THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC/HRC/PWrg:1418001

23 November 2017

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

Dear Attorney General,

Terrorism (High Risk Offenders) Bill 2017

I refer to the Terrorism (High Risk Offenders) Bill 2017 ("Bill"), which passed Parliament on 23 November 2017. We note our disappointment that we were not consulted on the Bill prior to its introduction, and at the very limited opportunity for any public scrutiny of the Bill.

The Bill is based on the *Crimes (High Risk Offenders) Act 2006*, and creates a post-sentence preventative detention regime for terrorist offenders, which complements the Commonwealth scheme. The Bill will enable the Supreme Court to impose extended supervision orders ("ESOs") or continuing detention orders ("CDOs") on offenders who pose an unacceptable risk of committing a future serious terrorism offence at the completion of their sentence.

The Law Society has a number of serious concerns with the Bill, which we have detailed below.

1. Post-sentence preventative detention

The Law Society does not support post-sentence preventative detention in prison or its equivalent, for any purpose. We are concerned that the post-sentence preventative detention regime under the Bill can apply to a person who committed an offence when they were a child. The Law Society has consistently opposed NSW legislation enabling post-sentence detention of high risk violent offenders and serious sex 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 the purposes of sentencing, 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, but on the basis of an assessment of future offending.

The Law Society also notes that predicting an offender's future conduct is a notoriously difficult task, and the High Court has recognised the unreliability of these predictions.[1] In the High Court decision of *Fardon v Attorney General for the State of Queensland*, 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'".[2]

In 2014, the UN Human Rights Committee (UNHRC) issued its authoritative General Comment No 35, which sets out in detail its views concerning article 9. In that document it made the following statement in light of its decision in *Fardon*:

> "If a prisoner has fully served the sentence imposed at the time of conviction, Articles 9 and 15 prohibit a retroactive increase in sentence, and a State party may not circumvent that prohibition by imposing a detention that is equivalent to penal imprisonment under the label of civil detention".[3]

On 9 November 2017, the UNHRC renewed its criticism in its Concluding Observations to its periodic review of Australia's compliance with the *International Covenant on Civil and Political Rights*, and stated:

> ".... the Committee, while acknowledging the State party's need to adopt measures to respond to the risk of terrorism, and while noting the safeguards in place to ensure respect for fundamental rights and freedoms, is nonetheless concerned about the haste with which some measures have been adopted, and the necessity and proportionality of certain counter-terrorism powers, including... post-sentence detention order regimes..."[4]

If there are concerns about an offender's continuing risk to the community at the end of their sentence, it would be more consistent with the rule of law to use existing solutions, either within the framework of sentencing, or within the mental health system, to manage these risks.

The Law Society considers that, from a human rights perspective, a post-sentence preventative detention scheme for terrorist offenders may involve breaches of the *International Covenant on Civil and Political Rights*[5], the *Convention on the Rights of the Child*[6] and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[7].

We attach our submission on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth), and reiterate our comments on the human rights aspect of that submission, which we believe are applicable to the provisions in the Bill.

2. Provisions of the Bill

While we note the Bill has passed, we make the following comments on the provisions in the Bill for your consideration.

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[1] *Fardon v Attorney General for the State of Queensland* (2004) 210 ALR 50, paras 124-125.
[2] Ibid, para 125.
[3] Human Rights Committee, *General Comment No 35, Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) para 21.
[4] Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 121st sess, (16 October-10 November 2017) p3.
[5] Opened for signature 16 December 1966, 999 UNTS 277 (entered into force 23 March 1976).
[6] Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[7] Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

Clause 4: Definition of *prescribed terrorism intelligence agencies*

"Prescribed terrorism intelligence agencies" should be defined in the Act and not left to regulation, given the significant role played by such agencies under the scheme, including independent standing in applications under the legislation (clause 52).

Clauses 9 and 10: Scope of definition of eligible offender

Clauses 9 and 10 should be deleted from the Bill. An application to remove an individual's liberty in the absence of a charge, further relevant conviction and the usual protections of a criminal trial process, is unjustified and contrary to the rule of law. It is also unnecessary in light of the existing anti-terrorism powers available to the NSW and Commonwealth governments. It enables the state to effectively avoid the criminal trial process and its fundamental elements of procedural fairness (such as the application of the rules of evidence and the criminal burden of proof) to detain someone beyond their sentence. This undermines the institutional integrity of the court, potentially in breach of Chapter III of the Constitution.

Eligibility under this category of eligible offenders does not require there be any further relevant offending. Clause 10 relies on proof - to a civil standard - of facts as to an offender's:

- Membership of a terrorist organisation, or
- Statements or conduct in support of terrorist act(s) and associations or affiliations with other persons or organisations advocating support for terrorism.

Where these factors, or the factors in clause 9, are established in civil proceedings, an offender is then rendered a "convicted NSW terrorism activity offender" or a "convicted NSW underlying terrorism offender", and potentially subject to continued detention. Imposing effective criminal liability in this manner is contrary to fundamental principles of the rule of law and international human rights principles.

A more targeted and balanced approach would be to restrict eligibility to convictions under section 310J of the *Crimes Act 1900* (NSW). This would be consistent with the approach taken under the Commonwealth High Risk Terrorist Offenders scheme.

Clause 9(3): Definition of "terrorism context"

If "terrorism context" is to be included as an element of whether an eligible offender is a "convicted NSW underlying terrorism offender", then clause 9(3)(a) and (b) should be proved beyond a reasonable doubt.

Clause 10: Definition of "convicted NSW terrorism activity offender"

This clause provides that an offender may be declared to be a "convicted NSW terrorism activity offender" if they are "associated or otherwise affiliated with other persons or with organisations advocating support for engaging in any terrorist acts". In the Law Society's view, mere proximity to terrorist ideology is an insufficient basis for eligibility.

The provision should be amended to enable the court to determine beyond a reasonable doubt, in the circumstances of the case, whether the defendant shares those views, or has any knowledge that the person or organisation advocated that position.

Clauses 9(3), 10(1)(c)

Provision should be made for the court to consider the relevant subjective features of an offender in determining whether his or her conduct meets the relevant test under clauses 9(3)(a) and (b) and 10(1)(c). That is, the court should be required to take into account any mental condition or cognitive impairment of the offender in forming an assessment as to their relevant state of knowledge. Without such a safeguard, the scheme may inappropriately be used against inmates suffering from mental illness and/or cognitive impairment rather than the category of individuals the legislation is intended to target.

Clause 10(2): Absence of conviction

Clause 10(2) provides that an offender can be declared to be an "convicted NSW terrorism activity offender", regardless of whether they have ever been convicted of a relevant offence (whether in Australia or elsewhere). This highlights the need for an amendment to require that the matters in clause 10(1)(b) and (c) to be proved beyond a reasonable doubt.

Clause 11: Determinations regarding relevant offenders

The ability of the Supreme Court to consider evidence in earlier criminal proceedings concerning the offender should be limited to evidence that was "admitted" in those proceedings rather than "adduced" in the earlier proceedings (clause 11(c)). Evidence in the earlier proceedings may have been adduced, but not admitted, for many sound reasons, for example, it was not relevant or was unfairly prejudicial to the accused. Allowing that evidence to be relied on in subsequent civil proceedings for the purpose of preventative detention subverts the integrity of the judicial process, as this evidence may not have been properly tested.

We also note that in determining whether an eligible offender is a "convicted NSW underlying terrorism offender" or a "convicted NSW terrorism activity offender", the Supreme Court may take into account "information indicating that current or former associates of the offender have been or are involved in terrorism activities" (clause 11(i)). An offender may have no awareness or knowledge of the actions of a former associate.

Clause 12

We note that under clause 12(5) a declaration for a "convicted NSW terrorism activity offender" has a limited duration, and we see no reason why declarations for a "convicted NSW underlying terrorism offender" should not also be time limited.

Clause 12 (9): Multiple or repeat applications

This clause enables the State to bring repeated or multiple applications for declarations that a person is a relevant offender without any regard to the principle of res judicata or the principles of fairness. This provision should either be deleted or at least limited to those instances where there are new or materially altered circumstances giving rise to a fresh application. Alternatively, leave of the court should be required for a renewed application in respect of the same offender.

Clause 13: Application of Act to offences before commencement

The legislation should operate prospectively.

Clauses 23 and 37: Timing of application for ESOs and CDOs

The window period of 12 months prior to expiry of an offender's current custody for applications to be made for an Extended Supervision Order (ESO) (clause 23(2)) or Continuing Detention Order (CDO) (clause 37(2)), should be amended to either 6 months (as under the current *Crimes (High Risk Offenders) Act 2006* (NSW) or, at most, 9 months (as under the recently enacted amendments to the *Crimes (High Risk Offenders) Act 2006* (NSW)).
Enabling applications to be brought 12 months before the offender's current custody expires significantly undermines their capacity to participate in available de-radicalisation and other rehabilitative programs in custody.

We note that the recent Statutory Review of the *Crimes (High Risk Offenders) Act 2006* (NSW), observed that information and documents required to inform an application (such as treatment completion reports, etc.) are generally only available towards the end of an offender's time in custody.

Clause 25: Determination of application for an ESO

Under this provision, the Court is required to consider:

> "Any beliefs or commitments of the offender (whether of an ideological, religious, political, social or other nature) that support engaging or participating in terrorist acts or acts of violence". (clause 25(l))

This element is very broad. It invites potentially time-consuming and irrelevant inquiry into the causal connection between a particular religion and terrorism. The inclusion of "social or other nature" is so broad as to be unhelpful to a court in its key task of assessing unacceptable risk of future terrorist offences. Of greater relevance to the objectives of the scheme would be probative evidence as to demonstrated links between the individual offender and a terrorist organisation, rather than particular religious or social beliefs.

Clause 45: Requirements with respect to application for an Emergency Detention Order (EDO)

EDO applications can be supported by evidence from the Commissioner of Police (clause 45(4)(a)). Under the current *Crimes (High Risk Offenders) Act 2006* (NSW), the Commissioner or Assistant Commissioner of Corrective Services NSW provides evidence in support of the application (section 18CC). This is appropriate because Corrective Services NSW are responsible for supervision of the offender in the community and are best placed to provide the court with relevant information as to the altered circumstances that give rise to the application.

The relevant evidentiary basis for the application should remain with, and be limited to, the Commissioner or Assistant Commissioner of Corrective Services NSW. We note the rationale for the EDO power, when it was first introduced, was premised on altered circumstances through no fault of an offender or breach of their ESO. As this power is incrementally broadened, there is a risk it will become used in place of breach proceedings.

Clause 52: Submissions by prescribed terrorism agencies

We are opposed to these bodies (which are not specified in the legislation, and are therefore unknown) having standing under the legislation. Proceedings should be between the offender and the State: it is contrary to procedural fairness to require the offender to respond to two adversaries.

Clause 61: Admissibility of documents or reports - no rules of evidence

This section provides that any document or report (or a copy of a document or report) provided to the Attorney General under this Part is admissible in proceedings under this Act despite any Act or law to the contrary. As such materials are likely to form the key evidence against an offender, the rules of evidence should continue to apply. Otherwise, evidence may be admitted which is irrelevant, lacking in probative value or unfairly prejudicial to an offender. Leaving these matters to considerations as to weight is inadequate when an individual's liberty is at stake.

Clause 70: Warning to eligible offenders

The warning provisions are very weak and give courts no assistance as to when it should give a warning (noting the effective lack of any index offence apart from section 310J of the *Crimes Act 1900*).

Offenders should be provided with a warning during the course of their sentences, possibly when eligible for parole and on the anniversary of parole refusals. Offenders likely to be the subject of applications should be also notified of the State's intention to apply for the orders with sufficient time to complete relevant programs prior to the expiration of their sentences.

Schedule 2, Item 2.10[2]: Limitation on consecutive sentences imposed by Local Court

We query why this amendment, which is not related to CDOs or ESOs, was included in this Bill.

Other concerns

- The Bill should provide that proceedings should be based on proof beyond a reasonable doubt.

- Applications for declarations, ESOs and CDOs should also be subject to a requirement that the Attorney General ensure that reasonable inquiries are made to ascertain any facts known to any enforcement officer or that would reasonably be regarded as supporting a finding that the order should not be made. This reflects the obligations on the Federal Attorney General under section 105A.5(2A) of the *Criminal Code Act 1995* (Cth).

Thank you for considering this submission. Please do not hesitate to contact me if you have any queries.

Yours sincerely,

Pauline Wright
President

Encl.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: JJC/CLC/HRC:GUml1198308

30 September 2016

Mr Jonathan Smithers
Secretary-General
Law Council of Australia
DX 5719 Canberra

By email: Natasha.Molt@lawcouncil.asn.au

Jonathan

Dear Mr Smithers,

Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016

I write to you on behalf of the Law Society of NSW in relation to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) ("Bill").

The Bill amends Part 5.3 of the *Criminal Code Act 1995* (Cth) to create a post-sentence preventative detention regime for terrorist offenders. We note that, under the new regime, a Supreme Court, upon application by the Attorney-General, may make an order for the continuing detention of a terrorist offender who is approaching the end of their custodial sentence and is about to be released into the community. The Court must be "satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious terrorism offence if the offender is released into the community".[1]

The Law Society does not support post-sentence preventative detention in prison or its equivalent, for any purpose. We are particularly concerned that the post-sentence preventative detention regime under the Bill can apply to a person who committed an offence when they were a child. The Law Society has consistently opposed NSW legislation enabling post-sentence detention of high risk violent offenders and serious sex offenders, as well as the incarceration of juveniles without a meaningful prospect of release. These submissions are attached, for your information.

The Law Society considers that, if there are concerns about an offender's continuing risk to the community at the end of their sentence, it would be more consistent with the rule of law to use existing solutions, either within the framework of sentencing, or within the mental health system, to manage these risks.

1. General principles regarding post-sentence preventative detention

The Law Society outlines its concerns with, and the general principles regarding, post-sentence preventative detention, as follows.

[1] Clause 105A.7(1)(b), Bill.

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The Law Society considers that 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, including punishment, deterrence, denunciation and protection of the community from the offender.[2] 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.

The Law Society also notes that predicting an offender's future conduct is a notoriously difficult task, and the High Court has recognised the unreliability of these predictions.[3] In the High Court case of *Fardon v Attorney General for the State of Queensland*, 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'".[4] The UN Human Rights Committee ("UNHRC") also highlighted this problem in its decisions in the *Tillman* and *Fardon* cases, stating that:

> The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science... the Courts must make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise.[5]

The Law Society submits that post-sentence preventative detention is outside the usual criminal justice framework, and creates difficulties in respect of usual common law and human rights protections, such as the right not to be subject to arbitrary detention, the right to be brought before a court without undue delay, and the right to a fair hearing.

The Law Society considers that, from a human rights perspective, a post-sentence preventative detention scheme for terrorist offenders may involve breaches of the following articles of the *International Covenant on Civil and Political Rights* ("ICCPR"):[6]

- Article 9(1) – Arbitrary detention;
- Article 14(1) – Fair trial rights, on the basis that the criminal trial procedure would not be applicable to judicial processes under the Act;
- Article 14(7) – Double punishment, on the basis that earlier sentences are a factor affecting the assessment of the need for further detention; and
- Article 15 – Retrospective legislation, on the basis that at the time of the sentencing of some prisoners, the Act and/or amendments to it, were not in force and there was then no prospect of post-sentence detention.

In particular, the Law Society notes that the UNHRC, the body which deals with formal complaints from individuals about the adherence of State parties to the ICCPR, strongly criticised the then *Crimes (Serious Sex Offenders) Act 2006* (NSW) in its views dated 18 March 2010 in response to a communication by Kenneth Davidson Tillman.[7] At the same

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[2] Section 3A, *Crimes (Sentencing Procedure) Act 1999.*
[3] *Fardon v Attorney General for the State of Queensland* (2004) 210 ALR 50, paras 124-125.
[4] Ibid, para 125.
[5] Human Rights Committee, *Views: Communication No 1635/2007,* 98th sess, UN Doc CCPR/C/98/D/1635/2007 (10 May 2010, adopted 18 March 2010) ("*Tillman v Australia*"), para 7.4; Human Rights Committee, *Views: Communication No* 1629/2007, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (10 May 2010, adopted 18 March 2010) ("*Fardon v Australia*"), para 7.4.
[6] Opened for signature 16 December 1966, 999 UNTS 277 (entered into force 23 March 1976).
[7] *Tillman v Australia.*

time, the UNHRC released its views dealing with the position of Robert John Fardon, the appellant in the High Court decision referred to above, which dealt with the similar Queensland legislation relating to serious sex offenders.[8] Both decisions came to the conclusion that the post-sentence preventative detention of the authors was incompatible with the prohibition on arbitrary detention under article 9(1) of the ICCPR.

In 2014, the UNHRC issued its authoritative General Comment No 35, which sets out in detail its views concerning article 9. In that document it made the following statement in light of its decision in the *Fardon* case:

> "If a prisoner has fully served the sentence imposed at the time of conviction, Articles 9 and 15 prohibit a retroactive increase in sentence, and a State party may not circumvent that prohibition by imposing a detention that is equivalent to penal imprisonment under the label of civil detention".[9]

2. General principles regarding post-sentence preventative detention of children

The Law Society opposes the application of post-sentence preventative detention to persons who committed an offence when they were a child. The following comments on post-sentence preventative detention of children apply equally to adults who committed an offence when they were a child.

The principle that every prison system should seek the reformation and rehabilitation of prisoners[10] applies with particular force to children in conflict with the law.[11]

The UN Committee on the Rights of the Child in its General Comment No 10 stated the following:

> Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.[12]

These principles underline juvenile justice legislation across Australia, including the *Young Offenders Act 1997* (NSW), the object of which is to (amongst other things) establish a scheme that provides an alternative process to court proceedings for dealing with children who commit certain offences.[13]

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[8] *Fardon v Australia.*
[9] Human Rights Committee, *General Comment No 35, Article 9 (Liberty and security of person),* 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) para 21.
[10] Article 10(3), ICCPR; Human Rights Committee, *General Comment No 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 44th sess, UN Doc HRI/GEN/1/Rev.1 (10 April 1992) para 10.
[11] See, e.g., Human Rights Committee, *Views: Communication No 1968/2010,* 112th sess, UN Doc CCPR/C/112/D/1968/2010 (17 November 2014, adopted 22 October 2014) para 7.8 ("*Blessington and Elliot v Australia*").
[12] Committee on the Rights of the Child, *General Comment No 10 (2007): Children's Rights in Juvenile Justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) para 10; see also Kelly Richards, "What makes juvenile offenders different from adult offenders?" *Trends and Issues in Crime and Criminal Justice,* February 2011, No 409, 1, http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi409.pdf.
[13] Section 3(a), *Young Offenders Act 1997* (NSW).

Post-sentence preventative detention of children for security purposes fails to recognise that children, by virtue of their unique vulnerability, are entitled to special protections in international law requiring that detention of children be used only as a last resort and for the shortest appropriate period of time,[14] and be limited to exceptional cases.[15]

Specifically, post-sentence preventative detention of children may be inconsistent with the following provisions of international human rights treaties, which Australia has ratified:

(a) *Convention on the Rights of the Child* ("CRC"):[16]

- Article 3(1) – In all actions concerning children, the best interests of the child shall be a primary consideration;
- Article 37(a) – Right to freedom from torture or cruel, inhuman or degrading treatment or punishment;
- Article 37(b) – Right to freedom from arbitrary detention. The detention of a child "shall be used only as a measure of last resort and for the shortest appropriate period of time";
- Article 37(c) – Right of a child deprived of their liberty to be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of their age;
- Article 37(d) – Right of a child deprived of their liberty to prompt access to legal and other appropriate assistance, and the right to challenge the legality of their deprivation of liberty before a court and to a prompt decision on any such action;
- Article 40(1) – Right of a child in conflict with the law to treatment which promotes their sense of dignity and worth, takes their age into account, and aims at their reintegration into society;
- Article 40(2)(a) – Prohibition on retrospective laws;
- Article 40(2)(b) – Right of a child in conflict with the law to basic guarantees, including to be presumed innocent until proven guilty; to be informed of the reasons for detention; to have the matter determined without undue delay; and to have a decision and any measures imposed reviewed by a higher authority;
- Article 40(3)(b) – States parties must seek to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

(b) ICCPR (in addition to those ICCPR articles outlined above):

- Article 10(3) – Child offenders must be accorded treatment appropriate to their age and legal status;
- Article 24(1) – Every child has the right to "such measures of protection as are required by his status as a minor, on the part of his family, society and the State"; and

(c) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("CAT"):[17]

- Article 16 – prohibition on cruel, inhuman or degrading treatment.

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[14] See article 37(b), CRC; Children's Legal Centre and UNICEF, 'Administrative detention of children: A global report', February 2011, 23. The UN Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules") (para 19), UN Rules for the Protection of Juveniles Deprived of their Liberty ("Havana Rules") (para 2) and UN Guidelines for the Prevention of Juvenile Delinquency ("Riyadh Guidelines") (para 46) state that institutionalisation of a child should be a measure of last resort and for the "minimum necessary period".

[15] Para 2, Havana Rules.

[16] Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

[17] Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

In relation to article 16 of the CAT, the UN Special Rapporteur on torture has recognised that life imprisonment and lengthy sentences, such as consecutive sentencing, are "grossly disproportionate and therefore cruel, inhuman or degrading when imposed on a child". Such sentences "have a disproportionate impact on children and cause physical and psychological harm that amounts to cruel, inhuman or degrading punishment."[18]

The Law Society notes that, under international law, the ICCPR, CRC and CAT have been binding on both the Federal and State Parliaments of Australia since they were ratified in 1980, 1990, and 1989, respectively. Each Parliament has an obligation to incorporate into its laws, and implement the provisions of, these ratified treaties.

3. Legislative provisions

The Law Society makes the following observations in relation to specific provisions of the Bill.

3.1 Who a CDO may apply to and effect of an order

Clause 105A.3(1)(c) provides that a continuing detention order ("CDO") may apply to a person who is at least 18 years old when the sentence ends. The Law Society understands that, in effect, a CDO may apply to adults who were under the age of 18 when they committed the relevant offence. We consider that this is inconsistent with the principles relating to children in conflict with the law under the CRC, discussed above.

3.2 Treatment of a terrorist offender in a prison under a CDO

Clause 105A.3(2) provides that the effect of a CDO is to commit the offender to "detention in a prison". Clause 105A.4(1) provides that a terrorist offender who is detained in a prison under a CDO must be treated in a way that is appropriate to their status as a person who is not serving a sentence of imprisonment, subject to any reasonable requirements to maintain, amongst other things, the management or good order of the prison. Clause 105A.4(2) provides that the offender who is detained in a prison under a CDO must not be accommodated or detained in the same area or unit of the prison as persons who are in prison for the purpose of serving sentences of imprisonment unless, amongst other things, it is necessary for the good order of the prison.

The Law Society considers that the offender would, in effect, continue to be subjected to imprisonment, although the Bill characterises "detention in a prison" as distinct from serving a sentence of imprisonment. We submit that the offender's detention in a prison would amount, in substance, to a fresh term of imprisonment which is not permissible in the absence of a conviction for which imprisonment is a sentence prescribed by law. We submit that this would amount to a violation of the prohibition on arbitrary detention under article 9(1) of the ICCPR.[19]

The Law Society notes that the UNHRC has stated that a State party may not circumvent the prohibition on a retroactive increase in sentence by imposing a detention that is equivalent to penal imprisonment under the label of civil detention.[20] We submit that this proposed scheme violates this prohibition under articles 9 and 15 of the ICCPR.

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[18] Juan E. Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* UN Doc A/HRC/28/68 (5 March 2015) para 74.
[19] *Tillman v Australia*, para 7.4; *Fardon v Australia*, para 7.4.
[20] Human Rights Committee, *General Comment No 35, Article 9 (Liberty and security of person),* 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) para 21; *Tillman v Australia,* para 7.4; *Fardon v Australia,* para 7.4.

The Law Society also notes that the UNHRC has stated that the conditions during any non-punitive period of additional detention "must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainee's rehabilitation and reintegration into society".[21] We submit that the need to maintain the management or good order of a prison is not a valid reason to treat a subject of a CDO in the same way as a prisoner who is serving a sentence of imprisonment, or to detain them in the same area of the prison as prisoners serving sentences of imprisonment.

3.3 Applying for a CDO

Clause 105A.5 provides that the Attorney-General, or a legal representative of the Attorney-General, may apply to a Supreme Court of a State or Territory for a CDO in relation to a terrorist offender, and that such application must include any report or other document that the applicant intends to rely on. Subclause 5 provides that the applicant is not required to give the offender any information included in the application if the Attorney-General is likely to give a certificate under Subdivision C of Division 2 of Part 3A of the *National Security Information (Criminal and Civil Proceedings) Act 2004*; seek an arrangement under s 38B of that Act; make a claim of public interest immunity; or seek an order of the Court preventing or limiting disclosure of the information.

The Law Society is concerned that the subject of the CDO proceedings may not be provided with information included in the application that is necessary to form a defence. We consider that the subject of the CDO proceedings should be provided sufficient information about the allegations against them to enable effective instructions to be given in relation to those allegations.

3.4 Appointment of and assessment by relevant expert

Clause 105A.6 provides that the Supreme Court may, on an application for a CDO, appoint one or more relevant experts who must conduct an assessment of the risk of the offender committing a serious Part 5.3 offence if the offender is released. Clause 105A.2 provides that "relevant expert" includes any of the following persons "who is competent to assess the risk of a terrorist offender committing a serious Part 5.3 offence" if the offender is released: any registered medical practitioner (whether or not they are a fellow of the Royal Australian and New Zealand College of Psychiatrists), any registered psychologist, and "any other expert".

The Law Society considers that the inclusion of "any other expert" in the definition of "relevant expert" is too broad. We query which other relevant experts would be competent to assess such a risk, and, if so, how their competence would be determined.

3.5 Matters a Court must have regard to in making a CDO

Clause 105A.8(b) provides that the Supreme Court of a State or Territory must have regard to any report received from a relevant expert that is appointed by the Court under clause 105A.6 in relation to the offender. Clause 105A.8(c) allows the Court to also consider "the results of any other assessment conducted by a relevant expert of the risk of the offender committing a serious Part 5.3 offence". The Law Society queries the validity of assessments conducted by experts who have not been appointed by the Court, pursuant to clause 105A.6.

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[21] Human Rights Committee, *General Comment No 35, Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) para 21.

Clauses 105A.8(g) and 105A.13(2) provide that the Supreme Court may receive in evidence in the CDO proceeding evidence of, and must have regard to, the offender's criminal history, including prior convictions and findings of guilt in respect of any other offences. The Law Society submits that consideration of prior convictions and findings of guilt amounts to double punishment, in breach of article 14(7) of the ICCPR.

The Law Society notes that there is no requirement for the Supreme Court to have regard to the views of the subject of the CDO proceedings. We consider that the Bill should be amended to require the Court to have regard to such views.

3.6 Making a CDO

Clause 105A.7(5) provides that the period of the CDO must be a period of no more than three years that the Court is satisfied is reasonably necessary to prevent the unacceptable risk. Subclause (6) provides that the Court may make successive CDOs. The Law Society is concerned that the scheme may, in practice, enable an offender to be indefinitely detained.

3.7 Civil evidence and procedure rules in relation to CDO proceedings

Clause 105A.13(1) provides that a Supreme Court of a State or Territory must apply the rules of evidence and procedure for civil matters during a CDO proceeding. The Law Society notes that the UNHRC has stated that civil proceedings do not meet the due process guarantees required under article 14 of the ICCPR for a fair trial in which a penal sentence is imposed.[22] We therefore consider that this clause may breach article 14 of the ICCPR.

3.8 Giving terrorist offenders documents

Clause 105A.15 provides for documents under proposed Division 105A on CDOs to be given to the terrorist offender. The Law Society considers that the documents should also be provided to the person's legal representative, and this should be prescribed in the legislation.

Thank you for considering this letter. Should you have any questions or require further information, please contact Meagan Lee, Policy Lawyer on (02) 9926 0214310 or email Meagan.Lee@lawsociety.com.au.

Yours sincerely,

Michael Tidball
Chief Executive Officer

[22] Ibid.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Crim/HRC:GUeh1193460

1 September 2016

Mr Andrew Cappie-Wood
Secretary
Department of Justice
Justice Precinct Offices
Locked Bag 5111
Paramatta NSW 2124

By email: anna.read@justice.nsw.gov.au

Dear Mr Cappie-Wood,

Statutory review of the *Crimes (High Risk Offenders) Act 2006*

Thank you for your letter inviting submissions to the statutory review of the *Crimes (High Risk Offenders) Act 2006* ("Act").

At the time, the Law Society of NSW did not support the introduction of continuing detention and extended supervision for high risk violent offenders. Broadly, the Law Society continues to oppose the application of continuing detention for high-risk violent offenders. Detaining a person beyond the maximum sentence imposed by the sentencing court offends the fundamental principle of proportionality.

The Law Society also reiterates its concerns regarding the challenges involved in accurately predicting future behaviour. 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).[1] 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"*".[2]

Expansion of the scheme

As noted in our letter to the Department of Justice dated 17 February 2016 (attached), the Law Society strongly opposes any expansion of the legislative tests in the Act, specifically the qualifying 'serious violence offence' behaviours set out in s 5A(1) of the Act.

Extended Supervision Orders ("ESOs") and Continuing Detention Orders ("CDOs") 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 society.

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

If continuing detention continues to be Government policy, the Law Society is supportive of the Department's focus on looking at ways to improve and enhance the way in which the scheme operates. We provide the following responses to the specific questions raised in the Department's consultation paper, *Statutory review of the Crimes (High Risk Offenders) Act 2006* (NSW) ("Consultation Paper").

Question 1 - Eligibility

The Law Society opposes the removal of the distinction between sex offenders and serious violent offenders in the Act, particularly given the concerns outlined above regarding the difficulties involved in establishing an offender's future conduct. The fact that a person has committed an offence of a certain nature provides a trigger for an application to be made, that is, it is an indicator to determine the likelihood of future offending. The distinctions between the two types of offenders provide significant safeguards to ensure the 'predictions' as to future offending behaviour are restricted and limited to those which closely reflect the nature of the high risk behaviour already displayed.

Question 2 - Definition of imprisonment

The Law Society is opposed to any expansion of the definition of imprisonment to specifically include suspended sentences, home detention and Intensive Corrections Orders ("ICO"). The Law Society supports Option 3 as set out in the Consultation Paper, namely confining the definition to sentences of full time imprisonment. This will ensure the cohort is confined to those who have served full time sentences of imprisonment for serious offences and directly targets the most serious of cases.

In order to pass the first threshold, it is important that the offence is sufficiently serious. There may have been good reasons why a suspended sentence or ICO was imposed for an earlier offence (for example the offender could have been a young person involved in consensual sex) and, as such, the Law Society opposes any widening of the cohort to capture those who fall within that category.

Question 3 - Extension to offences committed as a child

The Law Society's opposition to the use of continuing detention is amplified in relation to offences committed by children, due to their vulnerability. The Law Society submits that the Act should be amended to exclude offences committed by children aged 16 years and under. This reflects the fact that offences involving children operate under a different framework to adult offenders.

We support the continued exclusion of any offences dealt with by the Children's Court under the *Children (Criminal Proceedings) Act 1987*, as noted in the Consultation Paper.

Question 4 - Australian citizens who commit qualifying offences overseas

The Law Society is concerned about the application of the scheme to offences committed by Australian citizens overseas. The Law Society reiterates the concerns highlighted in the Consultation Paper, that is, the difficulties which may be faced in obtaining sufficient background information as to the nature of the offence committed overseas and the risks the offender may pose. This is particularly difficult where the original sentencing court has applied different standards to those which would be imposed by an Australian court. The Law Society seeks further information on the practical operation of this proposal in order to properly assess its impacts.

Question 6 - The test for making a CDO

The Law Society is opposed to any change to the test for making a CDO. The Law Society considers the current tests are adequate and consistent with the objectives of the Act.

In order to establish that a CDO is appropriate, the State must establish, inter alia, that adequate supervision will not be provided by an ESO.[3] The Act also specifies that the application must be accompanied by information which addresses each of the matters referred to in s 17(4) – but only "to the extent relevant to the application".[4]

The question of whether an ESO would be sufficient is a question for the Court, not the State. The Court is already required to take into account any reports prepared by Corrective Services NSW ("CSNSW") regarding the extent to which the offender could be "reasonably and practicably" managed in the community.

Further, the Law Society considers that any proposal to "delink" consideration of the ESO and CDO tests, as outlined in Option 2 of the Consultation Paper, could potentially undermine the independent role of the Court in making a decision on whether there is a least restrictive option for the offender, by effectively removing this presumption from the initial decision of whether the offender meets the test for a CDO.

Question 7 – Community safety as the paramount consideration

The Law Society considers that no amendment to the Act is necessary, given that section 3(1) of the Act already provides that ensuring the safety and protection of the community is the primary object of the Act.

Question 8 - Public Interest Monitor

The Law Society agrees with the suggestions made by the Rule of Law Institute and the Aboriginal Legal Service, that further safeguards should be incorporated into the process of obtaining emergency orders. The Law Society considers that this is particularly important where the applications are made ex parte, or where the offender is otherwise unrepresented.

The Law Society considers that the legislation should require immediate notification to Legal Aid NSW, where an emergency detention order application has been filed, or is highly likely to be filed.

The Law Society does not oppose the recommendation of the Rule of Law Institute and the Aboriginal Legal Service for the introduction of a Public Interest Monitor as an additional safeguard to appear at any emergency detention order hearing where an accused is unrepresented, however this should not replace the need for Legal Aid NSW to be notified in the first instance.

Questions 9-11 - State Parole Authority ("SPA")

The Law Society opposes the introduction of a requirement that the SPA take into consideration whether the State has signalled an intention to make an application for a CDO or ESO under the Act, when deciding whether or not to release an offender on parole. Such information could be extremely prejudicial to any consideration of parole and could cause extensive delays whilst confirmations are obtained and outcomes awaited.

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[3] Section 5D(1) *Crimes (High Risk Offenders) Act 2006.*
[4] Section 14(3) Crimes (High Risk Offenders) Act 2006.

The Law Society considers the interaction of parole with an ESO or CDO should remain unchanged.

Question 12 – Including family representatives of the victim in the definition of "victim" in the Act

The Law Society does not support expanding the definition of "victim" for the purposes of the Act to also include family representatives of the victim who are on the Victims Register. The purpose of victim impact statements under the Act is for the assessment of future risk and prevention of future harm. This is quite distinct from the role of victim impact statements in sentencing proceedings and submissions about parole. As such, the current narrower definition in the Act is appropriate.

Questions 15-16 - Disclosure

The Law Society considers that any material or information obtained should not be used for any purposes outside that contemplated by the Act. Such information can be highly sensitive and would have been prepared for that specific purpose. It is likely to be highly prejudicial if used in unrelated proceedings.

Question 23 - ESO conditions and breach

The Law Society does not consider that the framework for breach of an ESO requires amendment. The Law Society is strongly opposed to the introduction of mandatory sentencing as a penalty for a breach of an ESO. It is an established principle that the sentencing of offenders should take place on an individual basis. Mandatory sentencing undermines judicial discretion and prevents proper consideration being given to the objective and subjective circumstances of each case. In particular, the Law Society considers that mandatory sentences may lead to unjust outcomes and would undermine the express intention of the Act, which is to promote the rehabilitation of offences.

The Consultation Paper acknowledges that, given the myriad of ways in which an ESO can be breached, this lends greater weight to the argument that mandatory sentences could lead to unfair outcomes, without a proper assessment of the individual's circumstances.

The Law Society also submits that mandatory sentencing for minor breaches could result in greater rates of imprisonment, at a time when the NSW prisons are already at capacity.

Question 25 - Risk Management Authority

The Law Society reiterates its support for the establishment of an appropriate risk assessment framework, as recommended by the NSW Sentencing Council. The Sentencing Council, when considering the introduction of ESOs and CDOs for High Risk Violent Offenders ("HRVOs"), recommended an extension of the scheme to HRVOs on the condition that a Risk Management Authority be introduced to facilitate and regulate best practice in relation to risk-assessment and risk-management (see recommendation 3(b)).[5]

The Law Society specifically highlights discussion of this point in the Consultation Paper, which confirms that the 2014 amendments to the Act established a multi-agency response to

[5] Sentencing Council, *High-Risk Violent Offenders Sentencing and Post-Custody Management Options* (May 2012) vi. <http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Sentencing_Serious_Violent_Offenders/online%20final%20report%20hrvo.pdf>.

the management of high risk offenders through the creation of a High Risk Offenders Assessment Committee.[6] The consultation paper accepts:

> multi-agency cooperation arrangements are an important development in the management of high risk offenders in NSW. However, they do not address the specific concerns raised by the NSW Sentencing Council in relation to risk assessment and accreditation.[7]

The Law Society continues to be concerned that such a Risk Management Authority, or its equivalent, has not been introduced.

Human rights concerns

The Law Society reiterates its previous views that, from a human rights perspective, the Act may involve breaches of the following Articles of the *International Covenant on Civil and Political Rights* ("ICCPR"):[8]

- Article 9(1) – Arbitrary detention;
- Article 14(1) – Fair trial rights, on the basis that the criminal trial procedure would not be applicable to judicial processes under the Act;
- Article 14(7) – Double punishment, on the basis that earlier sentences are a factor affecting the assessment of the need for further detention; and
- Article 15 – Retrospective legislation, on the basis that at the time of the sentencing of some prisoners, the Act and/or amendments to it, were not in force and there was then no prospect of post-sentence detention.

Australia ratified the ICCPR in 1980 and since then, each Parliament has had an obligation under international law to implement its provisions into its domestic laws.

In particular, the Law Society notes that the UN Human Rights Committee ("UNHRC"), the body which deals with formal complaints from individuals about the adherence of State parties to the ICCPR, strongly criticised the then *Crimes (Serious Sex Offenders) Act 2006* (NSW) in a decision handed down on 18 March 2010 in response to a communication by Kenneth Davidson Tillman.[9] That decision related to the present Act before its extension to serious violent offenders, however the Law Society considers that the principles nevertheless remain applicable.

At the same time, the UNHRC handed down a similar decision dealing with the position of Robert John Fardon, the appellant in the High Court decision referred to above. This decision dealt with the similar Queensland legislation relating to serious sex offenders and came to the same conclusions.[10]

In 2014, the UNHRC issued its authoritative General Comment 35, which sets out in detail its views concerning Article 9. In that document it made the following statement in light of its decision in the Fardon Case:

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[6] Department of Justice, *Statutory review of the Crimes (High Risk Offenders) Act 2006 (NSW): Consultation Paper*, 2016, 31.
[7] Ibid.
[8] United Nations General Assembly, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 277 (entered into force 23 March 1976) ('ICCPR').
[9] *Tillman v Australia,* UN Doc CCPR/C/98/D/1635/2007 (18 March 2010), accessed at http://juris.ohchr.org/search/results.
[10] *Fardon v Australia*, UN Doc CCPR/C/98/D/1629/2007 (18 March 2010), accessed at http://juris.ohchr.org/search/results.

> "If a prisoner has fully served the sentence imposed at the time of conviction, Articles 9 and 15 prohibit a retroactive increase in sentence, and a State party may not circumvent that prohibition by imposing a detention that is equivalent to penal imprisonment under the label of civil detention".[11]

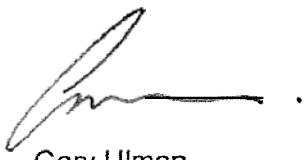
The Law Society considers that, if there are concerns about an offender's continuing risk to the community at the end of his or her sentence, it would be more consistent with the rule of law to use existing solutions, either within the framework of sentencing, or within the mental health system, to determine their suitability for release.

Indigenous Offenders

The Law Society notes and supports the particular concerns raised by Legal Aid NSW and the NSW Bar Association at the Roundtable meeting on 23 August 2016 about the disproportionate effect of the proposals on the Indigenous population. Indigenous offenders are already overrepresented in applications under the Act and any expansion of the scheme will further impact on the increasing rates of Indigenous incarceration.

Thank you for considering this submission. Should you have any questions regarding this letter I would be grateful if you could direct them to Ms Elaine Heaney, Senior Policy Advisor, on 02 9926 0310 or at: elaine.heaney@lawsociety.com.au.

Yours sincerely,



Gary Ulman
President

[11] UN Human Rights Committee, *General comment no. 35, Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35, available at: http://www.refworld.org/docid/553e0f984.html, para 21.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Crim:GUeh1091497

17 February 2016

Mr Andrew Cappie-Wood
Secretary
Justice Precinct Offices
Locked Bag 5111
Paramatta NSW 2124

By email: Sarah.Clark@justice.nsw.gov.au

Dear Mr Cappie-Wood,

Statutory review of the extensions to the *Crimes (High Risk Offenders) Act 2006* made in 2013

Thank you for your letter inviting submissions in relation to the upcoming statutory review of the extensions to the *Crimes (High Risk Offenders) Act 2006* ("Act") made in 2013.

The position of the Law Society of NSW ("Law Society") is set out below.

1. Expansion

The Law Society strongly opposes any expansion of the qualifying 'serious violence offence' behaviours set out in s 5A(1) of the Act. Extended Supervision Orders ("ESOs") and Continuing Detention Orders ("CDOs") 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 society.

The Law Society specifically opposes any expansion that may bring further behaviours within the scope of the scheme, for example the inclusion of wounding. Such expansion would capture a wide group of offenders and does not reflect the intention of the legislation, namely to target only those offenders who represent the highest risk.

Expanding the cohort to include those individuals who have a conviction for a serious violence offence, but who are in custody for a less serious violence offence, is also opposed.

2. The risk test

The Law Society acknowledges that there is a two stage test to qualify for an ESO or CDO. There are, however, difficulties in consistently applying the current risk assessment framework which are of concern.

In a 2011 consultation paper, a prominent psychiatrist, Dr Olav Nielssen commented as follows:

> With regards assessment of risk of future violence, there are currently no methods that can predict the future violent conduct of an individual with sufficient accuracy to make a fair decision based on the results of that assessment. The problems of risk assessment include the high number of false positive and false negative assessments, the lack of any empirical proof that acting on the results of risk assessment has actually prevented violence anywhere, the inability of risk assessment instruments to assess the extent of any harm that might occur, and the inability of current instruments to consider all the forms of harm that might occur or when they might occur[1].

And:

> In summary, I would strongly oppose (and recommend that psychiatrists refuse to participate in) any system that relied on psychiatric opinion about future behaviour, because of the scientific limitations of the prediction of future behaviour[2].

In the 2015 case of *BQJ v Children's Guardian*[3], Dr Nielssen went further in that he:

> described such risk assessments as "complete nonsense." He said that the Static 2000R "conflates the minor with the serious," and is a "simplistic 12 point scale," with "low' bands of reoffending. He said that, "It is not a sound basis form making predictions about an individual's personal behavior".

The Law Society notes that concerns regarding the risk assessment framework were reflected in the Sentencing Council's recommendations when considering the introduction of ESOs and CDOs for High Risk Violent Offenders ("HRVOs")[4]. The Sentencing Council recommended an extension of the scheme to HRVOs on the proviso that the State introduce a Risk Management Authority to facilitate and regulate best practice in relation to risk-assessment and risk-management (see recommendation 3(b)[5]). The Law Society is concerned that such a Risk Management Authority or its equivalent has not been introduced.

3. Warnings

The Law Society recommends strengthening the statutory requirement in the Act to warn offenders at sentence that they may be subject to an application. A new provision could also be included requiring offenders in custody to be notified that they may be the subject of an application. The warning should allow sufficient time to enable the offender to address their offending behavior, including sufficient time to enter and complete programs.

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[1] Dr Olav Nielssen, *Response to Sentencing Serious Violent Offenders*, Sentencing Council (10 July 2011) 1. <http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Sentencing_Serious_Violent_Offenders/drolavnielssensubmission.pdf>.

[2] Ibid 7.

[3] *BQJ v Children's Guardian* [2015] NSW CATAD 217 (21 October 2015) 67.

[4] Sentencing Council, *High-Risk Violent Offenders Sentencing and Post-Custody Management Options* (May 2012) vi. <http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Sentencing_Serious_Violent_Offenders/online%20final%20report%20hrvo.pdf>.

[5] Ibid.

4. Treatment

The Law Society understands that the Sentencing Council noted the importance of treatment in reducing the risk posed by serious violent offenders. It recommended that an independent review be undertaken of the Violent Offenders Treatment Program ("VOTP"), and that further treatment options be developed including for women and offenders with mental or cognitive impairments[6]. The Law Society would welcome further information regarding the status of this report and any recommendations arising from it.

5. Conditions

ESO conditions are detailed and numerous and can prove difficult to comply with, particularly given the complex needs of HRVOs. It is acknowledged that attempts have been made to simplify the standard conditions sought by the State. The conditions however remain difficult to meet and there continues to be a significant rate of both technical and more substantial breaches due to complexity and an overall lack of clarity.

The Law Society submits that the conditions, and enforcement of the conditions, should more comprehensively allow for accommodation of the complex needs of HRVOs and reflect the potentially disruptive and detrimental effect of being returned to custody.

6. Human rights concerns

From the human rights perspective, the Law Society reiterates comments it made in respect of the Crimes (Serious Sex Offenders) Amendment Bill 2013 (as it was then). The Act appears still to involve double punishment, arbitrary imprisonment and detention of a person based on uncertain assessments of the risk of future behaviour. Further, the Act may have retrospective application.

The Law Society submits that the legislation is likely to breach 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 – Retrospective 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 domestic laws.

We note that the UN Human Rights Committee, the body which deals with formal complaints from individuals about the adherence of State parties 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 communication by Kenneth Davidson Tillman.

The UN Human Rights Committee identified similar ICCPR breaches in the Tillman matter to those identified above in the Act.

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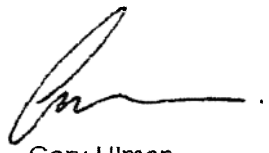
[6] Ibid.

The Law Society considers that the Act may be open to similar criticism. This may affect the reputation of the NSW Parliament, and convey the impression that there is a lesser adherence to human rights principles in this State.

From a human rights perspective, the Law Society continues to be unable to support this scheme. If there are concerns about an offender's continuing risk to the community at the end of his or her sentence, the Law Society considers it would be more consistent with the rule of law to use existing solutions, either within the framework of sentencing, or within the mental health system.

Should you have any questions regarding this letter I would be grateful if you could direct them to Elaine Heaney (Senior Policy Advisor) by email at: elaine.heaney@lawsociety.com.au. Miss Heaney can also be reached by telephone on 02 9926 0310.

Yours sincerely,



Gary Ulman
President

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HumanRightsGUvk:1091357

31 March 2016

The Hon Gabrielle Upton MP
Attorney General
GPO Box 5341
SYDNEY NSW 2001

By email: office@upton.minister.nsw.gov.au

Dear Attorney General,

The incarceration of juveniles without a meaningful prospect of release

The Law Society is writing in relation to the issue of the incarceration of juvenile offenders without the meaningful prospect of release in NSW.

The compatibility of the NSW criminal justice system with international law was considered by the UN Human Rights Committee ("UNHRC") in 2014, in respect of the incarceration of Mr Bronson Blessington and Mr Matthew Elliott. Mr Blessington and Mr Elliott were convicted of the murder in 1988 of Janine Balding. We understand that Mr Blessington has petitioned the Governor to be granted mercy, and that the Governor will make his decision on your advice.[1]

The Law Society's submissions do not focus on the question of whether Mr Blessington's petition for mercy should be granted, or that Mr Elliott should be released. Rather, we take this opportunity to query whether a system that does not allow for even the consideration of rehabilitation of people incarcerated as children is consistent with the rule of law, and with Australia's international law obligations.

These submissions have also been considered by the Criminal Law Committee of the NSW Bar Association and endorsed by that committee.

1. Overview

1.1. Factual background

By way of factual background, Mr Blessington and Mr Elliott were children when they committed the offence, being 14 and 16 years, respectively. They have both been in custody since shortly after Ms Balding's murder. At the time of their sentencing to life imprisonment, they had the right to apply for determination of their sentences with a realistic possibility of later being released on parole eight years later. However, in 1997, 2001 and 2005, the NSW Parliament passed legislation that has the effect that they are very unlikely to ever be released during their lifetimes. That release can only

[1] Tom Allard, "Bronson Blessington: former DPP Nicholas Cowdery backs mercy for Janine Balding killer," 5 February 2016, *Sydney Morning Herald,* <http://www.smh.com.au/nsw/bronson-blessington-former-dpp-nicholas-cowdery-backs-mercy-for-janine-balding-killer-20160205-gmmrfn.html>

now occur if they are dying or so incapacitated they have no capacity to harm any person.

We note that the UNHRC concluded in *Blessington and Elliott v Australia*[2] that Australia was in breach of the human rights of Mr Blessington and Mr Elliott. The UNHRC found that although they were incarcerated as children, the prospect of Mr Blessington and Mr Elliott's release is "extremely remote" given the various amendments of the relevant legislation,[3] and therefore a violation of their rights under the *International Covenant on Civil and Political Rights* ("ICCPR").

1.2. UN Human Rights Committee findings and recommendations

The UNHRC found that Australia had violated the rights of Mr Blessington and Mr Elliott under Articles 7, 10(3) and 24 of the ICCPR. The substantive issues provided for by the Articles are serious. Article 7 sets out the prohibition against torture, or cruel, inhuman or degrading treatment or punishment. Article 10(3) provides that the essential aim of a penitentiary system should be the reformation and social rehabilitation of prisoners.

Juvenile offenders should be segregated from adults and "accorded treatment appropriate to their age and legal status." Article 24 requires that every child should have, without discrimination, "the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."

The UNHRC considered that "the imposition of life sentence on the authors [Blessington and Elliott] as juveniles can only be compatible with article 7, read together with articles 10, paragraph 3 and 24 of the Covenant if there is a possibility of review and a prospect of release, notwithstanding the gravity of the crime they committed and the circumstances around it."[4] Such a possibility must not be a "mere theoretical possibility" and the review procedure must be thorough, and allow the domestic authorities to "evaluate the authors' concrete progress towards rehabilitation and the justification for the continued detention" and it must take into account the fact that they were only children at the time the crimes were committed.[5]

The UNHRC noted that the review procedure, given the legislative reforms in 1997, 2001 and 2005, was subject to such restrictive conditions that the prospect of release seemed "extremely remote", taking into account the "never to be released" recommendation made by Justice Newman of the Supreme Court of NSW. The UNHRC noted also that:

> the release, if it ever took place, would be based on impending death or physical incapacitation of the authors, rather than on the principles of reformation and social rehabilitation contained in article 10, paragraph 3.[6]

The UNHRC referred to the General Comment[7] on article 10 of the ICCPR, which provides that no penitentiary system should be only retributory and that it should essentially seek the reformation and social rehabilitation of the prisoner. The UNHRC noted that this principle applies with particular force in connection with juveniles.

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[2] UN Human Rights Committee, *Views: Communication No 1968/2010*, 112th sess, UN Doc CCPR/C/112/D/1968/2010 (14 April 2010, adopted 22 October 2014)
[3] Note 2, 16 [7.8]
[4] Note 2, 16 [7.7]
[5] Ibid.
[6] Note 2, 16 [7.8]
[7] General Comment No. 21 (44), paragraph 10

Given the above, the UNHRC concluded that the rights of Mr Blessington and Mr Elliott had been violated.

The UNHRC observed that, as a signatory to the ICCPR, and the Optional Protocol to the ICCPR, Australia is obliged to provide Mr Blessington and Mr Elliott with an effective remedy.[8] Australia is also obliged to review its legislation to ensure its conformity with the requirements of articles 7, 10(3) and 24 of the ICCPR "without delay" in order to prevent similar violations in the future.[9] Finally, Australia was requested to provide information to the UNHRC about the steps taken to give effect to the findings within 180 days of 22 October 2014.[10] So far as the Law Society is aware, that information has not yet been provided.

2. The Law Society's submissions

2.1. Rehabilitation the goal of corrective services

In respect of the matter of Mr Blessington and Mr Elliott, the Law Society acknowledges the abhorrent nature of the crimes committed. However, we note the view expressed by all of the then State and Territory Attorneys General that the aim of every prison system is the reformation and rehabilitation of prisoners[11].

It is a longstanding principle of international human rights law that children should not be incarcerated without a meaningful prospect of release, and this principle is confirmed in the UNHRC decision discussed above. Although Mr Blessington and Mr Elliott are now adults, they were children when they committed the crime and were first incarcerated.

Further, the then Chief Justice Gleeson (who delivered the appeal judgment on behalf of the Court of Criminal Appeal), stated that, because of the juvenile status of Mr Blessington and Mr Elliott, he did not support the recommendation by the trial Judge that they were never to be released.[12]

2.2. Different responses required to the sentencing of juvenile offenders

The Law Society notes that the Australian Institute of Criminology's view is that there are a range of biological, psychological and social factors that make juvenile offenders different from adult offenders, which necessitate unique responses to juvenile crime.[13] The relationship between age and crime is one of the "most generally accepted tenets of criminology,"[14] as the research shows that "young people are more at risk of a range of problems conducive to offending—including mental health problems, alcohol and other drug use and peer pressure—than adults, due to their immaturity and heavy reliance on peer networks."[15]

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[8] Note 2, 17-18 [9]
[9] Ibid.
[10] Note 2, 18 [10]
[11] Kirsty Needham, "Bali nine executions: attorneys-general join in plea for clemency", *Sydney Morning Herald,* 15 February 2015 available online: http://www.smh.com.au/national/bali-nine-executions-attorneysgeneral-join-in-plea-for-clemency-20150214-13erhu.html (accessed 19 February 2015).
[12] Note 2, 5 [2.10]
[13] Kelly Richards, "What makes juvenile offenders different from adult offenders?" *Trends and Issues in Crime and Criminal Justice,* February 2011, No. 409, at 1, available online: http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi409.pdf (accessed 9 July 2015).
[14] Ibid. at 2.
[15] Ibid. at 4.

In addition, the statistics show that young people are more likely to be the victims of crime.[16] This was in fact the case for Mr Blessington and Mr Elliott, who were both the victims of repeated physical and sexual assault as children.[17]

2.3. International law obligations

Further, the Law Society submits that the NSW and federal governments have an obligation to comply with international law. We are aware that there is a contention that, because Australia is a federation with legislative powers divided between Commonwealth and the States, the State Parliaments are not bound to observe international law in this respect, unlike the federal Parliament. However, in our view, under international law, the obligations Australia takes on when it ratifies a treaty are unaffected by internal legal arrangements,[18] and NSW is equally bound to comply with international law.

We note that international instruments are applied in NSW legislation. For example, section 138(3)(f) of the *Evidence Act 1995* requires that the court take into account "whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the *International Covenant on Civil and Political Rights*" in considering the exclusion of improperly or illegally obtained evidence.

2.4. Retrospective legislation

Finally, the Law Society notes that Mr Blessington and Mr Elliott were minors at the time of their offence and incarceration. Later, the NSW Parliament saw fit to change the law with retrospective effect to reduce and almost completely remove any meaningful prospects they had at the time of sentence to be released in the future. This retrospective change arguably amounted to a legislative increase of the sentences of these (and other) individuals. As such it may have been an interference with the sentencing process of independent courts and a further breach of international law. In that last respect, Article 15 of the ICCPR prohibits a heavier penalty being "imposed than the one that was applicable at the time when the criminal offence was committed".

2.5. The Law Society's request

We request that the NSW Government comply with the recommendations of the UNHRC, and address the issue of incarceration of juveniles for life without meaningful prospect of release. In particular, the relevant legislation should be reviewed to ensure its conformity with Australia's human rights obligations.

Thank you for your time in considering this letter. Questions may be directed to Vicky Kuek, Principal Policy Lawyer, on 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely,

Gary Ulman
President

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[16] Ibid.
[17] Note 2, 4 [2.1], [2.3]
[18] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 27

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:*
>
> > *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]
>
> *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.

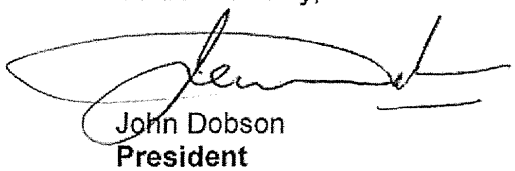
Finally, the HR Committee notes that the United Nations Human Rights Committee, the body which deals with formal complaints from individuals about the non-adherence of State parties (including Australia) to the ICCPR, strongly criticised the *Crimes (Serious*

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

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.

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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

[redacted]

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~~ Greg,

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

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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

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

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