THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Crim: PWrg1262559

7 March 2017

The Hon. Mark Speakman SC MP
Attorney General
GPO Box 5341
Sydney NSW 2001

Dear Attorney General,

Criminal law reform issues

I write to you on behalf of the Law Society of NSW. We take this opportunity to formally congratulate you on your appointment as Attorney General and we look forward to working with you in the future.

The Law Society's Criminal Law Committee is comprised of experienced and specialist criminal law practitioners. As discussed at our meeting last week, I confirm that the Criminal Law Committee has asked that I write to you to bring the following issues to your attention:

- Alternatives to custodial sentences of imprisonment;
- Concerns about proposals to abolish committals and narrow the scope of disclosure as part of the encouraging guilty pleas package of reforms;
- Concerns about proposals to change the test for making an extended supervision order (ESO) or continuing detention order (CDO), and the definition of 'imprisonment', under the *Crimes (High Risk Offenders) Act 2006*;
- Concerns about the lack of mechanisms for practitioners to provide feedback to the Department of Justice about how the Domestic Violence Evidence in Chief (DVEC) reforms are working in practice; and
- The implementation of driver licence disqualification reforms.

1. Alternatives to custodial sentences

The Law Society is deeply concerned about the current record high NSW prison population,[1] and the impact the prison population has upon the courts and the justice system as a whole. Of great concern to the Law Society is the over representation of Indigenous people in the criminal justice system. While 24.2% of the NSW adult prison population is Indigenous, only 2.9% of the NSW adult population identifies as Indigenous.[2]

[1] 13, 037 as at 5 February 2017. Source: CSNSW Offender Population Report 5 February 2017, 2.
[2] Australian Bureau of Statistics, Estimates of Aboriginal and Torres Strait Islander Australians, June 2011. http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0333 F +61 2 9231 5809
ACN 000 000 699 ABN 98 696 304 966 www.lawsociety.com.au

Over the last 15 years, in NSW the rate of Indigenous arrest for violent offences and for property offences has declined by nearly 37% and 33%, respectively.[3] However, the decline in Indigenous arrest rates for violent and property crime has not been accompanied by a decrease in Indigenous imprisonment. Between 2001 and 2015, the number of Indigenous Australians in NSW prisons more than doubled which, according to BOCSAR, is due to a combination of tougher sentencing and tougher law enforcement.[4]

The Law Society urges the Government to take measures to invest in community based health treatment such as drug and alcohol rehabilitation centres, and introduce reforms to better enable courts to impose alternatives to full time imprisonment, where appropriate, to help address this issue.

1.1. Intensive Correction Orders (ICOs) and home detention

One such measure would be to implement the NSW Law Reform Commission's recommendations directed at increasing the use of ICOs and home detention, including:

- Corrective Services NSW to ensure that home detention and ICOs are available across NSW.
- Removing the majority of offences that currently automatically exclude an offender from ICOs and home detention.
- Extending the maximum length of ICOs and home detention from two to three years.
- Removing barriers to suitability, including broadening the range of activities that satisfy the community service work attached to an ICO.[5]

1.2. NSW Drug Court

The Law Society has long advocated for the expansion of the NSW Drug Court to more locations. The most recent evaluation of the NSW Drug Court found that it was more cost effective and more successful at lowering the rate of recidivism than prison.[6]

His Honour Judge Roger Dive, Senior Judge of the Drug Court of NSW, describes the benefits of the Drug Court as follows:

> At any one time, approximately 230 participants are engaged in an intensive, judicially supervised program towards recovery. Years of research and evaluations have proved the long-term success of Drug Courts in reducing crime, and thereby reducing the impact of offending on our community. The court also sees important gains which can never be measured in any cost evaluation – for example the "ripple effect" of recovery upon the children and families of addicted offenders, and the long-term savings to the health system through early treatment of liver disease and chronic mental health issues.[7]

The Law Society submits that in light of record high prison numbers, and the Drug Court's proven effectiveness, resourcing further Drug Courts should be a Government priority.

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[3] Bureau of Crime Statistics and Research, Media Release, *Indigenous Crime and Imprisonment,* September 2016, http://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2016/mr-Indigenous-crime-and-imprisonment.aspx

[4] Ibid.

[5] NSW Law Reform Commission, *Sentencing*, Report 139, Recs 9.1-9.6, xxx-xxxi. http://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-139.pdf

[6] D Weatherburn, C Jones, L Snowball, and J Hua, *The NSW Drug Court: A Re-evaluation of its Effectiveness*, Crime and Justice Bulletin No 121 (NSW Bureau of Crime Statistics and Research, 2008) 12.

[7] NSW Drug Court, 2015 Annual Review, 11 August 2016, 1.

1.3. Koori Court

The Law Society supports the Youth Koori Court trial at the Parramatta Children's Court, which aims to reduce the likelihood of reoffending, by focusing on the needs of the young person with a view to addressing the underlying causes of criminal behaviour as early as possible, before it becomes entrenched. The Law Society supports the expansion of the current Youth Koori Court model to other locations and in particular, in areas with high rates of Indigenous youth incarceration.

The Law Society also understands that a trial of an adult Koori Court in the NSW District Court is currently being considered, which we would strongly support. We understand that the objectives of the adult Koori Court would be similar to the youth model and include, among other things: to enhance the level of court support provided to Indigenous offenders and victims; to reduce the amount of time spent by Indigenous offenders in custody; and to enhance the confidence of Indigenous communities in the court and the administration of justice.

A continuing key priority of the Law Society is to address the over-representation of Indigenous people in the criminal justice system. We will be engaging with the Australian Law Reform Commission in its upcoming inquiry on this issue, which we hope will result in significant law reform in NSW to meaningfully improve outcomes for Indigenous people and their communities.

2. Encouraging appropriate early guilty pleas

2.1. Abolition of committals in NSW

The Law Society and NSW Bar Association participated in the Department of Justice's Encouraging Appropriate Early Guilty Pleas Steering Group in 2016. The Steering Group was convened to consider the proposed reforms resulting from the Law Reform Commission's Report 141, *Encouraging Appropriate Early Guilty Pleas*.

We note that the reforms contain a number of proposals that would bring significant change to criminal justice processes in NSW; and we strongly support the objective of reducing delays in the criminal justice system.

We are, however, very concerned that the reform package includes a proposal to abolish the committal process in NSW. We strongly request that a modified form of committals be retained.

As you would know, the purpose of a committal hearing is for a magistrate to determine whether the prosecution evidence against a defendant is sufficient for the person to be committed for trial.

Our concern is that abolishing the committal process will remove the only opportunity for an independent judicial officer to consider the merits of the case prior to trial, and while the matter is still in the Local Court.

In practice, any party who seeks to challenge the capacity of the evidence to meet the charges, prior to a potentially costly and lengthy trial, would have to initiate stay proceedings before a superior court. Therefore, we are concerned that the reforms may, while reducing delays brought about by the administrative process of committal in the Local Court, result in the unintended outcome of increasing delays (and thereby expense) in superior courts.

During Steering Group discussions, a proposal for a modified form of committal proceeding was put forward by Mr Mark Ierace SC, Senior Public Defender (attached). At the time the proposal was put forward, it was supported by the Law Society, NSW Bar Association, Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT).

We submit that a modified committal process would avoid costly delays in the superior jurisdictions and add little time or expense to the current Local Court process. We ask that you reconsider the option of retaining a modified form of committals.

2.2. Disclosure and the "initial brief"

We are also opposed to any watering down of current disclosure requirements by police and the Office of the Director of Public Prosecutions (ODPP). The Law Society's position is that the starting point should be that a full brief of evidence be served in a timely matter in the Local Court, which is consistent with s15A of the *Director of Public Prosecutions Act 1986* and Guideline 18 of the Prosecution Guidelines of the ODPP, with a list of possible exceptions. The exceptions would only go to matters of form, not substance, thus consistent with the disclosure regime.

If full disclosure is not made, lawyers are placed in the position of having to provide qualified advice in relation to the accused's prospects of success at trial. This will mean that accused persons may be reluctant to enter a plea of guilty until there is assurance that all of the relevant prosecution evidence has been disclosed. If a defence lawyer has all of the relevant evidence prior to the case conference, the lawyer is able to give firm advice to the accused about the likelihood of conviction and therefore engage more productively in the case conference.

Providing a brief which falls short of this standard will inevitably lead to accused persons reserving their position in a significant number of cases until they can be assured that full disclosure has been made. This would be counter-productive to the aims of the reform package.

3. *Crimes (High Risk Offenders) Act 2006*

As you will be aware, the Department of Justice is finalising a statutory review report on the *Crimes (High Risk Offenders) Act 2006*, which provides for the extended supervision and continuing detention of high risk sex offenders and high risk violent offenders.

The Law Society does not support this legislation, as detaining a person beyond the maximum sentence imposed by the sentencing court offends the fundamental principle of proportionality. In our view, a Continuing Detention Order (CDO) 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. Extended Supervision Orders (ESOs) suffer from the same problem.

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).[8] In *Fardon*, Justice Kirby commented that predictions of dangerousness are "... *based largely on the opinions of psychiatrists which can only be, at best, an educated or informed "guess".*[9]

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[8] *Fardon v Attorney General for the State of Queensland* (2004) 210 ALR 50, 124-125.
[9] Ibid, 125.

The Law Society would be concerned if the statutory review were to recommend an amended test for making a CDO or ESO.

CDOs and ESOs are extraordinary measures outside of the judicial sentencing framework. The use of these measures should be limited to those offenders who present only the most serious risk to the community.

The Law Society is strongly opposed to any expansion of the test, as it would open the legislation to a much wider cohort of offenders, which is inappropriate. We consider the existing tests to be consistent with the objectives of the Act.

In particular, we would be concerned if the legislation were amended to state that 'imprisonment' includes full time custody, ICOs, and home detention. This would widen the scheme to beyond the most serious of offenders. In particular, the inclusion of ICOs may lead to significant net-widening.[10] It is counterintuitive to incarcerate a person who, on sentence, was punished to a
Community based outcome.

The Law Society submits that 'imprisonment' should be confined to those who have served full time custody so that the legislation directly targets the most serious of cases.

4. Domestic Violence Evidence in Chief (DVEC)

As you will be aware, the DVEC reforms commenced on 1 June 2015,[11] and enable a recorded video or audio statement of a domestic violence complainant to be admissible as evidence in chief in criminal proceedings for domestic violence offences.

The Law Society suggests that it would be beneficial if mechanisms were introduced to enable practitioners to provide feedback to the Department of Justice about how DVEC is working in practice, so that issues can be identified and addressed as they arise.

We note that the Law Society was previously represented on a DVEC Monitoring Group; however it does not appear that the group has met for some time. We would appreciate ongoing involvement with the Monitoring Group.

5. Driver Licence Disqualification Reform

The Law Society has consistently advocated for reform of the driver licence offences system. In 2013, the Legislative Assembly Committee on Law and Safety's released its report '*Driver Licence Disqualification Reform*'.[12] The Law Society strongly supports the recommendations contained in the report, in particular:

- The right to apply to court to have licence disqualification periods removed or reduced after they have completed a minimum offence-free period.
- Significant amendments to the Habitual Traffic Offenders Scheme, including a review of the scheme to determine whether or not it should be abolished.

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[10] The Law Society notes that the use of ICOs has increased markedly over the past five years from 838 in 2011-2012 to 1385 in 2015-2016. Source: NSW Bureau of Crime Statistics and Research, NSW Criminal Court Statistics July 2011 to June 2016.

[11] *Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014* http://www.austlii.edu.au/au/legis/nsw/num_act/cpavca2014n83577.pdf

[12] Legislative Assembly of NSW, Committee on Law and Safety, *Driver Licence Disqualification Reform*, November 2013, x-xii. https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/5254/Driver%20licence%20disqualification%20reform%20report.pdf

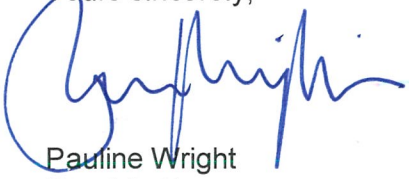
- The removal of mandatory licence disqualification periods.
- A review of the maximum penalties (fines and terms of imprisonment) for unauthorised driving offences.[13]

In its response to the report, the NSW Government supported all of the recommendations.[14] The Law Society would strongly support action to implement these reforms.

Again, the Law Society, and in particular the Criminal Law Committee, looks forward to working with you and providing a practitioner perspective on these important areas of law reform. We would greatly appreciate the opportunity to meet with you to discuss these matters in further detail.

The contact person for this matter is Ms Rachel Geare, Senior Policy Lawyer, who can be contacted on 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,



Pauline Wright
President

[13] Ibid, x-xii.
[14] NSW Government Response to the Legislative Assembly Committee on Law and Safety Report on *Driver* Licence Disqualification Reform, June 2014,3-8 https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryOther/Transcript/8341/Government%20Response%20to%20Report%20on%20Driver%20Licence%20Disqualification%20Reform.PDF

Possible Model for a confined retention of the committal

1. That if a defendant seeks to test the sufficiency of evidence for the purposes of ss.63 and 64, his or her legal representative on the record must file in the Local Court registry, and serve, an application for a committal hearing. A mandatory requirement is that the application is accompanied with a certification by that representative that in his or her opinion the application has merit. The application is to have attached to it the grounds of the application and written submissions in support of the grounds.

2. That the defendant's legal representative on the record file and serve a notice of readiness, signed by him or her, which confirms that the application is ready to proceed. The notice of readiness is to be filed and served before a set period prior to the listed date. If the notice of readiness is not filed and served within that period, the committal hearing does not proceed and the date is vacated.

Sections 63 and 64 of the Criminal Procedure Act 1986 (NSW)

63 Where prosecution evidence sufficient to satisfy jury

(1) If in any committal proceedings, after all the prosecution evidence is taken and after considering all the evidence before the Magistrate, the Magistrate is of the opinion that, having regard to all the evidence before the Magistrate, the evidence is capable of satisfying a reasonable jury, properly instructed, beyond reasonable doubt that the accused person has committed an indictable offence, the Magistrate must give the accused person an opportunity to answer the charge and a warning in the form prescribed by the rules.

(2) The Magistrate must proceed to take any statement by or any evidence adduced by the accused person in accordance with Division 4.

(3) If the accused person is not present, the Magistrate may make a decision under section 64 without complying with subsection (2).

(4) If the accused person is a corporation and the corporation appears by a representative, the representative may answer the charge on behalf of the corporation.

64 Decision about committal

When all the prosecution evidence and any defence evidence have been taken in committal proceedings, the Magistrate must consider all the evidence and determine whether or not in his or her opinion, having regard to all the evidence before the Magistrate, there is a reasonable prospect that a reasonable jury, properly instructed, would convict the accused person of an indictable offence.