeframe of approximately 9-10 months, may find their ability to undertake the program frustrated by factors such as movement between correctional centres, or insufficient numbers of suitable prisoners, meaning that the program may not commence in good time to allow completion prior to expected release.

Commencement of Proceedings

The Act provides that proceedings may be commenced at any point in the six month period prior to the expiry of the offender's head sentence. Legal Aid NSW submits that the practice of commencing proceedings within the last month should be curtailed. This practice offends principles of procedural fairness and is counter-productive to the rehabilitation of offenders.

Risk Assessment

The Sentencing Council recommended (at recommendation 3(b)) that an independent risk management body, such as the Risk Management Authority in Scotland, be established to facilitate and regulate best practice in relation to risk assessment and risk management. Legal Aid NSW supports the establishment of such a body to undertake and review independent risk assessments of high risk violent offenders.

In the experience of Legal Aid NSW, the risk assessment is undertaken by Corrective Services NSW, specifically by psychiatrists or psychologists employed or retained by Corrective Services NSW. In our submission, creation of an independent body to provide independent assessment and reviews would be consistent with the policy objectives of the Act and balance fairly the interests of the offender with protection of the community.

Conditions of Extended Supervision Orders

In our experience there may be over sixty conditions attached to Extended Supervision Orders. These may be so extensive that the offenders subject to such orders may not comprehend the nature of the orders and find themselves in breach through relatively minor infringement. We understand the need for strict conditions consistent with the policy objectives of the Act, and support the need for discretion on the part of Community Corrections when considering the need to commence breach proceedings.

We do not support the expansion of mandatory criminal charges flowing from specified breaches, for example, positive urine tests, and submit that the current regime is appropriate.