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Ms Megan Lawton
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Dear Ms Lawton

Thank you for your letter dated 27 March 2013 in which you raised concerns of the Law Society Northern Territory regarding the *Serious Sex Offenders Act 2013*.

The *Serious Sex Offenders Act 2013* provides for the continued detention or supervised release of serious sex offenders who are deemed to be such a serious danger to the community that continued management by detention or supervision of the offenders is warranted after they have served their original sentence. The focus of the legislation is on the most serious sex offenders in our community and it is anticipated that there will only be a handful of offenders under these orders at any one time.

The *Serious Sex Offenders Act 2013* is consistent with regimes in four other Australian jurisdictions and commenced on 1 July 2013.

Your comments were based on seven main areas of concern which I have addressed separately below.

1. Natural Justice

In relation to this issue, the *Serious Sex Offenders Act 2013* does not breach Australian law. Regimes such as this have been found to be valid by the High Court on a number of occasions, most notably in the matter of *Fardon v Attorney-General (Qld)* (2004) 223 CLR 75.

I acknowledge that the Queensland and New South Wales regimes have been considered by the Human Rights Committee and found to be in violation of Article 9 of the International Covenant on Civil and Political Rights, but it is important to note that Australia is not bound by the covenant and the regimes do not breach Australian law.

This Government respects and supports Australia's commitment to the International Covenant on Civil and Political Rights and agrees that it is important to ensure that NT legislation is consistent with the tenor and spirit of the covenant, as much as possible. However, the safety and protection of the most vulnerable Territorians must also be ensured. The balancing of the rights of individuals in our community is not always easy and, in this case, the protection of the community and sexual assault victims is paramount.

Having said that, the *Serious Sex Offenders Act 2013* has been carefully drafted to ensure consistency with existing legal principles such as the rule against double jeopardy and the articles of the International Covenant on Civil and Political Rights. This scheme does not impose additional punishment for sexual offences but is about civil detention aimed at the protection of the community. I am also confident that the Supreme Court can be relied on to appropriately balance the rights of individuals and the need for community protection in making its decisions.

Additionally, to ensure that the legislation does not impact unnecessarily on the fundamental principles of the justice system and the rule of law, a range of safeguards are included in the legislation, including a high standard of proof on the applicant and a robust review and appeal process.

As the first law officer in the NT, I am committed to ensuring that the focus of the legislation will always be on only those offenders at the most serious end of the scale. Underlying the scheme will be transparent and strict administrative procedures and policies, including the establishment of an interdepartmental assessment committee responsible for vetting offenders for the purpose of making recommendations to me about offenders in relation to whom applications should be made. A policy will also apply so that generally only offenders with two previous serious sex offence convictions (in the absence of exceptional circumstances) will be referred to me for an application.

I would also add that the scheme should be viewed as a safety net scheme to ensure that extremely serious sex recidivist offenders will not be released back into the community without appropriate supervision, reintegration and treatment services. There are good reasons for the Territory having a post sentence regime as a safety net. Firstly, it allows for the offender to have the full benefit of treatment opportunities while under their sentence. Secondly, it allows for the parole process (if any) to run its course. It recognizes that the parole process is thorough and allows for those who can be rehabilitated to receive the full effect of the parole process and any associated reintegration programs.

Overall, I would argue that rather than undermining and devaluing attempts at rehabilitation, the scheme actually supports and encourages this by providing an incentive to undertake rehabilitation and to provide support for reintegration and rehabilitation in the community through the use of supervision orders.

In relation to the issue of the application of the scheme to juveniles, the application is very limited. Section 23 of the *Serious Sex Offenders Act 2013* provides that orders can only be made in relation to offenders who will be an adult at the time their sentence expires. This is the position in Victoria and New South Wales. Section 23 recognises that, unfortunately, there can be older juvenile offenders who already exhibit a high level of recidivism and serious offending. These are few but their impact can be immense on victims and their community.

It is the view of this Government that the community should also be protected from these offenders. However, this needs to be balanced against the rights of young people and the need to reduce their likelihood of detention and ensure adequate access to support and alternative options. That is why the *Serious Sex Offenders Act 2013* does not apply to sex offenders who are very young or who have not committed offences that are so serious that the term of detention extends beyond the time they reach the age of 18 years.

2. Relevance

The Law Society's main concern in this regard is that the existing indefinite sentence regime for violent offenders under Part 3 of the *Sentencing Act* is a fairer approach as it applies the order shortly after conviction, and it is suggested that it is working satisfactorily. The Law Society's suggestion is that a better approach would be to expand the existing indefinite sentence regime to include sexual offenders, noting that the range of offences under this regime is currently too narrow.

I acknowledge that the indefinite sentence regime applies to a similar cohort of offenders, ie those who have committed extremely serious offences. The indefinite sentence regime applies to persons convicted of serious violent offences including rape and sexual intercourse/gross indecency with a child. Clearly there may be an overlap in the offenders this new scheme is targeting.

I agree that in the interests of justice and fairness, it is in most cases better to impose ongoing detention as early as possible in the process. As I have no objection in principle to expanding the indefinite sentence regime to include a wider cohort of offenders, I have directed my Department of the Attorney-General and Justice to consider an expansion of that scheme to cover serious sex offenders.

The important difference between this new scheme and the indefinite sentence regime is that this new scheme applies post-sentence, while indefinite sentences are imposed at the time of sentencing. While I agree that it is fairer for the offender to be made aware at the beginning of their sentence of the possibility of continuing management or detention post-sentence, for the safety of victims and the community it is necessary to have a scheme that can operate post-sentence to ensure that high risk sex offenders do not fall through the gaps of the corrections and justice systems.

The *Serious Sex Offender Act 2013* will fill the gap where it is not clear at the time of sentencing whether the offender will continue to be a serious danger to the community at the end of the sentence. This may be the case for a serious sex offender whose behaviour deteriorates during their period of imprisonment or who declines to participate in treatment. It is not always clear at the time of sentencing if a person is likely to become or continue to be, a risk years down the track. The court is reluctant, and rightly so, to impose an indefinite sentence on a person if it considers that long term treatment may assist.

Accordingly, I am particularly concerned about addressing the situation of some offenders who would not be suitable for an indefinite sentence as the court considers that at the time of sentencing they are treatable, however, towards the end of their sentence they are considered too dangerous to be released on parole, often because they have refused or not responded to treatment, which means that they will be released possibly without supervision, treatment or having undertaken any reintegration programs.

Another important function of this regime, that must not be underestimated, is to encourage those recalcitrant sex offenders who currently either resist treatment or decline treatment to actually take up and actively participate in treatment, thereby increasing their chances of rehabilitation or, at the very least, allow for appropriate management of their behaviour, so that they can safely be reintegrated into the community.

Please also note that the operation of both schemes side-by-side is not unusual; Queensland, Victoria and Western Australia all have similar indefinite sentencing regimes in addition to their serious sex offender regimes.

3. Politicisation of a sentencing process

Under this heading, the Law Society has suggested that the Director of Public Prosecutions is the appropriate applicant rather than the Attorney-General.

Under both the Queensland and New South Wales legislation, the Attorney-General is responsible for making applications. In both cases, the Crown Solicitor (the equivalent of the Solicitor for the Northern Territory) acts on behalf of the Attorney-General.

On the other hand, the Director of Public Prosecutions is responsible for applications in Western Australia and (for detention orders) in Victoria. During the drafting of the legislation, the Northern Territory Director of Public Prosecutions was consulted on whether his statutory office would be the appropriate applicant. His view was that he did not support his office being responsible for such applications as they are post-sentence applications relating to civil preventative detention and are undertaken in the civil jurisdiction.

As a civil application process, it is similar in policy to the approach taken under the *Criminal Property Forfeiture Act*. Under that Act, the Director of Public Prosecutions and the Commissioner of Police are the two statutory applicants. However, after the scheme was in operation for some time, it was agreed to establish a dedicated unit within the Solicitor for the Northern Territory to administer proceedings under that Act (and appear on behalf of the Director of Public Prosecutions and the Commissioner of Police) as the civil litigation expertise of the Solicitor for the Northern Territory was more suited to the role.

The *Serious Sex Offenders Act 2013* reflects this policy approach and the proposed administrative processes ensure adequate transparency and independence. The pre-assessment process and the assessment process that will be conducted by the proposed interdepartmental administrative assessment committee will ensure that only appropriate high risk offenders will be referred to the Attorney-General for an application. Additionally, the Solicitor for the Northern Territory will operate as it always does when representing the Territory, ie with the highest level of professionalism. Further, as I have already mentioned, the court can always be relied upon to exercise its powers and discretion appropriately.

Your letter also suggests that the effect of an order is to have a further sentence of imprisonment imposed. My view is that this is not the case; orders under the *Serious Sex Offenders Act 2013* are not equivalent to sentences of imprisonment and do not operate in that way. Firstly, it is anticipated that some of these orders are likely to be supervision orders, rather than continuing detention orders.

Secondly, the offender has a measure of control over whether an application will be made, in the sense that they have choices in relation to their full participation in their treatment and rehabilitation while under their sentence. Unlike a sentence of imprisonment, a continuing detention order has no end date but is subject to continual review of at least every two years. Offenders can make applications at any time to have a continuing detention order reviewed, should the circumstances of the offender change.

4. Costs and Funding

In your letter, you correctly identify that there will be costs associated with this scheme. Costs were considered during the development of the legislation and the Department of Correctional Services will be adequately funded to address those costs. A stand-alone specialist unit within that Department is currently being established, including the recruitment of specialist clinicians and supervision officers.

The issue of additional funding for Legal Aid Agencies is currently being considered as part of the negotiations for future funding between those agencies and the Department of the Attorney-General and Justice.

5. Purpose

As I understand it, your concerns in this regard are around the assessment process and whether it will be adequate to properly and fully assess the risk posed by these offenders.

The Department of Correctional Services currently assesses all sex offenders. This assessment process identifies static and dynamic risk factors and treatment needs, and evaluates the reduction of risk following treatment. A range of assessment tools (including psychometric tools) are already used depending on the individual offender. These tests include the Violence Risk Screen – Sex Offenders version and Risk for Sexual Violence Protocol. Assessments throughout each offender's sentence will be conducted by clinical staff experienced in the forensic assessment of sexual offenders. The existing process will be further enhanced by the additional skills brought in with the establishment of a new specialist unit with specialist clinicians and supervision.

However, when considering the making of the final continuing detention order or supervision order, it should be borne in mind that full and comprehensive assessments will be conducted by two independent specialist forensic psychiatrists. Psychiatrists are able to provide a full and expert medical opinion as opposed to assessment by psychometric testing.

During the development of this legislation, the Department of Correctional Services investigated various aspects of costing and criteria for identifying and managing serious sex offenders. It was important to determine some criteria that would assist the Department of Correctional Services to triage sexual offenders based on risk, to prevent the Attorney-General from being in a position where all individuals who have been convicted of a qualifying serious sexual offence were referred to the Supreme Court. This legislation deprives persons of liberty, and measures must be taken to ensure that people with a serious sexual offence conviction are not unnecessarily detained or restricted.

Explorations of threshold criteria were completed to determine which risk factors could be reviewed in order to assist in triaging offenders. Evidence around risk suggests that past behavior is the best predictor of future behavior.

In light of that evidence, the Department of Correctional Services considered prioritising offenders based on the number of sexual offences they had committed. The actuarial risk assessments used by the Department of Correctional Services are scored based on sexual offence history, victims and other factors. Individuals who have committed a greater number of sexual offences are likely to score higher on these risk assessments and often have a greater number of needs. However, there are a number of other salient factors to consider when evaluating risk and each individual case must be considered in light of all available evidence. As a result, individuals who have less than three prior sexual offences may also be considered for a referral to the Supreme Court if collateral evidence suggests they may be a significant risk to the community. These would generally be "exceptional circumstances."

All individuals who have a qualifying sexual offence will undergo some level of review by the committee. Those who fall into the high risk category based on an actuarial risk assessment will be examined carefully to determine if they pose a high risk of sexual offending overall. Individuals who pose a high risk based on factors not considered by actuarial risk assessment may also be considered if there is evidence of significant risk. Individuals who do not fall into the high risk category on actuarial risk instruments and do not have dynamic risk factors that provide evidence that they are a serious concern will not be considered for this legislation.

Generally, regarding the Law Society's suggestion that the combined effect of the existing indefinite sentence regime and the parole process are adequate to deal with the risks, as mentioned above, this Government's view is that not all of the risks posed by these types of offenders can be addressed through existing legislation. A post-sentence regime is necessary to address those offenders who fail to fully participate in treatment and would otherwise fall through the cracks.

6. Lack of access to culturally appropriate programs

The Law Society suggests the following:

- there is limited access to one-on-one counselling;
- interpreters are not used in either one-on-one or group counselling, which reduces the effectiveness of the programs, particularly for remote Aboriginal prisoners; and
- legal service providers have reported that an existing lack of programs in prisons has led to their clients being refused parole and therefore released without supervision which then leads to re-offending.

It is acknowledged that this scheme requires appropriate, consistent and ongoing treatment of serious sex offenders if it is going to operate effectively and fairly. It is acknowledged that, if opportunities are not provided to reduce risk and/or recidivism of the offender, the Supreme Court is likely to be critical of any application brought before it[1].

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[1] See *DIRECTOR OF PUBLIC PROSECUTIONS* v *Mangolamara* [2007] WASC 71 per Hasluck J, who refused to grant a detention or supervision order on the grounds that 'the statutory requirements concerning the evaluation of the risk of re-offending to the required level had not been established to the prescribed standard of satisfaction by the evidence…".

The existing Sex Offender Treatment Program will be available to serious sex offenders during their sentence. The Sex Offender Treatment Program delivered in prisons is culturally appropriate and was developed in conjunction with the Aboriginal and Torres Strait Islander Consultative Committee. Best practice treatment for sex offenders is usually in a group program context, particularly while they are in custody. There are very few situations where individual one-on-one counseling is suitable. However, in those cases where one-on-one counseling is appropriate, it is and will continue to be provided.

The program will also be continued to be delivered to people on continuing detention and supervision orders on an individual and on a group basis by Senior Clinicians (psychologists). Individual maintenance counselling is currently offered in community and will be bolstered under this new regime with additional clinical staff.

If the offender has already successfully participated in the Sex Offender Treatment Program, then their treatment while under a continuing detention or supervision order will be geared towards maintenance/relapse prevention.

I am satisfied that the Sex Offender Treatment Program delivered in Northern Territory prisons is delivered in a way that ensures the concepts are delivered in a way that people with limited English are able to understand. Consideration is given to the use of interpreters on a case by case basis. However, the practicalities of providing interpreters in group sessions can work to the detriment of participants, particularly if there are a wide range of language groups in the program. Having interpreters present has also been shown to reduce offenders' ability and willingness to participate in groups and to discuss sensitive personal information. Finally, the Department of Correctional Services is concerned about the issue of vicarious traumatisation, ie the trauma of having to cope with information about sexual offences particularly against children.

All Department of Correctional Services programs address criminogenic risk and the needs of offenders are reviewed and evaluated regularly. All offender programs are reviewed by the Institute of Criminology approximately every three years. The Department of Correctional Services has agreed to Australian Best Practice standards and sex offender facilitator standards for the provision of sexual offending treatment in the NT. In addition, the Department of Correctional Services is involved with research looking at alternative psychometric tests for Indigenous sex offenders. Improved assessment will continue to be developed and evaluated with the establishment of the stand-alone specialist unit within the Department of Correctional Services.

7. Broad power

The Law Society raises concern about the broad power to bring applications for indefinite imprisonment, noting that the definition of 'serious sex offence' covers all offences of a sexual nature that carry a sentence of imprisonment of seven years of more. The Law Society is concerned to ensure that indefinite imprisonment be sought for only the worst category of offending, and that it should only be used as an absolute last resort.

The Government agrees with this view and has kept the list of qualifying offences in Schedule 1 to a minimum to reflect only the most serious offenders. Added to this is the proposed administrative procedures and policy that will be applied.

As already mentioned, an interdepartmental committee is being established consisting of the Commissioner of Correctional Services and a range of Corrections, Police, Legal and Health professionals who will be responsible for considering each qualifying offender in the lead up to the end of their sentence to determine whether they are likely to satisfy the criteria under the legislation. This will avoid unnecessary referrals being made to the Attorney-General and it will also avoid wasting the court's time and resources in having to unnecessarily consider applications in relation to qualifying offenders who are not a significant danger to the community

Further, to ensure that the regime clearly focuses on only the very serious recidivist offenders, it is proposed to apply a further administrative policy that an application under the *Serious Sex Offenders Act 2013* will only be made by the Attorney-General after a robust actuarial risk assessment of the offender has been undertaken. Policy parameters are currently being prepared and will be applied transparently by the administrative committee.

I am satisfied that the number of offenders caught by the scheme will be very small. However, the positive impact of continually managing these offenders (whether in detention or on supervision) and ensuring they do not re-offend cannot be overestimated.

Overall, I agree with the need to ensure that this scheme ensures the rights of both offenders and victims in the process. Development of this legislation has been a fine balancing act and I am satisfied that the *Serious Sex Offenders Act 2013*, and the administrative processes that will support it, are and will be as fair, robust and transparent as possible. I am also confident that the scheme will target only those serious offenders whose ongoing supervision or detention is truly required to ensure the protection of all those in our community.

As mentioned above, I have directed officers from the Department of the Attorney-General and Justice to consider your proposal to extend the operation of the indefinite sentence regime to cover serious sex offenders as well as serious violent offenders, and to consult with the Law Society on the matter.

Thank you for your interest in this important reform. Please continue to keep me informed of any ongoing concerns you may have in regards to the scheme.

Yours sincerely

JOHN ELFERINK

17:56
4/7/13