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