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**Submission on the draft Sentencing Amendments (Dangerous Criminals and High Risk Offenders) Bill 2020**

Prisoners Legal Service, TAS.

[redacted]

Dear Members,

Thankyou for the opportunity to provide feedback on the Sentencing Amendments (Dangerous Criminals and High Risk Offenders) Bill 2020.

Please find comments below.

Regards,

Greg Barns
Chair

Jonathon Budgeon
Deputy Chair

ACleal

Anne Cleal
Executive Officer

## Comments on Sentencing Amendments (Dangerous Criminals and High Risk Offenders) Bill 2020.

The Prisoners Legal Service (PLS) strongly believe that Preventative detention legislation such as Dangerous Criminals and High Risk Offenders Bill 2020 (the Bill), which provide the mechanism for indefinite detention, infringes basic human rights, offends multiple principles of law and above all, is antithetical to the rule of law in a civilised society.

It is worth noting that the High Court of Australia in 1996 held by a majority, that preventative detention legislation that extends a person's sentence once it has expired is unconstitutional and may infringe the basic human rights which should underlie the laws of a modern democratic society'.[1]

Article 9(1) of The *International Covenant on Civil and Political Rights* (ICCPR) to which Australia is a signatory (Signed 18 December 1972, Ratified 13 August 1980) provides:[2]

> Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his [or her] liberty except on such grounds and in accordance with such procedure as are established by law.

Such legislation also offends the principle against double punishment (Double Jeopardy). Article 14(7) of the ICCPR states that '[n]o one shall be liable to be tried or punished again for an offence for which he [or she] has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'.[3] Double jeopardy has been held in Australian courts to also apply to punishment.[4]

Further principles of law which could be considered offended by the Bill include;

- The principle there should be no punishment without law pertaining to the aspect that once a sentence has been served, offenders are entitled to their freedom once they have served the sentence imposed on them by a court;

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[1] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 376.

[2] *International Covenant on Civil and Political Rights* (ICCPR), Australia signed 18 December 1972 [1980] ATS 23 (entered into force 13 August 1980) art 9(1).

[3] *Ibid, art 14(7).*

[4] *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119, 128–129; *Pearce v The Queen* (1998) 194 CLR 610 , 628.

- The principle of proportionality which provides the type and extent of punishment should be proportionate to the gravity of the offenders responsibility, as confirmed in *Veen v The Queen* (No 2);[5]
- The general principle that involuntary detentions should only be consequence of a finding of guilt as recognised in *Chu Kheng Lim v Minister for Immigration* (1992) per Brennan, Deane and Dawson JJ;[6]

> The involuntary detention of a citizen in custody by the State is penal or punitive in character and ... exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.

The argument that the preventative detention legislation does not reference 'punishment' does not alter the fact that imprisonment, even if done to protect the public, is still a form of punishment.
"Punishment is punishment, whether it is imposed in the vindication of or for remedial or coercive purposes. And, "…there can be no doubt that imprisonment constitutes punishment" said Brennan, Deane, Toohey and Gaudron JJ in *Withan v Holloway* (1995).[7]

It was also noted by Kirby J in *Fardon* case that "preventive detention takes place in prison (not a hospital or a detention centre) and the detainee remains a '*prisoner*".[8] *Kable* also recognised that it is contrary to the fundamental notions of justice to use penal censure and imprisonment to punish those who have not committed a crime.[9]

**Comments on section 23G**

The PLS adopts what Tennent J says in *Bell v Tasmania* (a case run by the PLS) regarding the current legislation*:*

> The order foreshadowed by the legislation creates an all or nothing situation. In my view, the legislation relating to applications such as this is unrealistic and promotes the continued incarceration of people who might, with assistance, be perfectly inoffensive members of the community were they given the opportunity".[10]

We support the pre-release mechanism in s23G as it provides the courts with greater flexibility in assessing whether to discharge the declaration. In addition to a pre release

[5] *Veen v The Queen (No 2)* (1988) 164 CLR 465, 472-475.
[6] *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27.
[7] *Withan v Holloway* (1995) 183 CLR 525, 534.

[8] *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50.

[9] *Kable* v *Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
[10] *Bell v Tasmania* [2016] TASSC 46, 4.

order, s23G should be broadened so that a prisoner can be released into the community and supervised. As per Tennent J in *Bell:*

> "…it is my opinion that it is likely risks could be acceptably managed if Mr Bell were subject to the appropriate levels of supervision and therapeutic contact…be supervised by community corrections and maintain some therapeutic or treatment contact in relation to his offending. Engagement in pro-social activity and monitoring of alcohol and other substance use would also be recommended.[11]

**Comments on section 23E**

The PLS supports the more liberal test proposed in s23E as to whether to discharge the declaration and again adopts what Tennent J said in *Bell*:

> "I accept that long- term incarceration may not necessarily be either the best or even the most sensible option for a sex offender. I accept also that the applicant perhaps should have the opportunity to be re-integrated into the community".[12]

## Conclusion

Risk permeates all aspects of human life. As a society, we generally accept the existence of some risk, as it is something we learn to live with, rather than something with which we can wholly dispense. An undue emphasis on negative sentencing as the means of creating a safer society should be seen as misguided and counterproductive to developing positive and equitable measures for minimising the dangers encountered by humans, coexisting in the community.

[11] Above n, 79.
[12] Above n, 78.