4. Operation and oversight

4.1 The Communiqué of the 5 August 2016 meeting of the Commonwealth and State and Territory Attorney-General's agreed, amongst other things, that Attorneys-General would

> work together to ensure the successful implementation of the proposed scheme within their jurisdictions. Matters to be discussed will include resourcing, operational matters and appropriate oversight.[1]

4.2 This chapter discusses some operational matters concerning the proposed continuing detention order (CDO) regime, including housing and rehabilitation programs, as well as oversight and reporting arrangements.

Conditions of detention – housing arrangements

4.3 Commonwealth terrorist offenders serving a custodial sentence are housed in State facilities with the type of accommodation and conditions of detention for each offender determined according to their individual security classification.[2]

4.4 Proposed section 105A.21 of the Bill requires the Commonwealth to enter into arrangements with the States and Territories to house an offender who

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

[2] Attorney-General's Department, *Submission 9*, p. 12.

is subject to a CDO. A note to proposed section 105A.3 states that '[a]n arrangement with a State or Territory must be in force for an offender to be detained at a prison of the State or Territory'.

4.5 The treatment of a terrorist offender subject to a CDO is set out in proposed section 105A.4. In summary, an offender:

- 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 reasonable requirements surrounding prison management, security and good order; the safe custody or welfare of the offender or any prisoner; and safety and protection of the community, and
- must not be accommodated or detained in the same area or unit of the prison as persons serving sentences of imprisonment, except in certain defined circumstances.[3]

4.6 In its submission, the Attorney-General's Department noted that the detention conditions imposed on a terrorist offender may be considered by the Court.[4]

4.7 According to the Attorney-General's Department, the provisions in proposed section 105A.4 were modelled on the Victorian *Serious Sex Offenders (Detention and Supervision) Act 2009*, which recognises an offender's status as an unconvicted prisoner. This requirement does not exist in any other State or Territory sex or violent offender regime, and offenders subject to an order under these regimes are housed in the same manner, and together with, prisoners (subject to any security requirements).[5]

4.8 The Department went on to state that:

[3] Proposed section 105A.4(2). The exceptions are (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.

[4] Attorney-General's Department, *Submission 9,* p. 13.

[5] Attorney-General's Department, *Submission 9,* p. 13.

- an Implementation Working Group is considering whether state and territory prison accommodation could be adapted,
- terrorist offenders are likely to be assigned a higher security classification than serious sex offenders, which may make it necessary to impose a relatively strict detention regime,
- while the bill does not require purpose built facilities, there is the possibility that dedicated facilities will be required, and
- appropriate professionals and staff will be required to manage detainees.[6]

4.9 In evidence, the Attorney-General's Department commented that:

> Each jurisdiction has different infrastructure and each jurisdiction also takes a different approach to how they manage the existing cohort of terrorism offenders. There is still a discussion to be had between the Commonwealth and the jurisdictions about how offenders of this kind will be managed in each case ...[7]

4.10 Following the hearing, the Committee sought additional information from the Attorney-General's Department about arrangements for housing terrorist offenders. The Department advised that:

> The Commonwealth has convened an Implementation Working Group with legal, corrections and law enforcement representatives from each jurisdiction to progress all outstanding issues relating to implementation of the proposed post sentence preventative detention scheme. The matter of housing arrangements is currently under consideration by the Implementation Working Group including whether existing state and territory prison accommodation could be adapted for offenders subject to a continuing detention order, and any resource implications this will have.[8]

4.11 Some submitters questioned whether the matters outlined in proposed section 105A.4 could be meaningfully achieved.

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[6] Attorney-General's Department, *Submission 9,* p. 13.

[7] Mr Coles, Attorney-General's Department, *Committee Hansard,* 14 October 2016, p. 47.

[8] Attorney-General's Department, *Submission 9.2,* p. 3.

4.12 Members of the Victorian Bar Human Rights Committee, for example, questioned how proposed section 105A.4(1), which requires a detained person to be treated in a way that is appropriate to his or her status as a person not serving a sentence of imprisonment, is to be achieved and how is it capable of being enforced, stating:

> The Bill contains no guidance. Further, the provision is subject to wide-ranging and generalised exceptions. The result is that, in practical terms, s 104A.4 may be little more than window-dressing.[9]

4.13 Professor Ben Saul considered that the requirement that an offender is detained separately to convicted persons (together with the requirement that a Court is satisfied no other less restrictive measures would be effective in preventing unacceptable risk) are safeguards that 'improve on the Queensland law', which was examined by the United Nations Human Rights Committee (UNHRC) in *Fardon v Australia* and *Tillman v Australia*.[10]

4.14 Professor Saul went on however to raise the following concerns:

- there are numerous wide discretionary exceptions to the protections outlined in proposed section 105A.4, so that '[i]n practice, the application of the exceptions is very likely to render illusory the special protections of non-prisoners',
- offenders are likely to be subjected to the same security measures as high risk prisoners,
- facilities and services are not designed for non-prisoners, 'such that the mixing of nonprisoners and prisoners is highly likely if effective access is to be provided to rehabilitation, work, education, socialisation, group activities and so on', and

[9] Members of the Victorian Bar Human Rights Committee, *Submission 16*, p. 6.

[10] Professor Saul, *Submission 1*, p. 1. See also Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Report 7 of 2016*, 11 October 2016, pp. 16–18.

- in substance, the Bill would 'likely involve continued incarceration under a prison regime, despite being designated as preventative detention'.[11]

4.15 Members of the Victorian Bar Human Rights Committee argued that if all that an offender could expect from a CDO is 'that he or she will be denied their freedom', then

> the law proposed by the Bill is properly characterised as one intended to extend a sentence of imprisonment for the crimes for which the person has already been punished. If so, it is undoubtedly punitive, and falls within the prohibition established by article 15(1) of the ICCPR.[12]

4.16 Ms Jacinta Carroll of the Australian Strategic Policy Institute noted that as offenders are detained in State and Territory correctional facilities, there will be different arrangements for housing and managing those detained under the regime.[13] Ms Carroll considered that a coordinated and collaborative approach is required across jurisdictions.[14]

4.17 The Attorney-General's Department noted that the Attorney-General will make arrangements with States and Territories that take into account jurisdictions' current corrective services frameworks and policies.[15]

Committee comment

4.18 The Committee notes that the conditions of detention for offenders subject to a CDO are one of the matters to be progressed by the Implementation Working Group. Little information was available to the Committee at this

[11] Professor Saul, *Submission 2,* p. 2. See also Law Council of Australia, *Submission 4,* pp. 29–31; ANU Law Students Counter-Terrorism Research Group, *Submission 5,* pp. 16–17; Muslim Legal Network (NSW), *Submission 11,* pp. 13–14; Associate Professor Nolan, *Submission 13,* p. 5; Joint councils for civil liberties, *Submission 14,* pp. 11–12.

[12] Members of the Victorian Bar Human Rights Committee, *Submission 16,* p. 6. See also Law Council of Australia, *Submission 4,* p. 31.

[13] Ms Jacinta Carroll, *Submission 7,* p. 5.

[14] Ms Jacinta Carroll, *Submission 7,* p. 5.

[15] Attorney-General's Department, *Submission 9,* p. 13.

time. It is clear from the evidence received, however, that there are significant issues that must be addressed.

4.19 Whether housing arrangements will be consistent across the country or vary between States and Territories depending upon their existing arrangements is one question to be answered. The Committee considers that, as a minimum, standards for the housing of offenders subject to a CDO should be agreed and implemented across all jurisdictions.

4.20 Utmost attention must be given to ensuring that the conditions of detention for offenders are appropriate and consistent with Australia's human rights obligations.

4.21 At the same time, the Committee considers that particular attention should be given to the possible risks associated with allowing an offender to elect to be accommodated or detained in the same area or unit of the prison as persons serving sentences of imprisonment.

4.22 To ensure the integrity of the regime, the Committee makes recommendations around required reporting on the timeframes, development and implementation of operational elements, including conditions of detention, later in this chapter.

Rehabilitation

4.23 The Bill requires both the Court and an appointed *relevant expert* to have regard to an offender's participation in rehabilitation or treatment programs.

4.24 Proposed subsection 105A.6(7) requires that the expert's report include

> (d) efforts made to date by the offender to address the causes of his or her behaviour in relation to Serious Part 5.3 offences, including whether he or she has actively participated in any rehabilitation or treatment programs;
>
> (e) if the offender has participated in any rehabilitation or treatment programs–whether or not this participation has had a positive impact on him or her;

4.25 Proposed section 105A.8 lists matters a Court must have regard to in making a CDO, including

> (e) any treatment or rehabilitation programs in which the offender has had the opportunity to participate, and the level of the offender's participation in any such programs;

4.26 The Court must also have regard to the matters listed in proposed section 105A.8 during any review of a CDO.[16]

4.27 In evidence to the Committee, representatives of the Attorney-General's Department advised that there are two 'bespoke' programs in Victoria and New South Wales, with Victoria having had a violent extremist rehabilitation program for a number of years while NSW is in the first year of its program. The Department outlined the NSW and Victorian programs in its submission.[17]

4.28 The Department advised that other States and Territories have general rehabilitation programs that 'are not specifically tailored to violent extremist offenders',[18] and indicated that it is working closely with States and Territories to build capability in all jurisdictions.[19]

4.29 Some participants expressed concerns about the availability of effective rehabilitation programs and the possible impact on operability of the regime in the absence of such programs.

4.30 Dr Tamara Tulich, for example, argued that:

> Post-sentence detention can only be justified if a mechanism exists to accurately assess the level of risk that a terrorist offender poses at the end of their custodial sentence and effective rehabilitation programs are available for convicted terrorists in prison. Neither of these currently exists in Australia. Remedying this situation goes beyond simply amending the terms of the bill. There is a need for further research into both the assessment of risk in the

[16] Proposed section 105A.12.

[17] Attorney-General's Department, *Submission 9*, pp. 14–15.

[18] Attorney-General's Department, *Submission 9.3*, p. 4.

[19] Ms Lowe, Attorney-General's Department, *Committee Hansard,* 14 October 2016, pp. 46–47.

> terrorism context, as well as the development of effective rehabilitation programs.[20]

4.31 Dr Tulich, appearing with Dr Rebecca Ananian-Welsh, explained:

> Our concern about the rehabilitation program stems from the fact that the relevant expert's report must consider whether or not the offender has participated in rehabilitation or treatment programs. For us that means the state has to provide effective rehabilitation programs …
>
> The difficulty is that without an effective rehabilitation program there is no way for an individual to avoid the operation of the act.[21]

4.32 Ms Jacinta Carroll noted that while research is underway across Australia to develop expertise and understanding of effective approaches to deradicalisation and rehabilitation, '[t]hese are not yet synchronised or subject to measures of effectiveness, and remain a work in progress'.[22]

4.33 In response to Committee questions about the availability of rehabilitation programs, the Attorney-General's Department reiterated earlier comments that programs are available in all states, with specific programs to target violent extremism in NSW and Victoria, and stated:

> The court is not required to make a negative inference if the offender has not had the opportunity to participate in a relevant rehabilitation program.[23]

4.34 The Department also outlined work currently being undertaken to improve the effectiveness of rehabilitation programs:

> Prisons and corrective services are a state and territory responsibility, underpinned by support of the Australian Government for research, training and pilot programs to manage the particular risks and challenges of terrorist offenders and / or of further radicalisation in prisons. For example, Australian Government funding (provided through the CVE sub-committee (CVESC) of

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[20] Dr Tamara Tulich, *Committee Hansard,* 14 October 2016, p. 24; See also Ananian-Welsh et al, *Submission 6,* p. 1.

[21] Dr Tulich, *Committee Hansard,* 14 October 2016, p. 25.

[22] Ms Jacinta Carroll, *Submission 7,* p. 5.

[23] Attorney-General's Department, *Submission 9.3,* p. 5.

> the Australia-New Zealand Counter Terrorism Committee) is supporting states and territories to deliver the Radicalisation and Extremism Awareness Program (REAP). REAP assists corrections staff to recognise and report indicators of radicalisation to violent extremism. In 2016-17, CVESC will fund a review and update of the REAP to ensure it reflects the current threat environment.
>
> CVESC is also funding a Corrective Services NSW pilot for the Proactive Integrated Support Model (PRISM – a disengagement model that aims to target inmates who are at risk of radicalisation) and has previously funded the first four years of a prisons-based program in Victoria. Best practice and learnings are shared through a prisons working group under the CVESC. The prisons working group also draws on domestic and international research, some of which has been mentioned in submissions to the PJCIS.
>
> The success of disengagement programs can be difficult to quantify. As with other areas of anti-social and criminal activity, there is no guarantee that prison based disengagement programs will work in every case. Success requires behavioural change and an acknowledgement by the individual that violent extremist activity is not the appropriate solution to their grievances. Some individuals will continue to actively engage, promote or support extremist activity. However, some participants for existing intervention and rehabilitation programs have successfully altered their behaviour.[24]

4.35 The Department noted that the Implementation Working Group is considering further rehabilitation programs for offenders subject to the CDO regime, including funding requirements. In addition to support already being provided by the Commonwealth for existing programs, the Department indicated that consultation on funding is ongoing with States and Territories.[25]

4.36 Academic research provided to the Committee has examined international deradicalisation programs and drawn conclusions that an Australian rehabilitation program is more likely to be effective if

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[24] Attorney-General's Department, *Submission 9.3,* p. 5. See also Deputy Commissioner Michael Phelan, Australian Federal Police, *Committee Hansard,* 14 October 2016, pp. 46–47; Ms Lowe, Attorney-General's Department, *Committee Hansard,* 14 October 2016, pp. 46–47.

[25] Attorney-General's Department, *Submission 9.3,* p. 6.

> it is applied flexibly to each individual offender and their rehabilitative readiness, involves the offender's family, includes a focus on identify change, allows the offender to work closely with a mentor, religious re-education is offered and support is continued after release.[26]

4.37 The Committee notes that the Parliamentary Joint Committee on Human Rights, in its report on the Bill, sought the advice of the Attorney-General as to the feasibility 'that the bill be amended to ensure the availability of rehabilitation programs to offenders that may be subject to the continuing detention order regime'.[27]

4.38 The Law Council of Australia emphasised the importance of terrorist offenders being 'given opportunities to participate in rehabilitation programs as soon as possible after their sentence commences'. The Council recommended that:

- the Commonwealth, States and Territories should properly fund effective rehabilitation programs for detainees, and
- legislation should require a preliminary assessment of high-risk terrorism offenders to determine an appropriate rehabilitation program as soon as possible after an offender has been sentenced.[28]

4.39 In response to the second point above, the Attorney-General's Department advised that this matter can be addressed administratively.[29]

4.40 Some submitters raised concerns about the practicality of rehabilitation for terrorist offenders. For example, Associate Professor Mark Nolan observed that deradicalisation support is provided on a very limited basis in Supermax Goulburn through the trial of the Proactive Integrated Support

[26] Charisse Smith and Mark Nolan, 'Post-sentence continued detention of high-risk terrorist offenders in Australia', *Criminal Law Journal,* (2016) 40 Crim LJ 163, pp. 174–178.

[27] Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Report 7 of 2016*, 11 October 2016, p. 20.

[28] Law Council of Australia, *Submission 4,* p. 31.

[29] Attorney-General's Department, *Submission 9.3,* p. 6.

Model (PRISM), but questioned how many offenders may currently be receiving any formal deradicalisation or disengagement therapy.[30]

4.41 Similarly, the Muslim Legal Network (NSW) raised concerns that:

> Because they are under such a high classification in terms of their security—a lot of them are in their cells for 23 hours a day—they do not have the same access that the mainstream prison population would have. Further to that, some of these programs that are in place, which the submission by the Attorney-General's Department touched on, are very preliminary at this stage.[31]

4.42 Concerns were also expressed about the relationship between the object of the Bill,[32] which is the safety and protection of the community, and rehabilitation.[33] Members of the Victorian Bar Human Rights Committee, for example, argued that 'the Bill makes no attempt to focus on rehabilitation as an object of further detention'. The Members considered that

> the lack of any focus in the Bill on the rehabilitation of the offender itself constitutes a serious departure from the views of the UNHRC as expressed in *Fardon* and also *Tillman.* That is, the absence of any provision in the Bill for the rehabilitation of the offender reinforces the impressions that the CDO regime to be established by the Bill constitutes a form of arbitrary detention in contravention of the ICCPR. [34]

4.43 The Muslim Legal Network (NSW) argued that '[i]n order for this regime to be truly preventative rather than punitive, the rehabilitation of the offender needs to be prioritised alongside protection of the community'.[35]

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[30] Associate Professor Nolan, *Submission 13*, p. 7.

[31] Ms Rabea Khan, Executive Member, Muslim Legal Network (NSW), *Committee Hansard,* 14 October 2016, p. 33. See also Muslim Legal Network (NSW), *Submission 11,* p. 14.

[32] Proposed section 105A.1.

[33] Associate Professor Nolan, *Submission 13,* pp. 5, 7.

[34] Members of the Victorian Bar Human Rights Committee, *Submission 16,* p. 6. See also ANU Law Students Counter-Terrorism Research Group, *Submission 5,* p. 15.

[35] Mr Edries, Muslim Legal Network (NSW), *Committee Hansard,* 14 October 2016, p. 31.

4.44 Associate Professor Mark Nolan noted that in its response to the UNHRC, the Australian Government stated that the community has a legitimate expectation to be protected from these offenders, and at the same time, that 'authorities owe these offenders a duty to try and rehabilitate them'.[36]

4.45 In evidence, the Human Rights Commissioner stated that, in his opinion, 'this bill is designed to encourage people to undertake truly rehabilitative programs and processes'.[37] The Commissioner recognised that 'the Commonwealth has a very strong interest in working cooperatively with the states and territories in ensuring that there are very effective rehabilitation programs available in prison'.[38]

4.46 For some submitters, a post-sentence detention regime offers the incentive for a terrorist offender to participate in rehabilitation while serving their sentence of imprisonment. Dr Tamara Tulich commented:

> I think in New South Wales and with the high-risk offender regimes, having perhaps the threat of post-sentence detention, in some ways, is an incentive to undertake the rehabilitation programs available. In New South Wales, when making an application for a continuing detention order, the court looks to any treatment or rehabilitation programs the offender has had the opportunity to participate in, the willingness of the offender to participate and the level of the offender's participation in such programs. So that could incentivise an individual to go through that to avoid operation of a post-sentence regime.[39]

4.47 The Australian Human Rights Commission considered that a warning should be given to a person who is convicted of an offence to which the regime applies of the possibility of post-sentence detention. The Commission suggested this would achieve two purposes: putting an offender on notice

[36] Associate Professor Nolan, *Submission 13,* p. 4. See also Charisse Smith and Mark Nolan, 'Post-sentence continued detention of high-risk terrorist offenders in Australia', *Criminal Law Journal*, (2016) 40 Crim LJ 163, p. 166.

[37] Mr Santow, Australian Human Rights Commission, *Committee Hansard,* 14 October 2016, p. 21.

[38] Mr Santow, Australian Human Rights Commission, *Committee Hansard,* 14 October 2016, p. 21.

[39] Dr Tamara Tulich, *Committee Hansard,* 14 October 2016, p. 27.

and giving added incentive for the offender to participate in rehabilitation programs.[40]

4.48 In a supplementary submission, the Attorney-General's Department advised that nothing in the Bill would 'preclude' a court from notifying an individual who is being sentence of the existence of the CDO and its application to the offence.[41]

Committee comment

4.49 The Committee supports the object of the Bill, which places the safety and protection of the community, as the paramount concern. However, the Committee considers that appropriate rehabilitation programs ought to be made available to offenders as a component of the proposed CDO regime. The Committee acknowledges however, that the efficacy of any available rehabilitation programs will ultimately depend upon the attitude and willingness of a terrorist offender to engage, in good faith, in such programs.

4.50 The Bill requires both the Court and an appointed relevant expert to have regard to an offender's participation in any rehabilitation and treatment programs in making a CDO. Accordingly, the Committee considers that rehabilitation programs must be specifically targeted to violent extremist offenders and made available in a meaningful way to offenders who are genuinely willing to attempt to be rehabilitated.

4.51 As the Court must also have regard to an offender's participation in rehabilitation programs when conducting any review of a CDO, it follows that such programs must be available both during an offender's initial sentence and throughout any period of post-sentence detention.

4.52 It is the Committee's view that any assessment of an offender's participation in rehabilitation programs must include an assessment of whether the offender has actively participated in such programs and the effect on their behaviour.

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[40] Mr Edward Santow, Australian Human Rights Commission, *Committee Hansard*, 14 October 2016, p. 14; See also Australian Human Rights Commission, *Submission 8*, p. 27.

[41] Attorney-General's Department, *Submission 9.2*, p. 4.

4.53 As with other aspects of the proposed regime, the evidence received by the Committee demonstrates that further work is required in both the development and implementation of appropriate programs across jurisdictions. This is another matter being considered by the Implementation Working Group. The Committee notes that the Commonwealth is also giving consideration to funding requirements.

4.54 The Committee sees merit in a warning be given at the sentencing of a terrorist offender advising that the offence for which he or she has been convicted renders that person liable for an application for post-sentence detention to be made at the conclusion of their imprisonment.

Recommendation 17

4.55 The Committee recommends that the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to require a Court, when sentencing an offender convicted under any of the provisions of the Criminal Code that apply to the continuing detention order regime, to warn the offender that an application for post-sentence detention could be considered.

4.56 The Committee again notes its concern that some operational elements critical to the integrity of the regime are yet to be adequately developed. Later in this chapter, the Committee makes recommendations around reporting on the timeframes, development and implementation of operational elements.

Oversight arrangements

Operational oversight

4.57 The Attorney-General's Department noted that States and Territories have a number of existing internal and independent oversight regimes, which

> oversee the corrective and custodial services generally and the risk assessment and management of high risk violent and sexual offenders subject to continuing detention orders.

> These oversight mechanisms and regimes occur periodically, and on an ad hoc basis throughout the offender's prison sentence and in preparation for the offender's post sentence transition.[42]

4.58 The Implementation Working Group is 'considering how the oversight mechanisms in each jurisdiction could be adapted to the proposed scheme in the Bill'.[43]

4.59 Current oversight examples include:

- in the ACT and NSW, the Ombudsman can investigate a complaint made by a person who is detained in custody and, at any reasonable time, enter and inspect a correctional centre,
- in NSW, the Serious Offenders Review Council, an independent statutory authority made up a judicial members, officers of Corrective Services and community representatives provides advice on the 'security classification, placement (including segregation directions) and case management of inmates classed as serious offenders',
- in NSW, the Inspector of Custodian Corrections has commenced 'an investigation into the assessment, management and service provision to prisoners of concern to national security in 2016' and has a number of official visitors who visit and report on conditions in correctional centres on a regular basis,
- in Western Australia, the Inspector of Custodial Services has unfettered access and may review any aspect of custodial services at any time,
- in the ACT, two official visitors receive and investigate prisoner complaints and grievances, and conduct inspections,
- in the ACT, the Auditor-General can conduct performance audits of ACT Corrective Services and the Human Rights Commissioner may enter and inspect a correctional centre at any reasonable time,
- in the ACT, a judge or magistrate may enter and inspect a correctional centre at any reasonable time, and

[42] Attorney-General's Department, *Submission 9,* p. 8.

[43] Attorney-General's Department, *Submission 9,* p. 8.

- in Victoria and NSW, there are single and multiagency review boards/committees 'which consider and make recommendations on applications for, and the management of, post sentence orders served both in detention and in the community'.[44]

Review by the Independent National Security Legislation Monitor

4.60 Some submitters proposed that the CDO regime be reviewed by the Independent National Security Legislation Monitor (INSLM).[45] For example, the Law Council of Australia recommended that the INSLM be tasked with undertaking a review of the proposed legislation, with this review to be completed no later than 12 months following the regime's implementation. The Law Council considered that the scheme should then be subject to periodic review by the INSLM.[46]

4.61 Under section 6 of the *Independent National Security Legislation Monitor Act 2010,* the role of the INSLM is to review, on his or her own initiative, the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation. This includes the power to consider whether such legislation contains appropriate safeguards for protecting the rights of individuals; remains proportionate to any threat of terrorism or threat to national security, or both; and remains necessary.[47] The Act also requires the INSLM to complete a number of mandatory reviews.[48]

4.62 Counter-terrorism and national security is defined by the *Independent National Security Legislation Monitor Act 2010* to include 'Chapter 5 of the Criminal Code and any other provision of that Act as far as it relates to that Chapter'.[49] The Attorney-General's Department noted that this would

[44] Attorney-General's Department, *Submission 9,* pp. 8–9.

[45] Law Council of Australia, *Submission 4,* p. 34; ANU Law Students Counter-Terrorism Research Group, *Submission 5,* pp. 3–4.

[46] Law Council of Australia, *Submission 4,* p. 34.

[47] *Independent National Security Legislation Monitor Act 2010*, paragraph 6(1)(b).

[48] *Independent National Security Legislation Monitor Act 2010,* subsection 6(1B).

[49] *Independent National Security Legislation Monitor Act 2010*, section 4.

therefore include the CDO regime, which would be inserted at Division 105A of the Criminal Code.[50]

4.63 Further, both the Prime Minister and the Parliament Joint Committee on Intelligence and Security may refer to the INSLM a matter relating to counter-terrorism or national security.[51]

4.64 The Committee notes that the current INSLM, the Hon Roger Gyles AO, QC has tendered his resignation with effect from 31 October 2016.[52] During a Supplementary Budget Estimates hearing on 17 October 2016, Senator the Hon George Brandis QC noted that he would be consulted on the appointment of a new INSLM and stated that he did not 'expect any undue or particular delay'.[53]

Review by the Parliamentary Joint Committee on Intelligence and Security

4.65 Some submitters considered that requiring this Committee to conduct a review of the CDO regime would be an additional safeguard.[54] The Australian Human Rights Commission proposed the review take place after three years, noting that in NSW the *Crimes (High Risk Offenders) Act 2006* requires a statutory review of the extension of that Act to serious violent offenders after three years.[55] The ANU Law Students Counter-Terrorism Research Group stated that a review should consider the ongoing need for

[50] Attorney-General's Department, *Submission 9*, p. 8.

[51] *Independent National Security Legislation Monitor Act 2010*, sections 7 and 7A.

[52] Hon Roger Gyles AO, QC, Independent National Security Legislation Monitor, *Proof Committee Hansard*, Senate Finance and Public Administration Legislation Committee, 17 October 2016, p. 80.

[53] Senator Brandis, *Proof Committee Hansard*, Senate Finance and Public Administration Legislation Committee, 17 October 2016, p. 80.

[54] ANU Law Students Counter-Terrorism Research Group, *Submission 5*, pp. 3–4; Australian Human Rights Commission, *Submission 8*, p. 27.

[55] Mr Santow, Australian Human Rights Commission, *Committee Hansard*, 14 October 2016, p. 14.

CDOs, the effectiveness of the reliance on reports by relevant experts, and international best practice.[56]

Sunset clause

4.66 Some contributors supported the inclusion of a sunset clause in the Bill.[57] Dr Tamara Tulich, for example, argued that the exceptional nature of the proposed regime warranted inclusion of a sunset clause as it would enable 'parliament to come back and see whether [the legislation] is working', and to identify whether issues had arisen in relation to risk assessment.[58]

Queensland Public Interest Monitor

4.67 The Queensland Government noted that existing provisions of the Criminal Code provide for a role for the Queensland Public Interest Monitor (PIM) in relation to control orders. The Queensland Government argued that

> the PIM already has an established role with respect to existing counter-terrorism measures, and it is submitted that including a role for the PIM in the HRTO Bill would ensure consistency in approach.[59]

Committee comment

4.68 The Committee recognises that the measures proposed by the Bill have serious consequences for a terrorist offender and that appropriate oversight of the CDO regime is required to ensure that it operates fairly and in accordance with Australia's human rights obligations.

4.69 There are a number of existing oversight mechanisms in place at a correctional level within the States and Territories. The Committee notes that the Implementation Working Group will consider how these might be adapted to the regime proposed in the Bill.

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[56] ANU Law Students Counter-Terrorism Research Group, *Submission 5,* p. 4.

[57] ANU Law Students Counter-Terrorism Research Group, *Submission 5,* pp. 3–4; Dr Tamara Tulich, *Committee Hansard,* 14 October 2016, p. 24.

[58] Dr Tulich, *Committee Hansard,* 14 October 2016, p. 29.

[59] Queensland Government, *Submission 15,* pp. 3–4.

4.70 Consistent with similar national security laws, such as the control order and preventative detention order regimes, the Committee considers that a sunset clause is an appropriate mechanism to ensure a review of the CDO regime 10 years after passage of the Bill.

4.71 This Committee should undertake a review of the scheme before the expiry of the sunset period.

4.72 The Committee recognises that the inclusion of a sunset clause acknowledges the extraordinary and new measures proposed in this Bill. There is an acceptance from the Committee that, following the ten year sunset period, the regime may form an ongoing and substantive part of the Criminal Code, potentially without the need for a further sunset clause.

4.73 Should the Government of the day intend to implement the regime without a further sunset clause, a referral must come to the Parliamentary Joint Committee on Intelligence and Security.

4.74 In addition, as the Independent National Security Legislation Monitor (INSLM) has an ongoing role to review Australia's counter-terrorism and national security legislation, the Committee considers the INSLM should review the scheme prior to the Committee's review.

4.75 Noting that the Hon Roger Gyles AO, QC has tendered his resignation effective from 31 October 2016, the Committee considers that the Government should appoint a new INSLM as a matter of priority.

Recommendation 18

4.76 The Committee recommends that the continuing detention order regime be subject to an initial sunset period that expires 10 years after passage of the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016.

Recommendation 19

4.77 The Committee recommends that the *Intelligence Services Act 2001* be amended to require the Parliamentary Joint Committee on Intelligence and Security to complete a review of the continuing detention order

regime at Division 105A of the Criminal Code six years after passage of the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016.

Recommendation 20

4.78 The Committee recommends that the *Independent National Security Legislation Monitor Act 2010* be amended to require the Independent National Security Legislation Monitor to complete a review of the continuing detention order regime at Division 105A of the Criminal Code five years after passage of the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016.

Recommendation 21

4.79 The Committee recommends that the Government appoint a new Independent National Security Legislation Monitor as soon as possible.

Attorney-General's report to Parliament

4.80 Under proposed section 105A.22, the Attorney-General must provide an annual report to Parliament about the operation of Division 105A. The report must include, but is not limited to, information about the number of applications for interim detention orders and CDOs, and the number of orders made, affirmed, varied and revoked.

4.81 As noted earlier, an Implementation Working Group has been established comprising legal, corrections and law enforcement representatives from each jurisdiction to 'progress all outstanding issues relating to implementation of the proposed post sentence preventative detention scheme'.[60] The Queensland Government stated in its submission:

> Much of the work that will need to be undertaken to successfully implement the regime, in particular, the processes for assessing the risk posed by this class of offender and arrangements for their ongoing management, including

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

the provision of effective rehabilitation programs, will require intensive development.[61]

Committee comment

4.82 Considerable work will be required following passage of the Bill to implement the CDO regime. The Committee was advised that this will take '[c]ertainly months and possibly years'.[62] The scope of this work includes risk assessment tools, rehabilitation programs, housing arrangements and oversight mechanisms.

4.83 These are enormously significant matters in the overall operation of the regime, and ones upon which the Attorney-General's Department was unable to provide a detailed response to the Committee's questions. While the Committee appreciates that an extended development and implementation phase should allow for the matters raised in evidence to be addressed, it is difficult for the Committee to assure itself about key operational aspects of the regime at this time.

4.84 As stated previously, it is not clear that a detailed development and implementation plan for the key operational elements of the Bill currently exists.

4.85 For these reasons and to provide assurance as to the integrity of the regime, the Committee considers that, in addition to the annual report already provided for, further reporting is required during debate on the Bill and, subject to its passage, during the regime's implementation.

4.86 The Committee should be informed of a clear development and implementation plan, including timeframes, prior to the Parliament's detailed consideration of the Bill. The Committee recommends that the Attorney-General make this plan available prior to the second reading debate in the Senate.

[61] Queensland Government, *Submission 15,* p. 1.

[62] Ms Lowe, Attorney-General's Department, *Committee Hansard,* 14 October 2016, p. 50.

Recommendation 22

4.87 The Committee recommends that the Attorney-General provide the Committee with a clear development and implementation plan that includes timeframes to assist detailed consideration of the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016. This plan should be provided prior to the second reading debate in the Senate.

4.88 Further, the Committee recommends that the Attorney-General provide the Committee a timetable for implementation of any outstanding matters being considered by the Implementation Working Group by 30 June 2017. The Attorney-General's report should include information about:

- the general categorisation and qualifications of relevant experts,
- the development and validation of risk assessment tools,
- conditions of detention, including any agreements reached with States and Territories on housing arrangements, and
- progress in adapting the existing oversight mechanisms for use in the continuing detention order regime.

4.89 The report should also include any other matters relevant to implementation of the regime.

Recommendation 23

4.90 The Committee recommends that the Attorney-General provide the Committee a timetable for implementation of any outstanding matters being considered by the Implementation Working Group by 30 June 2017. The Attorney-General's report should include information about:

- **the general categorisation and qualifications of relevant experts,**
- **the development and validation of risk assessment tools,**
- **conditions of detention, including any agreements reached with States and Territories on housing arrangements, and**
- **progress in adapting the existing oversight mechanisms for use in the continuing detention order regime.**

4.91 The report should also include any other matters relevant to implementation of the regime.

Proposed Government amendments

4.92 The Committee notes that there are three possible Government amendments to the Bill concerning:

- Section 3ZQU of the *Crimes Act 1914,* which governs the use and sharing of things seized under Part IAA and information and documents produced under Division 4B of the Crimes Act. The amendment would extend these provisions to proposed Division 105A.
- Clarifying that any terrorist offender convicted of an offence under the now repealed *Crimes (Foreign Incursions and Recruitment) Act 1978* and serving a sentence of imprisonment may be subject to a continuing detention order.
- Amending proposed subsections 105A.21(1) and (2) to ensure that the Attorney-General can arrange for a terrorist offender subject to an interim detention order to be detained in a prison of a State or Territory.[63]

4.93 The Committee finds no issue with these proposed amendments and supports in-principle attempts to improve the legislation and avoid legal loopholes prior to the Bill's passage through the Parliament.

Concluding comments

4.94 The Committee recognises that the provisions of the Bill are extraordinary. The Bill allows for a person who has completed their prison sentence to continue to be detained for an extended period without having (necessarily) committed any further offence. This invites questions as to whether the Bill may infringe on human rights and contravene the rule of law.

4.95 However, the Committee also recognises the extraordinary security threat that our community currently faces. Unlike previous threats to national

[63] Attorney-General's Department, *Submission 9,* p. 16.

security, our community is threatened not by enemy combatants from a foreign military power, but by a small number of persons within our community who, with ideological zeal, seek to undertake terrorist activities and do harm not only to Australian security and defence authorities, but to innocent civilians going about their lives. There have been examples both in Australia and overseas of persons under the influence of terrorist organisations who are willing to go to any lengths, and use any means, to commit acts of extreme violence against their own community. In some cases, authorities have been able to intervene before such people have carried out their wishes. In other cases, the results have been more tragic.

4.96 The Committee therefore accepts that there is a need, subject to strict safeguards, for courts to have extraordinary powers to minimise the risk of such persons carrying out their aims. Taking such steps to prevent the commission of terrorist acts can be seen as protecting the human rights of members of the Australian community and is an obligation on Australia under international law.[64] The Committee considers that a scheme for the post-sentence detention of terrorist offenders who continue to pose an unacceptable risk to the community will be an important part of Australia's multifaceted response to the terrorist threat.

4.97 In accepting the need for a post-sentence detention scheme, the question becomes whether the laws are appropriately targeted and include adequate safeguards to ensure their proportionality. Such matters have been the focus of this inquiry. In examining the Bill and the evidence provided by participants in the inquiry, the Committee has recommended a number of amendments to both enhance the regime's integrity and safeguards, and to improve its effectiveness.

4.98 The Committee commends its report to the Parliament and recommends that the Bill be passed.

[64] Australian Human Rights Commission, *Submission 8*, p. 3.

Recommendation 24

4.99 The Committee recommends that, following implementation of the recommendations in this report, the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be passed.

Michael Sukkar MP

Chair

November 2016