High Risk Offender Legislation

By Kellie Stares

There is currently no evidence that High Risk Offender Orders, which impose onerous obligations, have led to a decrease in specific or general offending. Since they disproportionately affect vulnerable members of our community, their utility needs to be examined.

Between 2008 and early 2020 there were at least 185 applications by the State of New South Wales in relation to alleged high risk offenders, seeking either continuing detention (CDO), or extended supervision orders (ESO).

The frequency of these applications has consistently increased since the introduction of the legislation. For example four applications were made in 2008, seven in 2009, but 45 in 2019, and 15 had already been made in the first two months of 2020. The Department of Communities & Justice published online that in October 2017 there were 87 high risk offenders subject to an ESO and two subject to a CDO (with an additional two offenders on interim orders.)[1] By July 2019 there were 111 high risk offenders on an interim or extended supervision order, ten subject to an interim or continuing detention order.[2] The current number of orders in place is not published.

High Risk Offender Orders *(HRO orders)* are made under the *Crimes (High Risk Offenders) Act* 2006 (NSW), and Terrorism High Risk Offender Orders (THRO orders) are made under *Terrorism (High Risk Offender) Act* 2017 (NSW) Orders. BOCSAR reported in 'Reoffending in NSW' that in 2006 the re-offending rate for adults was 17.5%, and by 2018 the re-offending rate had increased to 21%. For offenders exiting the prison system and re-offending within 12 months, the rate increased between 2006 and 2018 from 34.7% to 42.2%

There does not appear to be any quantitative assessment of the impact of these orders on re-offending rates of a particular individual or the group subject to these orders, although it would appear that it has made little or no positive impact on the overall re-offending rates in NSW.

Putting aside the utility of these orders, further consideration of the historical applications brings to mind many other concerning issues:

- The groups most affected by these orders are vulnerable.
- The practical implications of conditions.
- There are severe consequences for breaches of conditions.

It is important to note that the conditions attached to such orders are often exceptionally onerous on the defendant, and include conditions such as electronic monitoring, movement scheduling, search and seizure, disclosure of medical records, non-association orders, financial oversight, drug and alcohol abstinence and testing, as well as place and movement restrictions.

Characteristics of defendants

It appears that a number of minority groups, those particularly vulnerable in our community, are also affected by these orders. These include persons with a serious mental illness, or who suffer from an intellectual disability. There is also over representation of Aboriginal and Torres Strait Islander people.

In at least 35.7% of the cases that were brought, the defendant suffered from either a serious mental illness such as schizophrenia, or from an intellectual disability, limited or no literacy skills, or limited comprehension skills.

At least 15.7% of the applications involved a First Nations person. The proportion of First Nations persons the subject of an application has grown from 10% (for the period between 2008-2015) to around 15% thereafter, and has remained stable at this rate. This must also be viewed in the context of the rate of incarceration for Aboriginal and Torres Strait Islander people continuing to grow.[3]

Practical implications

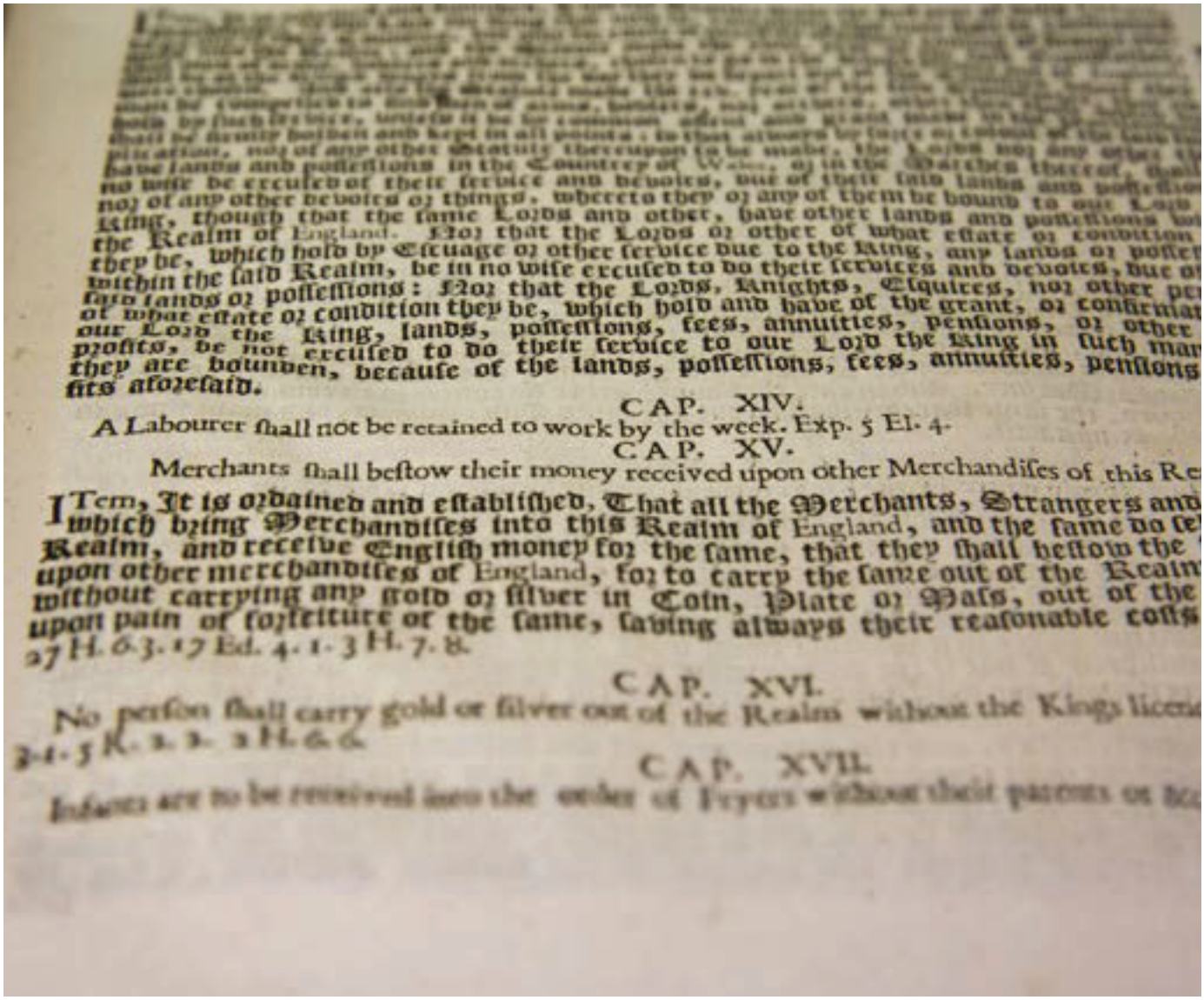
The practical implications of ESO orders appear to have been lost in the pursuit of avoiding all risk. The consequences of such an order often involve unintentional breaches that do not necessarily result in an increased risk of offending by the defendant.

Preliminary data held by Legal Aid NSW suggests that approximately half of persons subject to ESO orders are held in custody on breaches at any given time, and investigation of the circumstances surrounding the breach reveal that most breaches do not relate to any further offending but are breaches of conditions including minor breaches such as accomodation (including hanging a towel over a balcony railing to dry), scheduling movements (deviating from a schedule for unexpected circumstances such as picking a sick child up from day care) and similar trivial events.

Common examples of breaches include where the defendant is a person whom has limited literacy and comprehension skills. Despite these limitations, the State routinely proposes conditions which include, among other things, electronic monitoring and a schedule of movements to be provided by the defendant for approval by the supervising officer. The practical difficulty of an illiterate defendant attempting to prepare the document is obvious.

In recent experience, with a defendant who has very limited education and comprehension skills, the State drafted the proposed conditions with a definitions section at the end to articulate the terms used in the proposed conditions document. The definition section alone consisted of three pages, referencing multiple different pieces of legislation apparently for the defendant to decipher should he forget the particulars of a condition sometime during the next three years.

Other potential examples of unintentional breaches include if the defendant catches the wrong train and travels through an area he is excluded from, his or her work sends



CAP. XIV.

A Labourer shall not be retained to work by the week. Exp. 5 El. 4.

CAP. XV.

Merchants shall bestow their money received upon other Merchandises of this Re

Item, It is ordained and established, That all the Merchants, Strangers and which bring Merchandises into this Realm of England, and the same do se Realm, and receive English money for the same, that they shall bestow the upon other merchandises of England, for to carry the same out of the Realm without carrying any gold or silver in Coin, Plate or Mass, out of the upon pain of forfeiture of the same, saving always their reasonable costs 27 H. 6. 3. 17 Ed. 4. 1. 3 H. 7. 8.

CAP. XVI.

No person shall carry gold or silver out of the Realm without the Kings licen 3 H. 5. 8. 2 H. 6. 6.

CAP. XVII.

the defendant to a location other than that expected, a family member or friends attends the defendant's home unannounced and goes inside, or the defendant is with a person whom he is not aware has a criminal record.

It is therefore easy to demonstrate that defendants, without intentionally engaging in problematic behaviour that increases risk, can find themselves arrested and returned to custody very quickly. There is very little, or no exercising of a discretion in circumstances of an alleged breach, regardless of severity, by the ESO team.

In the decision of *State of NSW v Bugmy* [2017] NSWSC 855 Fullerton J made note of one of the breaches that Mr Bugmy had engaged in. Mr Bugmy is a person with an intellectual disability, and whom practitioners would recall from the High Court decision in *R v Bugmy* (No. 2) [2014] NSWCCA 322 had a significantly deprived background. A condition of Mr Bugmy's ESO was that he was not permitted to have anyone enter and remain at his home, or reside with him. At the time of his arrest Mr Bugmy had his girlfriend at the home, and she was staying a few nights a week. Mr Bugmy had known his partner for 20 years, and the Department were aware of the longstanding relationship and considered the relationship a positive feature in the progress of the Defendant in the community. Mr Bugmy was nevertheless arrested, and charged with breaching his ESO. He was initially refused bail and was ultimately convicted of the breach. It was common ground that the behaviour did not involve an increase in his risk, and the breach was not accompanied by any criminal offending.

Consequences for breaches of conditions

Breaches of conditions relating to ESO orders leads, in 93.3% of cases, to a sentence of full-time imprisonment. In the 60 cases in which a breach has been established in NSW, all but four have resulted in sentences of full-time imprisonment. *(JIRS statistics for the period January 2018 to December 2019).*

Conclusion

Given the deprivation of liberty, or freedom of movement that these orders usually entail, and their impact on highly vulnerable members of our community, there is a desperate need for quantitative analysis of their utility and the impact they have on community safety and crime rates, along with the serious practical implications for individuals affected by them. **BN**

ENDNOTES

1 https://www.justice.nsw.gov.au/Pages/Reforms/high-risk-offender-management.aspx accessed 4 March 2021.

2 NSW Government Media Release dated 7 July 2019, titled *'High Risk Offenders kept under close watch'.*

3 In the ABS Statistics for Prisoners in Australia, December 2020 release, between 30 June 2019 and 30 June 2020 the total prison population in NSW was 12,730. This represented an overall decline in prisoners by 5% from the previous year. However, the prison population of First Australians grew by 7% to 3,335 in the same period. This means that Aboriginal and/ or Torres Strait Islander people comprise 26.2% of the current prison population.