THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Crim:RHrg:1969766

16 September 2020

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

Dear Attorney,

Review of the high risk offender legislation in NSW

The Law Society writes to raise concerns about the operation of the high risk offender legislation in NSW.

We have made extensive and detailed submissions on both the *Crimes (High Risk Offenders) Act 2006* (NSW) (CHRO Act) and *Terrorism (High Risk Offenders) Act 2017* (NSW) (THRO Act) in recent years (submissions attached).

In a series of recent decisions, the NSW Supreme Court has expressed serious concerns about the approach of supervising authorities to the breach of Extended Supervision Orders (ESOs). We are of the view that such an approach may ultimately undermine the objectives of the legislation to promote community safety by preventing the offender's successful rehabilitation and reintegration into the community following often lengthy periods in custody. These decisions are detailed below.

In *NSW v Grooms (Final)* [2019] NSWSC 353, the relevant offending behaviour was invariably associated with substance abuse for which Mr Grooms had received limited treatment either in custody or the community. Mr Grooms was subject to an interim ESO during the time he lived in a Community Offender Support Program group house and was subject to the numerous onerous and strict conditions that are typically placed on an ESO. These included intensive supervision involving interviews, scheduled and unannounced home visits, movement schedules and electronic monitoring. Mr Grooms did not reoffend while subject to the interim ESO, apart from a breach arising from an incident where he removed his electronic monitoring device and was verbally abusive in frustration at his circumstances. Despite his subsequent acknowledgement that his conduct was unacceptable and his intention to attend a scheduled appointment the next day for anger management treatment, he was arrested, charged with breach of the ESO and refused bail. The decision by police to charge Mr Grooms in these circumstances drew sharp criticism from Justice Fullerton, who described it as "counterproductive to the statutory objects of protecting the community through the defendant's progress towards rehabilitation," (at [69]).

In *R v McQuilton (Final)* [2019] NSWSC 265, Justice Fagan was critical of the manner in which the orders were administered and breaches prosecuted, noting that the central purpose of punishment for breach was to deter breach and not as a mechanism for preventative detention (at [43]).

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In *NSW v Carr* [2020] NSWSC 643, the offender, an Aboriginal man with an intellectual disability, was imprisoned in 2001 for committing serious sexual offences at the age of 16. He was placed on a five-year ESO in 2009, which was only revoked in May 2020. Most of the intervening period was spent in prison because of technical breaches of his ESO. Some of these breaches involve using illegal drugs, others involve breaches of curfews, schedules of movements and accommodation conditions. In 2014 the Supreme Court expressed concern about the punitive approach to the practical implementation and enforcement of the ESO and how relatively minor breaches were dealt with by incarceration rather than support for engagement with culturally appropriate programs. At that time, the Court also expressed concern about evidence that supervision had failed adequately to take into account the "real and significant difficulties" experienced by Mr Carr as an intellectually disabled Aboriginal man. When the matter returned to the Court for the ESO to be revoked in May 2020, Justice Hamill concluded that "much, if not all, of what I said in 2014 fell on deaf ears" (at [5]). He found that the impact of the order resulting in Mr Carr's repeated incarceration for relatively minor breaches and his consequent institutionalisation adversely impacted on his prospects of rehabilitation, and that neither the primary nor the secondary objectives of the legislation were being served by the ESO remaining in place (at [32]).

Of equal concern to the Law Society is the impact of both schemes on Aboriginal offenders and on those suffering from a cognitive or mental health impairment. Since the THRO Act commenced in 2017, of reported applications brought to date in respect of 17 individuals, four of them have concerned Aboriginal offenders: *State of NSW v Ceissman*; *State of New South Wales v RC (No.2)* [2019] NSWSC 845; State of *New South Wales v Dickson* [2020] NSWSC 100 and *State of New South Wales v GB by his Tutor* [2020] NSWSC 913 (17 July 2020). In the first application under the THRO Act, an application brought against an Aboriginal offender, the Court observed:

> *The whole process of the imposition of an ISO or an ESO on a person in that category may exacerbate, rather than ameliorate, the radicalisation of such a person... Little attention has been paid, in the proceedings before the Court, to the positive aspects of any programs that are to be undertaken or suggested. Without them, the whole process envisaged by the THRO Act may be counter-productive.* (*State of NSW v Ceissman* [2018] NSWSC 1237 at [168] – [170]).

Since that decision, applications under the THRO have been brought against a cognitively impaired Aboriginal young person who had never been convicted of any terrorist offence nor any serious violence offence (*NSW v RC (No 2)* [2019] NSWSC 845); an Aboriginal man whose main political ideology concerned the legalisation of cannabis (*NSW v Dickson [2020]* NSWSC 100); and an 18-year-old cognitively impaired Aboriginal man with a history since infancy of severe abuse and neglect and who suffered from a myriad of complex mental health conditions (*NSW v GB by his Tutor* [2020] NSWSC 913).

We consider that it is an opportune time for a comprehensive and independent review of the high risk offender schemes in NSW, in order to identify amendments that can address these concerns while supporting the ultimate objectives of community safety. We suggest that the CHRO Act and the THRO Act be referred to the NSW Law Reform Commission for that purpose and we would welcome the opportunity to contribute to such a review.

The Law Society contact for this matter is Rachel Geare, Senior Policy Lawyer, who can be reached on (02) 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,

Richard Harvey
President
Encl.