



NEW SOUTH WALES  
BAR ASSOCIATION

Servants of All Yet of None

Selborne Chambers  
B/174 Phillip Street  
Sydney NSW 2000

DX 1204 Sydney  
T +61 2 9232 4055  
E enquiries@nswbar.asn.au

ABN 18 526 414 014  
ACN 000 033 652

nswbar.asn.au

Our reference: 16/68

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

Dear Director

***Crimes (High Risk Offenders) Act 2006***

Thank you for giving the New South Wales Bar Association the opportunity to make a submission to the statutory review of the extensions to the *Crimes (High Risk Offenders) Act 2006* (the **Act**).

*Does the Act provide for the extended supervision and continuing detention of high risk violent offender so as to ensure the safety and protection of the community?*

The existing Act adequately provides for the extended supervision and continuing detention of high risk offenders to ensure community safety. The Association opposes any further extension of the definition of the threshold for applications under the Act.

The definition of 'serious violence offence' under section 5A of the Act is sufficiently broad to capture the cohort of offenders who are at risk of committing a future serious violence offence. The Association notes the observation of Justice Button in *State of New South Wales and Lynn* (2013) NSWSC 1147 (at [15]) that the definition of a 'serious violence offence; is 'surprisingly broad'.

‘...Section 5A ... is as follows:

**5A Definition of "serious violence offence**

(1) For the purposes of this Act, a *serious violence offence* is a serious indictable offence that is constituted by a person:

(a) engaging in conduct that causes the death of another person or grievous bodily harm to another person, with the intention of causing, or while being reckless as to causing, the death of another person or grievous or actual bodily harm to another person, or

(b) attempting to commit, or conspiring with or inciting another person to commit, an offence of a kind referred to in paragraph (a).

(2) An offence that includes the elements referred to in subsection (1) (a) is a serious violence offence regardless of how those elements are expressed, and whether or not the offence includes other elements.

16. At its lowest, on analysis a serious violence offence could be an offence that features an act causing grievous bodily harm done with foresight of the possibility that actual bodily harm could occur. An example that springs to mind is punching someone to the face whilst realising that it is possible that the victim will receive a split lip and the victim, as a result of the punch, falling back and hits his or her head on concrete and suffering a very large laceration to his or her head. Clearly, the concept of a serious violence offence is not confined to offences of homicide, or even the intentional infliction of serious violence.’

The Association opposes the introduction of an additional test such as ‘offences of a violent nature’ as an index offence to broaden the range of offender caught by section 5A. Lowering the threshold for applications in this manner would unnecessarily expose offenders to applications under the Act and fails to strike an appropriate balance between the need to protect the community with the sentencing principle of proportionality. Applications under the Act should be limited to a small cohort of ‘high risk’ offenders.

The Association also opposes the introduction of a ‘two tiered approach’ to the existing definition of ‘serious violence offence’ whereby less serious violent offence could be the subject of an application if a court declared that the offender in question used or has a propensity towards serious violence. This approach would introduce unnecessary complexity into the application process under the Act. Moreover, a sentencing court is not capable of determining whether an offender will pose an unacceptable risk of committing a further serious violence offence at the time of sentence. Such an approach would not encourage an offender to engage in rehabilitation while serving a term of imprisonment.

*Does the Act encourage high risk offenders to engage in rehabilitation?*

The Association notes that there is a lack of empirical evidence from which to draw conclusions as to the effectiveness of violent offender treatment programs and questions whether continued detention for the purpose of participating in such programs promotes rehabilitation.<sup>1</sup>

---

<sup>1</sup> *The Violent Offenders Therapeutic Programme (VOTP)- Rationale and Effectiveness*. Ware J, Cieplucha C and Matsuo D. Page 7

The Association is also concerned that even if participation in Violent Offender Treatment Programs (VOTPs) is effective, insufficient resources are available for high risk violent offenders to undertake rehabilitation while in custody. In this regard it is noted that VOTPs are not available for female offenders, there are only a limited number of places for male offenders in custody and the suitability criteria are stringent and often results in high risk violent offenders being excluded from participation.<sup>2</sup>

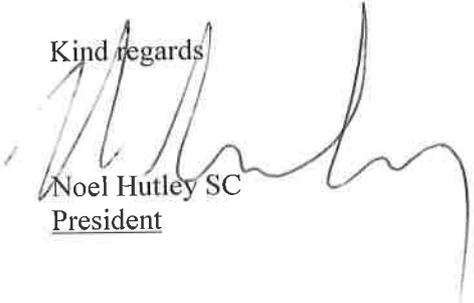
The Association also endorses the following statements in the Sentencing Council in the 'High Risk Violent Offenders' Report (2012):

'5.91 As a general principle, we consider that any sentencing or post custody management options 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.

If there is anything that you or your officers wish to discuss in relation to this letter, please do not hesitate to get in touch with the Association's Executive Director, Philip Selth on 9232 4055 or at [pselth@nswbar.asn.au](mailto:pselth@nswbar.asn.au).

Kind regards



Noel Hutley SC  
President

---

<sup>2</sup> Sentencing Council in the High Risk Violent Offenders' Report (2012): 5.95