THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: rbg 688496

25 February 2013

The Hon. Greg Smith SC MP
Attorney General and Minister for Justice
Level 31
Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Attorney General,

Crimes (Serious Sex Offenders) Amendment Bill 2013

I refer to the *Crimes (Serious Sex Offenders) Amendment Bill 2013* introduced into the Legislative Assembly on 20 February 2013.

Committees' position

The Law Society's Criminal Law Committee and Juvenile Justice Committee (Committees) are completely opposed to the introduction of continuing detention and extended supervision for high-risk violent offenders.

The Committees are strongly of the view that continuing detention should not be adopted for high-risk violent offenders. 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 (section 3A *Crimes (Sentencing Procedure) Act 1999*), including punishment, deterrence, denunciation and protection of the community from the offender. Continuing detention 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. Continuing detention amounts to a new punishment beyond that already imposed in accordance with law, in the absence of a new offence or conviction 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).

The Review of the *Crimes (Serious Sex Offenders) Act 2006*[1] found that while there are a number of common factors present within the serious sex offender cohort, the results of the audit conducted by the Department of Corrective Services showed no such common thread amongst the group of 14 high-risk violent offenders.

[1] *Review of the Crimes (Serious Sex Offenders) Act 2006*; Part 3: Serious Violent Offenders, Department of Justice and Attorney General, Criminal Law Review, November 2010

The group of 14 high-risk violent offenders that were identified was found to be disparate in its composition. The Committees are of the view that it is not possible to identify who should be included in the category of high-risk violent offender either at the initial sentencing stage or while the offender is in custody. This gives rise to further concerns that the attempt to define high-risk violent offenders will result in net widening.

The current legislative framework is sufficiently equipped to deal with high-risk violent offenders. For instance, offenders who are due for release who fall within the definition of 'mentally ill person' or 'mentally disordered person' under the *Mental Health Act 2007* can be involuntarily detained in a mental health facility if they present a risk of serious harm to themselves or others.

The plans to enact this legislation followed the publication of a report by the NSW Sentencing Council recommending that the government introduce continuing detention and extended supervision for 'high-risk violent offenders'[2] However, it should be noted that the Sentencing Council lacked unanimity in putting forward this recommendation.[3]

The inclusion of people who have been convicted of relevant offences committed as a child was not recommended in the Sentencing Council's report. There would appear to be no good reason why the legislation has been extended to include offences committed by juveniles and the Committees adamantly oppose the inclusion of juvenile offences. The proposal is contrary to well established sentencing principles relating to children in New South Wales.

Application of the proposed new provisions

The Committees are extremely concerned that the legislation extends to offences involving recklessness under section 35(1) and (2) of the *Crimes Act 1900* (proposed section 5A(1)). Recklessly inflicting grievous bodily harm is far too low a threshold. Statistics from the Judicial Information Research System show that there have 253 cases under section 35(1) and (2) in the last 4 years.

It should be noted that the Sentencing Council stated it its report on this issue at paras 2.50-2.51:

> *Framing a scheme in terms that would capture a broad range of offences that might have some connection with serious violent offending, risks being unwieldy and could result in broader reach than is justified. As pointed out in the DAGJ review:*
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> > *the experience of England and Wales in relation to the 96 offences that can qualify someone for a (sic) an IPP sentence, and the extreme numbers of prisoners now serving such sentences, should be heeded. Any preventative detention model should only be reserved for a very small, but truly dangerous, group of offenders.*[4]
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> *Including a broad range of offences would require stringent safeguards so as not to impose a level of scrutiny and oversight on offenders that would be completely disproportionate to the seriousness of their offence, particularly where they have not demonstrated any past propensity to commit offences of that type.*

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[2] *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options*, NSW Sentencing Council, May 2012, para 5.89.
[3] Ibid, para 5.83.
[4] *Department of Attorney General and Justice (Criminal Law Review Division), Review of the Crimes (Serious Sex Offenders) Act 2006 (NSW), (2010), 97.*

The proposed legislation does not restrict its reach to a truly dangerous group of offenders; its reach is far too broad. A much higher number of offenders will be categorised as 'high risk violent offenders' than as 'high risk sex offenders' which will result in significant net widening. The original *Crimes (Serious Sex Offenders) Act 2006* was aimed at the discrete area of sex offences, and was justified, in part, because it was aimed at a relatively limited type of offence.

The Committees have concerns with the proposed test for determining whether an offender is a 'high risk violent offender'. The effect of proposed section 5E(3) is that an 'unacceptable risk' can be proved on less than the balance of probabilities. The Committees submit that proposed section 5E(3) should be deleted.

Combined with the unsatisfactory safeguard in 5E(3), there is a real risk that this legislation will target a group of offenders completely outside the intended target group. Given that this legislation authorises the continued detention of people based on assessments of future dangerousness and generally against all existing sentencing principles then special caution should attach to defining the group of offenders who may fall within the definition.

Sections 5D(1) and 5G(1) provide that 'a continuing detention order may be made if the court is satisfied that adequate supervision will not be provided by an extended supervision order'. Lack of adequate supervision could clearly be a resource issue, a perennial problem with community based sentencing options that leads to discriminatory outcomes for people who live in the more rural and remote parts of NSW. This aspect of the legislation is of particular concern.

Human rights implications

The Human Rights Committee (HR Committee) endorses the position of the Criminal law Committee and Juvenile Justice Committee and would like to raise additional concerns from a human rights perspective. The HR Committee submits that the legislation appears to involve double punishment, arbitrary imprisonment and detention of a person based on what could only be an educated guess as to their likely future conduct. Further, the HR Committee submits that the legislation involves additional punishment despite the new legislation not being in existence when the person was initially sentenced, for the initial period after it comes into effect.

The HR Committee therefore takes the view that the legislation amounts to a breach of the following Articles of the International Covenant on Civil and Political Rights (ICCPR):

- Article 9(1) – Arbitrary imprisonment;
- Article 14(1) – Fair trial, on the basis that the criminal trial procedure would not be applicable;
- Article 14(7) – Double punishment, on the basis at least, that the earlier sentence would be a factor affecting the assessment of the need for further detention; and
- Article 15 – Retroactive legislation.

Under international law the ICCPR has been binding on both the Federal and State Parliaments of Australia since the ICCPR was ratified in 1980. Each Parliament has an obligation to implement the provisions of the ICCPR into its laws.

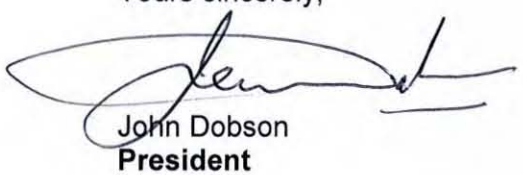
Finally, the HR Committee notes that the United Nations Human Rights Committee, the body which deals with formal complaints from individuals about the non-adherence of State parties (including Australia) to the ICCPR, strongly criticised the *Crimes (Serious*

Sex Offenders) Act 2006 (NSW) in a decision handed down on 18 March 2010 in response to a complaint brought by Kenneth Davidson Tillman.

The UN Human Rights Committee identified similar ICCPR breaches in the Tillman case to those identified above in the proposed legislation.

The HR Committee respectfully suggests that it is quite likely that similar criticisms will be made of the proposed legislation should it be enacted. This may have the effect of lowering the reputation of the NSW Parliament and convey the impression that there is a lesser adherence to human rights principles in this State, than may objectively be the case.

Yours sincerely,



John Dobson
President