THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HumanRights:JD:VK:671618

28 November 2012

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

Dear Attorney General,

Proposed Serious Violent Offenders legislation

I am writing on behalf of the Human Rights Committee of the Law Society of NSW which is responsible for considering and monitoring Australia's obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and advising the Law Society accordingly.

In my letter to you dated 31 October 2012 I conveyed to you the concerns of the Law Society's Criminal Law Committee about the proposed serious violent offenders legislation. The Criminal Law Committee's submission is attached for your convenience.

The Society's Human Rights Committee ("the Committee") has also considered the proposed serious violent offenders legislation and on the assumption that the Government's proposed legislation will be similar to the *Crimes (Serious Sex Offenders) Act 2006*, the Committee has the following additional concerns to those raised by the Criminal Law Committee.

The Committee respectfully submits that the proposal would appear to involve double punishment, arbitrary imprisonment, detention of a person based on what could only be an educated guess as to their likely future conduct, and any further detention could be ordered according to a probabilities test and not the usual "beyond reasonable doubt" standard. Further, the Committee submits that the proposal will involve 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.

As such, the Committee's view is that the proposal would amount 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.

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

As you are aware, under international law the ICCPR has been binding on both the Federal and State Parliaments of Australia since the ICCPR was ratified in 1980 under a Federal Coalition government. As such, each Parliament has an obligation to implement the provisions of the ICCPR into its laws.

The Committee joins with the Criminal Law Committee in submitting that if prisoners are alleged to have violent tendencies, in many cases they are likely to be "mentally ill" or "mentally disordered". The *Mental Health Act 2007* currently allows detention in a mental facility in such cases at the end of a term of imprisonment, so that appropriate psychiatric treatment can be administered.

Finally, the Committee notes that the United Nations Human Rights Committee, the body which deals with formal complaints from individuals to 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.

As you may be aware, the UN Human Rights Committee identified similar ICCPR breaches in the Tillman case to those identified above in the proposed legislation.

The Committee respectfully suggests that it is quite likely that similar criticisms will be made of the proposed legislation should it be enacted, that 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.

For all those reasons, the Committee is strongly of the view that the proposal should not be proceeded with.

I thank you in anticipation of your time spent in considering this submission. If the Government does proceed with the proposal, the Committee respectfully requests that it be afforded the opportunity to review the exposure draft legislation.

Yours sincerely,

Justin Dowd
President

THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: rbg 657248

31 October 2012

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,

Continuing detention and extended supervision for high risk offenders

I am writing to you on behalf of the Law Society's Criminal Law Committee (Committee). The Committee is very concerned about the Government's proposal to introduce continuing detention and extended supervision for high-risk violent offenders.

The Committee is 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 (s 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.

The group of 14 high-risk violent offenders that were identified was found to be disparate in its composition. The Committee is of the view that it is not possible to identify who should

[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

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 any attempt to define high-risk violent offenders may 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.

If the proposal is to proceed, then the Committee would appreciate the opportunity to review the draft legislation.

Yours sincerely,

Justin Dowd

Justin Dowd
President