1. Introduction

The Bill and its referral

1.1 On 15 September 2016, the Attorney-General, Senator the Hon George Brandis QC, introduced the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (the Bill) into the Senate.

1.2 The Attorney-General summarised the intent of the Bill in his second reading speech:

> [The Bill] introduces a framework into Part 5.3 of the Commonwealth Criminal Code that will provide for the continued detention of high risk terrorist offenders serving custodial sentences who are considered by a court to present an unacceptable risk to the community.[1]

1.3 On the same day, the Attorney-General wrote to the Committee to refer the provisions of the Bill for inquiry and report. He requested that the Committee, so far as possible, conduct its inquiry in public and that the Committee give particular attention to the following components of the bill:

- the timing of an application for a continuing detention order,
- the review period for a continuing detention order, and
- oversight mechanisms.

1.4 The Attorney-General suggested that detailed consideration of how the existing control order regime might better interact with the proposed

[1] Senator the Hon George Brandis QC, Attorney-General, *Senate Hansard*, 15 September 2016, p. 1034.

continuing detention order regime could be deferred for consideration by the reviews of the control order regime by the Independent National Security Legislation Monitor (INSLM) and the Committee in 2017 and 2018 respectively. In further correspondence dated 13 October 2016, however, the Attorney-General suggested that the Committee may wish to consider in the current inquiry the timing of control order applications. The Attorney-General's letter of 13 October 2016 is included at Appendix C.

Context of the inquiry

1.5 In his second reading speech, the Attorney-General said that terrorism poses a 'serious threat to Australia and its people', noting that there had been 19 counter-terrorism operations since September 2014, resulting in the charging of 48 persons.[2] He noted that there were a number of terrorist offenders serving sentences and increasing numbers coming before the courts. Figures from the submission of the Attorney-General's Department indicate that:

> There are currently 16 terrorist offenders serving sentences of imprisonment for relevant terrorism-related offences in NSW and Victoria. The head sentence for these offenders will expire from 2019 onwards. There are 33 individuals currently before the courts for relevant terrorism-related offences in NSW, Victoria and Queensland.[3]

1.6 The Attorney-General also highlighted that a majority of States and Territories, in addition to international counterparts, had enacted post-sentence preventative detention regimes for high risk sex and/or violent offenders. The regime in the Bill was said to be 'modelled closely' on these regimes. The Attorney-General noted, however, that there was 'no existing Australian regime for managing terrorist offenders who may continue to pose an unacceptable risk to the community following the expiry of their sentence'.[4]

1.7 In referring the Bill, the Attorney-General noted that, on 11 December 2015, the Council of Australian Governments (COAG) agreed to task the

[2] Senator Brandis, *Senate Hansard*, 15 September 2016, p. 1034.

[3] Attorney-General's Department, *Submission 9*, p. 4.

[4] Senator Brandis, *Senate Hansard*, 15 September 2016, p. 1034.

Australia-New Zealand Counter Terrorism Committee (ANZCTC) to develop a nationally consistent post-sentence preventative detention scheme to enable a continuing period of imprisonment for high risk terrorist offenders. The Legal Issues Working Group of the ANZCTC developed possible features of a proposed regime, and on 1 April 2016, COAG agreed in principle for the Commonwealth to lead the process of developing a post-sentence preventative detention regime that could apply uniformly across all jurisdictions. A confidential copy of the ANZCTC report on post-sentence preventative detention was provided to the Committee.

1.8 On 5 August 2016, the Attorney-General convened a meeting of all State and Territory Attorneys-General to consider the proposed scheme and ensure legislation could be introduced quickly. All Attorneys-General agreed in principle to a draft of the Bill. All States subsequently agreed to the text of the Bill in accordance with the Inter-Governmental Agreement on Counter-Terrorism Laws.

1.9 The Communiqué from the 5 August meeting noted that the legislation, after introduction by the Commonwealth Attorney-General, would be subject to further review and report by the Committee. Attorneys-General also agreed to work together to ensure the successful implementation of the proposed scheme within their jurisdictions, with matters to be discussed including resourcing, operational matters and appropriate oversight. The Communiqué went on to state:

> Terrorism poses a grave threat to Australia and its people. It is important to manage terrorist offenders who may continue to pose an unacceptable risk to the community following the expiry of their sentences. It is critical that we work together to implement this scheme as early as possible.
>
> The highest priority for Commonwealth, State and Territory Governments is to ensure the safety of the community. We also recognise the importance of balancing that with the protection of basic human rights. The scheme will include safeguards to achieve that balance.
>
> Commonwealth, State and Territory Governments are committed to ensuring that Australia's counter terrorism framework remains responsive to the evolving national security threat. We will continue to work together to achieve

this important reform as a matter of priority. We look forward to continuing the collaborative discussions undertaken today.[5]

Conduct of the inquiry

1.10 After receiving the Attorney-General's referral, the Committee agreed to complete its inquiry and report to the Attorney-General and the Parliament by 4 November 2016.

1.11 The Chair of the Committee, Mr Michael Sukkar MP, announced the inquiry by media release on 16 September 2016 and invited submissions from interested members of the public. The Chair also wrote to all State and Territory governments inviting written submissions to the review. Submissions were requested by 12 October 2016.

1.12 The Committee received 18 submissions and 5 supplementary submissions. A list of submissions received by the Committee is at Appendix A.

1.13 The Committee held one public hearing and one private hearing in Canberra on 14 October 2016. Details of the hearings are included at Appendix B.

1.14 Copies of submissions and the transcript of the public hearing can be accessed on the Committee's website at www.aph.gov.au/pjcis. Links to the Bill and Explanatory Memorandum are also available on the Committee's website.

1.15 As with previous bill inquiries, the Committee benefited from the provision of a secondee with technical expertise from the Attorney-General's Department.

[5] Senator Brandis, 'Meeting of Attorneys-General on post sentence preventative detention', *Media Release*, 5 August 2016: https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/ThirdQuarter/Communique-Meeting-of-Attorneys-General-on-post-sentence-preventative-detention.aspx

Timeframe for the inquiry

1.16 Some submitters raised concerns regarding the timeframe for the inquiry. The Committee also expresses concerns that the Bill has been brought forward with some operational elements still to be determined.

1.17 The Committee notes that further consultation with States and Territories on implementation of the regime is awaiting the recommendations from this report.

1.18 The Committee considers it performs a vital role in scrutinising national security legislation prior to its consideration by the Parliament, and that agreement by the Government and the Parliament to all of the Committee's recommendations made on various bills over the last three years is indicative of the important work performed by the Committee.

1.19 Specifically, the Committee is concerned to place community safety as its highest priority, and to ensure that any extension of agency powers is justifiable, proportionate and accompanied by the highest safeguards and oversight. Similarly, the introduction of significant and unprecedented new measures in relation to terrorism requires consideration of both community safety and human rights, and requires the highest safeguards and oversight.

1.20 To perform these functions effectively, time is needed for public consultations and to interrogate the provisions proposed in a Bill. In this instance, the Committee was required to inquire into and report on these complex issues in just seven weeks. The Committee requests that, as far as possible when considering the need for future national security legislation, sufficient time be provided for the Committee to undertake a comprehensive inquiry.

Report structure

1.21 This report consists of 4 chapters:

- This introductory chapter sets out the context and conduct of the inquiry, provides an overview of the main elements of the Bill and the rationale for its introduction, and discusses issues raised regarding

international human rights considerations, constitutional validity, and State and Territory support for the provisions,

- Chapter 2 outline the scope of the regime, in particular the range and severity of offences included, who the regime may be applied to, and the use of successive CDOs,
- Chapter 3 considers the process of making an application for a CDO, determining the threshold of 'high probability of unacceptable risk', the use of relevant experts and the standard of evidence required, access to legal representation, and the interaction of CDOs with control orders, and
- Chapter 4 addresses operation of the regime and its oversight, considering conditions of continuing detention (such as housing and access to services), the provision of rehabilitation and deradicalisation programs, oversight and reporting of these developments, and review of the regime.

Outline of the Bill

1.22 The main elements of the proposed continuing detention order regime are contained in Schedule 1 to the Bill. Schedule 1 proposes to insert a new Division 105A into the Criminal Code, comprising six subdivisions (A to F) as described below. Schedule 1 also contains the application provisions for the Bill.

1.23 Schedule 2 to the Bill contains consequential amendments intended to allow agencies to use, communicate or give information obtained using powers in the *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access) Act 1979* for purposes related to the regime.[6]

Proposed subdivision A – object and definitions

1.24 Proposed section 105A.1 provides an objects clause for the continuing detention regime, being:

> The object of this Division is to ensure the safety and protection of the community by providing for the continuing detention of terrorist offenders

[6] Explanatory Memorandum, p. 27.

who pose an unacceptable risk of committing serious Part 5.3 offences if released into the community.

1.25 Proposed section 105A.2 includes definitions for a number of key terms used elsewhere in the regime, including the definitions of 'relevant expert' and 'serious Part 5.3 offence' (see below).

Proposed subdivision B – continuing detention orders

1.26 A continuing detention order has the effect of committing the offender to detention in a prison for the period in which the order is in force. An order may be applied to a person if:

a the person has been convicted of

i an offence against the 'international terrorist activities using explosive or lethal devices' provisions of the Criminal Code,

ii an offence against the 'treason' provisions of the Criminal Code,

iii a 'serious Part 5.3 offence', which is defined as an offence against the 'terrorism' provisions in Part 5.3 of the Criminal Code for which the maximum penalty is seven or more years of imprisonment,[7] or

iv an offence against the 'foreign incursions and recruitment' provisions of the Criminal Code, and

b either

i the person is detained in custody and serving a sentence of imprisonment for the offence, and will be at least 18 years old when the sentence ends, or

ii a continuing detention order or interim detention order is in force in relation to the person.[8]

1.27 Proposed section 105A.4 of the Bill provides that a person who is detained in a prison under a continuing detention order

[7] Proposed section 105A.2.

[8] Proposed section 105A.3.

> must be treated in a way that is appropriate to his or her status as a person who is not serving a sentence of imprisonment, subject to any reasonable requirements necessary to maintain:
>
> (a) the management, security or good order of the prison, and
>
> (b) the safe custody or welfare of the offender or any prisoners, and
>
> (c) the safety and protection of the community.

1.28 Specifically, the Bill provides that the offender

> must not be accommodated or detained in the same area or unit of the prison as persons who are in prison for the purpose of service sentences of imprisonment unless:
>
> (a) it is reasonably necessary for the purposes of rehabilitation, treatment, work, education, general socialisation or other group activities; or
>
> (b) it is necessary for the security or good order of the prison or the safe custody or welfare of the offender or prisoners; or
>
> (c) it is necessary for the safety and protection of the community; or
>
> (d) the offender elects to be so accommodated or detained.[9]

Proposed subdivision C – making a continuing detention order

1.29 Under proposed section 105A.5, the Attorney-General or his legal representative may apply to a Supreme Court of a State or Territory for a continuing detention order.

1.30 An application may not be made more than six months before the end of the terrorist offender's prison sentence and or their existing continuing detention order (if applicable), and must be accompanied by certain information. Subject to certain exemptions, the applicant must give the offender a copy of the application within two days.

1.31 Within 28 days of the applicant being given a copy of the application, the relevant Supreme Court must hold a preliminary hearing to determine

[9] Proposed subsection 105A.4(2).

whether to appoint one or more relevant experts. A relevant expert may be appointed 'if the Court believes that the matters alleged in the application would, if proved, justify making a continuing detention order in relation to the offender'.[10]

1.32 'Relevant expert' is defined as a person 'who is competent to assess the risk of a terrorist offender committing a serious Part 5.3 offence if the offender is released into the community' and is

> (a) a person who is
>
> > (i) registered as a medical practitioner under a law of a State or Territory', and
> >
> > (ii) a fellow of the Royal Australian and New Zealand College of Psychiatrists,
>
> (b) any other person registered as a medical practitioner under a law of a State or Territory,
>
> (c) a person registered as a psychologist under a law of a State or Territory, or
>
> (d) any other expert.[11]

1.33 The relevant expert is required to conduct an assessment, attended by the offender, of the risk of the offender committing a serious Part 5.3 offence if released into the community. The expert must provide a report, including certain mandatory contents, to the Court, the Attorney-General and the offender.[12]

1.34 The Court may make a written continuing detention order under proposed section 105A.7 if, following receipt of an application, it is

> satisfied to a high degree of probability, on the basis of the admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community.

[10] Proposed section 105A.6.

[11] Proposed section 105A.2.

[12] Proposed section 105A.6.

and it is

> satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.

1.35 The Court must specify the period during which the order will be in force. The period must be no more than three years and the period that the Court is satisfied is reasonably necessary to prevent the unacceptable risk.[13]

1.36 In forming its opinion about the level of risk, the Court must have regard to

> (a) the safety and protection of the community,
>
> (b) any report received from a relevant expert in relation to the offender under the above procedure, and the level of the offender's participation in the assessment by the expert,
>
> (c) the results of any other assessment conducted by a relevant expert of the risk of the offender committing a serious Part 5.3 offence, and the level of the offender's participation in any such assessment,
>
> (d) any report, relating to the extent to which the offender can reasonably and practicably be managed in the community, that has been prepared by
>
> (i) the relevant State or Territory corrective services, or
>
> (ii) any other person or body who is competent to assess that extent,
>
> (e) any treatment or rehabilitation programs in which the offender has had an opportunity to participate, and the level of the offender's participation in any such programs,
>
> (f) the level of the offender's compliance with any obligations to which he or she is or has been subject while
>
> (i) on release on parole for any offence, or
>
> (ii) subject to a continuing detention order or interim detention order,

[13] Proposed section 105A.7.

(g) the offender's criminal history (including prior convictions and findings of guilt in respect of any other offences),

(h) the views of the sentencing court at the time the relevant sentence of imprisonment was imposed on the offender,

(i) any other information as to the risk of the offender committing a serious Part 5.3 offence, and

(j) any other matter the Court considers relevant.[14]

1.37 Under proposed section 105A.9, an interim detention order may be applied for by the Attorney-General and issued by a Supreme Court if the Court is satisfied that the offender's prison sentence or detention order will end before an application for a continuing detention order has been determined, and that the matters alleged in the application would, if proved, justify the making of a continuing detention order. Interim detention orders may be issued for a period of up to 28 days each, with a total period of no more than three months.

Proposed subdivision D – review of continuing detention order

1.38 Unless an application for a new continuing detention order has been made and not withdrawn, a Supreme Court of a State or Territory must begin a review of any continuing detention order within 12 months of it coming into force, or the most recent prior review having ended.[15]

1.39 A terrorist offender, or their legal representative, may also apply to the Court for a review of their continuing detention order. Such a review may occur if the Court is satisfied that there are 'new facts or circumstances' justifying a review, or that 'it would be in the interests of justice' to review the order.[16]

1.40 Similarly to the procedure for initially making a continuing detention order, in undertaking a review the Court may appoint one or more relevant experts

[14] Proposed section 105A.8.

[15] Proposed section 105A.10.

[16] Proposed section 105A.11.

and will either affirm or revoke the order, depending on whether it is satisfied of the same issuing criteria as described above. The Court may also shorten the period of an affirmed continuing detention order if it is 'not satisfied that the period currently specified is reasonably necessary to prevent the unacceptable risk'.[17]

Proposed subdivision E – provisions relating to continuing detention order proceedings

1.41 Proposed subdivision E covers a range of procedural matters relating to continuing detention proceedings. These include:

- that the rules of evidence and procedures for civil matters apply to the proceedings, with the exception that the Court may receive evidence of the offender's criminal history,[18]
- that a party to a continuing detention order proceeding may adduce evidence or make submissions to the Court,[19]
- that documents required to be given to a prisoner may be given to the chief executive officer of the prison, who must give the document to the offender personally 'as soon as reasonably practicable' and notify the Court and the person giving the document in writing,[20]
- that, when making a decision in a continuing detention order proceeding, the Court must state and record the reasons for its decision, and provide a copy of any order it made to each party to the proceeding,[21]
- procedures for an appeal, by way of a rehearing, against the decision of the Supreme Court within 28 days of a decision being made or by leave as the Court of Appeal allows,[22] and

[17] Proposed section 105A.12.

[18] Proposed section 105A.13.

[19] Proposed section 105A.14.

[20] Proposed section 105A.15.

[21] Proposed section 105A.16.

[22] Proposed section 105A.17.

- that, if an offender is released from custody before a continuing detention order application or an appeal against a decision is determined, the offender is taken to remain a 'terrorist offender' for the purpose s of the continuing detention order proceeding. If a continuing detention order becomes in force in relation to such a person after their release, any police officer may take the offender into custody and detain them using the same powers the officer would have if arresting or detaining them for an offence.[23]

Proposed subdivision F – miscellaneous

1.42 Proposed sections 105A.19 and 105A.20 enable the Attorney-General, or a delegate, to

- request a person prescribed in regulations to provide information relevant to the administration or execution of the continuing detention order regime, and
- disclose certain information in relation to the continuing detention order regime to a person proscribed in regulations, if it is reasonably believed that the disclosure 'is necessary to enable the person to exercise the person's powers, or to perform the person's functions or duties' and if any conditions specified in the regulations are met.

1.43 Proposed section 105A.21 enables the Attorney-General to make arrangements for terrorist offenders subject to continuing detention orders to be detained in State or Territory prisons.

1.44 Proposed section 105A.22 requires the Attorney-General to produce an annual report, tabled in the Parliament, about the operation of the continuing detention order regime. The report is required to include figures for the year on

- the number of continuing detention orders applied for,
- the number of interim detention orders applied for,
- the number of continuing detention orders made,
- the number of interim detention orders made,

[23] Proposed section 105A.18.

- the number of applications for review of continuing detention orders made,
- the number of continuing detention orders affirmed,
- the number of continuing detention orders varied, and
- the number of continuing detention orders revoked.

Application provisions

1.45 The provisions for the continuing detention order regime are proposed to commence on a 'single day to be fixed by proclamation', or, if not already commenced, six months after the day that the Act receives Royal Assent.[24]

1.46 The regime is proposed to be applied in relation to

- any person who, on the day the provisions commence, is detained in custody and serving a sentence of imprisonment for an offence referred to in subdivision B (see above), and
- any person who, on or after that day, begins a sentence of imprisonment for such an offence (whether the conviction for the offence occurred before, on or after that day).[25]

Rationale for the bill

1.47 The Explanatory Memorandum states that the Bill

> strengthens Australia's national security laws and counter-terrorism framework by ensuring that the Government has the means to protect the community from the risk of terrorist acts. It does so by enabling the continued detention of terrorist offenders serving custodial sentences who are assessed by a judge in civil proceedings to present an unacceptable risk to the community at the time their sentences finish.[26]

1.48 During the introduction of the Bill, the Attorney-General stated that existing measures do not adequately manage the risks posed by terrorist offenders

[24] Item 2, 'Commencement'.

[25] Proposed section 106.8.

[26] Explanatory Memorandum, p. 3.

who may continue to pose an unacceptable risk to the community at the expiry of their sentence:

> [L]aw enforcement agencies can seek to rely on control orders to manage the risk of terrorist offenders upon their release from prison. However, there may be some circumstances where, even with controls placed upon them, the risk an offender presents to the community is simply too great for them to be released from prison.[27]

1.49 In addition, the Attorney-General noted that the CDO regime represents

> part of the Government's comprehensive reform agenda to ensure Australia's counter-terrorism framework is effective in keeping the Australian community safe.[28]

1.50 Likewise, the Attorney-General's Department submitted that the restrictions available under a control order regime may be insufficient to address the risk of a terrorist act occurring due to the

> current security environment where an attack can be planned and carried out with great speed, ease and little engagement with other individuals.[29]

1.51 Several submitters expressed concerns around the principle of continued detention,[30] and emphasised the greater effectiveness of early intervention, mentoring, community welfare campaigns and rehabilitation strategies.[31]

1.52 In her submission to the Committee, Ms Carroll from the Australian Strategic Policy Institute noted that the National Terrorism Alert Level has listed a terrorist attack as 'probable' for the last two years. This indicates that

---

[27] Senator Brandis, *Senate Hansard*, 15 September 2016, p. 1034.

[28] Senator Brandis, *Senate Hansard*, 15 September 2016, p. 1035.

[29] Attorney-General's Department, *Submission 8,* p.3.

[30] See in particular Australian Lawyers' Alliance, *Submission 3*; Lebanese Muslim Association, *Submission 10*; Muslim Legal Network, *Submission 11*; Human Rights Watch, *Submission 12*; Joint councils for civil liberties, *Submission 14*; Civil Liberties Australia, *Submission 6*.

[31] See for example Muslim Legal Network, *Submission 11*.

individuals or groups have the intent and capability to conduct a terrorist attack in Australia.[32]

1.53 Ms Carroll also noted that since September 2014, Australia has experienced four terrorist attacks and 10 other terrorist plots were disrupted by police and other security agencies. She stated that

> while law enforcement and intelligence agencies have done well, they have advised that the number of plots and short turnaround times from planning to action mean that disruption won't always be possible.[33]

1.54 Ms Carroll also considered one of the strengths of the CDO regimes was that it

> draws upon existing legal mechanisms and does not seek to add any additional complexity such as new arrangements or bodies. Notably, the Bill draws significantly from existing dangerous offender regimes in State and Territory jurisdictions, including the Queensland sex offender legislation's power of continuing detention, which was upheld in the High Court of Australia, in Fardon v Attorney General (Qld).[34]

1.55 In previous inquiries, the Committee has noted the importance of prevention and intervention strategies, and community efforts to support social cohesion as part of the suite of measures addressing terrorism threats. As noted in the Explanatory Memorandum to the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, a multifaceted community, intelligence and enforcement approach is required to counter violent extremism and, in particular, to manage those who seek to engage in serious terrorism-related conduct against the Australian community.[35]

1.56 In relation to the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, the Australian Federal Police (AFP) noted that

---

[32] Ms Jacinta Carroll, Australian Strategic Policy Institute, *Submission 7*, p.1.

[33] Ms Jacinta Carroll, Australian Strategic Policy Institute, *Submission 7*, p.3.

[34] Ms Jacinta Carroll, Australian Strategic Policy Institute, *Submission 7*, p.3.

[35] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, September 2015.

> the speed of radicalisation and the trend towards smaller, opportunistic plots, dictate that police must act quickly in the interest of ensuring community safety.[36]

1.57 During the public hearing, the AFP indicated that, due to certain operational limitations, continuing detention orders would allow them to better manage high risk terrorist offenders:

> Law enforcement agencies and the intelligence agencies do not have the ability to monitor everybody who is out there in terms of the people that we have of interest. It is resource intensive and must be based on risk assessments for each individual case and the individual threat that they pose to the community.[37]

1.58 In relation to the current Bill, the AFP stated that, in establishing a regime for possible post-sentence detention, the current Bill provides 'a tool of last resort' for some people who have been convicted of serious terrorism-related offences and may potentially still hold those radical ideas and intent when released.[38]

1.59 The Communiqué from the 5 August 2016 meeting of Attorneys-General on post-sentence preventative detention states:

> Terrorism poses a grave threat to Australia and its people. It is important to manage terrorist offenders who may continue to pose an unacceptable risk to the community following the expiry of their sentences. It is critical that we work together to implement this scheme as early as possible.

1.60 The Communiqué further states that Commonwealth, State and Territory Governments are 'committed to ensuring that Australia's counter terrorism framework remains responsive to the evolving national security threat'. It notes that all governments 'recognise the importance of balancing that with

---

[36] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015*, February 2016, p. 13.

[37] Mr Michael Phelan, Deputy Commissioner National Security, Australian Federal Police, *Committee Hansard*, 14 October 2016, p. 45.

[38] Mr Phelan, Australian Federal Police, *Committee Hansard*, 14 October 2016, p. 45.

the protection of basic human rights' and that the scheme 'will include safeguards to achieve that balance'.[39]

Constitutional validity of post-sentence detention

1.61 Some submitters raised concerns regarding the constitutional validity of the Bill and the importance of taking into particular account the case of *Fardon v Attorney-General* (Qld) (2004) 223 CLR 575 ('*Fardon'*).[40] In *Fardon,* the High Court considered whether the preventative detention contemplated under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) was compatible with the separation of powers doctrine central to Chapter III of the Constitution.

1.62 A joint submission from Dr Rebecca Ananian-Welsh, Dr Nicola McGarrity, Dr Tamara Tulich and Professor George Williams noted that the *Fardon* case demonstrates that 'the constitutional validity of a post-sentence detention scheme turns on its adherence to certain aspects of procedural fairness'.[41] Similarly the Law Council of Australia noted that imprisonment may not be considered to be 'punishment' if authorised for a non-punitive reason, such as community protection.[42] However, both suggested that 'constitutional validity of the scheme is critical and it is imperative that appropriate consideration be given to this issue prior to enactment.'[43]

1.63 Ananian-Welsh et al observed that the High Court grounded its decision to uphold the legislation in *Fardon* due a number of procedural fairness aspects of the Act and that 'procedural fairness is an essential characteristic of courts

[39] Senator Brandis, 'Meeting of Attorneys-General on post sentence preventative detention', *Media Release*, 5 August 2016: https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/ThirdQuarter/Communique-Meeting-of-Attorneys-General-on-post-sentence-preventative-detention.aspx

[40] See for example Australian Law Council, *Submission 4*; Dr Rebecca Ananian-Welsh, Dr Nicola McGarrity, Tulich and Professor Williams, *Submission 6*; Australian Lawyers Alliance, *Submission 3*; and discussion of both *Kable v Director of Public Prosecutions* (1996) 189 CLR 51 and*Fardon v Attorney-General* (Qld) (2004) 223 CLR 575.

[41] Ananian-Welsh et al, *Submission 6*, p. 6.

[42] Law Council of Australia, *Submission 4*, p. 8.

[43] Law Council of Australia, *Submission 4*, p. 8.

and therefore entitled to constitutional protection'. The submission goes on to note that the current Bill is consistent with many of those procedural aspects identified in the High Court decision on *Fardon*. In particular, in acknowledging 'the fundamental importance of basic procedural fairness to human rights and the rule of law', the submission commended the inclusion of the following provisions in the Bill:

- the threshold of a high degree of probability that the offender poses an unacceptable risk of committing a defined list of serious offences,
- that the Attorney-General bears the onus of proof,
- that the Court must give reasons for its decision, and
- the preservation of appeal rights.[44]

1.64 However, Ananian-Welsh et al also noted that the High Court emphasised that the separation of powers requires a court to not be capable of avoiding the rules of evidence. They suggested a potential ambiguity may exist in the Bill whereby information may be adduced despite the rules of evidence, and this could risk a constitutional challenge. This matter is considered later in the report in discussions regarding the matters that a court must consider before deciding whether to make a CDO.

1.65 However, the Joint Councils of Civil Liberties expressed concern about the lack of an established evidence base to determine whether a terrorist offender represented an 'unacceptable risk', potentially undermining the constitutionality of the CDO regime. In its submission to the Committee, the Joint Councils cited Justice Kirby's dissent in *Fardon*:

> Even with the procedures and criteria adopted, the Act ultimately deprives people such as the appellant of personal liberty, a most fundamental human right, on a prediction of dangerousness, based largely on the opinions of psychiatrists which can only be, at best, an educated or informed "guess'. The Act does so in circumstances, and with consequences, that represent a departure from past and present notions of the judicial function in Australia.[45]

[44] Ananian-Welsh et al, *Submission 6*, p. 7.

[45] Joint Councils on Civil Liberties, *Submission 14*, p. 5.

1.66 In its submission to the Committee, the Australian Lawyers Alliance noted that though the Bill mirrors the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), the Bill also differs from that Act in a number of ways:

> The High Court challenge to the Qld Act centred on the Supreme Court of Queensland's status as a Constitutional Court, and the consequential requirement that no power be bestowed on that Court that would give rise to a conflict of the requirements of Chapter III of the Constitution.[46]

1.67 The Australian Lawyers Alliance cited Justice Gummow when querying whether post-sentence detention under federal legislation would be constitutional:

> Gummow J noted, however, that 'the outcome contemplated and authorised by the [Qld] Act, the making of a continuing detention order … could not be attained in the exercise of federal jurisdiction by any court of a State'.[47]

1.68 Likewise, the Law Council of Australia stated that it was crucial that the Committee give appropriate consideration to the constitutional validity of the Bill:

> It is important to recall that *Fardon* was concerned with the application of *Kable v Director of Public Prosecutions (NSW)* (1996) to a State Court vested with federal jurisdiction. The present Bill, on the other hand, involves the direct application of Chapter III of the Constitution to federal legislation. The constitutional validity of the scheme is critical and it is imperative that appropriate consideration be given to this issue prior to enactment.[48]

1.69 In his second reading speech for this Bill, the Attorney-General stated that the:

> Commonwealth considers that the new framework has a sound constitutional foundation. Out of an abundance of caution however, I have asked my State counterparts to enact amendments to existing referrals of power relating to

[46] Australian Lawyers Alliance, *Submission 2*, p. 7.

[47] Australian Lawyers Alliance, *Submission 2*, p. 7.

[48] Law Council of Australia, *Submission 4*, p. 8.

Part 5.3 of the Criminal Code to make explicit that State support extends to the post-sentence preventative detention regime.[49]

1.70 In its response to questions on notice, the Attorney-General's Department confirmed that it had sought advice from the Solicitor-General and Australian Government Solicitor on the constitutional validity of the Bill.[50]

Committee comment

1.71 The Committee notes that this Bill has been drafted with a view to implementing the safeguards outlined in *Fardon.* The Committee notes the commentary from Dr Ananian-Welsh et al which considers the protection of procedural fairness to be an important contribution toward the constitutionality of the Bill.

1.72 However the Committee also notes submitters' concerns that this Bill can be distinguished from *Fardon.* In particular, the Committee recognises the Law Council's concerns that *Fardon* did not fully consider the constitutionality of a federal post-sentence detention scheme. While the constitutionality of legislation is ultimately a matter for the High Court, it is incumbent on Government and the Parliament to legislate in a manner that minimises the risks of a successful constitutional challenge. This is particularly the case when the relevant legislation impacts fundamental civil liberties.

Recommendation 1

1.73 The Committee recommends that, following the consideration of the other recommendations listed in this Report, the Government obtains legal advice from the Solicitor-General, or equivalent, on the final form of the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016.

International human rights considerations

1.74 Several submitters noted the gravity of the measures proposed and their interactions with the following articles of the International Covenant on Civil and Political Rights (ICCPR):

[49] Senator Brandis, *Senate Hansard*, 15 September 2016, p. 1035.

[50] Attorney-General's Department, *Submission 9.3,* p. 11.

- Article 9(1) – the prohibition on arbitrary detention,
- Article 14(1)-(3) – rights to a fair trial,
- Article 14(7) – the prohibition on double punishment for an offence, and
- Article 15 – the prohibition on retrospective criminal laws (on the basis that at the time of the sentencing of some offenders, the regime proposed under the Bill was not in force and there was then no prospect of post-sentence detention).[51]

1.75 For example, members of the Victorian Bar Human Rights Committee claimed that the making of a continuing detention order in the manner proposed by the Bill is inconsistent with the ICCPR:

> Involuntary detention is punitive, and detention based on a prediction of possible future conduct is necessarily arbitrary, unless capable of being justified on other grounds. Whether this is the case depends on the content of the law which authorises the detention, upon its proper characterisation. If enacted, the Bill would authorise further punishment for past crimes beyond the period assessed by a Court as proportionate to the nature and gravity of the offender's conduct.[52]

1.76 Submitters also referred to the analysis provided by the Parliamentary Joint Committee on Human Rights (PJCHR) in regards to each of these ICCPR articles. The PJHCR noted that 'the bill contains certain safeguards which may support an assessment that the regime of continuing detention orders is necessary, reasonable and proportionate'.[53] Further information was sought from the Attorney-General regarding the extent to which the proposed scheme addresses concerns raised by the United Nations Human Rights Committee (UNHRC) in respect of existing post-sentencing preventative detention regimes.

---

[51] See in particular Civil Liberties Australia, *Submission 2*; Associate Professor Mark Nolan, *Submission 13*; Law Council of Australia, *Submission 4*; Ananian-Welsh et al, *Submission 5*; Australian Human Rights Commission, *Submission 8*.

[52] Members of the Victorian Bar Human Rights Committee, *Submission 16*, pp. 3–4.

[53] Parliamentary Joint Committee on Human Rights, *Report 7 of 2016: Human rights scrutiny report*, October 2016, p. 19.

1.77 In its review, the PJCHR noted that the Bill is based on continuing detention schemes in NSW and Queensland. It noted that these schemes were the subject of complaints to the UNHRC in *Fardon v Australia* and *Tillman v Australia.* In both cases, the UNHRC found that the schemes violated Article 9 of the ICCPR (freedom from arbitrary detention) for the following reasons:

- the complainants were incarcerated in the same prison regime, amounting to a fresh term of imprisonment, which was contrary to the prohibition of retrospective laws under Article 15 of the ICCPR,
- the procedures for making continuing detention orders were civil in nature, despite a penal sentence being imposed. This was considered to fall short of the minimum guarantees for criminal proceedings outlined in Article 14 of the ICCPR,
- the continued detention of offenders on the basis of predicted behaviour was problematic because that risk may never materialise, and
- the state should have demonstrated that other, less restrictive alternatives were not available.[54]

1.78 The PJCHR has sought further information from the Attorney-General regarding the extent to which the proposed scheme addresses concerns raised by the UNHRC in respect of existing post-sentencing preventative detention regimes.

1.79 The Communiqué from the 5 August 2016 meeting of State and Territory Attorneys-General noted that

> [t]he highest priority for Commonwealth, State and Territory Governments is to ensure the safety of the community. We also recognise the importance of balancing that with the protection of basic human rights. The scheme will include safeguards to achieve that balance.[55]

---

[54] Parliamentary Joint Committee on Human Rights, *Report 7 of 2016: Human rights scrutiny report*, October 2016, p. 17.

[55] Senator Brandis, 'Meeting of Attorneys-General on post sentence preventative detention', *Media Release*, 5 August 2016: https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/ThirdQuarter/Communique-Meeting-of-Attorneys-General-on-post-sentence-preventative-detention.aspx

1.80 In terms of strengthening safeguards, the PJCHR raised a range of issues such as the consideration of less restrictive measures, the civil standard of proof applied to proceedings, processes for assessing 'unacceptable risk', retrospectivity, and the availability of rehabilitation programs.[56]

1.81 The Committee acknowledges the safeguards already present in the Bill and also the concerns raised by submitters, in particular with respect to ensuring that detention is not considered arbitrary and that there is the right to a fair trial. The Committee makes comments on and proposes a number of recommendations around these issues in order to provide additional protections and ensure that the operation of the regime is considered proportionate and necessary.

Committee comment

1.82 The Committee acknowledges concerns raised by submitters regarding the impact that continuing detention orders may have upon civil liberties, and particularly the prohibition on arbitrary detention, the right to a fair trial, the prohibition on double punishment for an offence and the prohibition on the retrospective application of laws. This Committee notes the view of the Parliamentary Joint Committee on Human Rights (PJCHR) that the number and variety of safeguards in the Bill may support a finding that the regime is necessary, reasonable and proportionate.

1.83 The Committee also notes the PJCHR's request that the Attorney-General provide more information about the extent to which the proposed scheme addresses concerns raised by the United Nations Human Rights Committee (UNHRC) in respect of existing post-sentencing preventative detention regimes. It is important to ensure that where possible, this regime addresses the concerns previously raised by the UNHRC. This Committee considers it important that such information be provided in a timely manner to support Parliamentary debate on the Bill.

[56] Parliamentary Joint Committee on Human Rights, *Report 7 of 2016: Human rights scrutiny report*, October 2016, pp. 19–20.

State and Territory support

1.84 As referred to earlier, in his second reading speech the Attorney-General noted that

> a majority of states and territories, as well as international counterparts including the United Kingdom and New Zealand, have enacted post-sentence preventative detention regimes dealing with high risk sex and/or violent offenders.[57]

1.85 The Explanatory Memorandum notes the existence of post-sentence controls to manage dangerous offenders, including extended supervision or in some cases continuing detention, in other jurisdictions:

> New South Wales and South Australia have schemes which cover both sex offenders and violent offenders, while Queensland, Victoria, Western Australia, and the Northern Territory have limited their schemes to only sex offenders. Tasmania and the Australian Capital Territory do not have post-sentence detention regimes for sex offenders or violent offenders.[58]

1.86 In commencing this inquiry, the Committee wrote to all State and Territory Premiers and Chief Ministers noting that a nationally consistent post-sentence preventative detention scheme for high risk terrorist offenders had been considered by all State and Territory Attorneys-General and that the provisions of the Bill were subsequently agreed to by all States and Territories in accordance with the Inter-Governmental Agreement on Counter-Terrorism Laws.

1.87 The Committee invited all State and Territory governments to make a submission on any matters relating to the Bill that may be considered useful for consideration during the inquiry. Submissions were received from the Queensland, Northern Territory and New South Wales governments. All governments expressed full support for the proposed regime.

1.88 In addition, the Queensland and New South Wales governments identified issues relating to:

---

[57] Senator Brandis, *Senate Hansard*, 15 September 2016, p. 1035.

[58] Explanatory Memorandum, p. 3.

- the risk assessment process and oversight role by the Queensland Public Interest Monitor,[59] and
- a framework for managing individuals subject to continuing detention orders, information sharing and admissibility of evidence, and the timing of application for orders.[60]

1.89 These operational and implementation issues are considered later in the report.

1.90 The Committee notes the extensive consultation that has taken place with all state and territories, and that all governments support the object and provisions of the Bill. The Committee also notes that the Attorney-General has requested

> State counter-parts to enact amendments to existing referrals of power relating to Part 5.3 of the Criminal Code to make explicit that State support extends to the post-sentence preventative detention regime.[61]

[59] Queensland Department of Premier and Cabinet, *Submission 15*.

[60] New South Wales Government, *Submission 17*.

[61] Senator Brandis, *Senate Hansard*, 15 September 2016, p. 1035.