Submission Regarding the *Crimes (High Risk Offenders) Act* 2006 (NSW)

I. Introduction

The Rule of Law Institute of Australia thanks the Department of Justice for the opportunity to make a submission regarding the *Crimes (High Risk Offenders) Act* 2006 (NSW).

The Institute is an independent, non-partisan, not-for-profit body formed to promote and uphold the rule of law in Australia.

The Patron of the Institute is The Honourable James Spigelman AC QC, and the Governing Committee includes Richard McHugh SC, Professor Geoffrey de Q. Walker, David Lowy AM, Nicholas Cowdery AM QC, Professor Martin Krygier, and Hugh Morgan AC.

The objectives of the Institute include promoting good governance in Australia by the rule of law, and encouraging transparency and accountability in State and Federal government.

II. Initial Considerations

The Institute notes that post-sentencing supervision and detention regimes raise a number of important rule of law issues. These include:

- Detention orders being made, and custodial sentences being imposed for breaches of supervision orders, using civil burdens of proof, which deprive individuals of their liberty without the evidentiary and procedural safeguards built into criminal trials;
- Custodial sentences being imposed for breaches of supervision orders that may be vastly disproportionate to the gravity of the breach;
- Ex parte hearings occurring for detention orders, which undermines procedural fairness requirements; and

- Detention orders providing for the deprivation of liberty based on expectations about future behaviour, rather than as punishment for proven past offending.

As a result of these concerns, such post-sentence regimes *ipso facto* are difficult to reconcile with the rule of law.

Furthermore, the Institute notes ongoing concerns regarding:

- The accuracy of risk assessment methods; and
- The efficacy of supervision orders in preventing offending behaviour.

With respect to risk assessment methods, the Institute notes widespread concerns about the accuracy of such methods. In its 2007 report into High-Risk Offenders, the Victorian Sentencing Council noted that "risk assessment is notoriously difficult," pointing out that "the predictive accuracy of unguided clinical assessment is typically only slightly above chance," while the predictive accuracy of "empirically based actuarial assessment" methods is "still only in the moderate range."[1]

These concerns are particularly important, given the extension of the NSW post-sentence regime beyond serious sex offenders, to serious violent offenders. As the NSW Sentencing Council noted in its 2012 report into High-Risk Violent Offenders, predicting violent re-offending is even more difficult than predicting sex re-offending, "because HRVOs [high-risk violent offenders] are not generally specialists – they engage in violent behaviour as part of a broader criminal career."[2] The same point was made by the NSW Department of Justice in its 2010 review of the Crimes (Serious Sex Offenders) Act 2006, as it then was.[3]

Since severe consequences – significant intrusion into an individual's privacy or autonomy, or deprivation of liberty – may follow from these risk assessments, it is important that their accuracy not be overstated to the public.

In addition, with respect to the efficacy of supervision orders in preventing offending behaviour, the Institute notes the public comments by the Assistant Commissioner of NSW Corrective

1 Victorian Sentencing Advisory Council, 'High Risk Offenders: Post-Sentence Supervision and Detention - Final Report', May 2007, <https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/High%20Risk%20Offenders%20Post%20Sentence%20Supervision%20and%20Detention%20Final%20Report.pdf>, 2.2.9-2.2.12.
2 NSW Sentencing Council, 'High Risk Violent Offenders', May 2012, <http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Sentencing_Serious_Violent_Offenders/online%20final%20report%20hrvo.pdf>, 2.93.
3 NSW Department of Justice, Review of the Crimes (Serious Sex Offenders) Act 2006, November 2010 <http://www.justice.nsw.gov.au/justicepolicy/Documents/statutory_review_251110.doc>. See for example, pp. 96-7.

Services, Rosemary Caruana in July last year,[4] that supervision procedures cannot prevent re-offending behaviour:

> *All it takes is five minutes, five minutes to grab somebody, do the dirty, five minutes to grab a kid, five minutes to punch someone and move on… From an electronic monitoring room, we can see where they are, but we can't stop them from doing anything…*

The Institute advises that the accuracy of risk assessment methods – to ensure that individuals are properly caught by the post-sentence regime – and the efficacy of the less-intrusive supervision orders – to ensure that the post-sentence regime achieves its objects – are crucial to the legitimacy and value of any post-sentence regime. Concerns over these two features, not to mention the cost to the taxpayer involved in ongoing supervision and further detention, may throw doubt on the entire structure of post-sentence regimes.

However, the Institute also acknowledges the trauma that may be caused by serious sex or violence offences, and consequently accepts the government's legitimate interest and role in protecting the community. Post-sentencing supervision and detention regimes are becoming more common around the world, and the Institute notes the ongoing bipartisan support for such a regime in New South Wales.

Accordingly, this submission will be limited to suggestions for making such a post-sentence regime in New South Wales more compatible with the rule of law.

III. Ex parte emergency detention orders

One of the key amendments made to the *Crimes (High Risk Offenders) Act* 2006 (NSW) was the introduction of emergency detention orders, and, in particular, the capacity of the NSW Attorney-General to make an ex parte application for such an order.

The Institute notes that important safeguards have been placed on the exercise of this power, including that detention under an order cannot last for longer than 120 hours, only one order may be made in respect of each set of 'altered circumstances' of an offender, and an application must be accompanied by an affidavit from a Corrective Services officer setting out, inter alia, why there are no other means of ensuring the offender in question does not commit a serious offence.

4 Emma Patridge, 'High-risk offenders out on extended supervision orders are monitored by Corrective Services, police and psychologists', *Sydney Morning Herald*, 05/07/2015, <http://www.smh.com.au/nsw/highrisk-offenders-out-on-extended-supervision-orders-are-monitored-by-corrective-services-police-and-psychologists-20150703-gi498k.html>

The Institute acknowledges these safeguards, and the obvious conscious effort on the part of the NSW Parliament to protect the rule of law in the face of such a power.

Nevertheless, the Institute notes that ex parte hearings which may result in the deprivation of an individual's liberty are unusual and problematic.

Combined with the ongoing concerns about the accuracy of risk assessment methods discussed above, and the consequent risk of wrongful or unjust deprivation of an individual's liberty, the Institute considers that further safeguards are needed, in the form of a Public Interest Monitor, who would appear at any hearing for an emergency detention order, to test the appropriateness and validity of the application.

The Institute further notes that Public Interest Monitors are an accepted part of the Australian legal landscape, appearing in similar capacities in both Queensland and Victoria[5], as well as at Federal level in respect of metadata legislation.[6] The models, and experiences, of these jurisdictions could guide the creation of a New South Wales Public Interest Monitor.

Recommendation 1

> The Institute recommends the introduction of a Public Interest Monitor, who would appear at any hearing for an emergency detention order under the *Crimes (High Risk Offenders) Act* 2006 (NSW), in order to test the appropriateness and validity of the application.

IV. Penalties for Breaches of Supervision Orders

Another of the key amendments made to the *Crimes (High Risk Offenders) Act 2006* (NSW) was the increase in penalties for breaches of supervision orders under section 12, from two years' imprisonment or 100 penalty units (or both), to five years' imprisonment or 500 penalty units (or both).

The Institute notes that this is a maximum penalty, and does not undermine the discretion of a court to award a substantially lower penalty, depending on the circumstances.

Nevertheless, the Institute considers that such an increase is unnecessary and disproportionate, bringing, as it does, the

5 Chapter 21, Part 5, *Police Powers and Responsibilities Act* 2000 (Qld), and *Public Interest Monitor Act* 2011 (Vic).
6 See, s 180X *Telecommunications (Interception and Access) Act* 1979 (Cth), although the Public Interest Advocate does not participate in court proceedings.

maximum available penalty for a breach of supervision order to a level well above that available for the many criminal offences dealt with by NSW Local Courts, including sex and violence offences.[7] Such a sentencing discretion is inappropriate, given the capacity for section 12 to be triggered by minor breaches, and also given the civil standard of proof applicable to the original imposition of the supervision order.

Accordingly, the Institute considers that the previous penalty provisions be restored.

Recommendation 2

> The Institute recommends amending section 12 of the *Crimes (High Risk Offenders) Act* 2006 (NSW) to restore the original maximum penalties available for a breach of a supervision order, namely two years' imprisonment, 100 penalty units, or both.

V. Victim statements

The Institute notes that one of the previous amendments to the *Crimes (High Risk Offenders) Act* 2006 (NSW) was the introduction of s21A, which deals with victim statements, which may be provided to the court for consideration in any hearing for an order under the Act. This section was introduced in 2010.

The Institute acknowledges the initial and ongoing trauma that may be caused to victims of serious sex or violence offences, and supports the continuing empowerment of victims throughout the criminal justice system, including in post-sentence regimes.

However, the Institute also considers that an important distinction should be drawn between original sentencing, and post-sentence situations. In this respect, the Institute notes the submission of the South Eastern Centre Against Sexual Assault, made to the Victorian Sentencing Council, and quoted in the Council's 2007 report into High-Risk Offenders:

> *The crime that impacted on the victim has been dealt with. Post-sentence detention* [supervision orders may also be included] *is about the probability of future criminal activity… Whilst victims generally find it therapeutic to tell their story, this should have been possible at the original sentencing and in any therapy they have undertaken.*[8]

7 ss267-8 *Criminal Procedure Act* 1986 (NSW)
8 *Victorian Sentencing Council*, 3.12.17.

This points to a crucial distinction between sentencing and post-sentence, and the role victim statements ought to play: orders imposed under a post-sentence regime are not punitive or retributive, the way original sentencing may be. Orders under a post-sentence regime are purely rehabilitative or incapacitative. The ability for a court to consider a victim statement in a post-sentence situation ought not to blur this important difference. Orders made, or conditions imposed, should take due account of victims' concerns, but ought not to fall into the trap of re-sentencing the offender for the trauma caused by a previous offence.

Recommendation 3

> The Institute recommends that the NSW Department of Justice should produce guidelines concerning the use of victim statements in post-sentence situations, affirming the distinction discussed above, and explaining the ways in which victim statements may impact on orders made, or conditions imposed.

V. Conclusion

The post-sentence regime put in place by the *Crimes (High Risk Offenders) Act* 2006 (NSW) raises a number of rule of law concerns.

With a view to providing meaningful assistance to the Department, the Institute has restricted its submissions to suggestions for improvement of the current NSW regime, to make it more compatible with the rule of law.

However, this self-imposed restriction should not be taken as approbation for, or endorsement of, post-sentence regimes in general. The very concept of allowing significant intrusions into an individual's privacy or autonomy, let alone the deprivation of an individual's liberty, without that individual having been found to have committed an offence, and without the extensive safeguards available in criminal proceedings, remains problematic.

Nevertheless, the Institute accepts the government's legitimate interest and role in protecting the community, notes the ongoing bipartisan support for such a regime in New South Wales, and recommends that the NSW post-sentence regime take into account the following three issues, discussed above:

- The role of a Public Interest Monitor in ex parte emergency detention hearings;

- The restoration of the original, suitable, and proportionate maximum penalties for breaches of supervision orders; and
- The role played by victim statements in hearings under the Act.

The Institute thanks the NSW Department of Justice for the opportunity to make a submission regarding the *Crimes (High Risk Offenders) Act* 2006 (NSW).

Summary of Reccommendations

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Recommendation 2

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