THE LAW SOCIETY
OF NEW SOUTH WALES

Direct Line: 9926 0216

30 November 2010

Mr Greg Smith SC MP
Shadow Attorney General
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Smith,

Crimes (Serious Sex Offenders) Amendment Bill 2010

The Law Society's Criminal Law Committee has reviewed the *Crimes (Serious Sex Offenders) Amendment Bill 2010* and brings the following comments to your attention.

The Committee's position on the Act

The Committee reiterates its previously stated opposition to the *Crimes (Serious Sex Offenders) Act 2006*. The Act is unnecessary, and violates fundamental principles of the criminal justice system. The Act ignores the need for greater rehabilitation measures to be made available.

Detaining a person beyond the maximum sentence imposed by the sentencing court offends the fundamental principle of proportionality. The original sentence imposed reflects the synthesis of all of the purposes of sentencing (s 3A *Crimes (Sentencing Procedure) Act 1999*), including punishment, deterrence, denunciation and protection of the community from the offender. The Act undermines the established principle of finality in sentencing (subject to appeals), and has the practical effect of eliminating the relevance of the sentencing judge's decision altogether. The provisions of the Act amount to a new punishment beyond that already imposed in accordance with law. In the absence of a new offence or conviction it is inappropriate to further detain an offender on the basis of an assessment of future offending.

Predicting an offender's future conduct is a notoriously difficult task and the High Court has recognised the unreliability of these predictions (*Fardon v Attorney General for the State of Queensland* (2004) 210 ALR 50 at paras 124-125). In *Fardon*, Justice Kirby comments that predictions of dangerousness are "... *based largely on the opinions of psychiatrists which can only be, at best, an educated or informed "guess"* " (para 125).

Proposed sections 9 and 17

The most significant change contained in the Bill is to the test that the Supreme Court must apply when it is considering an application for an order under the Act. While the current test has caused some difficulties in interpretation and the proposed wording

The test has changed from "..is likely to commit a further serious sex offence.." to ".....poses an unacceptable risk of committing a further serious sex offence...". Unacceptable risk is defined as not requiring a finding that "it is more likely than not....." (proposed s 9(2A)).

The new test will make it easier for a court to make a continuing detention order or an extended supervision order. Given the extremely oppressive nature of this legislation and its impact on human rights it is concerning that the test for making an order has been watered down.

Proposed section 14 (2)(b)

The effect of proposed s 14(2)(b) is to allow the State to make an application for a continuing detention order against a person who is on an existing continuing supervision order or an interim supervision order if "...because of altered circumstances adequate supervision of the person cannot be provided....".

In the Second Reading Speech the Attorney General suggests that this new section will apply in circumstances where there are practical difficulties in the continued compliance with a condition of the order e.g. where a person can no longer continue taking anti-libidinal or psychiatric medication because of side-effects and therefore should be locked up.

The Committee sees the consequences of the new section as being far broader and of some concern. For instance, under proposed s 14(2)(b) Corrective Services NSW could apply for a continuing detention order instead of continuing to supervise the person in the community if funding or resources are reduced.

Proposed section 21A

Proposed s 21A is another new section which concerns the Committee. This section relates to the making of victim statements to be used in the proceedings. Proposed s 21A(6) prohibits the provision of a victim statement to an offender unless the victim consents. Proposed s 21A (7) provides some limited safeguards to an offender in the case where a victim does not consent. In the Committee's view there should be no protection as afforded by proposed s 21A(6). If a victim wants to take part in the proceedings then the victim's statement should be provided to the offender.

Thank you for seeking the Law Society's comments on this Bill.

Yours sincerely,

Mary Macken
President

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OF NEW SOUTH WALES

Direct Line: 9926 0216

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Mr David Shoebridge MLC
Parliament House
Macquarie Street
SYDNEY NSW 2000

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Predicting an offender's future conduct is a notoriously difficult task and the High Court has recognised the unreliability of these predictions (*Fardon v Attorney General for the State of Queensland* (2004) 210 ALR 50 at paras 124-125). In *Fardon*, Justice Kirby comments that predictions of dangerousness are "*... based largely on the opinions of psychiatrists which can only be, at best, an educated or informed "guess" "* (para 125).

Proposed sections 9 and 17

The most significant change contained in the Bill is to the test that the Supreme Court must apply when it is considering an application for an order under the Act. While the current test has caused some difficulties in interpretation and the proposed wording clarifies the test, it also lowers the threshold that must be met when the court is determining an application.

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