High-Risk Offenders: Post-Sentence Supervision and Detention Discussion and Options Paper Summary

Providing Comments on the Discussion and Options Paper

This brief report presents a summary of a discussion and options paper that outlines some of the existing legal mechanisms in Victoria and in other jurisdictions to manage offenders who may pose a serious risk to the community on their release from prison. The Council welcomes comments on the questions raised in the paper and reproduced in this summary.

Comments can be provided in writing by mail, email or fax, or orally by phone or in person. Written comments can also be uploaded to the Council's website. If you need any assistance in preparing your comments and/or need access to an interpreter, please contact the Council.

DUE DATE: Friday 23 February 2007

Our Terms of Reference

The Attorney-General, the Hon Rob Hulls, MP, wrote to the Sentencing Advisory Council on 19 May 2006, requesting the Council's advice about the merit of introducing a scheme that would allow for the continued detention of offenders who have reached the end of their custodial sentence but who are considered to pose a continued and serious danger to the community. Such schemes are currently in operation in Queensland, Western Australia and New South Wales.

In providing this advice the Council was asked to consider:

- current approaches to post custodial detention in other jurisdictions;
- the issues raised when Queensland's *Dangerous Prisoners (Sexual Offenders) Act 2003* was considered by the High Court in *Fardon v Attorney-General for Queensland*;[1] and
- how such a scheme could operate against the backdrop of the existing power of the courts to order an indefinite sentence under the *Sentencing Act 1991* (Vic).

Should the Government decide to introduce some form of continued detention, the Council was also asked to provide advice on the structure of such a scheme, including:

- the offences for which an order might be available;
- what process for making a continued detention order should be established;
- which body would be empowered to apply for such an order;
- what the criteria for making an order should be, and what process for assessing an offender against these criteria should be established;
- what body should be empowered to make an order;
- what the duration of such orders should be;
- what processes for review should be put in place; and
- what safeguards could be incorporated to ensure that such orders may only be imposed in appropriate circumstances.

State Government Victoria

Sentencing Advisory Council

Sentencing Advisory Council
Level 4, 436 Lonsdale Street
Melbourne Victoria 3000
Dx 210307

Telephone 03 9603 9047
Facsimile 03 9603 9030
contact@sentencingcouncil.vic.gov.au
www.sentencingcouncil.vic.gov.au

As the scheme would have to operate alongside the *Serious Sex Offenders Monitoring Act 2005* (Vic), the Council was asked to consider the introduction of such a scheme in the context of that Act.

In line with our terms of reference, the discussion and options paper addresses two broad issues. Firstly, the **merit** of introducing a continuing detention scheme in Victoria for offenders who may pose a continued and serious danger to the community on their release from prison at the end of their sentence. Secondly, what **form** a continuing detention scheme, if introduced, would take.

Discussion and Options Paper

This brief report provides a summary of the discussion and options paper that has been prepared in response to the Attorney-General's request for advice. The discussion and options paper examines current legal approaches in Victoria and other jurisdictions to high-risk offenders at different points in the criminal justice system, and in this context looks at the merit of introducing a continuing detention scheme in Victoria and the structure that such a scheme should take if it is introduced.

The paper is structured as follows:

- Approaches and Purposes of Post-Sentence Schemes
- Determining Risk: Who are 'High-Risk' Offenders
- The Current Framework
- The Merit of a Continuing Detention Scheme
- Structure of a Supervision and Continuing Detention Scheme
- Relationship with Existing Schemes

The discussion and options paper contains a detailed discussion of approaches to the management of high-risk offenders both in other Australian jurisdictions (in particular, in Queensland, Western Australia and New South Wales) and internationally (in countries such as New Zealand, the United Kingdom, Canada and the United States). It builds on the Community Issues Paper: *High Risk Offenders: Continued Detention and Supervision Options* published in August 2006 and draws from the Research Paper, *Recidivism of Sex Offenders*, published together with the Discussion and Options Paper.

This summary report presents an overview of the current approach in Victoria, highlights some of the issues raised by continuing detention and supervision of high-risk offenders and puts forward a model for a continuing detention scheme. For those wishing to read a more detailed analysis of the issues, please see the Council's full Discussion and Options Paper.[2]

The Next Step

The Council invites formal submissions in response to the discussion and options paper. It will also undertake a public consultation process prior to finalising its recommendations to the Attorney-General. The specific questions included in the discussion and options paper are reproduced in this summary report.

Purposes of Post-Sentence Schemes

Victorian Extended Supervision Scheme

Post-sentence preventive detention involves detaining offenders after they have already served their sentence for the offence that they committed. The accepted purposes of preventive detention schemes are generally the protection of the community and/or the rehabilitation of the offender.

The main purpose of the current Victorian scheme for extended supervision is to *enhance community protection*. The purposes of the conditions of extended supervision orders are to ensure the adequate protection of the community by monitoring the offender, and to promote the rehabilitation and the care and treatment of the offender.

Issues

The legislative purposes of a continuing detention scheme, should one be introduced in Victoria, are important as they may affect the constitutionality of the scheme and may guide decisions about the structure of the scheme and the management of offenders.

Existing Australian schemes have the dual purposes of community protection and rehabilitation. If rehabilitation is an integral purpose of the scheme, then the state has a responsibility to manage offenders under these orders in a way that provides opportunities for offenders to access appropriate treatment during their time on the order. On the other hand, if community protection is viewed as the sole purpose then treatment becomes a subsidiary issue. This raises concerns about using continuing detention to 'warehouse' offenders without addressing the underlying causes of their offending and has the potential to infringe an offender's human rights. There are also cost implications in adopting this approach.

Approaches to Post-Sentence Schemes

There are two broad approaches to post-sentence detention: a criminal justice model and a medical model. The criminal model sees sex offending as analogous to other types of offending and holds sex offenders responsible for their actions. It recognises that sexually deviant conduct is still intentional conduct.[3] In contrast, the medical model

treats sex offenders as mentally ill, with diagnosable sexual disorders that affects their ability to control their behaviour. Australian models of post-sentence detention and supervision follow a criminal justice model. This is not exclusively a penal model, as it is also concerned with treatment issues.

The medical model, with civil commitment of sex offenders into the mental health system after release from prison, has been criticised as unnecessarily pathologizing sex offences, as being anti-therapeutic and as violating constitutional rights. It also has significant resource implications.

Determining Risk: Who are 'High-Risk' Offenders?

Introduction

In any society there is a small group of convicted offenders who pose a continued and serious danger of committing further serious offences. This group of offenders presents a significant challenge for the justice system that involves balancing the community's right to safety and the right of potential future victims to be protected from dangerous offenders on the one hand, with the rights of an offender who has already been punished for crimes committed on the other hand. A critical threshold issue for this inquiry is whether these individuals can be identified with any precision, that is: who are 'high-risk' offenders?

Current schemes dealing with high-risk offenders at different stages in the criminal justice process have adopted different approaches to determining which group of offenders should fall within their scope. Recent legislation in Victoria and other Australian jurisdictions has focused on the supervision and detention of *serious sex offenders*, whereas legislation providing for indefinite sentences imposed at the point of sentencing typically applies to both sex offenders and to high-risk violent offenders.

With the exception of sex offender registers, most of the provisions for high-risk offenders require additional criteria to be met before an order can be made. Thus, before a court in Victoria can impose an indefinite sentence, it must be satisfied 'to a high degree of probability, that the offender is a serious danger to the community'.[4] However, identifying which offenders are at high risk of causing serious physical harm in the future is a difficult task.[5]

What do we know about High-Risk Offenders?

There is now general consensus among researchers and practitioners that sexual recidivism is associated with at least two broad factors: deviant sexual interests and antisocial behaviour/lifestyle instability. As with other kinds of offenders, sexual offenders often have multiple life problems, not all of which are related directly to their offending behaviour.

Hanson and Bussiere (1998) examined 61 different studies involving a total of 28,972 sex offenders in 1998. Their research identified the types of offenders who have a risk of recidivism:

- offenders with previous convictions for sex offending;
- offenders with stable deviant sexual preferences;
- offenders with identifiable antisocial personality;
- offenders who have committed diverse sexual offences;
- offenders who have committed non-contact sexual offences;
- offenders who have targeted extra-familial child victims;
- offenders who have targeted male child victims;
- offenders who have targeted strangers;
- offenders who began offending sexually at an early age;
- offenders who have never been married; and
- offenders who have failed to complete (who have dropped out of) a treatment program.

The Problems of Identifying which Offenders are at Risk of Reoffending

Most serious violent and sex offenders do not have previous convictions for violence or sexual offences and do not go on to be convicted for further violent or sexual offending.[6] In fact, a review of studies examining recorded recidivism rates of sex offenders found that only 13.4 per cent committed a new recorded sexual offence within four to five years.[7] However, this figure is likely to be a conservative estimate due to the substantial under-reporting of sexual offences.

Research has shown that mental health professionals tended to be especially cautious in their assessments of possible future offending and to over-predict violence. At best, clinical assessments of risk of recidivism based on subjective judgments are only slightly better than chance.[8] Such over-prediction has been shown to result in large numbers of 'false positives', where individuals have been identified as likely to commit further offences but who, upon release, have not actually reoffended.[9]

Assessments of risk for sex offenders are especially problematic due to the low base rates of recorded sexual reoffending. Any phenomenon that has a low observed prevalence is difficult to predict—accurate prediction of sexual reoffending is thus particularly problematic.

In addition, while predictions of risk can provide a percentage likelihood of reoffending over the long-term, they provide little information about the sub-group of offenders to whom the percentage applies, nor when or

why they might reoffend. Assessment tools cannot predict the circumstances under which people will reoffend; without such information on the nature of potential triggers or situations that may lead to reoffending, predictions of risk can do little to inform approaches to prevention.

The actuarial tools that are currently used for risk prediction have generally been shown to be able to predict sexual recidivism only moderately well (and not quite as well as predicting general or non-sexual violent recidivism). They are unable to distinguish between the risk of, for example, further child sexual offending versus further sexual offending against adults.

Risk of What?

Predictions of risk in a legal context are concerned with the prediction of either violent offending or sexual offending. The prediction of 'like' reoffending that is often stipulated in legislation is based upon an assumption that sex offenders are most likely to reoffend with further sexual offences. However the research on the nature of sexual offending has consistently shown that this is not the case: sex offenders and violent offenders are generalists in their offending, not specialists.

At What Stage Should Risk be Assessed?

Assessing an offender's risk of future reoffending at the time of sentencing is a particularly difficult task. Mental health professionals are called upon to identify the level of risk that an offender might pose many years in the future, before any experience of imprisonment or treatment. Opinions may be formed on the basis of brief interviews and assessments, without the benefit of developing a therapeutic relationship and having sufficient time to understand the person's particular situation.

For prisoners being assessed under preventive or continuing detention schemes at the end of their sentence, a key difficulty for mental health professionals is how to take into account relevant risk factors when offenders have been in prison for many years. In such a case, many risk factors such as the availability of supportive social networks may be difficult to assess. This will affect the accuracy of the prediction of risk, especially when there has been a long period of custody.

Who Should Assess Risk?

Legislation that depends on the assessment of risk of future offending places mental health professionals in a dilemma. Treating doctors are called upon to provide risk assessments based on disclosures that are made in the context of a therapeutic relationship. This has substantial implications for disclosure, as offenders may be less likely to offer candid thoughts under the possible threat of being subjected to supervision laws.

It has been suggested that an independent assessment be conducted by someone who has not been associated with the treatment process, or by an independent panel with expertise in sex offender risk assessment. Such a panel could be comprised of experts with both the clinical experience in treatment services and with the research knowledge of the risk assessment literature. A court could then be provided with an independent assessment of the offender, as well as explicit information on the limitations of risk prediction.

Treatment as a Means of Managing Risk

An exclusively penal approach cannot address all the factors that lead to reoffending and some behaviour may not be amenable to change without co-existing options for treatment. Most Australian jurisdictions have some form of prison-based sex offender treatment programs[10] delivered by individual and/or group therapy.

The primary focus of sex offender treatment programs is to reduce recidivism, with treatment occurring in prison and/or in the community. Prison programs tend to focus on intensive treatment of those factors that present the greatest risks of leading to reoffending, and may also mitigate the effects of prolonged imprisonment. Programs in the community tend to offer assistance to offenders to maintain a reduced risk of reoffending.

While few proper systematic evaluations of treatment programs have been carried out, the evidence that does exist suggests small but significant reductions in sexual recidivism following completion of treatment. This is particularly the case where offenders have access to maintenance programs in the community.[11]

Issues

The resources potentially directed at a continuing detention scheme could instead be spent on improving the quality, range and access of programs available to offenders in Victoria where there is a dearth of community-based treatment programs for offenders who are no longer under sentence. Treatment for these offenders is thus contingent upon their ability to afford the services of private practitioners.

Post-sentence schemes may adversely affect offenders accessing programs at all, or participating fully in them. If offenders are aware that disclosures made during 'treatment' may be considered in an application for post-sentence supervision or detention, they may be less willing to engage fully in the program.

The timing of the provision of sex offender treatment programs is problematic. Many offenders only participate in treatment programs towards the end of their sentence as parole approaches or even after parole has commenced. If an offender's attempts at rehabilitation—including participation in sex offender programs—are relevant to

an application for an extended supervision or continuing detention order, then as a matter of fairness, it is arguable that high-risk offenders should be given an opportunity to participate in rehabilitation programs as soon as possible after their sentence commences.

The better the availability of treatment in prison and in the community on an offender's release, the less the need for a post-sentence continuing detention scheme. Although costly, successful treatment programs can reduce recidivism and help offenders return to the community.

The Current Framework

Implicit in considering the merits of post-sentence continuing detention is whether there is a gap in the current responses in Victoria to high-risk offenders, and if so, whether it is best filled through the introduction of a continuing detention scheme, improving existing responses or exploring other approaches.

At Sentence: Sentencing Options

The courts have three main powers in Victoria to deal with serious offenders:

- The power to order a life sentence of imprisonment for offences that carry a maximum penalty of life (for example, murder and treason).
- The power to order an indefinite sentence of imprisonment for an offender found guilty of one of a number of 'serious offences'.
- The power to impose a longer than proportionate sentence on 'serious offenders' convicted of certain offences.

Issues

An effective use of sentencing options designed for serious offenders arguably could render post-sentence continuing detention and extended supervision schemes unnecessary: those offenders likely to be dangerous on their release from prison would be sentenced to longer, or even indefinite, sentences. Currently these kinds of sentencing options are used only sparingly in Victoria.

It could be argued that sentencing options are a more transparent and just means of achieving community protection than post-sentence continuing detention or supervision schemes because the offender is aware *at the time of* sentencing of the consequences of his/her sentence. In comparison, continuing detention orders are not made until shortly before an offender's sentence expires, and may not have been anticipated by the offender, who could otherwise have expected to be released without further restraint.

Indefinite and extended sentences may also be regarded as superior to continuing detention and extended supervision schemes because they provide a more effective incentive to reform. From the time offenders are sentenced, they are aware that their release is contingent upon them demonstrating that they no longer pose a danger to the community.

During Sentence: Managing High-Risk Offenders in Victoria

Parole

In Victoria, if a court imposes a sentence of over two years' imprisonment, it ordinarily must set a non-parole period. The main purpose of parole is to supervise the reintegration of offenders into the community. The Adult Parole Board (APB) determines whether offenders should be released into the community at the expiry of the non-parole period. The Board meets with offenders early on during their prison sentences to ensure that offenders undertake appropriate programs aimed at helping them reintegrate into the community.

The main advantage of the parole system is that it ensures that offenders are supervised and supported as they reintegrate into the community. It is based on the notion that supervision in the community is conducive to rehabilitation and that this is preferable to releasing an offender unconditionally without any support when the full sentence of imprisonment has been served.

Issues

The parole system is based on the premise that there are adequate services to assist parolees to reintegrate into the community. However community mental health services that are available to parolees are scarce and do not provide the level of safety the community requires, let alone the level of psychiatric support required by the many offenders who suffer from psychiatric and psychological problems'.[12]

It might also be argued that offenders who pose the highest risk of reoffending should be managed under different arrangements to the general prison population in order to respond better to the potential risk these offenders pose from the point of sentencing.

Post-Sentence: Current Options in Victoria

Post-Sentence Extended Supervision

In Victoria there are currently a number of legal approaches to managing the risk posed by sex offenders in the community, including offenders who have reached the end of their sentence. These are:

- a post-sentence extended supervision scheme, that requires offenders to comply with a number of conditions, including supervision and residence requirements; and
- other strategies aimed at preventing known sex offenders from coming into contact with potential victims (including sex offender registration, and offences such as loitering near schools or other places that children are known to frequent).

Issues

The recent amendments to the extended supervision scheme have, in effect, introduced a form of continuing detention in Victoria. It could be argued that the direction to courts to treat a residence condition requiring the offender to live on the grounds of a prison as 'living in the community' undermines the original intention of the Act—that is, to allow the offender to be supervised in the community for the protection of the community and to facilitate his or her rehabilitation.

Preventive Offences

A number of specific offences are directed at known sex offenders to prevent them coming into contact with children. For example, the offence of 'loitering near schools' creates a criminal offence for convicted sex offenders who loiter in areas where children are likely to be present.

Sex Offender Registration

The *Sex Offenders Registration Act 2005* (Vic) requires sex offenders to keep the police notified of their whereabouts and inform them of their personal details in order to reduce the likelihood that they will reoffend.

Sex offender registers assist police in monitoring the whereabouts of sex offenders and facilitate the investigation and prosecution of any further offences. However maintaining such registers can be resource intensive and can add a level of complexity to the conditions imposed in supervising sex offenders under other orders, such as the *Sex Offenders Monitoring Act 2005* (Vic).

Options for Reform

Responses such as special offences for sex offenders, civil protective orders, and sex offender registers are all aimed at managing the risk of reoffending of known or potential offenders. Jurisdictions such as Canada and the United Kingdom have also developed multi-agency arrangements to manage offenders in the community. These types of responses may avoid some of the objections raised to continuing detention and extended supervision schemes because unless an offender fails to comply with the conditions of the order or registration requirements or places him or herself in a situation that constitutes an offence, there are no further consequences. In comparison, extended supervision and continuing detention schemes place quite significant restrictions on an offender's liberty after the full sentence has been served without any further offences being committed. On this basis, these types of alternative responses may be viewed as more consistent with human rights and fundamental legal principles.

On the other hand, these responses may be seen as not going far enough to protect the community against offenders who may place the community at risk of quite significant harm. It could further be argued that this group of offenders requires a level of intensive supervision and treatment that cannot adequately be provided without extended supervision or continuing detention.

The Merit of Continuing Detention

Continuing detention schemes raise complex ethical, moral and legal questions about the lengths to which the community is prepared to go to protect itself from the risks posed by dangerous offenders who have already served a sentence for the crimes that they have committed.

While it is generally acknowledged that there is a small group of convicted offenders who may pose a real danger of inflicting serious harm on others and that these risks should be managed wherever possible, there is disagreement about the means by which this risk should be managed and where the balance should lie between the rights of offenders and the state's interest in protecting the community.

The Relevance of Risk Assessment to Merit

A defensible continuing detention scheme depends on the accurate and reliable assessment of an individual's risk of reoffending. But risk assessment is notoriously difficult and fraught. Even for clinicians who have substantial experience in the prediction of risk for sex offenders, the best calibrated actuarial assessments will still be wrong at least some of the time.

The issue of potentially incorrect predictions of risk is especially significant in the context of a continuing detention scheme. In the absence of a high degree of certainty in predictions of future offending, a scheme that

detains offenders beyond the end of their sentence may seem unjustified. Continuing detention laws may thus deprive people of liberty for lengthy periods on the basis of an educated guess.

However continuing detention schemes may not require that prediction be achieved to such a high level of certainty. The assumption that a high degree of certainty is required 'expresses a preference for certainty that is analogous to the criminal law requirements that the government prove the essential elements of crime beyond a reasonable doubt'.[13] But when the goal of detention is prevention rather than punishment, this standard of proof may be 'overly stringent'.

The Effects of Continuing Detention on Treatment

Under the Victorian extended supervision scheme as well as schemes for continuing detention in other jurisdictions, treating clinicians are called upon to play a dual role: a treatment role, where doctors act in the best interests of their patients under the duty of beneficence that is integral to the practice of medicine and a policing role, where doctors may act in the best interests of the public in assisting in the legal control of offenders.

This dual role may have substantial negative effects on the therapeutic relationship and may indeed have a 'chilling effect'[14] on disclosure and ultimately on the efficacy of treatment. If offenders are aware that disclosures during treatment might be used as evidence in an application for continuing supervision or detention, they may be less likely to participate fully (or to participate at all) in treatment programs.

Constitutional Issues

Constitutional issues have arisen in Australia in relation to continuing detention legislation. These issues focus on whether decisions to deprive individuals of their liberty under continuing detention schemes are incompatible with the concept of judicial power set out in the Australian Constitution.

Is Continuing Detention Compatible with Human Rights?

It has been suggested that continuing detention schemes may infringe on the basic human rights that underlie the laws of modern democratic societies.

The *Universal Declaration of Human Rights* recognises the 'inherent dignity and inalienable rights of all members of the human family' and sets out a series of rights as 'a common standard of achievement for all peoples and all nations'. The rights of prisoners and their entitlement to fairness in legal procedures are consolidated in a number of international instruments. The most relevant Covenant to continuing detention schemes is the *International Covenant on Civil and Political Rights* (ICCPR) to which Australia is a signatory.

Sometimes a balance needs to be struck between competing rights because the rights of one person may represent a threat to another. The protection of the community must be balanced against the maintenance of individual rights such as the right to liberty.

The *Charter of Human Rights and Responsibilities Act 2006* (Vic)[15] was recently enacted in Victoria. The Charter enshrines human rights such as the right of every person to liberty and security and the right not to be subjected to arbitrary arrest or detention. It also provides that a person must not be deprived of his or her liberty 'except on grounds, and in accordance with procedures, established by law'.

The Charter recognises that a person must not be tried or punished more than once for an offence. Other principles recognised by the Charter include the principle against retrospective criminal laws, including the principle that a penalty must not be imposed on a person for an offence that is greater than the penalty that applied at the time when the offence was committed.

All of these rights need to be taken into account when considering options for the supervision and detention of high-risk offenders and, unless there are exceptional circumstances, any new legislative scheme should be compatible with them.

Schemes such as extended supervision and continuing detention orders are not necessarily incompatible with the rights enshrined in the Charter, provided necessary protections are put in place. The Charter recognises that rights are not absolute and specifically allows for human rights to be subject to reasonable limitations 'as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.

Should a form of continuing detention be introduced in Victoria, protections may need to be put in place to ensure any limits on the human rights outlined above are by the least restrictive means to achieve the purpose of community protection. These protections include:

- Due process: procedural fairness, including the right to a fair hearing, is a fundamental principle of Australian law which maintains a balance between the coercive powers of the State and the human rights of citizens.
- Proportionality and finality in sentencing: the principle of proportionality provides that the type and extent of punishment should be proportionate to the gravity of the harm and the degree of the offender's responsibility.[16] Post-sentence preventive detention legislation that authorises imprisonment may be seen as contrary to the principle of finality of sentence.[17] Post-sentence preventive detention schemes operate at the end

of the offender's sentence, leading to uncertainty as to how long the offender must remain in prison after the sentence expires.
- Rule of law: the general principle is that once a sentence has been served, offenders can be said to have 'done their time' and are entitled to freedom. Continuing detention schemes extend the time that offenders spend in prison and arguably offend against this aspect of the rule of law.[18] Governments should punish criminal conduct, not criminal types.
- Procedural fairness: requires that safeguards operate to ensure that hearings carried out under the scheme operate in a way that is fair to the person being detained or supervised.
- Double jeopardy and the principle against double punishment: the Victorian Charter establishes that a person must not be tried or punished more than once for an offence.
- Criminal detention only following a finding of guilt.
- The principle against retrospective laws.

Does Continuing Detention Meet Its Objectives?

The main purpose of the three existing Australian schemes of continuing detention that adopt a criminal justice model is to ensure the adequate protection of the community. The current schemes have only been operating in Australia for a very short period and it is difficult to find measures to establish whether they are indeed effective in relation to improving community protection. What continuing detention schemes aim to avoid is not harm, but *potential* harm which is empirically difficult to establish.[19]

Is Continuing Detention the Best Use of Resources?

Current legal responses to dangerous offenders in Australia and overseas have attracted criticism for ignoring the realities of sexual and violent offending and focusing disproportionate attention on some offenders over others—typically focussing on those who have committed offences outside the family.[20]

By focusing on the small group of high-risk offenders who have been processed by the criminal justice system, it may be argued, funds are potentially diverted away from combating other forms of violence, including abuse within the family. The use of specialised interventions such as registries, community notification and continuing detention for sex offenders may not represent an optimal allocation of crime prevention resources. These specialised interventions aim to protect potential victims from attacks by strangers, which constitute only a small minority of cases, and do not protect people from family members and acquaintances. Early intervention with young offenders, programs to teach effective parenting skills and better community education about the true nature of sex offending—and the most common source of the danger—may also provide more effective mechanisms for reducing victimisation.

Given that provisions such as continuing detention cannot prevent all recidivism, and overall are likely to have only a small impact on the total number of sexual offences that are committed, it could be argued that resources to reduce victimisation should be provided for additional or alternative approaches, such as increased funding for earlier risk assessment, prison and community treatment programs and early intervention.

Is There a Need for Continuing Detention?

Continuing detention schemes have been justified on that basis that they are required to protect the community from serious offenders, especially those who have shown no remorse and a disregard for the safety of the community. The fact that offender treatment programs cannot prevent recidivism does not necessarily mean that continuing detention should be dismissed because it may have repercussions in relation to the treatment process. In addition, the lack of certainty in relation to the ability to predict future offending is not necessarily fatal to a scheme of continuing detention as long as a lower threshold is set.

Such schemes are also justified on the basis that the rights of potential future victims must be considered and that the protection of the community outweighs the rights of past offenders. There is an acknowledgement, even within instruments designed to protect the rights of the individual, that these rights are not absolute and that in certain circumstances the rights must be subject to 'reasonable limitations'.

On the other hand it has been argued that the current measures in Victoria—or the current measures with some improvements and/or additional resources—are sufficient to address the problem posed by those offenders who are considered to be dangerous and are reaching the end of their prison sentence. Continuing detention schemes are not regarded as the best use of resources to protect potential victims of serious crimes and the dearth of evidence as to whether continuing detention schemes in any way achieve their goal of protecting the community is regarded as a reason for caution.

Structure of a Supervision and Detention Scheme

In addition to the question of whether there is a need to introduce continuing detention in Victoria, the Attorney-General has also sought advice on the structure of a continuing detention scheme, should one be introduced.

Implications of the Victorian Charter of Human Rights and Responsibilities

The *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter') was enacted in July 2006 with the purpose of protecting and promoting human rights. While the Charter is not necessarily a barrier to the introduction of a continuing detention scheme in Victoria, it does bring sharply into focus the need to ensure, as far as possible, that any scheme introduced is consistent with human rights and if it infringes those rights, that such infringements are reasonable and can be properly justified.

A Discussion Model

In response to the Attorney-General's request, the Council has developed a model for continuing detention in Victoria. This model does not necessarily reflect the Council's position on the issues raised; rather, it is put forward to stimulate discussion and debate around the elements of a possible continuing detention scheme, taking into account human rights and other concerns. The model draws on existing schemes operating in Queensland, Western Australia and New South Wales, as well as international approaches to the management of high-risk offenders. It also includes possible reforms to indefinite sentences that might result in a more consistent model of management for high-risk offenders under sentence and on post-sentence orders.

The Council hopes that one of the consequences of framing the issues in this way will be to encourage those who choose to respond to the discussion paper to consider how the elements of a continuing detention scheme might fit together as a whole, and how such a scheme might operate alongside existing sentencing and post-sentence options, consistent with the Victorian Charter of Human Rights and Responsibilities.

The general principles that have guided the development of the model are:

- the scheme should be consistent with the Victorian Charter of Human Rights and Responsibilities and the Victims' Charter;
- the scheme must not be designed to punish the prisoner, but rather to protect the community;
- the purpose of a post-sentence scheme should be to protect the community through the rehabilitation, care and control of the offender;
- continuing detention should be a last resort, with a presumption in favour of the least restrictive alternative;
- the scheme should be targeted at offenders who are at high-risk of committing sexual offences against both adults and children;
- consistent with the purposes of the scheme, offenders subject to continuing detention should be accommodated wherever it is considered their rehabilitation needs can bets be met, taking into account community protection concerns;
- the scheme should create reciprocal obligations on the state to provide the means by which an offender may meaningfully participate in rehabilitation and treatment;
- the scheme should aim to provide incentives to offenders to address factors related to their risk, while recognising the purpose of community protection as paramount;
- there should be independent oversight and coordination of agencies managing high-risk offenders and improved mechanisms to provide courts with the information they require; and
- the following procedural safeguards should be built into the scheme:
    - the relevant test applied should require the court 'to be satisfied of the "unacceptable risk" posed by the offender "to a high degree of probability";
    - in determining an application under the legislation, a court should be required to exercise judicial power in accordance with the rules of evidence;
    - if a court is empowered to make decisions under the scheme, the court must have a discretion as to whether and what kind of order to make;
    - offenders must have adequate time to prepare for hearings, to instruct counsel, to analyse the evidence and to make arrangements for witnesses to give evidence;
    - there should be a system of periodic review, at the very least on an annual basis;
    - there should be an appeal mechanism;
    - there should be a fixed time limit for the continuing detention order; and
    - there should be a right to independent legal representation.

A New Post-Sentence Supervision and Detention Scheme for Victoria

One of the issues that must be considered should a scheme of post-sentence detention be introduced is how it might operate alongside the current extended supervision regime. One possibility would be to combine post-sentence supervision and detention into a single streamlined scheme. Under the model presented for discussion, the management of offenders under post-sentence orders would be integrated, and supervision orders and detention orders would be combined into a more flexible 'High-Risk Offender Order' (HRO Order).

Under the model presented, the HRO Order would be applied for during an offender's sentence and would come into operation once the sentence had been served. The order would allow for a post-sentence extension period for up to five years, with a power to renew the extension period in appropriate cases. The HRO Order would be flexible in that it could be served either in custody or under supervision in the community, depending on the least restrictive alternative for safely managing an offender's risk.

While offenders would have an obligation to comply with the conditions of their order, such as to participate in treatment, the state, in turn, would be required to provide offenders with access to appropriate programs and services. Under the discussion model, monitoring the compliance of both the offender and the state, with the requirements of the order, would be the responsibility of an independent authority, referred to as the High-Risk Offender Panel (the HRO Panel).

There is a need to improve current processes for assessing risk and to create greater transparency and accountability in the management of high-risk offenders both while under sentence, and on post-sentence orders. Currently Corrections Victoria bears the primary responsibility for the management of offenders under extended supervision orders. One of the consequences of this is that it must deal with a host of issues, such as locating suitable accommodation and programs in the community, that overlap with the responsibilities of other agencies.

One means of ensuring that the responsibility of managing these offenders is shared and that there is appropriate interagency cooperation would be to establish an independent authority—a High-Risk Offender Panel—that would have responsibility for overseeing the management of all high-risk offenders subject to the proposed HRO Order. The Panel might also oversee the management of offenders subject to an indefinite sentence

The functions of such a Panel could include:

- coordinating the assessment of offenders, including the accreditation of those who are qualified to assess risk;
- the screening of eligible offenders serving a standard fixed term sentence for a possible application by the Director of Public Prosecutions for a High-Risk Offender Order;
- overseeing the management of high-risk offenders subject to an indefinite sentence or a High-Risk Offender Order; and
- providing information to the courts and to the relevant Minister.

The potential benefits of locating these functions in one body would be to concentrate expertise in dealing with these offenders in a single body and to encourage greater consistency in their overall assessment, treatment and management. It would also ensure that offenders were actively managed during the period of their sentence, and during any form of post-sentence order. In addition, the Panel could be provided with the power to direct relevant agencies to cooperate with the Lead Authority in formulating and delivering services under an Offender Management Plan.

Under the proposals, the Panel might also be given a power to set conditions (including whether the offender is detained in custody or supervised in the community) and to recall an offender to custody. Prosecuting authorities and those who are involved in the day-to-day management of offenders should not be represented on the HRO Panel to avoid any potential conflict of interest.

The membership of the HRO Panel could include a member of the Adult Parole Board, a senior person with relevant corrections experience, and professionals with expertise in working with perpetrators of sexual assault (such as psychologists or psychiatrists). The Panel might also include people with experience in working with victims of crime and other community representatives.

Purposes

What is considered to be the appropriate purpose or purposes of continuing detention may depend on how a scheme is conceptualised. Under Australian models of continuing detention, which adopt a primarily criminal justice approach, rehabilitation is only one of the purposes of detention, with emphasis also being placed on the protection of the community through the 'control' and 'monitoring of the offender.

Discussion Model

Issue	Description	As for Extended Supervision?
Purpose	To enhance community protection by providing for the control, care and treatment of high-risk offenders to facilitate their rehabilitation.	Yes—but this purpose links protection of the community to the rehabilitation of the offender.

The model suggests that the purpose of the current extended supervision scheme, if extended to incorporate continuing detention, should be amended to make clear the connection between community protection, and the rehabilitation, care and control of offenders. While rehabilitation on its own could be viewed as insufficient to ensure community safety, community protection achieved solely through the 'control' or incapacitation of the offender might also be viewed as problematic due to its punitive impact. For this reason, under the model presented, orders would be required to meet all three purposes.

Eligible Offenders

As post-sentence schemes have the potential to restrict severely the liberty of offenders on the basis of assessments of their risk of reoffending, care should be taken to confine such schemes to those offences that are likely to cause the most harm.

The Victorian scheme currently applies to those serving a prison sentence (at the time the application is made) for a wide range of contact and non-contact sexual offences against children, including rape, indecent assault, the possession of child pornography and loitering near schools. Although the scheme also covers other forms of sexual offending such as bestiality, sexual offences against adults are excluded from the scheme. Serious violent offences are also not included in the scheme.

Current evidence does not support the conclusion that people who commit the offences covered by the Victorian scheme are necessarily more dangerous than violent offenders or other types of sex offenders. There is insufficient evidence to link less serious forms of offending, such as non-contact sexual offences and bestiality, with the likelihood of offenders committing serious sexual offences.

As continuing detention is a more radical restriction on an offender's liberty than extended supervision, it could be argued that continuing detention should apply to a narrower group of offences. On the other hand, it could be argued that it would be preferable if extended supervision and continuing detention were to operate as a streamlined scheme covering the same offences.

In terms of the age criteria any proposed scheme of post-detention supervision and detention should be structured in a way that supports the current 'dual track' system that separates adolescent and adult offenders and that recognises the different circumstances of these two distinct groups. Consequently, it could be argued, any post-sentence detention scheme should adopt the same definition of eligible offender as is found in the current ESO legislation, thereby excluding offenders in Youth Training Centres (YTCs). On the other hand, the exclusion of juvenile offenders sentenced to serve a period of detention in YTCs could be viewed as inappropriate on the basis that these young offenders equally may present a serious danger to the community of reoffending on their release.

Discussion Model

Issue	Description	As for Extended Supervision?
Offences included	Sexual offences against children. Sexual offences against adults. OPTIONS: Option A—Exclude all non-contact offences carrying a maximum penalty of < 5 years. Option B—Include homicides with a sexual element or sexual motivation.	No. Offenders who have committed sexual offences against adults would be eligible, while those convicted solely of bestiality would not be.
Other eligibility criteria	The person has been sentenced to a 'custodial sentence' (a term of imprisonment in an adult prison or police gaol) for a relevant offence and is serving that sentence at the time of the application.	Yes.

While the Council's terms of reference do not suggest post-sentence detention should be limited to sex offenders, in the interests of consistency between the two schemes, arguably they should be available for a similar range of offences.

While other violent offences, such as murder and intentionally causing serious injury, could potentially be covered by such post-sentence schemes, extending a post-sentence scheme to capture these types of offenders could be viewed as unnecessary as murder carries a maximum penalty of life imprisonment, and in cases where the seriousness of the offence or offences committed raises concerns about possible future violent offending, the court has the option to impose this sentence. The targeting of post-sentence supervision and detention schemes to sex offenders in other Australian jurisdictions suggests that there are particular concerns about the risks of reoffending and the likely harm caused by these types of offenders.

The discussion model suggests that post-sentence supervision and detention should be available for offenders convicted of sexual offences committed against adult victims—as is the case in other Australian jurisdictions that have introduced such schemes. Young offenders serving a sentence in a Youth Training Centre would not be eligible for post-sentence supervision or detention, consistent with current arrangements under the current ESO scheme.

The Application Process: Who, When and How?

The application process for continuing detention orders requires consideration of:

(1) when an application should be made;
(2) what body would be empowered to apply for an order;
(3) what processes should be established for determining whether an application should be made;
(4) what body should be empowered to make an order; and
(5) what provision should be made for preliminary hearings and interim orders.

In Victoria, an application for an extended supervision order must be made while an offender is serving a relevant custodial sentence or, in particular circumstances, another custodial sentence served concurrently or cumulatively with the relevant custodial sentence.

The Secretary to the Department of Justice may apply to the Supreme or County Court (depending on which court sentenced the offender for the relevant offence) for an extended supervision order of up to 15 years in relation to 'serious sex offenders'. The application must be accompanied by an assessment report by a psychologist, psychiatrist or specified health service provider.

An Extended Supervision Order Review Board has been established by the Secretary to provide advice regarding the administration and outcome of assessments undertaken or facilitated by Corrections Victoria under the *Serious Sex Offenders Monitoring Act 2005* (Vic). This Board is responsible for making recommendations to the Secretary concerning whether an application for an ESO should be made. Ultimately, however, the decision is that of the Secretary.

Discussion Model

Issue	Description	As for Extended Supervision?
How are eligible offenders identified?	The High-Risk Offenders Panel will have responsibility for reviewing all eligible cases, obtaining risk assessments in relation to high-risk cases and making recommendations to the DPP.	No—The Sex Offender Program identifies eligible offenders and clinical assessments are undertaken by SOP staff or external providers. Assessment reports are provided to the ESO Review Board, which makes recommendations to the Secretary to the Department of Justice as to whether an application should be made.
Who makes application?	DPP on the recommendation of the High-Risk Offenders Panel.	No—Orders for extended supervision are applied for by the Secretary to the Department of Justice on the recommendation of the Extended Supervision Orders Review Board.
When is the application made?	The application is to be made no later than two thirds of the way through the non-parole period of the offender's sentence, unless new evidence becomes available after this time.	No—Applications can be made at any time in relation to a person who is serving a custodial sentence for a relevant offence.

If continuing detention is introduced in Victoria, an integrated system for identifying eligible offenders and briefing the person responsible for making applications will need to be established.

Under the discussion model, responsibility for screening offenders and making recommendations would be assigned to the HRO Panel. This would ensure consistency of management and the accumulation of expertise in dealing with high-risk offenders, while allowing for appropriate oversight of the management of these offenders and the agencies managing them. Under the model, all eligible offenders serving a standard fixed term sentence of imprisonment would be reviewed on a regular basis by HRO Panel. In appropriate cases, the Panel could make recommendations to the Director of Public Prosecutions

(DPP) that an application for a High Risk Offender Order should be made.

Responsibility for making an application would be shifted from the Secretary to the Department of Justice to the DPP. Making the DPP responsible for these applications might address potential concerns that such decisions, which may have serious consequences for those in relation to whom applications are made, should be removed as far as possible from the political process.

Applications could no longer be made at any time as of right. Rather, there would be a presumption that applications should be made no later than two thirds of the way through the non-parole period of an eligible offender's sentence. If an application was made after this point, there would have to be new evidence concerning the offender's risk. This change would mean that offenders would be aware at a much earlier time that they would be subject to a post-sentence order, which would provide greater incentive for offenders to participate in programs to reduce their risk and would also provide for sufficient time to plan for the eventual release and reintegration of offenders in circumstances where this is appropriate.

Who Should Make the Order?

Under the current Victorian scheme for extended supervision, applications for extended supervision are made to the court that sentenced the offender for the relevant offence (if that court was the County Court or Supreme Court) or to the County Court (if the Magistrates' Court sentenced the offender for the relevant offence). Applications in the Supreme Court or County Court are determined by a single judge.

Discussion Model

Issue	Description	As for Extended Supervision?
In what court is the application heard?	Sentencing court (if Supreme Court or County Court). County Court (if the offender was sentenced in the Magistrates' Court).	Yes.
Who decides if an order should be made?	Single judge of the court in which the application is made.	Yes.

If continuing detention is introduced in Victoria, there are several possible options for the most appropriate forum for making continuing detention orders. A secondary question is whether the same forum should be made responsible for making decisions about extended supervision orders. If the two schemes are integrated, this approach might be preferable.

Under the discussion model, applications for a High-Risk Offender Order could be made in both the County and Supreme Courts. The decision as to whether or not to make an order, and the continued need for the order would also be made by a single judge, as is currently the case. The High-Risk Offender Panel would perform a role in assisting the court through the provision of reports on the offender.

If it is determined that, contrary to the discussion model presented, continuing detention should not be integrated with the existing extended supervision order scheme, and that the application process for continuing detention orders should be different, a decision may need to be made about whether changes are required to the ESO scheme to ensure consistency.

Directions Hearings and Interim Orders

Under the Victorian extended supervision scheme, the court may set a date for a directions hearing to be conducted in relation to the hearing of the application. The scheme also provides the court with a number of ancillary powers in relation to extended supervision orders.

Provided that a supervision application is made while the offender is serving a relevant sentence, the court may continue to determine the application even if that sentence has expired prior to the final hearing date. A court may also issue an arrest warrant if satisfied that the offender has absconded or is unlikely to attend the hearing. There is no power to supervise the offender during the period between the completion of the sentence and the final hearing date, for example, by making an interim supervision order.

The Victorian Act provides that the offender must be present at the hearing of an application under the Act. However if the offender is unable to be present at a hearing because of illness or for any other reason, the court may proceed in the offender's absence if satisfied that doing so will not prejudice the offender's interests, and that the interests of justice require that the hearing should proceed even in the absence of the offender.

The court also has the power to order an offender to attend for a personal examination by a medical expert or any other person to enable that person to make a report or give evidence to the court.

Discussion Model

Issue	Description	As for Extended Supervision?
Directions Hearings and Interim Orders	The court may compel an offender to attend any hearings that will take place after the offender's release and may place an offender on an interim high-risk offender order providing for his or her continuing detention or supervision in the community. The offender may tender evidence and may challenge evidence tendered by the DPP in support of an application for an interim order.	No—Although there is power to compel the offender to attend court, there is no power to supervise the offender during the period between the completion of his or her sentence and the final hearing date.

Although there is power under the Victorian scheme to compel an offender whose sentence has expired to attend the final hearing of the application for an extended supervision order, there is no power to supervise the offender during the period between sentence completion and the final hearing date.

The discussion model includes a power to compel the offender to attend any hearings that will take place after the offender's release and to place such offenders on an interim High-Risk Offender Order either in custody or under supervision in the community. This may alleviate concerns about the way offenders who are considered at high risk of reoffending are managed where there are delays in the application process. The discussion model also provides for evidence tendered in an application for an interim order to be challenged by the offender and for the offender to lead evidence in such applications.

Legal Test, Risk Assessment and Evidence

There are two aspects to the determination of risk for a particular offender: a clinical risk assessment and a legal test based on this risk assessment and other relevant evidence.

Risk Assessment and Relevant Evidence

Under the Victorian extended supervision scheme, applications must be accompanied by an assessment report from a psychologist, psychiatrist or specified health service provider. The assessment reports can only be made following a personal examination of the offender but the expert may still make the assessment report even if the offender does not cooperate or does not cooperate fully.

The assessment report must set out the medical expert's assessment (and the reasons for that assessment) of the risk that the offender will commit another relevant offence if released in the community and not made subject to an extended supervision order.

Discussion Model

Issue	Description	As for Extended Supervision?
What information should a court be permitted to consider in determining an application?	The assessment report, any other report made, or evidence given, by a medical expert and anything else that the court considers appropriate.	Yes

The discussion model proposes that the current matters that a court can have regard to under the Victorian Act should be permitted to be taken into account by a court in determining whether or not the test for a High-Risk Offender Order has been satisfied. This includes any assessment report prepared, other report made or evidence given by a medical expert, and any other matters that the court considers appropriate.

Legal Test, Onus and Standard of Proof

A court may only make an extended supervision order if it is satisfied, to a *high degree of probability*, that the offender is *likely to commit a 'relevant' offence* if released in the community after serving a prison sentence and not made subject to an extended supervision order. The Secretary to the Department has the onus of proving this likelihood. The standard of proof of a 'high degree of probability' lies between the criminal standard of proof (beyond reasonable doubt) and the civil standard of proof (on the balance of probabilities).

There are two aspects to the determination of risk for any specific offender, a legal and a clinical one. Although the two are conceptually distinct, there is a danger that they may become blurred. The *clinical test* for assessing risk is to be distinguished from the *legal test* which is set out in various extended supervision and detention schemes. This legal determination of risk is based on the proposition that a clinical assessment of risk is a reliable and accurate tool and that clinicians are able to predict future behaviour to a high degree of certainty. However these two assumptions have yet to be proven. Indeed, it has been suggested that a major clinical limitation of continuing detention legislation is the assumption that clinicians can predict risk *to the point that* people may be detained. There is value in adopting a

more transparent legal test that is more consistent with how risk assessments are approached and that properly acknowledges the limitations of assessing individual risk.

As the determination of applications for continuing detention involves predicting the level of risk that an offender poses to the community, such a determination could never be reached if the standard of proof required were 'beyond reasonable doubt'. However the civil standard of proof 'on the balance of probabilities' might be seen as too low a threshold given the serious consequences for an offender of a continuing detention order being imposed.

Discussion Model

Issue	Description	As for Extended Supervision?
What is the process for assessing risk?	If the court determines that the threshold test is met, the court makes an order for a risk assessment and a draft offender management plan (OMP). The OMP is drafted by the Lead Authority and approved by the High Risk Offenders Panel. The purpose of the risk assessment and draft OMP is to assist the court in determining the application and to provide the framework for development of an OMP, should the offender be placed on the order. The HRO Panel ensures that the risk assessment and draft OMP are prepared in time for the next Court date.	No—The court must have regard to any medical psychiatric or other report submitted, but there is no specific requirement for an independent risk assessment to be ordered.
What is the test for making the order?	There is an unacceptable risk that the offender will commit a relevant offence if the offender is released from custody.	No—This test is modelled on that which applies under the Queensland and Western Australian schemes.
What is the standard of proof?	High degree of probability.	Yes.

Under the model presented, once a court made an order for assessment, the offender would be assessed by assessors accredited by the High-Risk Offender Panel. Assessments could either be carried out by a dedicated assessment body or practitioners in the community who receive their accreditation individually. These assessors would be independent of Corrections Victoria. The form of the assessment would be approved by the HRO Panel to ensure consistency for all offenders.

One of the potential benefits of having an independent body, such as the proposed HROP, coordinate the preparation of assessment reports would be that it would ensure that assessments are carried out by people who are appropriately qualified and who are independent of the treatment providers. This model would separate treating clinicians from assessing clinicians by removing the assessment from those responsible for the treatment of offenders, while still ensuring that assessments are conducted by qualified professionals who maintain a consistent approach, through the accreditation process and adherence to guidelines set down by HROP.

The test proposed in the model places the focus on the 'unacceptable risk' posed by the offender, rather than whether he or she is 'likely' to commit a relevant offence. Such a test could be viewed as more consistent with medical assessments of risk and as providing courts with greater latitude to find a risk is unacceptable, even if it cannot be determined with degree of confidence that an individual offender is more likely than not (or will go on) to reoffend. It also retains the requirement that the unacceptable risk should be established beyond reasonable doubt.

Other Criteria–Principle of Reciprocal Obligation

The question of whether the legal test of risk has been met is only one of the considerations for a court in deciding whether or not to make an order. The extended supervision and continuing detention schemes operating in Australia, including the Victorian scheme, all provide the court with a discretion, once the threshold test has been satisfied, whether or not to make the order, and what type of order to make.

Some element of 'reciprocal obligation' should be built into the legislation which would require the state to establish that it has made every reasonable effort to provide opportunities for the offender's rehabilitation before an order can be made.

Duration of Continuing Detention Orders

In Victoria, the Secretary to the Department of Justice may apply to the Supreme or County Court for an extended supervision order of up to 15 years' duration.

A post-sentence detention order of a set duration has a number of possible advantages over indefinite schemes including that:

- it minimises the harm caused by an inaccurate prediction of risk;
- it avoids the 'demoralisation' that can occur in an indeterminate regime; and

- it can have 'a positive therapeutic effect because it gives the [individual] a specific behavioural goal to achieve (that is, no antisocial activity within the specified period in order to obtain release)'.[21]

If continuing detention orders are of a fixed length, the question arises as to whether any renewal of the period of detention should be allowed, and if so, on what terms.

Discussion Model

Issue	Description	As for Extended Supervision?
How is the order structured?	The offender serves the remainder of his or her sentence. The High-Risk Offender Order comes into force at the expiry of the offender's sentence. A set five-year HRO Order is imposed at the time the order is made (but before the HRO comes into operation). This is subject to review one year before the end of the offender's sentence.	Yes No—The court sets the period of the ESO at the time the order is made. There is no power to review the duration of the order.
What is the maximum duration of the order?	5 years.	No—The maximum period of an ESO is 15 years.
Can the order be renewed?	Yes— The DPP can apply for a new HRO Order for a further period of up to five years, should this be considered necessary. Applications should be made one year prior to the order's expiration. There are no limitations on the number of times a HRO Order can be extended in this way.	Yes—However, applications for new orders are made by the Secretary to the Department of Justice and may be made at any time while the ESO is still in force.

The model proposes that all post-sentence orders be limited to five years. This is consistent with the position in NSW and with the duration of an extension period that may be ordered as part of an extended sentence in the United Kingdom for violent offences (the extension period for sexual offences is up to 8 years). Applications for new orders could be made should it become clear the offender's risk has not sufficiently abated over the period of the order.

One of the existing challenges for Victorian courts in setting an appropriate supervision period is the lack of guidance as to the appropriate reference point in determining the appropriate duration of an extended supervision order (such as the length of the original sentence imposed or the severity of the risk posed by the offender). The set five year period proposed would mean that all offenders in relation to whom a High-Risk Offender Order is made would initially be subject to a set five year order, regardless of the level or their risk or the duration of the original sentence. However, the conditions of the order (for example, whether the person should be detained in custody or supervised in the community) and the duration of the order would be subject to review one year prior to the expiration of the offender's extension period to allow for the order to be better tailored to the individual circumstances of the offender. The power to vary the order in this way also may provide an additional incentive to offenders to take active steps to reduce factors associated with their risk of reoffending.

The model would also provide flexibility allowing an offender to be held in detention or subject to conditions in the community during the five year period, depending on what the least restrictive alternative is for dealing with his or her level of risk.

Conditions of Orders

The possible conditions that can be placed on a supervision order may have some impact as to whether an offender is placed on such an order for supervision or detention.

The current extended supervision order which is made by the court in Victoria *must* contain a number of conditions, such that an offender can potentially be made subject to conditions or instructions from three separate sources: the Court (the mandatory conditions on the extended supervision order); the Secretary to the Department of Justice; and the Adult Parole Board.

Having three potential sources of conditions which an offender must obey may lead to confusion on the offender's part as to which conditions are in place at a given time. It would be preferable for one body to consolidate all of the conditions to minimise any confusion on the part of the offender.

All three Australian jurisdictions with a combined supervision and continuing detention scheme have provided that the conditions of extended supervision orders must be set by the Supreme Court, rather than the Parole Board.

Under the Victorian legislation, although the Supreme or County Court is responsible for making an extended supervision order, there is no power for the order to be returned to the court once the Adult Parole Board has made conditions. The Court of Appeal has no power to return the order to the lower court or the Adult Parole Board to vary the condition nor can the court substitute the conditions it believes to be appropriate. Instead, the Court can only confirm or revoke the order. If the order is

revoked, there is no power to apply for a new order if the offender's sentence has ended.

Concerns may be raised about delegating the setting of conditions to the Parole Board, in the context of the long-term offender sentencing provisions. On the other hand it could be argued that the Adult Parole Board is better placed, and has the experience in dealing with these offenders, to know what conditions (including treatment conditions) are necessary to enhance public protection.

Discussion Model

Issue	Description	As for Extended Supervision?
Who sets conditions?	OPTIONS: Option A—Court sets all conditions (informed by risk assessment and draft Offender Management Plan supplied by the HRO Panel); Option B—Court makes determination as to whether the offender is to be detained in custody or on conditions in the community, with all other conditions set by the HRO Panel; Option C—The HRO Panel sets all conditions (including whether the offender is detained in custody or released into the community).	No—The ESO must contain specified conditions, including that the offender obey any lawful instructions from the Secretary to the Department of Justice and the Adult Parole Board. This means that an offender can be made subject to conditions or instructions from three separate sources: • the Court (the mandatory conditions on the ESO); • the Secretary to the Department of Justice; • the Adult Parole Board. There is no obligation to work towards the offender's rehabilitation, although this is one of the purposes for which conditions can be imposed.

The discussion model presents three possible options for the setting of conditions:

- Option A—the court sets all the conditions (informed by the risk assessment and draft Offender Management Plan supplied by the HRO Panel);
- Option B—the court makes the determination as to whether the offender is to be detained in custody or on conditions in the community, with all other conditions set by the HRO Panel (similar to the current ESO scheme arrangements where most of the conditions are set by the Adult Parole Board); or
- Option C—the court makes the determination only as to whether the HRO Order should be made, with the conditions of the order set by the HRO Panel (including whether the offender is detained in custody or released into the community).

Under both Options A and B, the decision as to whether the offender should be detained in custody or be subject to supervision in the community would be made by a court. Due to the deprivation of liberty involved in the making of such orders, it could be argued that such decisions are appropriately made by a court rather than an administrative body. On the other hand, delegating responsibility for this to the HRO Panel would allow greater flexibility and responsiveness in the way offenders were managed as the Panel could make these decisions without the matter needing to be brought before a court. The Panel would then have the flexibility to make decisions over the duration of the period of the order as to whether the offender should be released in the community for a time, or recalled into custody if he or she has engaging in concerning behaviour.

Offenders serving their orders in the community would be subject to additional conditions, as is currently the case for offenders on ESOs. Under all Australian schemes, with the exception of the Victorian ESO scheme, conditions are set by the court. Option B more closely reflects the current position under ESOs under which the specific conditions of the order are determined largely by the Secretary and the Adult Parole Board.

Arguably Option B—that would require the Court determine whether or not the offender should be in custody during the extension period, but leaving other conditions to the HRO Panel—may represent the best balance between the protection of the offender's rights and removing courts from the 'micro-management' of the offender's sentence.

The argument against Options B and C is that they may delegate too much power to an administrative body to make decisions that may have a serious impact on an offender subject to the order. For example, under the existing ESO scheme, the Adult Parole Board can require an offender to live on prison grounds and not go outside the grounds of the prison without an escort. This was possibly one of the reasons other jurisdictions determined that the power to set the conditions of the order should be left in the hands of the court making the initial determination.

Accommodation

Of central importance to an extended supervision and continuing detention scheme is providing suitable accommodation for offenders subject to orders. Suitable accommodation is, in part, determined by what the purposes of the scheme are. Where the main purpose of continuing detention is to protect the community, this goal can be achieved, at least in the short term, by removing the offender from contact with the public. However, if the purpose includes the care and treatment of high risk offenders, there needs to be some consideration of where an offender should be housed in order to provide the most conducive environment for treatment, rehabilitation and reintegration into the community.

A persistent challenge to supervision provided in the community is the issue of accommodation. The overseas experience has been that sex offender registers, community notification of the locations of sex offenders, and the co-location of multiple sex offenders within group housing, have on occasion led to vigilantism on the part of neighbouring communities that are concerned not only about the safety of their children, but also about the economic stability of the neighbourhood once it has developed a reputation for housing such residents.[22] Vigilante conduct towards sex offenders has also been suspected in Victoria.[23] Within this potentially volatile environment, community-based treatment programs may face severe challenges in successfully reducing recidivism and reintegrating offenders back into the community.

There have been significant difficulties finding appropriate accommodation for some Victorian offenders on extended supervision orders. Recent amendments to the legislation deeming that these offenders may be housed on prison grounds as part of their 'community' supervision, have given rise to concerns about the effect of this arrangement on treatment outcomes. In particular, extended supervision orders are designed to help offenders reintegrate into the community. Supervising offenders by keeping them on prison grounds may in fact impede their rehabilitation and negate the original intention of the order.

If continuing detention were adopted in Victoria, a separate facility or unit for offenders subject to a continuing detention order could be created with an emphasis on the provision of specialised treatment. In order to find suitable accommodation for offenders on continuing detention orders, a clear understanding of the purpose of the order is required as this will dictate to some degree the arrangements to be put into place.

Discussion Model

Issue	Description	As for Extended Supervision?
Where should offenders be housed?	Offenders should be housed wherever it is considered their rehabilitation needs can best be met, taking into account community protection concerns. As a general rule offenders should be housed separately from the general prisoner population (for example, as is currently the case with those offenders subject to an ESO who are required to live within the grounds of a prison).	Not applicable

Under the model, decisions made about where an offender should be detained under a High-Risk Offender Order would be made according to where it was considered that person's rehabilitation was most likely to be facilitated, taking into account community protection concerns. Reflecting the spirit of the Charter of Human Rights and Responsibilities, as a general rule offenders should be housed separately from the general prisoner population (for example, as is currently the case for some offenders subject to an ESO who are required to live within the grounds of a prison). Regardless of where they are housed, offenders should also still be able to access programs offered within in the prison where it is in the interests of their rehabilitation to do so.

It is recognised that as a matter of practicality, while the ideal might be for those under post-sentence detention orders to be housed in a purpose-built treatment facility, this may not be possible. Consequently, those subject to such orders may need to be housed within existing correctional facilities where arrangements can be made for access to appropriate treatment programs.

The Management of Offenders

The current approach to managing offenders on extended supervision orders in Victoria is primarily based on a corrective services model. While Corrections Victoria plays an important role in liaising with relevant social services such as the Office of Housing to assist in the offender's reintegration into the community, it faces a number of challenges in successfully achieving this objective. One of the reasons for this is that it has responsibility for managing offenders on these orders on its own, unlike, for example, in the United Kingdom where there are formal arrangements for coordinating agency responses to the management of offenders who have reached the end of their sentence.

Tailored plans to facilitate an offender's rehabilitation and reintegration should be offered both during sentence and while on continuing detention orders. In addition to having management plans in place for offenders from an early stage, there is a need to introduce clear processes and defined responsibilities for formulating and implementing these plans.

Sex offender treatment that is mandated by the Adult Parole Board or undertaken purely for the purpose of parole may not lead to any real behavioural change. More resources may need to be provided to ensure that all high-risk offenders are assessed prior to sentencing or as early as possible thereafter to ensure that an appropriate treatment regime is put in place as soon as possible during an offender's prison sentence which operates for the duration of their sentence and which continues once they are eligible for release to assist with reintegration into the community.

If a system of continuing detention were established, it should place a heavy onus (beyond reasonable doubt) on those seeking the order to establish that all reasonable steps had been taken to provide rehabilitation opportunities to the offender, that the offender had been given full information about the availability of programs, and that if necessary, programs had been specifically designed to meet the needs of the offender.

If a continuing detention scheme is introduced it is likely that responsibility for managing offenders subject to supervision or detention orders will continue to rest with Corrections Victoria. Rather than placing sole responsibility on one organisation, a multi-disciplinary team approach should be adopted as has occurred in other jurisdictions. There may also be benefit in having an independent body, such as exists in Scotland, to approve and monitor management plans which are developed for these offenders.

An alternative approach would be to vest this responsibility in the Parole Board which already has responsibility for supervising offenders in the community. The Parole Board has built up expertise in this area and it may be a duplication of services or may over-complicate the management of offenders to have a number of different bodies with responsibility for their management during or after sentence. On the other hand, if continuing detention is not intended to be punitive in nature and applies after a person has completed their sentence, there could be value in having a clearer distinction between how offenders are managed under a continuing detention order as opposed to under a sentence.

Discussion Model

Issue	Description	As for Extended Supervision?
What happens once the order is made?	As soon as possible after order imposed, Lead Authority (Corrections Victoria) finalises OMP and submits to the HRO Panel. The HRO Panel approves plan and sends back to lead authority for implementation. Lead Authority manages offender. The HRO Panel to regularly review case (at least once per year).	No—While Corrections Vic manages offenders under orders, there is no independent body that oversees the development or delivery of a management plan.

Under the model presented for discussion, the High-Risk Offender Panel would oversee the management of offenders on High-Risk Offender Orders, whether the offenders were in custody or under supervision in the community.

The primary responsibility for managing offenders under sentence and on post-sentence orders would remain with Corrections Victoria, which would be designated as the 'Lead Authority' for the purposes of the scheme. Once a court made an order for assessment for a HRO Order, a draft Offender Management Plan (OMP) would be developed by Corrections Victoria as the Lead Agency. The OMP would set out the obligations of the Lead Authority and other agencies as well as the rehabilitation goals, and obligations on the offender.

The draft Offender Management Plan would then be sent to the HRO Panel for approval. If the HRO Panel formed the view that the Plan failed to address the issues raised in the assessment report or in any other way would fail to provide adequate strategies for the management of the offender, the HRO Panel could direct the lead agency to redraft and resubmit the Plan. The draft OMP would address the management of the offender during sentence, and post-sentence (in custody and/or in the community). Once the draft Plan had been approved by the HRO Panel, it would then be provided to the court for consideration at the final hearing of the application.

Once a HRO Order was made, the lead agency would be required to finalise the OMP in conjunction with any other service providers who will have responsibility under the Plan. An interagency approach would be particularly important in the case of offenders who would be supervised under order in the community as would need to be collaboration with other agencies to provide housing, employment and treatment services. The finalised OMP would be approved by the HRO Panel.

As part of the Offender Management Plan, a Case Manager would be identified who would be responsible for the implementation of the plan and would report to the HRO Panel on a regular basis. An OMP progress report would be submitted to the HRO Panel prior to a review or where necessary (for example, if the offender is not complying with his or her obligations under the order).

As part of its management function, the HRO Panel would be required to conduct regular reviews of each offender's case. The HRO Panel would also have the power to direct Lead Authorities and other agencies in relation to both the development and implementation of the plan, to avoid a situation where an offender, for whatever reason, does not receive the required care and treatment.

This model could also be adapted for use for offenders who are subject to indefinite sentences.

Variation, Review and Appeal

Despite the fact that the scheme in Victoria is relatively new, a number of operational issues have arisen in its administration. Some of these relate to the processes that have been established to provide for the amendment or review of orders or appeals against orders.

Under the Victorian scheme for extended supervision there appears to be no power to apply to vary an extended supervision order or the conditions that have been included in the order. There is a power to review the extended supervision order but the purpose of the review is limited to determining whether the offender should remain subject to the extended supervision order. The Secretary may apply for a renewal of an extended supervision order at any time while it is still in force.

Under the scheme the offender has a right to appeal a decision to make, renew or not to revoke an extended supervision order. Similarly, the Secretary has a right to appeal such decisions if considered to be in the public interest.

Although the Victorian extended supervision scheme allows the review or appeal of the making of an order (or decisions of whether or not to revoke or review), there appears to be no explicit process for varying, reviewing or appealing the *conditions* of an order. This is largely a consequence of the Parole Board being given the principal responsibility for the setting of conditions, effectively delegating any powers of variation or review from the court to the Parole Board. The only circumstances in which the conditions can be reviewed are if the conditions ordered are determined to be *ultra vires* (outside the powers of the Board to order). Similarly, there appears to be no power on appeal to amend the *length* of an order, although arguably this power is unnecessary because if the court determines the order is no longer required, it can be revoked, and if the court determines it is necessary to extend the period of supervision, a new order can be made.

Issue	Description	As for Extended Supervision?
VARIATION		
Can the order be varied and by which court?	Yes. The HRO Order should include a power for the order to be varied by: • the relevant court—on an application for variation; and • the relevant court—on review of the order. • the relevant court—after a matter had been remitted back from the Court of Appeal.	No—the conditions and the term of extended supervision orders cannot be varied.
REVIEW		

How is the order reviewed?	The DPP must initiate the review.
	One year before the end of the sentence there is an automatic review of the order by the relevant court to determine:
	• Whether the offender remains a risk (as per initial test).
	• What is the least restrictive means of managing that risk, including:
	  ○ whether the period of the order should remain at five years or be reduced;
	  ○ whether the offender should remain in custody or be under supervision in the community (if the court, rather than the HRO Panel, sets this condition);
	  ○ if the offender is to be released into the community what conditions should be imposed (if the court, rather than the HRO Panel, sets the conditions); and
	  ○ if offender to remain in custody, what more needs to happen to ensure that offender can be released at a later date.
		No—ESO is reviewed every three years.
		The proposal is similar to the QLD/WA continued detention schemes.

How often are subsequent reviews required?	The HRO Panel must review at least once per year. Court to review at least once every two years, but the offender can apply for a review at any time with the leave of the court on the ground there are exceptional circumstances.	No—ESO is reviewed every three years.
What orders can the court make if the offender is still considered an unacceptable risk to the community?	The court can confirm or vary the order. If the court sets the conditions, it may confirm or vary the conditions of the order (including whether the person is managed in detention or in the community). If the HRO Panel sets the conditions, the court may confirm the conditions, or direct the Panel to vary the conditions of the order.	No—If the offender continues to present a risk, they can only be kept under supervision. There is no power to vary the conditions of the order.
How is the order managed after the first review?	If the offender is ordered to remain in custody: as soon as possible after the review the Lead Authority finalises the OMP which sets out the rehabilitation goals of the offender, the actions to be taken by the Lead Authority, and a reintegration strategy for the offender. If the offender is ordered to be released into the community at the end of the fixed term, the Lead Authority finalises the Community OMP and submits it to the HRO Panel within 3 months of Order being made. The HRO Panel approves the OMP. The Lead Authority manages the offender according to the OMP. The Lead Authority is required to report regularly to the HRO Panel on offender's progress and action taken under the OMP. The HRO Panel is required to review cases at least once a year.	No—Management of the offender under an ESO is the responsibility of Corrections Victoria. There is no independent authority which manages offenders' progress and can compel other agencies to cooperate with Corrections Victoria.

Issue	Description	As for Extended Supervision?
Can the order be renewed?	Yes. The DPP can apply no later than one year before expiration of the order.	Yes.
What happens if no new application is made?	The offender is discharged at the end of the period of the order set by the court (up to 5 years).	Yes.
APPEAL		
Who should have a right of appeal?	The offender and the DPP have a right of appeal in relation to a decision to make/not make, to renew/not renew or to revoke/not revoke an order.	Yes.
What powers should a court have on appeal?	The Court of Appeal may: • confirm the relevant decision; • revoke the order, in which case the court may make an interim order and remit the matter back to the court which made the decision, with or without any directions; • if it thinks that an order should have been made or renewed, quash the relevant decision, make an interim order if necessary, and remit the matter to the court which made that decision, with or without any directions; or • if it thinks that the order should not have been revoked, quash the relevant decision and make an order reviving the order.	No.

Under the model presented, there would be a power to vary an order on a review of the order (including when the offender is still under sentence and the order is yet to take effect). Providing a power to vary the duration and conditions of the HRO Order will allow for necessary adjustments to be made in line with the offender's progress under the order and may ensure that the offender's risk is managed in the least restrictive way.

The order would be for a set five year period. The continued need for the order would be reviewed one year before the expiration of the sentence. At this time the court will be in a better position to assess the offender's progress, the appropriate length of the order and, if the court sets these conditions, whether the offender should be subject to continuing detention or supervision in the community, and the conditions that should be set.

The order would also be subject to regular reviews by the HRO Panel, and by a court at least once every two years. This would bring the Victorian scheme more in line with those operating in Queensland and Western Australia that provide for annual reviews of continuing detention orders by the Supreme Court. Provision for regular reviews may ensure that offenders remain motivated to continue to meet rehabilitation goals and potentially avoid a situation where an offender, for whatever reason, does not receive the care and treatment he or she requires.

Breach Provisions

The Victorian scheme for extended supervision provides that an offender who breaches a condition of the order—without reasonable excuse—is guilty of an indictable offence carrying a maximum penalty of five years' imprisonment. Once the breach charge is filed, an application for the issue of a summons to appear or a warrant to arrest the offender may be made to the Magistrates' Court. A summons directs the offender to appear at the court which made the extended supervision order, whereas if a warrant is issued the offender can be brought before a bail justice or before the court which made the extended supervision order.

The process for responding to suspected breaches of conditions of extended supervision orders is too cumbersome in comparison to the process for responding to breaches of parole.

Consideration should be given to establishing a separate body to monitor extended supervision orders. This would create a clear distinction between the arrangements for monitoring offenders under sentence and on parole and the arrangements in place once an offender's sentence has expired.

Issue	Description	As for Extended Supervision?
What happens if an offender breaches their conditions, while in the community?	If a police officer reasonably suspects (including on the advice of a corrective services officer) that an offender who is on a supervision order has breached a condition of the order, the officer may exercise a power of arrest, but must bring the person before a court as soon as reasonably possible before the relevant court. If the court is satisfied, on the balance of probabilities, that the offender has breached a condition of the order, it has the power to: • amend the conditions of the supervision order/interim supervision order; • rescind a supervision order and make an continuing detention order; or • make any other order the court considers appropriate to achieve compliance with the supervision order/interim supervision order or to ensure adequate protection of the community.	No— Where it is alleged that an offender has breached the conditions of an ESO the Secretary of DoJ must give the offender at least 14 days notice of the intention to file a breach charge. The Secretary may dispense with this period of notice if the Secretary believes that a charge should be filed without delay, having regard to the seriousness of the alleged breach. Once the charge is filed an application for the issue of a summons to appear / warrant to arrest may be made to the Magistrates' Court. A summons directs the offender to appear before the court that made the ESO. A warrant allows the offender to be brought before a bail justice or before the court which made the ESO.

The discussion model presented aims to simplify the process for responding to breach of an order by giving police officers a power of arrest where they reasonably suspect that an offender has contravened a condition of his or her supervision order.

The model also provides more flexibility in dealing with an offender on breach of an order, depending on the seriousness of the breach and the surrounding circumstances.

Additional Safeguards

There are a number of additional safeguards which should be considered if continuing detention is introduced in Victoria.

In jurisdictions in which continuing detention is available, courts must first be satisfied that the purposes of making the order cannot be achieved by making an extended supervision order. Including a similar requirement in any continuing detention order scheme introduced in Victoria would be consistent with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) recently enacted in Victoria.

Any scheme that involves the detention of individuals by the state requires transparency on the part of those making the decision as to who is to be detained and those administering the scheme. If continuing detention is introduced in Victoria, measures that facilitate transparency should be incorporated into it. Some initiatives which could be considered include easy access to reasons for the decision to make an order, a sunset clause in the enabling legislation, statutory reporting conditions or an independent review body to oversee the entire process.

The Victorian extended supervision scheme specifically provides that an offender is entitled to be legally represented at the hearing of any applications under the scheme and that the court may only begin to hear the application if satisfied that the offender has had a reasonable opportunity to obtain legal representation.

The existing scheme also includes an implied right to be heard. If an offender does not agree with an assessment report filed with the court or any other report or evidence given by a medical practitioner, the offender may file a notice of intention to dispute that report or evidence, in whole or in part. Once such a notice is filed, the offender can then lead evidence on the disputed matters and/or cross examine the author of the report as to its contents. As a matter of fairness, and taking into account the more serious consequences of this order, it would be appropriate that the same protections be made available to offenders in relation to whom an application for a continuing detention order is made.

If a system of continuing detention is introduced in Victoria, a similar policy for legal aid as exists in Queensland and New South Wales should be introduced for people in relation to whom an application for continuing detention is made. Additional funding also may need to be made available for such applications, including allowing for the preparation of any reports that may be necessary.

Discussion Model

Currently there is no requirement for Corrections or the Minister for Corrections to report on the number of offenders subject to extended supervision orders and the conditions of those orders. Such a mechanism may be considered particularly important in Victoria where orders can be made by both the County Court and Supreme Court as decisions of the County Court are not published. In jurisdictions where applications can only be made for orders to the Supreme Court, the judgments are more easily accessible.

It is suggested that the HRO Panel would be required to produce annual reports in relation to the number of offenders managed under the scheme. Like the NSW Serious Offenders Review Committee, the Panel might also be given the power to report to the Minister for Corrections in relation to any issues that may arise in the execution of its functions that may affect the management of offenders, such as resource issues.

Victims of Crime and Continuing Detention

The Victorian extended supervision scheme allows a person included on the victims register to make a submission to the Adult Parole Board for the Board to consider in deciding which instructions or directions the offender should be made subject to while on extended supervision. Before giving an offender any instruction or direction, the Adult Parole Board *must* consider any victim submission in relation to the matter; and *may* give that submission the weight that it sees fit in deciding whether to give an offender an instruction or direction.

A question arises as to whether victims should also have a role in applications or review hearings under a continuing detention scheme or in relation to the existing extended supervision order scheme.

Arguments for allowing victims to have some sort of role in the hearing of an application for continuing detention include:

- it will reduce the perception that victims have no role in the criminal justice process;
- it provides a therapeutic benefit to victims by being able to tell their story in their own words; and
- it may aid in rehabilitation if offenders are confronted with the harm caused as a result of their offending.

Arguments against enabling victims to have a role in the hearing of such applications include:

- it is impossible to assess the nature of the harm suffered by an individual because each individual's response to trauma differs;
- applications for continuing detention should be as dispassionate as possible and it is impossible for judges to remain immune from the emotional impact of victims' views; and
- research has suggested that where victim impact statements have been taken into account in determining penalty, they have had little effect on sentencing outcomes.[24]

Further, it could be argued that submissions made by past victims have no place in a process that is directed at assessing the offender's risks of reoffending post-sentence and at protecting possible future victims from harm. On this basis any involvement should be limited to submissions relevant to the conditions the offender might be placed under should the continuing detention order be downgraded to supervision, as well as to concerns with notification of the offender's release into the community under either a supervision order or unconditionally.

Discussion Model

Issue	Description	As for Extended Supervision?
Victims' involvement in a post-sentence scheme of supervision and detention	Victims may be notified of the making of an application for a High-Risk Offender Order and have the opportunity to make submissions in relation to any conditions set by the relevant decision making body.	Yes.

Relationship with Existing Schemes

The Attorney-General asked the Council to consider how a continuing detention scheme could operate against the existing power of the Courts to order an indefinite sentence under the *Sentencing Act 1991* (Vic) or to place an offender on an extended supervision order under the *Serious Sex Offenders Monitoring Act 2005* (Vic).

A system of continuing detention could possibly run alongside the current scheme for indefinite sentences. However as there is potential for the range of offences covered by indefinite sentencing and serious offender provisions on the one hand and a continuing detention scheme on the other hand to be quite different, this would need to be considered in structuring a continuing detention scheme.

If continuing detention is introduced in Victoria the opportunity should be taken for all schemes which address the management of high-risk offenders at sentence, during sentence or after their sentence to be compared and, if appropriate, amalgamated.

Discussion Model

Indefinite Sentences

Some possible reforms to the indefinite sentencing scheme have been identified which would address this issue and provide some consistency with the proposals for the High-Risk Offender Order.

Under the model presented, changes are proposed in the following three areas:

- risk assessments and offender management—with overall responsibility for these functions vested in the High-Risk Offender Panel;
- arrangements as to when and how the offender is released into the community to improve flexibility; and
- when indefinite sentences are reviewed.

Should a body, such as the suggested High-Risk Offender Panel, be established, it might have similar responsibilities in relation to the assessment of offenders where the court is considering the imposition of an indefinite sentence. In such a case, the court would have the power to make an order for risk assessment and a draft offender management plan. The Lead Authority (Corrections) would produce the draft offender management plan and the assessment would be carried out by assessors accredited by the High-Risk Offender Panel.

The High-Risk Offender Panel could also have responsibility for managing offenders who have been placed on an indefinite sentence, in the same way that they would manage offenders subject to a High-Risk Offender Order. Ongoing structured management might improve the likelihood that by the end of the nominal period, the offender will have been provided with appropriate programs and other opportunities to change his or her behaviour.

Under the model, indefinite sentences would be, as their name suggests, indefinite. However, when such a sentence was up for review, the court would be required to make a determination of what the least restrictive means of managing the offender's risk is. If it were considered that the offender could be effectively managed in the community, the court would have the option of releasing him or her. Alternatively, if it was considered that the offender's risk could not be managed in the community, keeping in mind the interests of community safety, then the court could decide to make no order, and the offender returned to custody.

If released, the offender would remain under sentence indefinitely while in the community and would be subject to supervision and conditions as deemed appropriate by the court and/or the High-Risk Offender Panel. If at any time the offender breached his or her conditions or displayed behaviour that was concerning, he or she could be returned to detention. This would streamline the management of offenders on indefinite sentences with offenders on High-Risk Offender Orders who are also under supervision in the community.

It is also proposed that indefinite sentences are reviewed six months prior to the end of the nominal period, as opposed to the current situation where the sentence is reviewed once the nominal period has expired. This would allow time for new offender management plans to be drawn up for the post-nominal period of incarceration or supervised conditional release into the community.

Serious Offender Provisions

Under the discussion model, no changes to the application of the serious offender provisions are proposed. If an offender is sentenced to a longer than proportionate sentence under the serious offender provisions, an application for a HRO Order could still be made during the offender's sentence. If a court exercised its discretion not to impose a longer than proportionate sentence under the serious offender provisions, this would not preclude an application for a HRO being made at a later stage provided the offender is eligible under the scheme.

Extended Supervision Orders

Under the model presented, the current Victorian post-sentence extended supervision scheme would be replaced by a new post-sentence scheme which provided for a High-Risk Offender Order (HRO Order). Offenders subject to HRO Orders could be managed either in the community (as under the current ESO scheme) or in custody, depending on what option was the least restrictive means of managing the offender's risk. These offenders would come under the supervision of the HRO Panel rather than the Adult Parole Board (as is currently the case for offenders subject to ESOs).

If the model presented in this paper was introduced, the legislation creating the extended supervision scheme would have to be either significantly amended or repealed. The orders of those who are currently subject to extended supervision orders may also need to be reviewed to ensure their consistency with the new scheme.

Questions

1. Should Victoria introduce a post-sentence scheme that would allow for the continuing detention of offenders who have reached the end of their custodial sentence but who are considered to pose a continued and serious danger to the community?

2. Are there any alternatives or additional reforms that should be considered instead of, or in addition to, a continuing detention scheme?

3. If continuing detention is introduced in Victoria, should it be a separate order that operates alongside the current extended supervision order scheme, or should continuing detention and extended supervision be integrated into one streamlined scheme (such as suggested in the Discussion Model)?

4. If a new post-sentence scheme is introduced, is there a need to establish an independent body (such as the High-Risk Offender Panel suggested) to oversee the operation of the scheme? If yes, what should its functions be?

5. If an independent authority, such as a High-Risk Offenders Panel, is established, what should its membership be?

6. If a new post-sentence detention scheme is introduced in Victoria, what should its purpose or purposes be?

7. If a new post-sentence detention scheme is introduced in Victoria:
   (a) to what offences should such a scheme apply?
   (b) what other eligibility criteria should apply (for example, that the offender is currently serving a custodial sentence)?

8. If a new post-sentence detention and supervision scheme is introduced in Victoria:
   (a) what processes should be established for deciding whether an application should be made and for making an application?
   (b) who should be empowered to make applications under the scheme (for example, the Secretary to the Department of Justice as is currently the case for extended supervision orders, or the Director of Public Prosecutions)?
   (c) when should applications be permitted to be made (for example, at any time during an offender's sentence or at an earlier stage)?

9. If a new post-sentence detention and supervision scheme is introduced in Victoria:
   (a) in what forum should applications be heard (for example, in either the County Court as is currently the case for extended supervision orders, or the Supreme Court)?
   (b) who should be responsible for making decisions about whether the legal test has been satisfied and if so, whether an order should be made (for example, a Supreme Court or County Court judge, an expert panel, a jury or a combination of these)?

10. If a new post-sentence detention and supervision scheme is introduced in Victoria:
    (a) should there be provision made for a preliminary hearing?
    (b) should there be a power to make an interim detention or supervision order, and if so, how should this order be structured (for example, should the offender be able to lead evidence or to challenge evidence led, what should the maximum duration of the interim order be, should there be a power to renew an interim order, and should any limits be set on the maximum number of times that the interim order can be renewed)?

11. If a new post-sentence scheme is introduced in Victoria, what information should a court be permitted to consider in determining an application?

12. If a new post-sentence scheme is introduced in Victoria:
    (a) what should be the test for making a post-sentence detention or supervision order?
    (b) what should be the standard of proof? For example:
        - high degree of probability (as for extended supervision);
        - balance of probabilities; or
        - beyond reasonable doubt?

13. If a new post sentence scheme is introduced in Victoria, what other legislative criteria should guide decisions made under the scheme? For example, should the principle of reciprocal obligation be expressly recognised?

14. If a new post sentence continuing detention scheme is introduced in Victoria, should orders be of fixed duration (with a power to renew the orders if necessary) or indefinite? If of fixed duration:
    (a) what should be the maximum length of an order?
    (b) should any criteria be provided to assist courts in determining the appropriate length of the order (for example, a requirement to take into account the sentence imposed for the original offence)?
    (c) should an order be able to be renewed (for example, by an application for a new order)? If so:

(i) when should an application to renew the order be made?; and
(ii) should any additional safeguards be included (for example, to limit the total period for which a person can be subject to an order, and/or setting different criteria for determining if the order should be renewed)?

15. If a new post-sentence scheme is introduced in Victoria:
    (a) who should determine whether the offender is detained in custody or supervised in the community?
    (b) how should the other conditions be set (for example, by a court, by an expert panel, by the Adult Parole Board, prescribed in legislation or a combination of these options)?
    (c) what should the purpose, or purposes of conditions be?

16. If a new post-sentence scheme is introduced in Victoria:
    (a) what should be the principal consideration in determining where offenders are housed (for example, where an offender's rehabilitation needs can best be met and/or the least restrictive means of managing the offender's risk)?
    (b) should offenders who are subject to a post-sentence detention order be detained:
        - in prison;
        - in separate facilities within prison grounds; or
        - in another facility?
    (c) if offenders are detained in separate facilities, should they be given non-residential access to prison-based programs, facilities and services?
    (d) if a new post-sentence scheme is introduced that only provides for continuing detention and does not replace the existing extended supervision order scheme, would an inconsistency arise with the recent amendment to the *Serious Sex Offenders (Monitoring) Act 2005* (Vic) in relation to the housing of offenders on extended supervision orders on prison grounds?

17. If a new post-sentence scheme is introduced in Victoria:
    (a) what arrangements should be made for the *management* of offenders subject to detention and supervision orders under the scheme?
    (b) who should have responsibility for the management of these offenders (for example, the Adult Parole Board and Department of Justice as is currently the case, or a new body such as the High-Risk Offender Panel)?
    (c) if a High-Risk Offender Panel, or similar body, was established to manage offenders under post-sentence detention and supervision orders, what should be the relationship between this body and the Adult Parole Board while an offender is still under sentence?

18. If a new post-sentence scheme is introduced in Victoria, what provision should be made for the variation, review and appeal of orders under the scheme?

19. If a new post-sentence scheme is introduced in Victoria, what process should be adopted for responding to breaches?

20. If a new post-sentence scheme is introduced in Victoria, should there be specific provision for ancillary orders, such as suppression orders?

21. If a new post-sentence scheme is introduced in Victoria, should there be any additional measures to enhance transparency?

22. If a new post-sentence scheme is introduced in Victoria:
    (a) should there be provision for the right for an offender to be heard, the right to legal representation and the right to receive legal assistance?
    (b) if a scheme includes the right to legal assistance, what should funding cover (for example, legal representation for hearings, reviews and (where relevant) appeals and psychiatric reports)?
    (c) should the funding be means tested or should offenders have a right to legal assistance regardless of their income and assets?

23. If a new post-sentence scheme is introduced in Victoria, what other safeguards should be included in the scheme?

24. If a new post-sentence scheme is introduced in Victoria, should victims have the same rights as they currently do under the existing extended supervision order scheme?

25. If a new post-sentence scheme is introduced in Victoria, should any changes be made to:
    (a) the way indefinite sentences are structured are the *Sentencing Act 1991* (Vic)?
    (b) the way offenders under an indefinite sentence are managed?

26. If a new post-sentence scheme is introduced in Victoria, should any changes be made to the existing serious offender provisions under the *Sentencing Act 1991* (Vic)?

Endnotes

1 *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50.

2 The Discussion and Options Paper is available by contacting the Council or via the Council's website http://www.sentencingcouncil.vic.gov.au.

3 Karen Gelb, *Recidivism of Sex Offenders* (Sentencing Advisory Council, 2007) 18; Stephen J Morse, 'Bad or Mad?: Sex Offenders and Social Control' in Bruce J Winick and John Q LaFond (eds), *Protecting Society from Sexually Dangerous Offenders* (2003) 165, 167.

4 *Sentencing Act 1991* (Vic) s 18B(1).

5 Paul Mullen, 'Dangerousness, Risk and the Prediction of Probability' in Michael Gelder, Juan Lopez-Ibor and Nancy Andreason (eds), *New Oxford Textbook of Psychiatry* (2000) 2066.

6 Nigel Walker, 'Ethical and Other Problems' in Nigel Walker (ed.) *Dangerous People* (1996) 7-8.

7 R. Karl Hanson and Monique T Bussière, 'Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies', (1998) 66 *Journal of Consulting and Clinical Psychology* 348.

8 Ibid.

9 Henry Steadman, 'From Dangerousness to Risk Assessment of Community Violence: Taking Stock at the Turn of the Century' (2000) 28 (3) *The Journal of the American Academy of Psychiatry and the Law* 265, 266.

10 Denise Lievore, *Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy* (Australian Institute of Criminology, 2004) 80.

11 Ibid 102.

12 Adult Parole Board of Victoria, *Annual Report 2004-05*, (2005) 6.

13 Christopher Slobogin, *Minding Justice: Laws that deprive people with mental disability of life and liberty* (2006) 109.

14 Professor James Ogloff, '*Legal and therapeutic efforts to protect the public from the sexual predator', (presentation to the Australian and New Zealand Association of Psychiatry Psychology and Law Dinner Meeting, Melbourne, Victoria, 21 September 2006).*

15 *The Charter of Human Rights and Responsibilities Act 2006* (Vic) became law on 25 July 2006.

16 Richard Fox, *Victorian Criminal Procedure* (2000) 298.

17 Kate Warner, 'Sentencing Review 2002–2003' (2003) 27 *Criminal Law Journal* 325, 338.

18 Patrick Keyzer *et al*, 'Pre-Emptive Imprisonment for Dangerousness in Queensland Under the *Dangerous Prisoners (Sexual Offenders) Act 2003:* The Constitutional Issues' (2004) 11(2) *Psychiatry, Psychology and Law* 244, 250.

19 George Zdenkowski, 'Community Protection Through Imprisonment Without Conviction: Pragmatism Versus Justice' (1997) 3(2) *Australian Journal of Human Rights* 8.

20 See, for example, Lenore Simon and Kristen Zgoba, 'Prevention of Sex Crimes against Children: Legislation, Prevention and Investigation' in Richard Wortley and Stephen Smallbone (eds) *Situational Prevention of Child Sexual Abuse* Monsey, NY: Criminal Justice Press, (2006) 86-87.

21 Christopher Slobogin, 'A Jurisprudence of Dangerousness' (2003) 98 *Northwestern University Law Review* 1, 49.

22 Minnesota Department of Corrections, *Level Three Sex Offenders Residential Placement Issues: 2003 Report to the Legislature* (2003), 8.

23 See for example: 'Investigators probe pedophile house fire' *The Australian* (Sydney), 6 October 2006, 3; 'Flames of Hate' *Herald Sun* (Melbourne) 6 October 2006, 1, 4.

24 Tracey Booth, 'Homicide, Family Victims and Sentencing: Continuing the Debate about Victim Impact Statements' (2004) *Current Issues in Criminal Justice* 253 at 255.