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Liberty Victoria Comment

Serious Offenders Bill 2018 (Vic)

1. As summarised in the Statement of Compatibility to the Serious Offenders Bill 2018 (Vic) (the Bill), the Bill constitutes the final phase in implementing the recommendations of the Harper Review. The Bill, if enacted, would, amongst other things:

   (1) expand the post sentence scheme to apply to both serious sex offenders and serious violent offenders who after completing a prison sentence, pose an ongoing and unacceptable risk of harm to the community;

   (2) establish a legal framework for placing and supervising offenders in a new secure residential treatment facility;

   (3) introduce a new Emergency Detention Order to allow supervised offenders to be temporarily detained for up to seven days to provide an additional mechanism for managing the escalating and imminent risk of an offender committing an offence that causes serious interpersonal harm; and

   (4) provide for the new Act to be reviewed within five years of its operation.

2. These will be addressed in turn. However, it should be noted that the Bill has only been introduced to Parliament fairly recently and Liberty Victoria has not had the opportunity to consider every provision in detail.

(1) Expanding the post sentence scheme to apply to both serious sex offenders and serious violent offenders

3. Liberty Victoria opposes the expansion of the detention and supervision order regime under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) to violence offences.

4. It must be remembered that these forms of detention and supervision orders take effect only after a person has completed a sentence of imprisonment imposed by an independent judicial officer, and where that sentence of imprisonment was found to be proportionate having regard to all sentencing considerations, including the risk of reoffending and the need for community protection.

5. Because of the increased rate of incarceration of offenders, and the recent reforms to the parole regime, there is a real issue with a large number of offenders being released with little or no supervision on parole. This will be compounded by the recent restrictions on the use of Community Correction Orders (CCOs) introduced by the *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic).

6. It appears that these detention and supervision orders are in part intended to fulfil the function once intended by supervision on parole, including access to rehabilitative programs, but only after a proportionate sentence has expired.

7. Imprisonment has a criminogenic effect, and that needs to be counteracted in the early stages of incarceration, not after a sentence of imprisonment has expired. It would be much better use of public resources if greater funding was allocated to prisoners to undertake rehabilitative programs when they are serving their sentences, as opposed to the creation of an additional layer of post-sentence supervision.

8. The Bill mirrors the present regime for detention and supervision for sexual offences. If subject to a detention order, an offender can be required to reside at a prison. For a supervision order, it appears that an offender can be required to reside at the new "Rivergum Residential Treatment Centre", which is adjacent to the Hopkins Corrections Centre (prison) at Ararat, and which itself will be closed with a perimeter wall. As with Corella Place, the reality is that being required to reside at such a facility

is not truly supervision "in the community", it is a form of extended post-sentence detention. It is commonplace for persons residing at such facilities (such as Corella Place) to not be able to leave the facility without supervision, to have strict curfews, to not be allowed to work, and to be electronically tagged.

9. The Government asserts that "[t]he courts will continue to apply the unacceptable risk test when deciding whether or not to impose an order. This threshold test is well-tested and has been applied by the courts making detention and supervision orders. A similar test was upheld by the High Court in *Fardon v Attorney-General for the State of Queensland* [2004] HCA 46".

10. However this test of "unacceptable risk" sets a very low bar for the making of an order that can have such an impact on all aspects of a person's life, including where they live, whether they can work, and who they can associate with. It must be noted that under the Bill such orders, and such restrictive conditions, can be renewed indefinitely.

11. The Human Rights Committee of the United Nations in *Fardon v Australia* (*Fardon*)[1] and *Tillman v Australia* (*Tillman*),[2] criticised the capacity for psychiatric experts to properly predict dangerousness:

> *The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science. [The legislative regime] on the one hand, requires the Court to have regard to the opinion of psychiatric experts on future dangerousness but, on the other hand, requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available evidence, the reality is that the Courts must make a finding of fact on the suspected future behaviour of a past offender, which may or may not materialise.*

12. In *TSL v Secretary to the Department of Justice*[3] (*TSL*) Callaway JA cited an issues paper prepared by Professor Bernadette McSherry concerning the dangers of evidence provided by mental health professionals, especially in light of the "…potential for judges and juries to misunderstand and misuse risk assessments, assigning greater accuracy and inevitability to predicted behaviours than is warranted".

[1] (UNHRC, Communication No 1629/2007, 18 March 2010).
[2] (UNHRC, Communication No 1635/2007, 18 March 2010).
[3] (2006) 14 VR 109, 122.

13. Callaway JA also referred to Kirby J's reasons for judgment in *Fardon v Attorney-General,*[4] where his Honour held:[5]

> *…experts in law, psychology and criminology have long recognised the unreliability of predictions of criminal dangerousness. In a recent comment, Professor Kate Warner remarked '[A]n obstacle to preventive detention is the difficulty of prediction. Psychiatrists notoriously over predict. Predictions of dangerousness have been shown to have only a one-third to 50% success rate.*

14. The problems with "risk assessment", which largely depend on a subject assessment about possible future conduct, are manifest. The Government has not explained whether there has been a proper scientific validation of the risk assessment methodology for the violence offences that are included the Bill. It is likely there is no such validation.

15. Liberty Victoria does not accept that these orders are not punitive. As Brennan, Deane, Toohey and Gaudron JJ held in *Witham v Holloway*,[6] "[p]unishment is punishment, whether it is imposed in vindication or for remedial or coercive purposes".

16. The reality of these types of orders, even with the paramount aim of community protection and secondary aim of rehabilitation, is that they constitute a form of post-sentence punishment.

17. While the Government in the second reading speech has said that "civil detention and supervision should only be used as a last resort", that has not been the experience with supervision orders for sexual offences. While the regime was initially intended to apply to the "worst of the worst", applications are now made in a large number of cases where people are eligible to be made subject to such orders. The regime has had a massive impact on the workload of the County Court of Victoria and Victoria Legal Aid.

18. Further, should the Bill be enacted there is a real issue about whether there will be equality of arms for people to resist the making of such orders. For example, will Victoria Legal Aid be funded to respond to such applications? Will there be adequate funding for respondents to obtain their own risk assessment reports given the limitations noted above, and to challenge the evidence and/or methodology relied on by the applicant?

[4] (2004) 223 CLR 575.
[5] Ibid at 623 [124].
[6] (1995) 183 CLR 525, 534.

19. Because of recent sentencing reforms, including the CCO reforms noted above, there will be many prisoners serving sentences of imprisonment for eligible offences. It is submitted that the eligible offences have been cast too wide. For example, the offence of recklessly causing serious injury should not be an eligible offence for such a significant order to be made. Further, the very structure of the Bill indicates that more offences can and will be added over time, as has occurred over the past five years with the dramatic increase in offences attracting mandatory and prescriptive sentences.

20. Should it be enacted, Liberty Victoria does support the Bill's retention of the Courts' discretion as to whether or not to make an order even if the threshold tests are satisfied. As noted by the Government, that is important in preserving the independence of the judiciary.

21. Liberty Victoria, for reasons expressed in previous submissions, strongly opposes the mandatory imprisonment for 12 months for breaches of conditions (proposed s 169). See our comment on the *Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016* here:

    https://libertyvictoria.org.au/sites/default/files/LibertyVictoriaComment-Sex-Offenders-Detention-Supervision-Amendment-Bill-2016.pdf

22. As we noted in that submission, to include relatively minor offences such as assault, criminal damage and threats (which are commonly dealt with by the Magistrates' Court) in Schedule 3 to the Bill indicates that the Bill is designed to try to ensure compliance from persons subject to supervision orders in residential facilities as opposed to preventing more serious harm to members of the community. There is significant scope for such provisions resulting in mandatory imprisonment to be misused by police or custodial officers.

23. Further, core conditions of a supervision order that requires a person to live at a residential facility that the person include, amongst other things:

    (1) "not engage in conduct that poses a risk to the good order of the facility or the safety and welfare of offenders or staff at the facility or visitors to the facility";

    (2) "obey all instructions given by a supervision officer or a specified officer"; and

    (3) "not engage in any behaviour or conduct that threatens the safety of any person (including the offender)."

24. A breach of those conditions (apart from self-harm, which has been carved out of the Bill) would result in a mandatory period of 12 months' imprisonment, subject to a "special reasons" exception. It is already very difficult to establish "special reasons", particularly after the approach taken by the Court of Appeal in *Director of Public Prosecutions (DPP) v Hudgson*.[7] Further, it is likely that the criteria for establishing special reasons, under s 10A of the *Sentencing Act 1991* (Vic) will be made even more difficult to satisfy by legislative amendment.

25. The meaning of conduct that would pose a risk "to the good order" of a residential facility could extend to persons being a nuisance to staff, behaving in a rowdy manner, or even potentially protesting about conditions and/or treatment. For such conduct to potentially result in a 12-month mandatory minimum term of imprisonment is simply draconian.

26. Notably, this results in persons in such facilities being subjected to harsher penalties for such conduct than those in prisons pursuant to s 53 of the *Corrections Act 1986* and r 50 of the *Corrections Regulations 2009*.

27. Liberty Victoria opposes any further fettering of judicial discretion in sentencing. For the reasons we stat in our 2016 submission to the Sentencing Advisory Council as part of the Attorney-General's Sentencing Guidance Reference,[8] this kind of prescriptive model leads to, amongst other things:

    (1) More accused persons taking matters to trial or contested hearing (because of the disincentive to plead guilty caused by the mandatory minimum sentence and/or the risk that a judicial officer will not find the exception of "special reasons"). This results in significant public expense and protracted proceedings for complainants and a considerable burden to police informants and witnesses;

    (2) Increased charge negotiation where the key decisions are made by prosecuting authorities as to whether to proceed with such charges, which depends on potentially subjective and variable decision making by members of the executive which are not amenable to judicial review; and

    (3) A model of prescriptive sentencing which will be continually "ratcheted up" over time with longer standard periods of imprisonment, and broader

[7] [2016] VSCA 254.
[8] https://libertyvictoria.org.au/content/sentencing-guidance-reference

categories of offences. The kind of model is very susceptible to politicised decision making as part of "law and order auction" campaigning.

(2) Establishing a legal framework for placing and supervising offenders in a new secure residential treatment facility.

28. The reality is that the new secure residential treatment facility will have a punitive impact on offenders, even if there is also an emphasis given to rehabilitation.

29. As noted above, the new community facility “Rivergum Residential Treatment Centre” is adjacent to the Hopkins Corrections Centre (prison) at Ararat, and will itself be closed with a perimeter wall. The reality will be that this will be regarded by those subject to supervision orders, and required to live in the facility and subjected to various other conditions that impact upon their liberty, freedom of movement and freedom of association, as a form of post-sentence imprisonment.

(3) Introducing a new Emergency Detention Order

30. The Government has not made the case as to why such new powers are necessary.

31. Such an order would allow for imprisonment of a person for up to 7 days (extendable if there are new circumstances), on the basis of a person presenting a *risk* of committing an offence, and such an order can be made *ex parte*. That is an extraordinary power, and its necessity has not been demonstrated.

32. The Bill already provides for a “holding power” for a person to be detained by police for up to 72 hours (see proposed Part 15, Division 1), which mirrors the power in the current supervision order regime for sexual offences. Such a person can be detained without charge and does not need to be brought before Court. such powers may be exercised “…only if there are reasonable grounds to suspect that there is an imminent risk that the offender will breach a condition of a supervision order” and contemplates that a person will usually be held in police station cells.

33. As we noted in our submission on the *Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016* (link above), which expanded those holding powers, there is no evidence that the proposed power was necessary or proportionate. There was no evidence or analysis suggesting it would have prevented past serious offences from occurring. We noted that if a person has his or her liberty

removed then he or she should be brought before a Court as soon as possible in order for an independent judicial officer to determine whether that loss of liberty is justified. That is a fundamental principle underpinning our criminal justice system. However, this holding power requires no such oversight.

34. With regard to holding powers, for a person to be able to have their liberty removed, for up to 3 days, based on a "reasonable suspicion" that there is an imminent *risk* that a person will breach an order, without any judicial oversight, is clearly creating a power that can and will be abused. In combination with other reforms proposed by the Bill, such powers could be used where a police officer reasonably suspects that there is an imminent *risk* that a person will engage in conduct that poses a *risk* to the good order of a residential facility. The power could be used to impose discipline in a residential facility. The scope for the abuse of such powers is manifest.

35. Liberty Victoria opposes both the holding powers and the new Emergency Detention Order provisions.

(4) Providing for the new Act to be reviewed within five years of its operation.

36. Should the Bill be enacted, Liberty Victoria supports the review of the Act within five years.

Conclusion

37. Thank you for the opportunity to comment on the Bill. If you have any questions regarding this comment, please do not hesitate to contact Liberty Victoria Senior Vice-President Michael Stanton or the Liberty office on 9670 6422 or info@libertyvictoria.org.au.