



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: rbg 657248

31 October 2012

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


Dear Attorney General,

Continuing detention and extended supervision for high risk offenders

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

The Committee is strongly of the view that continuing detention should not be adopted for high-risk violent offenders. Detaining a person beyond the maximum sentence imposed by the sentencing court offends the fundamental principle of proportionality. The original sentence imposed reflects the synthesis of all of the purposes of sentencing (s 3A *Crimes (Sentencing Procedure) Act 1999*), including punishment, deterrence, denunciation and protection of the community from the offender. Continuing detention undermines the established principle of finality in sentencing (subject to appeals), and has the practical effect of eliminating the relevance of the sentencing judge's decision altogether. Continuing detention amounts to a new punishment beyond that already imposed in accordance with law, in the absence of a new offence or conviction on the basis of an assessment of future offending.

Predicting an offender's future conduct is a notoriously difficult task and the High Court has recognised the unreliability of these predictions (*Fardon v Attorney General for the State of Queensland* (2004) 210 ALR 50 at paras 124-125). In *Fardon*, Justice Kirby comments that predictions of dangerousness are "... based largely on the opinions of psychiatrists which can only be, at best, an educated or informed "guess"" (para 125).

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

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

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

be included in the category of high-risk violent offender either at the initial sentencing stage or while the offender is in custody. This gives rise to further concerns that any attempt to define high-risk violent offenders may result in net widening.

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

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

Yours sincerely,



Justin Dowd
President