GAT:dgr

BAR ASSOCIATION OF QUEENSLAND

16 November 2018

Committee Secretary
Legal Affairs and
Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: lacsc@parliament.qld.gov.au

Dear Committee Secretary

Re: Protecting Queenslanders from Violent and Child Sex Offenders Amendment Bill 2018

The Bar Association of Queensland ('the Association') welcomes the opportunity to provide comment on the *Protecting Queenslanders from Violent and Child Sex Offenders Amendment Bill 2018* (Qld) ('the Bill') that was introduced into Parliament by Private Member's Bill on 19 September 2018.

The Bill proposes to alter very substantially the operation of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ('the DPSO Act') with regard to supervision orders. The changes include the following:

- The insertion of a new Part 4B that would mean that any adult who has been convicted of two or more serious sexual offences (at any time) and is imprisoned for any period (for any offence) will, after their release, be required to wear a location monitoring device,[1] report to a corrective services officer every month,[2] not leave Queensland without the permission of a corrective services officer,[3] and submit to at least two psychological examinations every three years.[4] The requirement to wear a monitoring device remains for the rest of the person's life and this condition cannot be altered, even by the Attorney-General.[5] Other aspects of the indeterminate supervision order continue indefinitely until the Attorney-General decides to remove them.[6]
- All current court ordered supervision orders (which judges had under the present regime determined to be for a particular period) will automatically be converted into indefinite orders which cease only by a decision of the Governor in Council.[7]
- All future court ordered supervision orders may only be made as indefinite orders which will cease only by a decision of the Governor in Council.[8]

[1] *Protecting Queenslanders from Violent and Child Sex Offenders Amendment Bill 2018* (Qld) cl 10, proposed s 43AL(1)(a).
[2] Ibid, proposed s 43AL(1)(b)(iii).
[3] Ibid, proposed s 43AL(1)(b)(iv).
[4] Ibid cl 8, proposed s 19E(2).
[5] Ibid cl 10, proposed s 43AM(2).
[6] Ibid, proposed s 43AM(3).
[7] Ibid cl 8, proposed s 19C.
[8] Ibid, proposed s 19B.

BAR ASSOCIATION OF QUEENSLAND
ABN 78 009 717 739
Ground Floor
Inns of Court
107 North Quay
Brisbane Qld 4000
Tel: 07 3238 5100
Fax: 07 3236 1180
DX: 905
[redacted]
Constituent Member of the Australian Bar Association

Presently, there are four key Acts by which the liberty of those who have concluded serving a sentence of imprisonment or other punishment ordered by a criminal court can be removed or curtailed. Those Acts are:

- the *Criminal Law Amendment Act 1945* (Qld);
- the *Penalties and Sentences Act 1992* (Qld) (Part 10 of that Act);
- the DPSO Act; and
- the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) ('the Child Protection Act').

These Acts represent a balance between the removal or reduction of a person's liberty (other than as court ordered punishment) and the protection of the community. A critical aspect of achieving this balance has been to require the exercise of judicial discretion for at least the most serious reductions of a person's liberty.

The recent decision of the Court of Appeal in *Attorney-General (Qld) v Fardon* [2018] QCA 251 ('*Fardon*') is an illustration of both the successful operation of the DPSO Act and the complexity of the task of assessing the risk of future offending such as to justify ongoing reductions in a person's liberty.

The Association respectfully submits that the existing framework for the preventative detention and supervision of those who have been convicted of serious sexual offences has been shown to be appropriate and adequate for the task of protecting the community and properly bestows the responsibility for assessment of risk on the judges tasked with considering evidence that is presented and tested in court, rather than upon the Executive.

The Association is also concerned about the lack of any mechanism for legal representatives to make submissions or examine witnesses as part of the proposed reviews by the Governor in Council or Attorney-General of current and future supervision orders.[9]

With respect to the particular clauses proposed, the Association respectfully offers the following submissions:

- **Clause 3** – The current object of the DPSO Act, namely to ensure "*the adequate protection of the community*", would appear to be appropriate. It is not apparent to what degree (if any) the change to the object of the Act to ensure "*the safety and protection of the community*" would alter the operation of the DPSO Act. Given the substantial body of jurisprudence established under the existing object of the DPSO Act, it is inadvisable, in the Association's view, to alter the object of the Act without a substantial reason for doing so.

- **Clause 4** – The Association is of the view that the determination of community expectations and finding an appropriate balance between the competing considerations of the liberty of the person and community protection in any particular case can be given effect to by the judiciary, without the need to designate that the safety and protection of the community must be considered paramount over other competing considerations.

- **Clause 5** – The express removal of any consideration of the "*means of managing the risk*" or the "*likely impact of a division 3 order on the prisoner*"

[9] Ibid, proposed ss 19B and 19C.

is antithetical to the proper administration of justice. The practical ability to engage a prisoner in the community or administer an order are appropriate considerations and consideration of them is necessary in order to make an assessment of whether the community can be protected from risk.

- **Clause 6** – The Association considers the fixing of the period of a supervision order to be an important safeguard. There are provisions currently in place that allow for the extension of orders in appropriate cases. This framework ensures appropriate judicial consideration is given to any application to extend orders. Because of the length of time the DPSO Act has now been in operation, Queensland courts are now being called upon to consider the making of further orders in appropriate cases. *Fardon* is illustrative of the operation of the current framework where the Court of Appeal overturned a decision of the Supreme Court of Queensland not to set a hearing for the determination of whether a further supervision order was required.

- **Clause 7** – This clause proposes that all existing supervision orders (that under the DPSO Act have been ordered by a judge to be for specific period) be automatically converted into indefinite orders that only the Executive has the ability to remove. The Association is concerned that granting the Executive power to determine when a supervision order is extinguished, particularly, in relation to pre-existing judicially created orders for supervision of a determinative length may render the legislation unconstitutional. This change at least creates a risk that the legislation would be held to offend the *Kable* principle.[10]

- **Clause 8** – The Association considers the periodic review of supervision orders, as provided for in the proposed s 19B, after the first five years and each year, thereafter, would provide some kind of safeguard against unduly long orders. These repetitive reviews would, however, need to be both thorough and expedited given the number of orders that would need to be reviewed. The current system of reviews takes considerable time and effort and is done when the Executive has determined that there is a need for the Attorney-General to make an application for a further order at the expiration of the fixed period. The Association is concerned that to require reviews of every order, rather than allowing them to cease in the absence of an application to extend them, would in many instances be unnecessary overreach.

  Furthermore, the Bill is unclear about the practical manner by which reviews would be conducted by the Governor in Council. The proposed legislation does not specify what material would be considered beyond that referred to in s 19D(2), whether a hearing would be conducted with an opportunity to have any psychiatric evidence tested under cross-examination, and whether legal representation would be allowed.

- **Clause 10** – This clause provides for the insertion of a new Part 4B into the DPSO Act. This Part creates "*indeterminate supervision orders*" for all adults who are convicted of two or more serious sexual offences and imprisoned for any period. Such persons are referred to as "*repeat offenders*". The definition would include a person who has committed two such offences even if they were committed on the same day and dealt with in the same sentence proceeding.

[10] *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51.

The effect of these indeterminate supervision orders is that, after their release, "*repeat offenders*" will automatically be required to wear a monitoring device,[11] report to a corrective services officer every month,[12] not leave Queensland without the permission of a corrective services officer,[13] and comply with conditions relating to where they are permitted to live.[14] Other than the wearing of a monitoring device, these requirements are to continue indefinitely until the Attorney-General decides to remove the order.[15] In the case of a monitoring device, the proposed Part 4B provides no means for this requirement to cease, such that every person caught by the provision will be required to wear a monitoring device for the rest of their life.[16]

The mandatory requirements in indeterminate supervision orders appear to the Association to be too general in their scope, especially when one considers the number and diversity of the offenders likely to become subject of the new indeterminate supervision orders. For example, requiring monthly reporting conditions by the proposed s 43AL(1)(iii) would unnecessarily reduce the administrative authority of Queensland Corrective Services to determine the appropriate level of contact in any given instance.

Putting aside questions of advisability, there is a real question about the need for the creation of this new Part in the DPSO Act, given the existing obligations upon reportable offenders under the Child Protection Act, This Act is designed exactly for the purpose of allowing authorities an appropriate level of awareness of an offender's movements and alterations to appearance.

In addition, s 13A of the Child Protection Act allows the Police Commissioner to make an application to a court for a prohibition order in respect of a relevant sexual offender who has engaged in concerning conduct. Such an order may, pursuant to s 13FA of the Child Protection Act, require a respondent to wear a tracking device, reside at a particular residence and submit to psychological treatment.

The proposed new s 43AO of the DPSO Act requires that each person subject to an indeterminate supervision order submit to two psychological examinations at least every three years.[17] The cost of having two psychiatrists examine each repeat offender on an indeterminate supervision order at least once every three years would be costly and burdensome on the administering agency and affiliated agencies.

Under s 43AQ, it is proposed that the Attorney-General be the sole decision maker as to whether a person is subject to continuing obligations, other than the monitoring device which can never be removed.[18]

- **Clause 11** – The Association agrees that a review of the operation and impact of the amendments which the Bill would effect, were it to be enacted, is an appropriate proposal. However, given that the review would essentially be in

[11] *Protecting Queenslanders from Violent and Child Sex Offenders Amendment Bill 2018* (Qld) cl 10, proposed s 43AL(1)(a).
[12] Ibid, proposed s 43AL(1)(b)(iii).
[13] Ibid, proposed s 43AL(1)(b)(iv).
[14] Ibid, proposed s 43AL(1)(b)(ii).
[15] Ibid, proposed s 43AM(3).
[16] Ibid, proposed s 43AM(2).
[17] Ibid, proposed s 43AO.
[18] Ibid.

relation to the actions of the Attorney-General under the legislation, consideration should be given to the review being conducted by a person or body other than the Attorney-General.

- **Clause 12** – The effect of these transitional provisions is that an offender who has committed two or more serious sexual offences will be considered a repeat offender, regardless of when the offences were committed. The repeat offender will then be subject to an indeterminate supervision order if they are someone who is also "*a prisoner detained in custody serving a period of imprisonment or subject to a division 3 order*".

  The combination of proposed ss 43AJ, 43AK and 69 has the effect that an offender who committed two serious sexual offences (even against an adult) as a 18 year old in 1980, commits no further sexual offences, but who enters custody for entirely non-sexual offences (such as fraud) in 2019 would be a repeat offender, for the purposes of the Act, and would be subject to an indeterminate supervision order upon release from custody. That person would have to wear a monitoring device for the rest of their life.[19] They also could not be within 200 metres of a school,[20] could not live within one kilometre of a place where children are regularly present such as a park or shopping centre,[21] would be required to report to a corrective services officer every month,[22] and not leave Queensland without permission[23] until the order is no longer considered necessary.[24] This would seem to be a period of at least three years, as when the repeat offender is required to be assessed by two psychiatrists, the Attorney-General would be obliged to consider those reports.[25]

Conclusion

For the reasons set out above, the Association has concerns about the effect of the proposed Bill upon the existing balance of the interests of personal liberty and the protection of the community under the present system of preventative detention and supervision of offenders.

The Association also has concerns that the procedures brought into place by the Bill would be expensive and would impose a considerable (and, in the Association's view) unnecessary burden upon general components of the Queensland justice system including resources of the community corrections system which currently contributes to the protection of the Queensland community by working to enhance the rehabilitation of former prisoners and by reducing the number of prisoners who lapse into reoffending.

In the Association's view, the Bill would also have the detrimental effect of allocating large quantities of community corrections resources in the manner provided in the Bill. Not only has this the potential to require increased taxation to pay for the necessary resources, it also has the effect of making resource allocation decisions by legislative fiat. Resource allocation decisions of this kind are better made at a level where careful adjustments can be made according to the particular needs of the particular case.

---

[19] Ibid, proposed ss 43AM, 43AL(1)(a).
[20] Ibid, proposed s 43AL(1)(b)(i).
[21] Ibid, proposed s 43AL(1)(b)(ii).
[22] Ibid, proposed s 43AL(1)(b)(iii).
[23] Ibid, proposed s 43AL(1)(b)(iv).
[24] Ibid, proposed s 43AM(3).
[25] Ibid, proposed s 43AO.

While policy issues that determine legislation are ultimately a matter for the Parliament representing the people of Queensland, the views of the Association are provided in order to assist in ensuring that Parliament's consideration of the complex issues raised by the Bill has the benefit of members of the Association who have considerable expertise in the way in which the justice system operates in practice.

Yours faithfully

G A Thompson QC
President