THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: RBGMM1295106

7 August 2009

Ms Penny Musgrave
Director
Criminal Law Review Division
Attorney General's Department
DX 1227 SYDNEY

Dear Ms Musgrave,

Re: Statutory Review of the Crimes (Serious Sex Offenders) Act 2006

The Law Society's Criminal Law Committee (Committee) welcomes the opportunity to provide comment to the statutory review of the *Crimes (Serious Sex Offenders) Act 2006* (Act).

The Criminal Law Committee's position on the Act

The Act allows the Attorney General to apply to the Supreme Court to make a continuing detention order (CDO), or an extended supervision order (ESO), for serious sex offenders. CDOs can be made for up to five years, with no limit on how many orders can be applied to one offender.

The Committee reiterates its previously stated opposition to the Act. 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).

Standard of proof

In applying the test in s 9(2) and s 17(2) of the Act as to the the standard to be used in

determining whether a CDO or an ESO is to be made, the two key statutory phrases are "satisfied to a high degree of probability" and "likely to commit a further serious sex offence."

The Committee suggests that the appropriate test should be that 'likely' means 'more likely than 'not'.

This test was accepted in *Attorney General for the State of New South Wales v Tillman* [2007] NSWSC 605 at [27], per Bell J, adopting what had been said provisionally by McClellan CJ at CL in *Attorney General for the State of New South Wales v Gallagher* [2006] NSWSC 340 at [34] and in *Attorney General for the State of New South Wales v Winters* (2007) 176 A Crim R 249; and by Mason P in dissent in *Tillman v Attorney General for the State of New South Wales [2007]NSWCA 327.*

However, the current test being utilised suggests that 'likely' means less than the balance of probabilities. The majority in *Tillman v Attorney General for the State of New South Wales [2007] NSWCA 327* held that 'likely' does not mean 'more probable than not'. Their Honours applied the decision of the Victorian Supreme Court in *TSL v Secretary to the Department of Justice* (2006) 14 VR 109, and held that the word 'likely', "denotes a degree of probability at the upper end of the scale, but not necessarily exceeding 50 per cent" at [89].

The adoption of this interpretation seems unfortunate given that the Victorian Court of Appeal has recently retreated from the position in *TSL* and held that the test should be 'more likely than not': *R J E v Secretary to the Department of Justice* [2008] VSCA 265, per Maxwell P and Weinberg JA.

Resourcing of community treatment

Committee Members have observed that where the court is considering an ESO the sticking point has been the payment for treatment outside of the custodial environment. In *New South Wales v Wilde* [2008] NSWSC 1211 the Department of Corrective Services' representative gave evidence that the Department would not pay for the offender's treatment in the community. This was a matter of considerable argument and concern for Justice Kirby who commented that the Government was prepared to spend significant amounts of money on lawyers resisting the defendant's attempts to reside in the community, but were not prepared to fund treatment (see paragraphs 100 and preceding).

The issue of lack of proper resourcing was also raised in *Winters v Attorney General of NSW* [2008] NSWCA 33. Hodgson JA observed that:

> "*The practical effect is that legislation has been put in place which provides for the retention of persons such as Mr Winters in prison beyond the completion of their sentence who, if appropriate community resources were provided, could be released. It is not difficult to envisage, having regard to the evidence in this case, a circumstance where the effect may be that a person is incarcerated indefinitely. It could only be in the most extreme of cases that the legislature intended that an offender who had served his sentence would never again be released.*" (at para [147]).

As *Winters* demonstrates, not all high risk offenders will be best suited to custodial treatment. Community treatment and programs are required and must be properly funded.

The Committee agrees with the majority of the Sentencing Council's position in support of the progressive development of community based programs to provide a greater opportunity for the making of ESOs. This would reserve CDOs for offenders with the highest risk of reoffending, and for those who have unreasonably resisted or failed to complete custodial programs.

Sentencing Council's Recommendations

The Sentencing Council's Report *'Penalties Relating to Sexual Assault Offences in New South Wales (Volume 3)'* provides a comprehensive analysis of the operation of the Act and the issues relating to the continuing detention and extended supervision of an offender.

The Committee has commented on a number of the Sentencing Council's recommendations below.

1. That preventive detention legislation remain an option to be used in respect of a very small class of offenders, and that it be tempered by suitable safeguards, as set out at 2.29.

In accordance with the Committee's position on the Act, the Committee does not agree that preventive detention remains as an option, and is of the view that the Act should be repealed. However, while the Act remains in force, the Committee agrees that it should only be used in respect of an extremely small class of offenders with appropriate safeguards.

The Committee supports the Sentencing Council's caution against broadening the scope of the Act beyond the offenders it currently applies to. The Committee notes that the *Courts and Crime Legislation Amendment Act 2008* amended the Act to broaden the definition of "serious sex offence" to capture more offenders.

5. That DCS engage in ongoing evaluation of the tools which it employs for risk assessment, over an extended time frame, and with a larger population group, so as to determine their degree of accuracy.

6. That, as a necessary precondition for any long term use, or extended application, of preventive detention, DCS be sensitive to the academic debate concerning sex offender assessment tools with a view to identifying any superior models that may emerge.

7. That DCS publish material in relation to sex offender treatment programs and their evaluations.

8. That ongoing evaluation of sex offender treatment programs be conducted, on a long term basis and with an extended population base.

The Committee agrees with recommendations 5 to 8.

The Committee strongly supports further funding of, and research into, rehabilitation for sex offenders, both in-custody and in the community. Custodial and community treatment programs should be research and evidence based. The Government should be funding the independent evaluation of treatment programs in order to determine their effectiveness. Overseas research and models of treatment might be incorporated into New South Wales; however the models should be based on funded research.

effectiveness. Overseas research and models of treatment might be incorporated into New South Wales; however the models should be based on funded research.

15. That if non-participation in a program while in custody is to be used as a ground for a CDO, that it is necessary that the State ensure that such programs are available and accessible for offenders, prior to expiry of the non-parole period.

The Committee agrees with this recommendation.

In determining whether or not to make a CDO the Supreme Court must have regard to "any treatment or rehabilitation programs in which the offender has had an opportunity to participate, the willingness of the offender to participate in any such programs, and the level of the offender's participation in any such programs" (s17(4)(e)).

There are serious deprivation of liberty issues involved for offenders who refuse to, or cannot participate in, the CUBIT program. The Committee does not sanction the CUBIT program. However, while the program exists CUBIT should be adapted so that people with a cognitive impairment and people from non-English speaking backgrounds can participate in the program. Until such modifications have been implemented the Committee is of the view that these categories of offenders should be exempt from the program.

Participation in the CUBIT program centres around asking and answering questions and confronting guilt which is something a person with a cognitive impairment finds more difficult than other people. This is particularly so if there are complex or multiple questions asked at once, or where jargon or abstract concepts are used. A person with a cognitive impairment is often vulnerable to suggestion and will give their best communication and/or evidence if the number of times that they are required to tell the story is reduced. The person may have already had to tell their story to parents, service providers and police. A person with a cognitive impairment will find participating in the program more stressful than a person without a disability, because it is harder for that person to adapt to new environments and situations or confess to crimes in front of other persons involved in the program.

The result for people with an intellectual disability may be that they are incarcerated indefinitely where they are unable to complete the CUBIT program.

In the Sentencing Council's Report it is stated that the Department of Corrective Services advised that it now provides a modified CUBIT program for people with a cognitive impairment. However, the Committee's understanding is that the modified program only caters for people with literacy problems and those with a lower than average IQ, but does not to cater for people with an intellectual disability.

The Committee is aware that the state-wide disability services of the Department of Corrective Services have held discussions with the Criminal Justice Program (CJP) of the Department of Ageing, Disability and Home Care about a trial program. The trial would involve five offenders in custody with an intellectual disability and CJP would be responsible for the offenders' maintenance on their release. However, this trial is yet to commence.

The Committee strongly suggests that until CUBIT is designed to meet the needs of people with a cognitive impairment (which includes people with an intellectual disability), and people from a non-English speaking background, these categories of offenders should be exempt from the program.

16. That such programs be sufficiently flexible to accommodate those offenders who have practical difficulties in participation in those programs, subject always to their being capable of leading to gains equivalent to those deliverable under CUBIT.

Recommendation 16 contains a contradiction. The recommendation takes into account that some offenders may have practical difficulties in completing CUBIT and recommends that it must be sufficiently flexible to accommodate these offenders. However, this is conditional on offenders having capacity to be "capable of leading to the gains equivalent to those deliverable under CUBIT".

So, whilst an offender with a cognitive impairment may be able to access an alternative modified CUBIT program, it does seem fair if it can only be undertaken successfully on the provision that there is gain equivalent to those without a cognitive impairment.

The Committee presumes that what is meant by the proviso is that the offender must adopt a view to eradicate such behaviours in the future, confront their crime and acknowledge their guilt. An offender with a mild to moderate intellectual disability is likely to lack the ability to gain such insight. This falls short of what is realistic for a person with a cognitive impairment to gain, and is arguably against the object of what is set out in s 3(2) of the Act "to encourage serious sex offenders to undertake rehabilitation".

The Committee proposes that the potentially discriminatory reference of recommendation 16: "subject always to their being capable of leading to gains equivalent to those deliverable under CUBIT" should be deleted and replaced with "subject to their compliance with a suitable treatment plan prepared by the Director of Offender Services and Programs".

20. That the *Crimes (Serious Sex Offenders) Act 2006* (NSW) be amended so as to allow the Supreme Court, in appropriate cases, to make an additional order for extended supervision when it makes a CDO, to operate at the expiry of the CDO, and so as to include:

a) a power to revoke the ESO before expiry of the CDO; and
b) a power to vary the conditions of the ESO if considered appropriate prior to the expiry of the CDO.

In appropriate cases this recommendation would avoid the need for a further hearing, and would give the offender some certainty about what is going to happen at the end of the CDO. The Committee does not consider that the Court would make such an additional order frequently, as most judges would seek further reports at the end of the CDO to evaluate the ongoing risk to the community.

21. That the *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 13 be extended in relation to ESOs, to allow the Court, upon application, to substitute a CDO.

The Committee opposes this proposed amendment as it would allow the Attorney General to make an application under s 13 to substitute a CDO for an existing interim supervision order (ISO) or and ESO. Currently there can only be a CDO if there is a breach of ISO or ESO (s 14A). It is repugnant to replace an ESO with a CDO simply on the application of the Attorney General. Section 14A is available if there is a breach.

22. That *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 19 be extended in relation to CDOs, to allow the Court, upon application, to substitute an ESO.

The Committee does not oppose this recommendation as it allows the court to substitute a less serious outcome upon application.

23. That a breach of an interim supervision order or of an ESO be addressed by a return of the matter to the Supreme Court which could deal with it as a breach of one of its orders, rather than by way of a prosecution for a s 12 offence in the Local Court, preserving however the power of the State to prosecute the offender separately for any offence that might constitute a breach of the relevant order.

Whilst the Committee considered this recommendation no comment is offered at this stage. However, if the Government is considering this recommendation further, the Committee would appreciate an additional opportunity to comment.

24. That following the impending 2009 review of the *Crimes (Serious Sex Offenders) Act 2006* (NSW), the Act be reviewed again in 3 years.

The Committee supports the recommendation for a future review of the Act in three more years. The Committee agrees with the Sentencing Council that it is important to review the Act in order to monitor its effectiveness on a longer term basis, and to determine whether it reduces the recidivism of those offenders who are subject to its application and later released into the community.

Yours sincerely,

Joseph Catanzariti
President