Purpose of this Summary

This paper briefly summarises the key findings and recommendations of the Sentencing Advisory Council’s Final Report on High-Risk Offenders: Post-Sentence Supervision and Detention. This summary should be read in conjunction with the Final Report which provides a comprehensive analysis of the issues and a full set of the Council’s recommendations.1

Terms of Reference

In May 2006, the Attorney-General, the Hon Rob Hulls, MP, requested the Sentencing Advisory 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. The Council was also asked to provide advice on the possible structure of such a scheme, should one be introduced in Victoria.

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;2 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).

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

The Current Supervision Scheme

Offenders who have committed certain sexual offences (primarily sexual offences against children) and who have reached the end of their prison sentences may be made subject to an extended supervision order (ESO). An ESO allows for an offender’s ongoing supervision in the community under various conditions for a period of up to 15 years. However, the continuing need for the order is reviewed at least every three years.

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 sexual offence if released unsupervised into the community after serving a custodial sentence. There is no limit on the number of times that an order may be made in respect of an offender.

Since the ESO scheme commenced, there have been 14 successful applications for extended supervision orders.3 The types of conditions that have been set under ESOS include curfews, outings only under escort and a requirement to live in a temporary centre established by Corrections Victoria within the walls of Ararat Prison.4

The legality of requiring an offender to live on land within the perimeter of a prison was recently challenged in the Supreme Court.5 The legislation was subsequently amended specifically to allow this to occur.
A New Continuing Detention Scheme for Victoria?

Continuing detention schemes currently exist in New South Wales, Queensland and Western Australia.

As in other states with continuing detention, the power in Victoria to detain offenders after they have fully served their sentences would exist alongside provisions allowing for an offender’s post-sentence supervision in the community under conditions.

Inquiry Process

On 4 September 2006 the Council released an Issues Paper entitled *High-Risk Offenders: Continued Detention and Supervision Options*. The Issues Paper examined current legal responses in Victoria and other jurisdictions to high-risk offenders at different points in the criminal justice system, with a particular focus on sentencing and post-sentence options. The Council held preliminary consultations to inform the development of the Issues Paper and also called for written submissions on the Issues Paper.

The Council released a more detailed Discussion and Options Paper on 29 January 2007 (the Discussion Paper). This was structured around the two key questions under review: the merit of introducing a continuing detention scheme in Victoria; and the possible structure of such a scheme, if introduced. The Discussion Paper presented a discussion model for a continuing detention scheme for the purposes of stimulating discussion and debate.

To coincide with the release of the Discussion Paper, the Council also published a research paper reviewing the current literature about the nature of sex offending, the characteristics of sex offenders, their risk of reoffending, and the efficacy of treatment in reducing recidivism.

The Council called for further submissions and held an intensive series of consultations. The Council received 34 submissions in response to the Discussion Paper and hosted a number of meetings.

The Council also held six focus groups with community members drawn from a small random sample of the Melbourne population (two following the release of the Issues Paper, and a further four after the release of the Discussion Paper). While the opinions and perceptions of such a small group are not necessarily representative of those held by the broader community, the focus groups were a valuable exercise and the Council appreciated hearing the views of a wide cross-section of ordinary community members.

Merit of Continuing Detention

Introduction

The first part of the Council’s terms of reference sought advice on the merits of introducing continuing detention. A comprehensive analysis of the issues and the Council’s conclusions on merit are set out in Part 2 of the Report.

The stated purpose of post-sentence schemes is to enhance community protection through the monitoring, treatment and control of offenders at high risk of committing serious (most usually, sexual) offences. Because post-sentence schemes apply after an offender has already served his or her sentence for an offence, the purpose of these schemes cannot be to further punish the offender.

The introduction of legislation that allows for the continuing detention of high-risk offenders beyond the end of their sentence can be seen as an extreme response to the problem of protecting the community from serious crime.

Unlike criminal sentences that are imposed on an offender for *proven past offending*, post-sentence schemes target the risk of reoffending based on *predictions of future behaviour*. This represents a radical departure from long-standing legal principles.

Reflecting the complexity of the issues, a range of views have been expressed to the Council during this inquiry about whether or not Victoria should introduce a continuing detention scheme, form firm support for the idea to strong opposition.

Key Issues

Lawfulness of Continuing Detention

A majority of the High Court has held that the Queensland legislation allowing continuing detention is constitutionally valid. In doing so, the High Court pointed to a number of factors including the protective purpose of the scheme, the test that must be satisfied, that the rules of evidence apply, and that there are safeguards such as a right of review and to appeal.

Risk Prediction

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. Such difficulties have led one forensic clinician to conclude that predictions of risk come ‘ perilously close’ to chance. Continuing detention laws may deprive people of liberty for lengthy periods on the basis of ‘ an educated guess’ and may lead to the detention of people who are unlikely to reoffend.

Human Rights Issues

The continuing detention of offenders beyond the term of their sentence may infringe human rights. The Victorian Charter of Human Rights and Responsibilities enshrines a number of human rights, including the right to freedom of movement, to liberty and security, to a fair trial, and the right not to be subjected to arbitrary arrest or detention.
The human rights protected in the Victorian Charter are not absolute and may be subject to reasonable limitations ‘as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom’. The Charter specifies a list of relevant factors to be taken into account in relation to whether a limitation of a right can be justified including:

- the nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relationship between the limitation and its purpose; and
- any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The overriding purpose of continuing detention schemes is community protection. The key questions in relation to the merit and structure of a continuing detention scheme are whether there is evidence that supports the need for such a scheme (for example, evidence that such schemes are an effective means of protecting the community) and whether there are any less restrictive means of achieving the same purpose. Even if continuing detention is proven to be an effective means of achieving community protection, it may not be considered to be ‘reasonably justified’ in accordance with the Charter if other less intrusive means of achieving this objective can be found.

Need and Effectiveness: The Evidence

There is no way of knowing how much more effective a formal continuing detention scheme would be in meeting the objective of community protection than an improved ESO scheme, and whether there are other, less intrusive means of effectively protecting the community. The absence of evidence as to whether continuing detention schemes achieve their goal of protecting the community, and whether this could be achieved in a less intrusive way, could be viewed as a reason for caution.

A recent editorial in The New York Times questioned the underlying motivation for an ‘explosion’ of laws designed to keep sex offenders at bay, given the lack of evidence about their effectiveness in promoting community safety:

> What you see is not a rational system for managing risks and rehabilitating people, but a system for managing public fear.

A number of submissions questioned whether a continuing detention scheme could be justified given a lack of solid empirical data that community safety would be improved, taking into account the broader impacts of introducing such a scheme. For example, continuing detention schemes have the potential to have a negative effect at other points in the legal process, such as on rates of guilty pleas for sexual offences. They also may have adverse effects on treatment and consequently community safety if offenders fear information disclosed during treatment may be ‘used against them’ leading to the possibility of continuing detention.

Many submissions also questioned the value of continuing detention in reducing the overall incidence of sexual abuse. This is because continuing detention schemes typically target sex offenders who offend outside the family. A significant proportion of sexual assaults are perpetrated by family members or by someone known to the victim. As the majority of sexual offences are never reported, and only a small number of sex offenders are ever prosecuted, continuing detention schemes will only ever capture a small number of known offenders. Continuing detention may therefore set up a false sense of security, leaving parents and children vulnerable to abuse from family members and other people known to them.

Fears also were raised by some that a continuing detention scheme could be used to compensate for failure to provide offenders with access to adequate treatment during the period of their sentence.

Cost

Continuing detention schemes are potentially costly and may divert funding away from other measures that may more effectively protect the community, such as crime prevention and interventions earlier in the criminal justice system. While there is no information on the costs of existing Australian schemes, the overseas experience suggests that the resources required to support continuing detention are likely to be significant.

Only a small proportion of sexual offences are ever reported to police. A focus on the small group of high-risk offenders whose behaviour has been dealt with in the criminal justice system may divert funds away from combating other forms of violence, including abuse within the family.

Alternatives to Continuing Detention

The merit of continuing detention must be assessed against existing approaches to high-risk offenders and other alternative responses.

For example, improvements to the use of sentencing options for serious offenders (including improvements to pre-sentence assessments to better inform the sentencing judge) could arguably render a post-sentence continuing detention scheme unnecessary.

In Australia and overseas, a range of other approaches to managing high-risk offenders and other high-risk groups in the community has been developed. These could be viewed either as alternatives or as adjuncts to a continuing detention scheme. Relevant initiatives include:

- the introduction of multi-agency cooperative arrangements to improve the coordination and delivery of services, as well as the management of high-risk people in the community;
- the establishment of independent authorities to oversee the management of high-risk offenders, and/or undertake research and conduct training on best-practice approaches; and
- community initiatives to assist the reintegration of offenders into the community while managing the risk of reoffending.
The responses in Victoria to high-risk sex offenders include the establishment of a register of sex offenders, the creation of special offences to prevent offenders coming into contact with potential victims, and the extended supervision scheme that provides for the post-sentence supervision of high-risk sex offenders who offend against children.

A number of those who opposed the introduction of continuing detention argued that current measures to manage high-risk offenders would be sufficient to protect the community if there were adequate resources and the measures were consistently applied. There was support for improving the range of sentencing options, the frequency and standard of pre-sentence assessments and arrangements for managing offenders in the community, including under the existing extended supervision order scheme.

However, others thought that such responses did not go far enough to protect the community against the ‘critical few’ offenders who may place the community at a significant risk of serious harm. It was thought that the only way to protect the community from those offenders is to detain them beyond the end of their sentence.

The Council’s View

Like the community, Council members have struggled to reach consensus on the question of the merit of introducing continuing detention in Victoria.

All Council members recognise the state’s legitimate role in protecting community members from criminal offences. The Council is sympathetic to concerns about the potential of sex offenders, in particular, to reoffend upon their release from prison if adequate supervision and other protections are not put in place. We acknowledge the devastating effects on victims and their families of these offences. The Council strongly endorses the adoption of a range of measures that may reduce the risk posed by serious offenders.

However, a majority of the Council has concluded that regardless of how a continuing detention scheme is structured, the inherent dangers involved outweigh its potential benefits, particularly taking into account the existence of less extreme approaches to achieving community protection, such as extended supervision.

The Council members in the majority are persuaded by the many submissions that have been made expressing serious concern about whether such an extreme measure as continuing detention can be justified. They share concerns about the inability of clinicians to predict risk accurately, the potential of such schemes to infringe human rights and due process, and the lack of evidence to support claims that continuing detention will reduce overall risks to the community. They also believe there are other, more cost-effective means of reducing risk.

Although the existing ESO scheme has been in operation for only a short period of time, those in the majority believe supervision in the community, if properly resourced and structured, is equally able to achieve the goal of community protection, and does so in a less intrusive way that avoids many of the pitfalls of continuing detention. Until such time as the current scheme has been evaluated and found to be deficient in some significant respect that goes beyond practical challenges, such as finding suitable accommodation in the community, the Council members in the majority are not prepared to recommend the more radical step of continuing detention.

A minority of Council members support the introduction of a continuing detention scheme in Victoria to deal with the ‘critical few’ offenders who pose a serious risk to the safety of community members. Those in the minority consider that the law should allow for the continuing detention of offenders who pose a high risk of committing further serious crimes, particularly sex offences. A transparent scheme with appropriate checks and balances is a legitimate measure to protect the community by preventing the reoffending of these critical few. These Council members base their support on the assumption that a continuing detention scheme will include all of the features and safeguards recommended in the Final Report. This will ensure that the competing rights and interests of offenders and the broader community are balanced appropriately and orders are made in only the most compelling cases.

All Council members agree that, should continuing detention be introduced, its use should be carefully circumscribed and limited to those few offenders who pose a serious continuing risk to the community on their release. Such a scheme should also include all the protections identified in the Final Report.

Reflecting the views of a majority of the Council, the Council has presented possible reforms to the ESO scheme as an alternative to the recommendations about how any continuing detention scheme should be structured. These are set out in the Final Report.

Structure of a Post-Sentence Scheme

Introduction

The second part of the Council’s terms of reference sought advice about the structure of a post-sentence continuing detention scheme. A comprehensive analysis of the issues and the Council’s recommendations on structure are set out in Part 3 of the Final Report.18

The Council, like a number of those who made submissions, believes that post-sentence detention and supervision should be viewed as extraordinary measures and that this should guide the formulation of any model. For this reason it believes any scheme allowing for continuing detention or extended supervision should be narrowly drawn and limited in scope, and should build in a number of protections for those who might find themselves subject to it.

In developing the model outlined in the Report, the Council has endeavoured to ensure that the scheme is consistent with both the Victorian Charter of Human Rights and Responsibilities and the Victims’ Charter, and, having regard to the High Court’s comments in Fardon v Attorney-General (Qld), to ensure that appropriate safeguards are included.19
The Council recommends that regardless of whether the existing ESO scheme is retained and reformed, or a new high-risk offender scheme is introduced, consideration should be given to providing additional funding and resources at various points in the system to support the proper operation of the scheme.

Guiding Principles

The general principles that have guided the proposals in the Council’s Final Report are that:

- the scheme must not be designed to punish the offender, but rather to protect the community;
- continuing detention should be a last resort, with a presumption in favour of the least restrictive alternative;
- the scheme should be targeted primarily to offenders who pose an unacceptable risk of committing serious sexual offences against either adults or children, and should include offenders convicted of murder, manslaughter or attempted murder;
- the state should 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;
- the legislation should, as far as possible, be consistent with the principles in the Victorian Charter of Human Rights and Responsibilities and the Victims’ Charter; and
- strong procedural safeguards should be built into the legislation.

A New High-Risk Offenders Scheme

High-Risk Offender Orders

The Council recommends that if continuing detention is introduced, the management of offenders under post-sentence orders should be integrated into a single scheme—the High-Risk Offenders scheme (‘HRO scheme’). Orders made under the scheme would be referred to as ‘high-risk offender orders’ (‘HRO orders’).

It is recommended that the legislation provide for two forms of HRO order:

- a supervision HRO order, under which an offender is managed in the community (similar to the existing ESO); and
- a detention and supervision HRO order, which would allow the offender to be detained or managed in the community, depending on the least restrictive alternative for safely managing the offender’s risk.

Unlike the form of continuing detention in other Australian jurisdictions, a detention and supervision HRO order would expressly allow for the offender to be made subject to other less restrictive forms of control than detention during the period of the order. The Council believes this would increase the flexibility of the order (for example, by allowing for periods of supervised release, with the ability to quickly recall offenders to prison at any time), and maximise the scheme’s compliance with the Victorian Charter of Human Rights and Responsibilities.

Length of High-Risk Offender Orders

Instead of long orders with frequent automatic reviews, the Council concluded that it would be more transparent to make HRO orders for a set two-year period, although an application to review an existing order could be made at any time. In circumstances where the offender was still believed to present an unacceptable risk to the community at the end of an existing order, a new order could be made.

There would be no limits on the number of times a new order could be made. Under the Council’s proposals, it might be possible for an offender who continued to present an unacceptable risk to be on an HRO order for the rest of his or her life, provided the offender continued to pose an unacceptable risk of committing a relevant offence.

What Body Would Make Orders?

Because of the exceptional nature of post-sentence measures, particularly the possibility of offenders being detained, the Council recommends that the Supreme Court should be the only court that can make HRO orders, and that should also decide what type of order (supervision only or detention and supervision) to make.

Who Would Apply?

Applications under the Council’s proposals would be made by the Director of Public Prosecutions (DPP) on the advice of the screening body (an internal screening committee constituted by the Department of Justice). Assigning responsibility for making applications to the DPP, or in the alternative an independent office established for this purpose, would ensure that the application process is removed as far as possible from the political process.

The Role of Victims

The DPP, as the applicant, would be required to make all reasonable efforts to notify a person on the Victims Register of an application for an HRO order, and the outcome of the application.

A person included on the Victims Register would have the right to make a submission about the types of conditions that may be given to an offender who is subject to an HRO order (for example the victim may request that the offender not be housed in the same suburb as that in which the victim resides).

When Would Applications be Made?

Under the Council’s proposals, applications for the initial HRO order would need to be made prior to an offender’s earliest release date (usually the parole eligibility date) unless new adverse evidence about an offender’s risk became available (in which case the application would need to be commenced prior to the end of the offender’s sentence). This would allow the offender’s risk to be more intensively managed during the remainder of his or her sentence.
The initial HRO order would commence upon the expiry of the offender’s sentence or order.

Interim Orders
The court would also have the power to make an interim order in circumstances where it considers an offender’s sentence (or an existing order) may expire before the application is finally determined and where it is in the interests of justice to make an interim order, taking into account the reasons why the application was not finalised before the expiry of the offender’s sentence or order.

Eligibility for an HRO Order
To be eligible for an initial HRO order an offender would need to:
  • have been found guilty of a serious sexual offence against a child or an adult (such as rape, sexual penetration of a child or committing an indecent act with a child), murder, manslaughter or attempted murder; and
  • be serving a custodial sentence for one of the relevant offences; and
  • be aged 21 years or over at the time the application is made.

The Council believes the inclusion of homicide offences—while a point of difference with other existing Australian schemes—would be appropriate given the gravity of harm caused, and the impact of these offences on victims and their families.

The Test, Burden and Standard of Proof
Before making an HRO order, the Supreme Court would need to be satisfied that the offender presented an unacceptable risk of reoffending if an order were not made. The DPP would have the burden of proving this test.

The standard of proof, as for the existing ESO scheme, would be a high degree of probability.

The Supreme Court would retain discretion as to whether or not to make an order.

Relevant Factors
In deciding whether to make an order, and what type of order to make (supervision only or detention and supervision), the Supreme Court would be required to take into account a range of factors, including the risk the offender would pose to the community if an order were not made and the need to protect the community from this risk. Before making an order the court would also have to consider whether there were any less restrictive means of managing the offender’s risk.

The court would also have to take into consideration the contents of any assessment reports from accredited experts.

Risk Assessment
Assessment reports could only be prepared by a person accredited for this purpose (a psychiatrist or psychologist with demonstrated expertise in the field of sexual and other serious violent offending, and risk).

The Council has recommended the establishment of a new independent Office of the Risk Management Monitor (discussed below). The functions of the Monitor would include accrediting those authorised to make risk assessments under the scheme and developing guidelines and standards for risk assessment reports.

Right to be Heard
The offender would have a right to be present at the hearing and to be legally represented. The court would only be permitted to begin hearing the application if satisfied that the offender has had a reasonable opportunity to obtain legal representation.

Right to Appeal
Decisions made concerning the making of an order would be able to be appealed to the Court of Appeal.

A New High-Risk Offenders Board
Once the initial HRO order was made (generally prior to the expiry of the offender’s non-parole period), the offender would come under the management of a new independent body referred to as the High-Risk Offenders Board (‘the HRO Board’).

The HRO Board would make all decisions concerning an offender’s parole while he or she was still under sentence, and also have responsibility for managing offenders post-sentence. The continuing need for an HRO order, and the type of order (i.e. a supervision HRO order, or a detention and supervision HRO order) would be reviewed by the Supreme Court prior to the end of an offender’s sentence and the HRO order coming into operation.

The establishment of a new dedicated body, such as the proposed HRO Board, to manage this group of high-risk offenders is an important aspect of the scheme. In the Council’s view, it would allow for the accumulation of expertise in the management of these offenders, and for these offenders to be more intensively managed than other offenders at lower risk of reoffending.

The Council has recommended that the membership of the HRO Board should be determined once a commitment is made to establish such a body. However, at a minimum, the Board should be chaired by a current (or possibly retired) Supreme Court judge, and the deputy-chair should be a judicial officer or another experienced legal practitioner. The Council has also recommended that the Board include community representatives, including at least one member representing the interests and views of victims of crime.

The Management of Offenders
Responsibility for the day-to-day management of offenders would remain with Corrections Victoria as the Lead Agency. Corrections Victoria would be responsible for developing Offender Management Plans (OMPs) detailing the obligations of the offender and agencies delivering services under the plan, such as treatment services. Responsibility for approving OMPs would rest with the HRO Board, which would also have the power to issue directions to agencies to ensure the delivery of services. This approach recognises the importance of both
the offender and the state complying with their obligations under the scheme. This is sometimes referred to as the principle of reciprocal obligation. The HRO Board would be required to review OMPs at least once a year.

Conditions of HRO Orders

While the core conditions of HRO orders (for example, not to commit another offence, not to leave the state without permission, and to notify any changes of name or address) would be set out in the legislation, any additional conditions would be set by the HRO Board. The Board would have the power to vary the conditions at any time to ensure the safe management of the offender.

Where Would Offenders Reside?

Under the Council’s proposals, offenders on supervision HRO orders would have to be housed in the community. The Council believes the current practice of housing offenders within the perimeter of a prison under the guise of ‘supervision in the community’ is unsustainable. The Council has recommended that alternative options be explored as a matter of priority.

The Council has recommended that offenders detained under detention and supervision HRO orders should be housed separately from the general prisoner population, and detained wherever it is considered their rehabilitation needs can best be met, taking into account community protection concerns and the least restrictive means of managing those offenders’ risk. The Council suggests that consideration should be given to alternative detention arrangements, such as a secure treatment facility.

In the case of offenders subject to a detention and supervision HRO order, the HRO Board would have the power to authorise periods of supervised release, and would also have the power to recall these offenders to custody at any time, for reasons including a breach of the conditions of the order.

Breach of Orders

Breach of an HRO order would be an offence punishable by up to two years’ imprisonment.

The Council has also made recommendations about the process for responding to breaches to allow offenders to be dealt with quickly and efficiently.

Transparency

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 on the part of those administering the scheme.

If a new high-risk offender scheme is introduced it is important that the scheme operate in a transparent way, both to promote public confidence, and to ensure that its operation and effectiveness can be properly assessed.

Some of the measures the Council has recommended to enhance transparency include:

- making the court’s reasons for decisions publicly accessible (even in cases where identifying details are suppressed);
- ensuring there are statutory reporting conditions, requiring those responsible for the administration of the scheme to provide information on the scheme, including the production of annual reports; and
- requiring the legislation to be independently evaluated after it has been in operation for five years to assess the effectiveness of, and continued need for, the legislation.

Confidential Information

While transparency is important, a balance must be struck between the need for reporting and transparency, and for suppressing sensitive information in appropriate cases. The Council recommends that, as for the existing ESO scheme, a new HRO scheme should allow the suppression of details that might identify offenders or victims. Under these proposals, breach of suppression orders would constitute an offence punishable by 1000 penalty units in the case of a body corporate, or in any other case 240 penalty units, two years’ imprisonment, or both.

The Council also recommends that the unauthorised disclosure of confidential information should be an offence punishable by 240 penalty units, or 2 years’ imprisonment.

Office of the Risk Management Monitor

The Council has recommended the establishment of a new independent Office of the Risk Management Monitor. The broad role of the Monitor would be to ensure that best-practice approaches are used in the assessment and management of high-risk offenders subject to post-sentence orders.

The Risk Management Monitor would:

- undertake and commission research on risk assessment methods, and best-practice treatment interventions for high-risk sexual and violent offenders;
- develop guidelines and standards for risk assessment reports and risk management plans;
- accredit those authorised to make risk assessments under the scheme;
- audit and monitor the adequacy of treatment interventions;
- advise the HRO Board and the responsible Minister; and
- provide education and training to practitioners and service providers on risk assessment and risk management.

The Council has proposed that the person appointed to this role should be a senior clinician with experience in sex offender treatment and risk assessment.

Transitional Arrangements

The introduction of a new integrated scheme raises complex transitional issues which will require careful consideration. It is likely that there will be a group of offenders who are subject to ESOs at the time when the new arrangements come into force.

The Council has recommended that the Supreme Court review all ESOs as soon as practicable after commencement of the high-risk offender legislation to
determine whether each offender should be made the subject of an HRO order and, if so, the nature of the order (i.e. a supervision HRO order or a detention and supervision HRO order). The legislation should incorporate a mechanism to preserve the validity of existing ESOs pending the Supreme Court review. In the meantime these offenders should come under the jurisdiction of the High-Risk Offenders Board and be subject to other relevant new arrangements.

An Alternative Approach: A Reformed Extended Supervision Scheme

Reflecting the views of a majority of the Council, in the Final Report the Council has presented possible reforms to the ESO scheme as an alternative to its high-risk offender scheme.

The proposed set of alternative reforms to the extended supervision scheme are generally consistent with the high-risk offender scheme. However, a reformed extended supervision order scheme would:

- **not** allow for the post-sentence detention of offenders;
- retain the current provision allowing the County Court or Supreme Court to hear applications for ESOs, depending on the court in which the offender was sentenced; and
- provide that the court making an ESO should have the **power to set conditions** (unless the HRO Board would set any additional conditions not provided for in the legislation).

Indefinite Sentences

The Council was asked how a post-sentence scheme would operate against the backdrop of the existing power of the courts to order an indefinite sentence.

Indefinite sentences are sentences of an indefinite length than can be imposed for certain serious offences, such as murder, manslaughter, rape and serious sexual offences against children.

Similar to post-sentence orders, the court must be satisfied to a high degree of probability that the offender is ‘a serious danger to the community’ before imposing an indefinite sentence. The court must also specify a nominal sentence, after which time the offender’s sentence is reviewed and the offender may be discharged from the sentence. The nominal sentence must be equal in length to the non-parole period the court would have set had the court sentenced the offender to a fixed term sentence.

The Council has recommended changes to the way indefinite sentences are structured and administered to ensure the management of offenders serving an indefinite sentence is consistent with that of offenders subject to post-sentence orders.

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**Endnotes**

3. E-mail from Corrections Victoria, 19 April 2007.
6. Bernadette McSherry, High-Risk Offenders: Continuing Detention and Supervision Options Community Issues Paper (2006). This paper was authored on behalf of the Council by Professor Bernadette McSherry.
12. See further Sentencing Advisory Council, (2007b), above note 1, Section 2.1; Sentencing Advisory Council, (2007a), above n 7, [5.3]–[5.15].
16. For example, only 19 per cent of those surveyed as part of the most recent ABS Personal Safety Survey who had experienced sexual assault in the last 12 months had reported the incident to police: Australian Bureau of Statistics, Personal Safety Survey Australia, Catalogue 4906.0 (2005) 21.