

PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016

Parliamentary Joint Committee on Intelligence and Security

November 2016
CANBERRA

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Membership of the Committee

Chair

Mr Michael Sukkar MP

Deputy Chair

Hon Anthony Byrne MP

Members

Senator David Bushby

Hon Mark Dreyfus QC, MP

Senator David Fawcett

Mr Andrew Hastie MP

Hon Dr Mike Kelly AM, MP

Senator Jenny McAllister

Senator Bridget McKenzie

Senator the Hon Penny Wong

Mr Jason Wood MP

List of abbreviations

AFP	Australian Federal Police
ANZCTC	Australia-New Zealand Counter Terrorism Committee
ASIO	Australian Security Intelligence Organisation
CDO	Continuing detention order
COAG	Council of Australian Governments
ICCPR	International Covenant on Civil and Political Rights
INSLM	Independent National Security Legislation Monitor
PJCHR	Parliamentary Joint Committee on Human Rights
UNHRC	United Nations Human Rights Committee

List of recommendations

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.

Recommendation 2

- 2.26 The Committee recommends that proposed section 105A.3 in the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to remove from the scope of offences section 80(B) of the Criminal Code, which refers to treason.

Recommendation 3

- 2.27 The Committee recommends that proposed section 105A.3 in the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to remove from the scope of offences subsections 119.7(2) and (3) of the Criminal Code, which refer to publishing recruitment advertisements.

Recommendation 4

- 2.42 The Committee recommends that the Explanatory Memorandum to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to clarify the interaction between parole and bail provisions, and make explicit that:

- a person is not eligible for parole if that person is subject to a continuing detention order,
- a person detained for the purposes of giving effect to a continuing detention order is not entitled to seek bail, and
- a person subject to a continuing detention order and charged with a further offence is entitled to make an application for bail for that offence.

Recommendation 5

3.19 The Committee recommends that the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to provide that an application for a continuing detention order may be commenced up to 12 months (rather than six months) prior to the completion of an offender's sentence, in order to provide all parties additional time to prepare and for the offender to seek legal representation.

Recommendation 6

3.43 The Committee recommends that, to avoid a potential ambiguity, proposed section 105A.8 of the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to make clear that the rules of evidence apply to the matters the Court is required to have regard to in its decision as to whether the terrorist offender poses an unacceptable risk of committing a serious terrorism offence if released into the community.

Recommendation 7

3.100 The Committee recommends that the Explanatory Memorandum to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to provide greater clarity to the definition of 'relevant expert' in proposed section 105A.2. This should include examples of persons who may potentially fall within the category 'any other expert' at item (d) of the definition.

Recommendation 8

3.102 The Committee recommends that proposed sub section 105A.6(7) of the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be

amended to replace the word ‘must’ with ‘may’ so that the expert’s report may include the matters listed in paragraphs (a) to (h).

Recommendation 9

3.106 The Committee recommends that the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 and Explanatory Memorandum be amended to make explicit that each party is able to bring forward their preferred relevant expert, or experts, and that the Court will then determine the admissibility of each expert’s evidence.

Recommendation 10

3.107 The Committee recommends that the Explanatory Memorandum to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to make explicit that a Court may appoint a relevant expert at any point during continuing detention order proceedings.

Recommendation 11

3.141 The Committee recommends that the Explanatory Memorandum to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to make explicit that an offender is to be provided in a timely manner with information to be relied on in an application for a continuing detention order.

Recommendation 12

3.142 The Committee recommends that the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended so that if an offender, through no fault of his or her own, is unable to obtain legal representation:

- the Court has the explicit power to stay proceedings for a continuing detention order, and
- the Court is empowered to make an order for reasonable costs to be funded to enable the offender to obtain legal representation.

Recommendation 13

3.143 The Committee recommends that the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to require documents related to a continuing detention order to be given to the offender's legal representative. If the offender does not have a legal representative, the documents may be delivered to the chief executive officer of the offender's prison as currently provided for in the Bill.

Recommendation 14

3.157 The Committee recommends that the Explanatory Memorandum to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to clarify what is proposed by a 'rehearing' as set out in proposed section 105A.17, namely

- what matters may be considered within a rehearing, and
- the types of circumstances that would constitute 'special grounds' to allow new evidence to be introduced during a rehearing.

Recommendation 15

3.160 The Committee recommends that the Government clarify the process for the initiation of a periodic review of a continuing detention order in the Explanatory Memorandum, and, if necessary, in the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016.

Recommendation 16

3.186 The Committee recommends that, for the avoidance of doubt, the Government should amend Division 104 of the Criminal Code to make explicit that a control order can be applied for and obtained while an individual is in prison, but that the controls imposed by that order would not apply until the person is released.

3.187 The Committee further recommends that the Government consider whether the existing control order regime could be further improved to most effectively operate alongside the proposed continuing detention order regime. Any potential changes should be developed in time to be considered

as part of the reviews of the control order legislation to be completed by the Independent National Security Legislation Monitor (INSLM) by 7 September 2017 and the Parliamentary Joint Committee on Intelligence and Security (PJCIS) by 7 March 2018.

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.

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.

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.

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.

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.

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 purposes 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 PJCHR 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*.

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

⁵³Parliamentary 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.

2. Scope of the continuing detention order regime

Range of offences

- 2.1 This chapter discusses provisions of the Bill relating to the scope of the offences included in the proposed continuing detention order (CDO) regime and their application to persons. The Bill provides that a CDO may be made in relation to a person if they have been convicted of international terrorist activities using explosive or lethal devices,¹ treason,² serious terrorism offences which carry a maximum penalty of seven or more years,³ or foreign incursions and recruitment offences.⁴ A list of the offences which fall within the scope of proposed section 105A.3 and maximum penalties for these offences is included below.
- 2.2 A CDO may only be granted against a person who is serving a sentence of imprisonment for one of these offences or has a continuing detention order, or interim detention order, in force against them.⁵ A CDO may only be

¹ Criminal Code, Subdivision A of Division 72.

² Criminal Code, Subdivision B of Division 80.

³ Criminal Code, Part 5.3.

⁴ Criminal Code, Part 5.5.

⁵ Proposed paragraph 105A.3(1)(b).

granted against a person who is at least 18 years old when their sentence ends.⁶

Table 2.1 Offences included within proposed section 105A.3

Offence	Penalty threshold
International terrorist activities – Subdivision A of Division 72	
International terrorist activities using explosive or lethal devices (s72.3)	Imprisonment for life
Treason – Subdivision B of Division 80	
Causing the death of, harm to or imprisoning the Sovereign, the heir apparent of the Sovereign, the consort of the Sovereign, the Governor-General or the Prime Minister (s80.1(1)(a)–(c))	Imprisonment for life
Levying war, or any act preparatory to levying war on the Commonwealth (s80.1(1)(d))	Imprisonment for life
Instigating a person who is not an Australian to make an armed invasion of the Commonwealth or a Territory of the Commonwealth (s80.1(1)(g))	Imprisonment for life
Materially assisting enemies at war with the Commonwealth (s80.1AA(1))	Imprisonment for life
Assisting countries engaged in armed hostilities against the Australian Defence Force (s80.1AA(4))	Imprisonment for life
Terrorism offences - Part 5.3	
Committing a terrorist act (s101.1)	Imprisonment for life
Providing or receiving training connected with terrorist acts (s101.2)	25 years imprisonment
Possessing things connected with terrorist acts (s101.4)	15 years imprisonment

⁶ Proposed paragraph 105A.3(1)(c).

Collecting or making documents likely to facilitate terrorist acts (s101.5)	15 years imprisonment
Other acts done in preparation for, or planning, terrorist acts (s101.6)	Imprisonment for life
Directing the activities of a terrorist organisation (s102.2)	25 years imprisonment
Membership of a terrorist organisation (s102.3)	10 years imprisonment
Recruiting for a terrorist organisation (s102.4)	25 years imprisonment
Training involving a terrorist organisation (s102.5)	25 years imprisonment
Getting funds to, from or for a terrorist organisation (s102.6)	25 years imprisonment
Providing support to a terrorist organisation (s102.7)	25 years imprisonment
Financing terrorism (s103.1)	Imprisonment for life
Financing a terrorist (s103.2)	Imprisonment for life
Foreign incursions and recruitment - Part 5.5	
Incursions into foreign countries with the intention of engaging in hostile activities (s119.1)	Imprisonment for life
Engaging in a hostile activity in a foreign country (s119.1(2))	Imprisonment for life
Entering in, or remaining in, declared areas (s119.2)	10 years imprisonment
Preparations for incursions into foreign countries for purpose of engaging in hostile activities (s119.4)	Imprisonment for life
Allowing use of buildings, vessels and aircraft to commit offences under s119.4 (s119.5)	Imprisonment for life
Recruiting persons to join organisations engaged in hostile activities against foreign governments	25 years imprisonment

(s119.6)

Recruiting persons to serve in or with an armed force in a foreign country (s119.7) 10 years imprisonment

Source: Criminal Code

Preparatory offences

- 2.3 The proposed scope of the CDO regime was the subject of several submissions. Key concerns centred on the inclusion of preparatory and treason offences in the range of offences for which a CDO could be made and the threshold for the length of imprisonment.
- 2.4 ‘Preparatory offences’ relate to activities that do not amount to conducting a terrorist attack but instead facilitate the planning and conduct of terrorist attacks or enable the existence and growth of terrorist organisations. These offences include providing or receiving training connected with terrorist acts,⁷ possessing things connected with terrorist acts,⁸ recruiting for a terrorist organisation,⁹ financing a terrorist organisation,¹⁰ and providing support to a terrorist organisation.¹¹
- 2.5 Several submitters argued that preparatory offences should not be included within the scope of the CDO regime because they do not represent the most serious form of terrorist offences. At the public hearing, Dr Tamara Tulich stated that preparatory offences

are already subject to significant penalties. To then enable someone [to be subject to a CDO] who has only taken actions that are at the very beginning of criminality before there is clear criminal intent to engage in a terrorist act is not supportable.¹²

⁷ Criminal Code, section 101.2.

⁸ Criminal Code, section 101.4.

⁹ Criminal Code, section 102.4.

¹⁰ Criminal Code, section 102.6.

¹¹ Criminal Code, section 102.7.

¹² Dr Tamara Tulich, *Committee Hansard*, 14 October 2016, p. 26.

2.6 Human Rights Watch also indicated that the inclusion of preparatory acts within the definition of ‘terrorist offences’ under Part 5.3 was at odds with the UN special rapporteur on human rights and counterterrorism, who stated that

the concept of terrorism includes only those acts or attempted acts ‘intended to cause death or serious bodily injury’ or ‘lethal or serious physical violence’ ...to otherwise risks human life.¹³

2.7 Similarly, the Australian Human Rights Commission stated that an individual convicted of entering or remaining in a declared area of a foreign country where a listed terrorist organisation is engaging in hostile activity should not be eligible for a CDO.¹⁴ It noted that this offence does not require any intention to engage in terrorist activity and that it may be difficult for that individual to demonstrate that they were in that area for a legitimate purpose. A ‘legitimate purpose’ is narrowly defined and does not include visiting friends, transacting business or attending to personal or financial matters.¹⁵

2.8 During the public hearing, the Commission recommended removing the declared area offence from the scope of the CDO regime as it was not sufficiently serious to justify the infringement on individual liberty. It stated that

merely by being in a declared area somewhere overseas, you are taken to have committed an offence. It seems like that is very different from the purpose of this regime, which is to try and prevent the public from being harmed by people who do intend to harm them.¹⁶

2.9 The Law Council of Australia asserted that the preparatory nature of these offences made it difficult to accurately predict whether the relevant offender posed an unacceptable risk to the community.¹⁷

¹³ Human Rights Watch, *Submission 13*, p. 5.

¹⁴ Australian Human Rights Commission, *Submission 8*, p. 16; see Criminal Code, section 119.2.

¹⁵ Australian Human Rights Commission, *Submission 8*, p. 16.

¹⁶ Mr. Edgerton, Australian Human Rights Commission, *Committee Hansard*, 14 October 2016, p. 22.

¹⁷ Law Council of Australia, *Submission 4*, p.15.

- 2.10 In their submission to the Committee, Dr Rebecca Ananian-Welsh, Dr Nicola McGarrity, Dr Tamara Tulich and Professor George Williams recommended that the definition of a 'serious Part 5.3 offence' be narrowed to the offence of engaging or attempting to engage in a terrorist act contrary to section 101.1 of the Criminal Code. Human Rights Watch also recommended limiting the use of CDOs to terrorist offences amounting to acts of violence.¹⁸
- 2.11 Alternately, Dr Ananian-Welsh et al recommended that the inclusion of preparatory offences within the scope of the CDO regime be limited to offences under Part 5.3 that caused, or were intended to cause, the death of another person or grievous bodily harm to another person.¹⁹
- 2.12 The Attorney-General's Department submitted that it was appropriate to include preparatory offences within the scope of the CDO regime, noting the majority of terrorism prosecutions have been connected to preparatory offences
- intended to cause serious damage to property and infrastructure and serious harm, or death, to people.²⁰
- 2.13 The Department indicated the gravity of these offences is also reflected in the maximum penalties that are available.²¹ For instance, an individual convicted for financing a terrorist may be subject to life imprisonment,²² or be sentenced for a maximum of 25 years for recruiting on behalf of,²³ or otherwise providing support to,²⁴ a terrorist organisation.

¹⁸ Human Rights Watch, *Submission 12*, p. 7.

¹⁹ Ananian-Welsh et al, *Submission 6*, p. 4.

²⁰ Attorney-General's Department, *Submission 9.2*, p. 3.

²¹ Attorney-General's Department, *Submission 9.2*, p. 3.

²² Criminal Code, section 103.2.

²³ Criminal Code, section 102.4.

²⁴ Criminal Code, section 102.7.

Length of imprisonment

2.14 To ensure that the scheme is appropriately targeted, it is intended that the regime only applies to terrorist offences under Part 5.3 which carry a maximum penalty of 7 or more years of imprisonment. The Attorney-General's Department stated that it considered the maximum penalty of an offence to be an appropriate threshold as it was

the best, most objective measure of the seriousness of the offence as compared to the sentence actually imposed by the sentencing court, which can take into account other factors not relevant to the seriousness of the offending.²⁵

2.15 A number of submitters indicated concerns about the scope of the CDO regime. The Law Council of Australia recognised that the CDO scheme is intended to be applied to particularly serious terrorism-related offences and that the seven year threshold is consistent with the NSW High Risk Offender legislation.²⁶ However, the Council noted that

the maximum sentence of an offence is intended for the most serious behaviour and does not necessarily reflect the gravity of the particular terrorist offender's conduct.²⁷

2.16 During the public hearing, the Australian Human Rights Commission stated:

Our recommendation is that [the scope of the CDO regime] should be limited to the most serious offences, given the very serious infringement on liberty.

2.17 During the public hearing, Dr Tulich endorsed restricting the scope to include offenders with head sentences of at least seven years, stating that this was an important safeguard.²⁸ The Law Council of Australia made a similar recommendation in its submission.²⁹

²⁵ Attorney-General's Department, *Submission 9.2*, p. 4.

²⁶ *Crimes (High Risk Offenders) Act 2006* (NSW), section 5A.

²⁷ Law Council of Australia, *Submission 4*, p. 10.

²⁸ Dr Tulich, *Committee Hansard*, 14 October 2016, pp. 28–29.

²⁹ Law Council of Australia, *Submission 4*, p. 10.

Inclusion of treason offences

2.18 Treason may include causing the death of or harm to the Sovereign, the Governor General or the Prime Minister; levying war (or doing acts preparatory to levying war) against the Commonwealth; instigating a person who is not an Australian citizen to make an armed invasion of the Commonwealth or one of its territories; materially assisting enemies at war with the Commonwealth; or assisting countries engaged in armed hostilities against the Australian Defence Force.³⁰

2.19 During the public hearing, the Law Council argued that treason threatens particular individuals such as the Prime Minister and Governor-General whereas terrorism can relate to a mass incident harming a large number of people. The Law Council argued that treason can be distinguished from the other offences listed in proposed paragraph 105A.3(1)(a) which involve international terrorist activities using explosive or lethal devices, serious Part 5.3 terrorism offences and foreign incursions and recruitment offences.³¹ During the public hearing the Law Council stated

the key part of the definition of a terrorist offence is that it is politically motivated. Most crime is not. That is the big distinction. A query: would you say that the killing of a Prime Minister is politically motivated? It may or may not be. It may be that someone has a personal grudge against the Prime Minister.³²

2.20 The Law Council recommended that treason offences be removed from the scope of the CDO regime as the rationale for their inclusion had not been provided, stating:

Our initial approach to the use of extraordinary powers is that they need to be very directly targeted at the focus. The inclusion of some of the terrorist offences, indeed, but certainly the treason offences, seem to be broader than [it] needs to be. That is the problem, and when we looked for some justification of the inclusion of that category in the papers, we did not find it.

³⁰ Criminal Code, Division 80.

³¹ Dr David Neal SC, Member, National Criminal Law Committee, Law Council of Australia, *Committee Hansard*, 14 October 2016, p. 7.

³² Dr Neal, Law Council of Australia, *Committee Hansard*, 14 October 2016, p. 8.

We think that if that measure is going to be taken, that needs to be justified and, as I say, we have not seen what the justification is that has been offered.³³

2.21 While noting that treason is not always terror-related, the Attorney-General's Department submitted that

the offences listed in section 105A.3 are a group of offences for which a person is incarcerated that may suggest they are a type of person likely to pose a risk down the track of committing a serious terrorism offence.³⁴

Committee comment

2.22 The Committee notes the views of some submitters that preparatory offences should be differentiated from the offences of engaging in or attempting to engage in a terrorist act, and should not fall under the scope of the Bill as they represent a lesser degree of harm. However the Committee notes that the inclusion of an offence only renders a person able to be *considered* for a CDO should it be determined that they pose an unacceptable risk at the time of their release. It is appropriate then that conviction for a preparatory offence, especially where this is of a significant and serious nature, should fall under the scope of the Bill.

2.23 In regard to the inclusion of treason offences, the Law Council of Australia raised concerns that these offences are not necessarily comparable to the other terrorism-related offences proposed for inclusion in the Bill. The Committee accepts this proposition and also understands that no person in Australia has been prosecuted for treason since the end of the Second World War. The Committee is concerned to ensure that the scope of offences is rightly limited to terrorism-related activities, and it does not consider that the inclusion of treason is necessary or appropriate. It is recommended that treason offences are removed from the scope of the Bill.

2.24 Similarly the Committee considered the scope of the foreign incursions and recruitment offences in Part 5.5 of the Criminal Code, with a view to assessing the necessity and appropriateness of their inclusion in the Bill. The

³³ Dr Neal, Law Council of Australia, *Committee Hansard*, 14 October 2016, p. 7.

³⁴ Mr Anthony Coles, Assistant Secretary, Counter-Terrorism and Intelligence Unit, Attorney-General's Department, *Committee Hansard*, 14 October 2016, p. 49.

Committee was satisfied that the majority of these offences were likely indicative of serious terrorist affiliations or allegiances, and were appropriate for inclusion. However, the Committee was concerned about the breadth of section 119.7 of the Criminal Code which refers to recruiting persons to serve in or with an armed force in a foreign country, and includes:

- subsection 119.7(1) – Recruiting others to serve with foreign armed forces,
- subsections 119.7(2) and (3) – Publishing recruitment advertisements, and
- subsection 119.7(4) – Facilitating recruitment.³⁵

2.25 Subsections (2) and (3) were differentiated as broader in scope than the recruiting others and facilitating recruitment offences, and not necessary and appropriate for the object of the Bill. Accordingly, it is recommended that proposed section 105A.3 of the Bill be amended to remove the offences of publishing recruitment advertisements from the scope of the CDO regime.

Recommendation 2

2.26 The Committee recommends that proposed section 105A.3 in the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to remove from the scope of offences section 80(B) of the Criminal Code, which refers to treason.

Recommendation 3

2.27 The Committee recommends that proposed section 105A.3 in the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to remove from the scope of offences subsections 119.7(2) and (3) of the Criminal Code, which refer to publishing recruitment advertisements.

³⁵ Criminal Code Part 5.5 s 119.7

Treatment of minors

- 2.28 A CDO may only be made in relation to offenders aged 18 years or over at the end of their sentence.³⁶ This means that a CDO can be granted against an individual who was a minor when they committed the relevant offence but will be 18 years or over when their sentence ends.³⁷
- 2.29 A number of submitters expressed concerns about the inclusion of individuals in the scheme who were minors at the time the relevant offence occurred.³⁸ Members of the Victorian Bar Human Rights Committee considered this outcome ‘particularly harsh and inconsistent with the United Nations Convention on the Rights of the Child.’³⁹ The members noted that while the Court can consider any factor it considers relevant when making a CDO, it is

unclear whether and to what extent the Bill requires the Court to take into account the offender's previous status as a child when considering whether to impose a CDO on the offender who has reached adulthood while imprisoned.⁴⁰

- 2.30 In its submission, the Law Council of Australia endorsed General Comment No. 10 of the United Nations Committee on the Rights of the Child, which states:

Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law ... the traditional objectives of criminal justice, such as repression/retribution, must

³⁶ Proposed paragraph 105A.3(1)(c).

³⁷ Law Council of Australia, *Submission 4*, p. 23.

³⁸ Law Council of Australia, *Submission 4*, p. 26; Mr Edward Santow, Human Rights Commissioner, Australian Human Rights Commission, *Committee Hansard*, 14 October 2016, p. 14; Members of the Victorian Bar Human Rights Committee, *Submission 16*, p. 11.

³⁹ Members of the Victorian Bar Human Rights Committee, *Submission 16*, p. 11.

⁴⁰ Members of the Victorian Bar Human Rights Committee, *Submission 16*, p. 11.

give way to rehabilitation and restorative justice objectives in dealing with child offenders.⁴¹

- 2.31 The Law Council stated that this emphasis on rehabilitation meant that making a CDO against individuals who were minors at the time of conviction should be an act of last resort.⁴² If a CDO was to be made, a number of submitters recommended specifically requiring the Court to take into account the age of the child at the time of offending.⁴³ A number of submitters indicated that it was unclear the extent to which courts could take the age of the offender into account when determining whether to impose a CDO.⁴⁴

Committee comment

- 2.32 Currently, the Bill proposes that the Attorney-General may make an application for a CDO for a person who is over the age of 18 years, has been convicted of a relevant offence and is considered to be an unacceptable risk to the community. Concerns were raised that this may potentially result in the application of a CDO to a person who is over 18 years at the time of their release, but who may have been a minor at the time of the offence.
- 2.33 The Committee acknowledges these concerns, the important safeguards that are appropriate for minors, and the challenging nature of responding to the radicalisation of young people.
- 2.34 The Committee considers it an important distinction that a person must be over the age of 18 at the time of the release in order for the Attorney-General to apply to the Court to consider a CDO. Further, the assessment of the terrorism risk posed must relate to the assessed terrorism risk at the time of

⁴¹ Law Council of Australia, *Submission 4*, p. 24.

⁴² Law Council of Australia, *Submission 4*, p. 24.

⁴³ Law Council of Australia, *Submission 4*, p. 26; Mr Santow, Australian Human Rights Commission, *Committee Hansard*, 14 October 2016, p. 14; Members of the Victorian Bar Human Rights Committee, *Submission 16*, p. 11.

⁴⁴ Law Council of Australia, *Submission 4*, p. 26; Members of the Victorian Bar Human Rights Committee, *Submission 16*, p. 11.

the person's release (as an adult) and is not based on the acts or assessed risk at the time of the relevant offence.

Interaction of the CDO regime with bail and parole

- 2.35 Generally, CDOs are designed to apply to individuals who are already in custody, whether it be to serve a sentence for the offences outlined above, or due to a CDO or interim detention order.⁴⁵
- 2.36 In a supplementary submission, the Attorney-General's Department stated that where a terrorist offender is granted parole prior to the expiry of their sentence, they could not be considered for a CDO. However in instances where parole is revoked and the offender is returned to prison, then a CDO may be considered at the end of the offender's sentence.⁴⁶
- 2.37 In its submission, the Law Council of Australia indicated that the interaction between the Bill and relevant parole laws is unclear.⁴⁷ On a practical level, it is unlikely that any offender who is liable to meet the threshold for a CDO would be successful in obtaining early release on parole. To avoid any confusion, the Law Council recommended amending the Explanatory Memorandum to clarify the manner in which parole is intended to interact with the CDO regime.⁴⁸
- 2.38 The Law Council of Australia also recommended clarifying the interaction between the Bill and relevant bail provisions.⁴⁹ The Law Council stated that proposed subsection 105A.18 allows a police officer to take an offender into custody and detain them for the purposes of giving effect to a CDO. However, it also provides that the police officer has the same powers as if

⁴⁵ Proposed paragraph 105A.3(1)(b); Explanatory Memorandum, p. 19.

⁴⁶ Attorney-General's Department, *Submission 9.2*, p. 4.

⁴⁷ Law Council of Australia, *Submission 4*, p. 28.

⁴⁸ Law Council of Australia, *Submission 4*, p. 29.

⁴⁹ Law Council of Australia, *Submission 4*, p. 28.

they were arresting the offender, which would include granting them bail.⁵⁰ The Law Council concluded that

this power of arrest and detention hinges on there being a detention order in force in respect of the offender, an argument could easily be made that, in those circumstances, the offender would not be entitled to conditional liberty in any event.⁵¹

Committee comment

- 2.39 Given the threshold of ‘unacceptable risk to the community’ that is required for a Court to grant a CDO, on a practical level the Committee considers it is unlikely that any offender who is liable to meet the threshold for a CDO would be successful in obtaining early release on parole. Nonetheless, to address the issue raised by the Law Council of Australia, the Committee considers it appropriate that the Bill and Explanatory Memorandum provide clarity on the manner in which both parole and bail provisions are intended to interact with the CDO regime.
- 2.40 If a person has met the conditions for and been granted parole, then these are not circumstances in which a CDO would expect to be considered. It is the view of the Committee and the Committee considers it the intention of the Bill that a CDO cannot be granted where a person has been released on parole prior to the end of their custodial sentence. However, there may be circumstances where a person with a conviction for a relevant offence has parole revoked and a CDO is then granted at the end of their sentence if they are considered to pose an unacceptable risk of carrying out a terrorism-related activity.
- 2.41 The Committee also notes the Law Council’s suggestion that the regime’s interaction with relevant bail laws be clarified – namely to make explicit that a person subject to a CDO is not eligible for parole, a person detained for the purposes of giving effect to a CDO may not apply for bail, but a person subject to a CDO and charged with a subsequent offence is entitled to seek bail for that offence.

⁵⁰ Proposed section 105A.18.

⁵¹ Law Council of Australia, *Submission 4*, pp. 27–28.

Recommendation 4

2.42 The Committee recommends that the Explanatory Memorandum to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to clarify the interaction between parole and bail provisions, and make explicit that:

- a person is not eligible for parole if that person is subject to a continuing detention order,
- a person detained for the purposes of giving effect to a continuing detention order is not entitled to seek bail, and
- a person subject to a continuing detention order and charged with a further offence is entitled to make an application for bail for that offence.

Successive use of CDOs

2.43 According to the Bill, the period of a CDO must represent a period of time that the Court is satisfied is reasonably necessary to prevent the unacceptable risk to the community and cannot exceed three years.⁵² This does not prevent the Attorney-General from making application and the Court granting successive CDOs that commence immediately after the previous CDO ceases to be in force.⁵³

2.44 There is no limit to the number of CDOs that may be made against a terrorist offender.⁵⁴ In responses to questions on notice, the Attorney-General's Department noted that

at the expiry of that [CDO] period, a further application can be made and the court will need to consider whether it is satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is

⁵² Proposed subsection 105A.7(5).

⁵³ Proposed subsection 105A.7(6).

⁵⁴ Explanatory Memorandum, p. 22.

released into the community and that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.⁵⁵

- 2.45 The Attorney-General's Department considered it appropriate for courts to have the discretion to make successive CDOs because the regime was designed to protect the community:

If a court is satisfied that this test is met, it is appropriate for the offender to continue to be detained in order ensure the safety and protection of the community, regardless of how many previous continuing detention orders have been made in relation to that offender.⁵⁶

- 2.46 A number of submitters indicated concern that the ability to make successive CDOs will in effect enable indefinite detention of terrorist offenders. The Muslim Legal Network (NSW) stated that it was

extremely concerned as this effectively leads to indefinite detention. Whilst we are opposed to continuing detention orders as a principle, if they are to be legislated, we submit that the period of orders should be reduced and successive applications should be limited.⁵⁷

- 2.47 In its submission to the Committee, the Law Council of Australia cited the experience of the United Kingdom when it established an indefinite detention regime for high risk offenders:

[I]t was ultimately abolished in 2012 following significant criticism in relation to the low threshold for establishing risk, and the high requirements for release.⁵⁸

- 2.48 The Law Council's submission discussed the United Kingdom's extended determinate sentence framework, which replaced the indefinite detention regime for high risk offenders. The current regime allows the Court to detain high risk offenders where they present a significant risk to the public of committing certain offences. This framework limits the extended

⁵⁵ Attorney-General's Department, *Submission 9.3*, p. 2.

⁵⁶ Attorney-General's Department, *Submission 9.3*, p. 2.

⁵⁷ Muslim Legal Network, *Submission 11*, p. 6.

⁵⁸ Law Council of Australia, *Submission 4*, p. 12.

imprisonment period to five years and the combined total of the prison term and extension period cannot exceed the maximum sentence of the offence committed.⁵⁹

2.49 Having regard to the United Kingdom's experiences, the Law Council recommended that a maximum prescribed term of ongoing detention should be set out in the Bill or alternatively, that there should be a limit on the number of successive CDOs that can be made.⁶⁰

2.50 Likewise, the joint councils for civil liberties recommended that the provision relating to successive CDOs be amended to include a limit on the number that can be made against an individual.⁶¹ In its submission, the joint councils stated that:

There is an explicit provision clarifying that the Court may make successive continuing orders. This means that the period of detention that can result within the CDO regime is potentially indefinite. The CCLs consider this to be unreasonable and excessive.⁶²

2.51 Similarly, the Australian Lawyers Alliance criticised the ability for courts to make an unlimited number of CDOs.⁶³

2.52 During the public hearing, Dr Tulich stated that it was crucial for terrorist offenders to be provided with adequate rehabilitation and deradicalisation opportunities in the first instance, so that the application for CDOs would be a last resort. She stated that

without having those programs in place and available to individuals who are convicted of terrorism related offences that might come under the post-sentence detention regime, then we are setting those individuals up to be subject to potentially indefinite detention.⁶⁴

⁵⁹ Law Council of Australia, *Submission 4*, p. 13.

⁶⁰ Law Council of Australia, *Submission 4*, p. 13.

⁶¹ Joint councils for civil liberties, *Submission 14*, p. 12.

⁶² Joint councils for civil liberties, *Submission 14*, p. 12.

⁶³ Australian Lawyers Alliance, *Submission 3*, p. 4.

⁶⁴ Dr Tulich, *Committee Hansard*, 14 October 2016, p. 25.

Committee comment

- 2.53 The Committee acknowledges concerns regarding the application of successive CDOs and suggestions that this could amount to indefinite detention.
- 2.54 The Committee notes that indefinite definition is not the intent of the Bill, although the Committee recognises that it is possible for a person to be held for prolonged periods beyond their sentence if successive CDOs are applied for and granted by the Court.
- 2.55 The issue of the application of successive CDOs and the resulting detention over a prolonged and indeterminate period was considered carefully by the Committee. Critical to the Committee's consideration is that the Attorney-General must initiate a new application for each new CDO and that application is considered by the Court—that is, an existing CDO cannot be extended and any application for a successive CDO must be considered by the Court as if it were the first application for a CDO. The Court will have the same capacity to consider expert evidence and the same requirement that an assessment be undertaken that the offender meets the threshold of a high probability of posing an unacceptable risk to the community. Each new application for a CDO must establish this threshold with the burden of proof on the Attorney-General, and the final determination resting with the Court. Further, each CDO attracts anew the same review rights.
- 2.56 The Committee considers that setting the maximum term of a CDO at three years, and requiring a new application, consideration and assessment of present risk at the time of granting each CDO, provide important safeguards in the regime against claims of arbitrary or indefinite detention.
- 2.57 However, the Committee recognises that procedural fairness in the successive assessment of risk when a CDO is applied for relies on an offender's access to rehabilitation programs and opportunities.
- 2.58 During the inquiry there was some focus on the provision of rehabilitation programs prior to the conclusion of an offender's sentence. The Committee is concerned to ensure that appropriate rehabilitation programs and opportunities should continue to be made available to all offenders who are

subject to a CDO. The development of and access to rehabilitation programs is discussed in Chapter 4.

3. Making an application for a continuing detention order

3.1 The chapter considers matters integral to the process of making an application for a continuing detention order (CDO), namely

- the timing of CDO and interim detention order applications,
- the standard of proof required,
- matters that must be considered by the Court,
- the use of relevant experts and risk assessment tools,
- the offender’s access to information and legal representation,
- review and appeal rights, and
- alternatives to CDOs.

Timing of CDO applications

3.2 The Bill enables an application for a CDO to be made in the last six months of the terrorist offender’s sentence.¹ This provision is intended to ensure that the offender is given time to demonstrate they are no longer a risk to the community prior to being assessed by an independent expert and eventually, the Court.²

¹ Proposed section 105A.5(2).

² Attorney-General’s Department, *Submission 9*, p. 6.

- 3.3 The Attorney-General's Department's submission noted that the timing has been modelled on the NSW, Western Australian and Queensland sex offender schemes.³ However, these jurisdictions have expressed concerns about this timeframe to the Attorney-General's Department, indicating that it may not allow enough time for:
- the relevant expert or experts to complete an assessment and prepare the necessary report, and
 - to allow offenders adequate time to prepare for their hearings, to instruct counsel, analyse evidence and to make arrangements for witnesses to give evidence.⁴
- 3.4 In its submission to the Committee, the Department outlined the process that must be completed in the six months prior to the completion of the terrorist offender's sentence:
- an application for a CDO is made to the Court,⁵
 - the applicant must, subject to proposed subsection 105A.5(5), give a copy of the application to the offender personally within two business days after the application is made,⁶
 - a preliminary hearing must be held within 28 days after a copy of the application is given to the offender for the Court to consider appointing one or more relevant experts,⁷
 - the relevant expert who is appointed must conduct an assessment of the risk of the offender committing a serious Part 5.3 offence if the offender is released into the community,⁸
 - the offender is required to attend the assessment,⁹

³ Attorney-General's Department, *Submission 9*, p. 6.

⁴ Attorney-General's Department, *Submission 9*, p. 6.

⁵ Proposed subsection 105A.6(1).

⁶ Proposed subsection 105A.5(4).

⁷ Proposed subsection 105A.6(2).

⁸ Proposed paragraph 105A.6(4)(a).

⁹ Proposed subsection 105A.6(5).

- the relevant expert must provide a report of their assessment to the Court, the Attorney-General and the offender,¹⁰ and
- the Court may hold a hearing to determine whether to make a CDO.¹¹

3.5 The Law Council of Australia recommended that the Bill be amended to ensure that an application for a CDO is finalised well in advance of the expiry of the person's sentence or CDO.¹² The Law Council expressed concerns about the time available to prepare for a CDO proceeding, noting that

[t]he experience of criminal legal practitioners in relation to sex offenders preventive detention regimes suggests a difficulty with late applications which means that a person is required to remain in custody through all the adjournments. Adequate safeguards are required to ensure that the Crown makes applications with enough time for the person who might be subject to the order to respond and for disputed court processes to be properly prepared, heard and decided.¹³

3.6 During the public hearings, the Law Council indicated that it would be preferable to be able to commence proceedings 12 months prior to the conclusion of the sentence or CDO:

There are vast volumes of material that have to be gone through. It really is imperative that at least six months before the release date the authority—the Attorney—notifies his or her intentions in relation to such an order ... Twelve months before the expiry of the sentence in relation to such a person really should not be too much to ask. You ought to know by the time they have been in jail for that long what you think about whether an order such as this may be on the cards.¹⁴

3.7 The Australian Federal Police also supported the Law Council's view that it will likely be resource intensive and take some time to prepare for a CDO proceeding:

¹⁰ Proposed paragraph 105A.6(4)(b).

¹¹ Proposed subsection 105A.7(1).

¹² Law Council of Australia, *Submission 4*, p. 12.

¹³ Law Council of Australia, *Submission 4*, p. 11.

¹⁴ Dr Neal, Law Council of Australia, *Hansard*, 14 October 2016, p.8.

The actual application would be much shorter, but we have to make sure that we get it right—dot the i's and cross the t's. We would be looking at months, again, to get it right, particularly the first time we put it forward, because we would want to make sure that we had it right.¹⁵

Interim Detention Orders

3.8 Courts may make an interim detention order when the terrorist offender's sentence, or existing CDO, will come to an end before the Court has been able to make a decision on whether to make the CDO.¹⁶ To make such an order, the Court must believe that the matter alleged in the CDO application would, if proved, justify making such an order.¹⁷ The interim detention order may last for up to 28 days. While further interim detention orders may be made against the offender, they cannot last longer than three months in total.¹⁸

3.9 Ms Jacinta Carroll from the Australian Strategic Policy Institute stated that the interim detention orders

sensibly provides for situations where there is a gap between the sentence and a determination by the court on continuing detention.¹⁹

3.10 The Law Council of Australia submitted that the current drafting of the Bill makes it very difficult to challenge interim detention orders.²⁰ The Law Council noted that in effect, the Court would consider the matters relied upon in support of the application, assume that they are proved, and then make an assessment as to whether or not those matters would justify a CDO:

There's no way to challenge the matters relied upon in the first place because the court has to work on the assumption that those matters are proven. It

¹⁵ Mr Neil Gaughan, Assistant Commissioner and National Manager Counter-Terrorism, Australian Federal Police, *Committee Hansard*, 14 October 2016, p. 47.

¹⁶ Attorney-General's Department, *Submission 9*, p. 7.

¹⁷ Proposed subsection 105A.9(2).

¹⁸ Proposed subsection 105A.9(5).

¹⁹ Ms Jacinta Carroll, *Submission 7*, p. 4.

²⁰ Proposed section 105A.9.

would only be open to Court to determine that the evidence, such as it is, is not sufficient.²¹

- 3.11 The Law Council of Australia recommended requiring courts to take the public interest into account when considering an application for an interim detention order:

[I]n lieu of challenging the evidence the Attorney-General puts forward, the respondent could make a public interest argument against the IDO and, in considering the point, the Court can have regard to a wide range of matters it considers appropriate.²²

- 3.12 The Australian National University (ANU) Law Students Counter-Terrorism Research Group recommended that offenders subject to an interim detention order be provided with a copy of the Court's reasons for deciding to make the order:

It is important that an offender is provided with the reasons for any period they continue to remain in detention after the expiry of their conviction or previous order. The Human Rights Committee recently stressed the importance of reasons being provided to the detainee for their detention to be compatible with article 9(1) of the ICCPR, and found failure to provide reasons may be relevant towards violations of other obligations under the Convention.²³

- 3.13 The New South Wales Government submitted that, based on its operational experience with its post-sentence detention scheme, the maximum three month period for interim detention orders may be insufficient:

The present NSW post-sentence detention scheme has an equivalent three month timeframe for interim detention orders, however operational experience indicates this timeframe is difficult to meet. For example, often the information and documents required to inform an application including treatment completion reports, etc. are only available towards the end of an offender's time in custody.

²¹ Law Council of Australia, *Submission 4*, p. 23.

²² Law Council of Australia, *Submission 4*, p. 23.

²³ Australian National University (ANU) Law Students Counter-Terrorism Research Group, *Submission 5*, p.10.

It is anticipated the information gathering and application process for the Commonwealth scheme will be far more complex than that which currently applies under the NSW scheme. Under the NSW scheme the operation of a 'High Risk Offenders Assessment Committee' facilitates review of risk assessments, co-operation between and co-ordination of relevant agencies, information sharing between relevant agencies, and makes recommendations about the taking of action under the NSW Act. The absence of equivalent facilitative structures under the proposed scheme causes further concern the three month interim period may be insufficient.²⁴

- 3.14 The New South Wales Government further suggested that, 'to enable suitable post-order support arrangements to be made for the individual', consideration be given to including a mechanism to extend an interim detention order for a short period in the event that a continuing detention order is not granted.²⁵

Committee comment

- 3.15 The Committee accepts the need for interim detention orders when an offender's sentence is to end prior to a court reaching a decision on whether to grant a CDO. The Committee is satisfied that 28 days is an appropriate maximum period for an interim detention order, given both the gravity of the threat to be assessed and consequence of detaining a person beyond their sentence.
- 3.16 The Committee received evidence from the New South Wales Government that a three month cap on the length of time for which interim detention orders can be granted may be insufficient. Interim detention order proceedings are not contested and do not require the Court to have regard to the factors in proposed sections 105A.7 (making a continuing detention order) and 105A.8 (matters a Court must have regard to in making a continuing detention order). As such, the Committee does not consider it would be appropriate to extend the maximum time for which interim orders can be issued.

²⁴ New South Wales Government, *Submission 17*, p. 3.

²⁵ New South Wales Government, *Submission 17*, p. 3.

- 3.17 The Committee notes that the provision in the Bill requiring an application for a CDO to be made in the last six months of a terrorist offender's sentence (or prior CDO) is modelled on State-based legislation and is intended to ensure that the offender is given time to demonstrate they are not a terrorist risk to the community, prior to being assessed under the scheme. The Committee received evidence, however, that the six month period may not provide enough time for the offender to prepare for their hearing and for all the relevant proceedings, including the expert assessment, to take place.
- 3.18 In light of these concerns, the Committee considers that extending the time in which an application can be made for a CDO to up to 12 months before the end of the offender's sentence would strike the right balance between giving the offender sufficient time to demonstrate their rehabilitation, and allowing enough time for all parties to prepare and for the proceedings to take place. This extension of time will also reduce the likelihood that a Court's decision on whether to make a CDO would still be pending at the end of the three-month maximum period for successive interim detention orders.

Recommendation 5

- 3.19 The Committee recommends that the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to provide that an application for a continuing detention order may be commenced up to 12 months (rather than six months) prior to the completion of an offender's sentence, in order to provide all parties additional time to prepare and for the offender to seek legal representation.**

Standard of proof

- 3.20 Before making a continuing detention order, proposed paragraph 105A.7(1)(b) in the Bill requires that the Supreme Court of a State or Territory be
- satisfied to a high degree of probability on the basis of 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.

- 3.21 Some participants in the inquiry questioned whether this was the most appropriate test for the CDO regime.²⁶ Of these, some argued that the criminal standard of proof ‘beyond reasonable doubt’ should replace the term ‘high degree of probability’, despite the proceedings being characterised in the Bill as civil rather than criminal.
- 3.22 For example, the Muslim Legal Network (NSW) submitted that even though the Explanatory Memorandum describes the detention of offenders under a CDO as preventative rather than punitive, ‘in practical terms for the offender, the effect will be punitive’.²⁷ It went on to argue that

it is inappropriate to apply the civil rules of evidence and procedure, in circumstances where the offender has originally been convicted of a criminal offence and may now be subject to this Bill’s regime to prevent them from committing further criminal offences.

Instead, criminal evidence and procedural rules should apply to continuing detention orders. By applying the civil evidence and procedure rules, the offender is denied of the important safeguards afforded to accused persons under our criminal legal system including at its core, a differing standard of proof. By not applying the criminal standard of proof, the regime avoids the need to apply procedural fairness and rights afforded in the ICCPR.²⁸

- 3.23 The joint councils for civil liberties similarly argued that the regime could not be considered exclusively preventative.²⁹ The councils noted that there had been a ‘divergence of views as to the precise meaning of “satisfied to a high degree of probability” and “unacceptable risk”’ in similar legislation in other jurisdictions. The councils’ submission recommended that

[g]iven that the imposition of a CDO will lead to the detention of a person for up to three years with no restriction on the number of sequential CDOs the standards of proof and level of risk should be amended to ‘beyond reasonable

²⁶ Law Council of Australia, *Submission 4*, p. 1820; Muslim Legal Network, *Submission 11*, p. 2021; Joint councils for civil liberties, *Submission 14*, p. 11; Members of the Victorian Bar Human Rights Committee, *Submission 16*, p. 9.

²⁷ Muslim Legal Network, *Submission 11*, p. 5.

²⁸ Muslim Legal Network, *Submission 11*, p. 20.

²⁹ Joint councils for civil liberties, *Submission 14*, p. 11.

doubt' and the 'unacceptable risk' should be clarified as meaning 'beyond more probably than not'.³⁰

3.24 Again noting the gravity of the consequences of a CDO, the Law Council of Australia submitted that the 'unacceptable risk' test is not appropriate because:

- the lack of any established body of specialised knowledge on which to base predictions (discussed earlier in this chapter),
- the concept of risk is too fluid and may be very subjective, and
- it is inconsistent with the existing test for preventative detention orders, which requires a 'more certain' standard of reasonable grounds to suspect that the person will engage in a terrorist act.³¹

3.25 The Law Council consequently argued that the test for the CDO regime should be that the Court is 'satisfied beyond reasonable doubt that there are reasonable grounds to believe that the person will engage in a Part 5.3 offence'.³²

3.26 At the public hearing, representatives of the Law Council added that not only would a 'beyond reasonable doubt' standard be consistent with the preventative detention order regime, it would also be consistent with 'the basis for sentencing the person in the first place'.³³

3.27 Other participants in the inquiry were more accepting of the existing test in the Bill. The Australian Human Rights Commission identified the 'relatively high threshold' for the making of a CDO as an aspect of the regime that has been 'designed to achieve a post-sentence preventative detention scheme that is not arbitrary, and that is reasonable and proportionate to the purpose of ensuring community safety'.³⁴

³⁰ Joint councils for civil liberties, *Submission 14*, pp. 8–9.

³¹ Law Council of Australia, *Submission 4*, pp. 19–20.

³² Law Council of Australia, *Submission 4*, p. 20.

³³ Dr Neal, Law Council of Australia, *Committee Hansard*, 14 October 2016, p. 11.

³⁴ Australian Human Rights Commission, *Submission 8*, p. 14.

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- 3.28 Similarly, the submission from Ananian-Welsh et al pointed out that part of the grounds for the High Court's upholding of legislation in the *Fardon* case was the 'high degree of probability' standard of proof (as opposed to 'balance of probabilities') and that the Court's discretion was subject to precise standards, including 'unacceptable risk'.³⁵
- 3.29 Although firmly opposing the continuing detention regime, the Australian Lawyers Alliance noted that, in relation to future activities, the usual 'beyond reasonable doubt' standard of proof that is required to imprison persons in criminal cases 'clearly ... cannot be met'.³⁶
- 3.30 In response to questions from the Committee, the Attorney-General's Department stated that a CDO was considered civil rather than criminal in nature because there 'is no question of criminal guilt of an offence'. It argued that the Bill 'contains sufficient procedural safeguards to ensure that the terrorist offender may contest the evidence and the court may properly test that evidence'.³⁷
- 3.31 The Department also submitted that requiring the Court to be satisfied to a 'high degree of probability' would be higher than the ordinary civil standard of 'more probable than not'. It claimed that the higher standard 'strikes the right balance between protection of the community and safeguarding the rights of the individual'. It further noted that the 'unacceptable risk' test, modelled on existing State regimes, would, unlike a 'reasonable grounds' test, require the Court to 'undertaking a balancing exercise'.³⁸

Committee comment

- 3.32 The Committee carefully considered arguments received during the inquiry for the standard of proof and threshold test contained in the Bill to be amended. The Committee recognises the issue raised by applying civil standards of proof but considers that the standard of a high degree of

³⁵ Ananian-Welsh et al, *Submission 6*, p. 6.

³⁶ Australian Lawyers Alliance, *Submission 3*, p. 18.

³⁷ Attorney-General's Department, *Submission 9.3*, p. 15.

³⁸ Attorney-General's Department, *Submission 9.3*, p. 16.

probability is appropriate in these circumstances. The Committee came to this conclusion for a number of reasons:

- The test in the Bill is modelled off similar regimes for high risk sex offenders and violent offenders States and Territories, with an existing body of jurisprudence. Aspects of the test have been important in the decision of the High Court to uphold the legislation in the *Fardon* decision.
- It is appropriate that a CDO proceeding be considered civil rather than criminal in nature. A CDO is not intended to re-punish past behaviour, but rather to protect the community from an unacceptable risk of future harm that may be caused by an unreformed convicted terrorist being released at the end of their prison sentence.
- Although it is a civil proceeding, the requirement of 'high degree of probability' proposed for the CDO regime raises the level of proof that will be required. This recognises the seriousness of the consequences of a CDO for the offender.
- The onus of satisfying the Court that the test has been met is borne by the Attorney-General (as the applicant for the order).
- It is appropriate that the CDO regime has a different threshold to the existing preventative detention order regime. Unlike the preventative detention order regime, the proposed CDO regime is a contested process in the Supreme Court of a State or Territory. It involves persons who have been previously proven to a criminal standard to have committed serious terrorism or terrorism-related offences. Rather than responding to a specific, imminent threat, it is intended to manage the medium-term, non-specific threat of the person reoffending.
- The 'unacceptable risk' test enables the Court to conduct a balancing exercise, taking the individual circumstances of the case into account. The Court could, for example, weigh up the level of probability that the terrorist offender may re-offend with the likely level of seriousness and impact of such a further offence.

Matters that must be considered by the Court

- 3.33 As outlined in Chapter 1, proposed section 105A.8 lists certain matters that the Court must have regard to in making its decision as to whether it is satisfied that the offender poses an unacceptable risk of committing a serious part 5.3 (terrorism) offence if released into the community.³⁹
- 3.34 The Australian Human Rights Commission submitted that, while it is appropriate that the Court take the matters listed in the Bill into account, missing from the list is ‘any factor relating to the impact of the order on the particular circumstances of the offender’. The Commission contrasted this omission with the control order regime, which requires an issuing court to ‘take into account the impact of the obligation, prohibition or restriction on the person’s circumstances (including the person’s financial and personal circumstances)’.⁴⁰
- 3.35 Although noting that the list of matters in proposed section 105A.8 is non-exhaustive – and therefore does not prevent the impact of the order on the offender from being taken into account – the Commission argued:
- The corollary is that the Court is not prompted to give due weight to this matter, and the Court’s failure to consider it altogether would not be considered an error. It should be noted, for example, that there have been differences in the interpretation of the phrase ‘unacceptable risk’ in the New South Wales legislation. By contrast, if the Bill were amended to require the Court to consider the impact of the order on the particular circumstances of the offender, it would better reflect the balancing process that international human rights law mandates, as well as providing greater practical assistance to the Court in the weighing-up process.⁴¹
- 3.36 The Commission recommended that proposed section 105A.8 be amended to require the Court to ‘have regard to the impact of the order on the particular

³⁹ Proposed section 105A.8. The specific factors that must be considered are listed in Chapter 1 of this report.

⁴⁰ Australian Human Rights Commission, *Submission 8*, pp. 21–22.

⁴¹ Australian Human Rights Commission, *Submission 8*, p. 22.

circumstances of the offender’ when making its decision about the level of risk.⁴²

3.37 As also referred to in Chapter 1, a joint submission from Ananian-Welsh et al highlighted that, during its upholding of the legislation in the *Fardon* decision, the High Court had emphasised that ‘the separation of powers requires that a court not be capable of avoiding the rules of evidence’. The submission recommended that an ambiguity in the Bill concerning the application of the rules of evidence should be addressed in order to reduce the risk of constitutional challenge.⁴³

3.38 Specifically, Ananian et al noted the broad nature of the list of matters in proposed section 105A.8, including ‘any report’ of a relevant expert, ‘the results of any other assessment ...’, ‘any other information the Court considers relevant’ and other similarly worded matters. Ananian-Welsh et al argued that ‘ambiguity arises as to whether the obligation on the Court to consider these matters’ is subject to the requirements in sections 105A.13 and 105A.7 for the rules of evidence and procedure for civil matters to be applied, and for the Court to ground its decision in admissible evidence:

This ambiguity creates a potential for a loophole by which information not subject to the rules of evidence may be adduced in these proceedings. It follows that the provisions risk constitutional challenge.⁴⁴

3.39 Following questioning on this issue at the public hearing, Dr Ananian-Welsh indicated that the ambiguity could be resolved ‘quite simply’ by inserting

[a] subsection at the end of section 105A.8 that clarified that when the court is taking those matters listed in that section into account the rules of evidence apply.⁴⁵

3.40 In a supplementary submission, the Attorney-General’s Department expressed its view that, under the unamended Bill, the matters set out in

⁴² Australian Human Rights Commission, *Submission 8*, p. 22.

⁴³ Ananian-Welsh et al, *Submission 6*, p. 7.

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

⁴⁵ Dr Ananian-Welsh, *Committee Hansard*, 14 October 2016, p. 28.

proposed section 105A.8 would already be subject to the requirements of sections 105A.13 and 105A.7.⁴⁶

Committee comment

- 3.41 The Committee notes the concern of the Australian Human Rights Commission that the Bill does not require the Court, when deciding on whether to make a CDO, to consider the impact of an order on the particular circumstances of the offender. However, the Committee does not agree that the Bill needs to be amended in this regard. The Committee notes that, while the particular impact of the order on the offender is not listed as a mandatory item for the Court to consider, proposed section 105A.8 does require the Court to have regard to 'any other matter the Court considers relevant'. Given that the making of a CDO is a contested proceeding with strong procedural safeguards, there would be adequate opportunity for the offender (or their legal representative) to attempt to convince the Court as to why the particular circumstances of the offender should be considered a relevant matter.
- 3.42 The Committee notes that a potential ambiguity – highlighted in the submission from Ananian-Welsh et al – arises in proposed section 105A.8 as to whether the rules of evidence are intended to apply to the matters that the Court must have regard to in its decision on whether to issue a control order. The Committee understands that it is intended that the rules of evidence apply to these matters, but considers that, for clarity and to reduce the risk of constitutional challenge, this ambiguity should be rectified by amendment to the Bill.

Recommendation 6

- 3.43 The Committee recommends that, to avoid a potential ambiguity, proposed section 105A.8 of the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to make clear that the rules of evidence apply to the matters the Court is required to have regard to in its decision as to whether the terrorist offender poses an unacceptable risk of committing a serious terrorism offence if released into the community.**

⁴⁶ Attorney-General's Department, *Submission 9.3*, p. 17.

Relevant experts and risk assessment tools

- 3.44 The Bill requires the Court to be satisfied to a high degree of probability, on the basis of admissible evidence, that an offender presents an unacceptable risk to the community of committing a Part 5.3 (terrorism-related) offence if they are released into the community.⁴⁷
- 3.45 In its submission, the Attorney-General's Department noted that various forms of evidence may be admitted during CDO proceedings, including observations of the offender during his or her period of imprisonment.⁴⁸ In addition, the Court may appoint a relevant expert to conduct an assessment of the risk posed by the offender.⁴⁹ The Attorney-General Department's submission draws comparisons between the proposed regime and State and Territory preventative detention regimes for high risk sex offenders where experts may use risk assessment tools to support their assessment.⁵⁰
- 3.46 The Attorney-General's Department has formed an Implementation Working Group which is comprised of legal, corrections and law enforcement representatives from each jurisdiction to progress outstanding implementation issues.⁵¹ One of its functions include
- considering the development of risk assessment tools that could be of assistance to an expert who is undertaking an assessment of an offender under the proposed Commonwealth regime. The existing tools for violent offenders, together with tools that are in use or in development in relation to countering violent extremism, provide a useful starting point.⁵²
- 3.47 The Department emphasised the critical importance of expert's skill and judgement when applying any risk assessment tool:

⁴⁷ Proposed section 105A.7.

⁴⁸ Attorney-General's Department, *Submission 9*, p. 10.

⁴⁹ Proposed section 105A.6.

⁵⁰ Attorney-General's Department, *Submission 9*, p. 10.

⁵¹ Attorney-General's Department, *Submission 9*, p. 4.

⁵² Attorney-General's Department, *Submission 9*, p. 10.

[N]o risk assessment tool is determinative, and the skills and expertise of the expert will be critical. The expert will be able to use their structured professional judgement, based on a range of factors, including the efforts made by the offender to address the causes of his or her behaviour.⁵³

3.48 The next section considers the role, availability and appointment of experts. Following this the report discusses the validity of and the time it may take to develop risk assessment tools.

The use of relevant experts

3.49 Concerns regarding the use of relevant experts centred on two key issues:

- the appointment process of relevant experts, and
- the availability and basis of expertise of relevant experts.

Appointment of a relevant expert

3.50 When determining whether to issue a CDO, the Court must have regard to any report received from a relevant expert under section 105A.6 in relation to the offender, or any other assessment conducted by a relevant expert of the risk of the offender committing a serious Part 5.3 offence.⁵⁴

3.51 A ‘relevant expert’ is defined as any of the following persons who is competent to assess the risk of a terrorist offender committing a serious Part 5.3 offence if they are released into the community:

- a person who is registered as a medical practitioner under a law of a State or Territory and is a fellow of the Royal Australian and New Zealand College of Psychiatrists, or
- any other person registered as a medical practitioner under a law of a State or Territory, or
- a person registered as a psychologist under a law of a State or Territory, or
- any other expert.

⁵³ Attorney-General’s Department, *Submission 9*, p. 11.

⁵⁴ Proposed section 105A.8.

- 3.52 If an application for a CDO is made, the Court must hold a preliminary hearing to determine whether or not to appoint one or more relevant experts.⁵⁵ The decision to appoint a relevant expert is at the Court's discretion. The Court may appoint one or more relevant experts if it believes that the matters alleged would, if proved, justify making a CDO in relation to that offender.⁵⁶
- 3.53 The Explanatory Memorandum notes that this provision is designed to ensure that the Court considers where there is a minimum basis to the application prior to requiring the offender to attend an assessment by an expert. Importantly, the Explanatory Memorandum states:
- The proceedings can continue, even if the Court decides not to appoint an expert because it does not consider this threshold to be met. Furthermore, the court may decide not to appoint an expert even if it considers the threshold to be met. The decision to appoint an expert is at the Court's discretion.⁵⁷
- 3.54 It is unclear to what extent courts may appoint experts after the preliminary hearing has concluded. In instances where the Court did not consider the threshold to be met and did not appoint an expert, but found during the substantive hearings that the Attorney-General may meet the test for a CDO, it is uncertain whether a relevant expert can be appointed at that stage of the proceedings.
- 3.55 In addition, the Court may appoint a relevant expert to conduct an assessment of the risk posed by the offender.⁵⁸ The Court must have regard to the expert's report when making its decision.⁵⁹ If appointed by the Court, a relevant expert must conduct an assessment of the risk that the offender will commit a serious Part 5.3 offence if they are released into the

⁵⁵ Proposed section 105A.6(1).

⁵⁶ Proposed section 105A.6(3).

⁵⁷ Explanatory Memorandum, p. 20.

⁵⁸ Proposed section 105A.6.

⁵⁹ Proposed subsection 105A.8(b).

community and provide a report of their assessment to the Court, Attorney-General and the offender.⁶⁰ Such a report must include:

- the expert's assessment of the risk that the offender will commit a serious Part 5.3 offence,
- reasons for that assessment,
- the pattern or progression to date of behaviour on the part of the offender in relation to serious Part 5.3 offences, and an indication of likely future behaviour,
- efforts made by the offender to address the causes of his or her behaviour in relation to serious Part 5.3 offences,
- if the offender has participated in rehabilitation or treatment programs, whether or not this has had a positive impact upon him or her,
- any relevant background of the offender, including developmental and social factors,
- factors that may increase or decrease any risks that have been identified by the offender committing a serious Part 5.3 offence if the offender is released into the community, and
- any other matters the expert considers relevant.⁶¹

3.56 In its submission, the Attorney-General's Department indicated that a possible

type of expert that will be appointed by a court will have expertise in forensic psychology or psychiatry (and in particular, recidivism) coupled with specific expertise on terrorism, radicalisation to violent extremism and countering violent extremism.⁶²

3.57 Nevertheless, the Department emphasises that the expert report is only one of the matters courts must consider when determining whether to make a CDO. Other factors include:

⁶⁰ Proposed subsection 105A.6(4).

⁶¹ Proposed subsection 105A.6(7).

⁶² Attorney-General's Department, *Submission 9*, p. 10.

- any report related to the extent to which the offender can reasonably and practicably be managed in the community, that has been prepared by the relevant State or Territory Corrective Services, or any other person or body who is competent to assess that extent,
- any treatment or rehabilitation programs in which the offender has had an opportunity to participate in, and the level of the offender's participation in such programs,
- the offender's level of compliance with obligations whilst he or she was subject to parole for any offence, a CDO or an interim detention order,
- the offender's criminal history and the views of the sentencing court at the time the relevant sentence was imposed, and
- any other information as to the risk of the offender and any other matter the Court considers relevant.⁶³

3.58 The Attorney-General's Department has stated that it has convened an Implementation Working Group which is comprised of legal, corrections and law enforcement representatives from each jurisdiction to progress outstanding implementation issues.⁶⁴ One of its functions include compiling a body of experts who may be called upon by a court during a CDO proceeding.⁶⁵ In its supplementary submission, the Attorney-General's Department indicated that it believed appropriately qualified experts currently reside within Australia.⁶⁶

3.59 A number of submitters raised concerns about the Bill requiring the Court to appoint experts and then make judgements as to the veracity of the experts' evidence. The Australian Human Rights Commission recommended that an independent risk management body be established to appoint experts, to avoid undermining court independence.⁶⁷

3.60 The Law Council of Australia stated that

⁶³ Proposed section 105A.8.

⁶⁴ Attorney-General's Department, *Submission 9*, p. 4.

⁶⁵ Attorney-General's Department, *Submission 9*, p. 10.

⁶⁶ Attorney-General's Department, *Submission 9*, p. 9.

⁶⁷ Australian Human Rights Commission, *Submission 8*, p. 20.

given the likely challenges to the existence of a specialised body of knowledge in relation to the prediction of terrorist offences, and the qualification of people who may be called to provide such expert opinions, courts would be put in the inappropriate position of ruling on objections to the expertise of an expert whom the Court itself had appointed.⁶⁸

- 3.61 During the public hearing, Dr David Neal SC from the Law Council emphasised that requiring the Court to call a witness may compromise the independence of the judge and make it harder for the defence to run its case effectively:

[I]f the judge were to call an expert witness, it would be a seal of approval by the court. If I, for example, had to get up and challenge the expertise of the witness that the court had appointed and get a ruling on whether or not it met section 79 of the Evidence Act, that would be an unusual and embarrassing position for both the judge and me as counsel.

It would compromise the independence of the judge in what would be an extraordinarily sensitive type of hearing. So I would be surprised if there were not many judges who would feel very uncomfortable about being put in that position, to say nothing of the process by which they would judge who is in fact an expert and so on.⁶⁹

- 3.62 Similarly, Dr Lesley Lynch from the NSW Council for Civil Liberties expressed concerns about the lack of detail in the Bill about the appointment of relevant experts:

We are concerned that nowhere does the bill specify that the experts should be independent, and however this is done there should be such a specification in the bill. There is no provision that says that the offender must have any input into the selection of the expert or be able to call their own expert. We think both of these should be considered as special provisions.⁷⁰

- 3.63 The Attorney-General's Department clarified how the appointment of experts was intended to occur in a supplementary submission. It is expected

⁶⁸ Law Council of Australia, *Submission 4*, p. 17.

⁶⁹ Dr Neal, Law Council of Australia, *Committee Hansard*, 14 October 2016, p. 10.

⁷⁰ Dr Lesley Lynch, Vice President, NSW Council for Civil Liberties, *Committee Hansard*, 14 October 2016, p. 40.

that a list of suitable experts would be provided to the Court enabling either party to nominate a suitable expert subject to court approval.⁷¹ The Department stated that:

It is not suggested that the court would appoint experts independently of the parties, only that the court should ultimately appoint the expert for the purposes of the proceeding. Both parties will be able to challenge the status of the relevant expert in the normal fashion.⁷²

Basis of expertise of a relevant expert

3.64 A number of submitters have indicated that the definition of ‘relevant expert’ is too broad and may include individuals who are not properly qualified to assess whether a terrorist offender demonstrates an unacceptable risk to the community.⁷³ During the public hearings, Dr Lynch from the NSW Council for Civil Liberties expressed concern that relevant expert definition was so broad that it would undermine safeguards:

Like others, we found the definition of relevant experts to be extraordinarily open-ended, and we argue that such an open-ended definition of competent expert could exacerbate the inherent imprecision of the risk assessment process. This definition needs to be significantly clarified and probably tightened.⁷⁴

3.65 In its submission, the Law Council of Australia stated that the assessment of unacceptable risk is best undertaken by a psychologist or psychiatrist and that there is no need to include medical practitioners within this definition.⁷⁵ At the public hearing, the Law Council even queried the expertise of psychologists and psychiatrists to conduct this assessment.⁷⁶

⁷¹ Attorney-General’s Department, *Submission 9.3*, p. 9.

⁷² Attorney-General’s Department, *Submission 9.3*, p. 9

⁷³ Ananian-Welsh et al, *Submission 6*, p. 4.

⁷⁴ Dr Lynch, NSW Council for Civil Liberties, *Committee Hansard*, 14 October 2016, p. 40.

⁷⁵ Law Council of Australia, *Submission 4*, p. 16.

⁷⁶ Dr Neal, Law Council of Australia, *Committee Hansard*, 14 October 2016, p. 6.

- 3.66 Ananian-Welsh et al also raised concerns about the inclusion of medical practitioners in the definition.⁷⁷ The Law Council recommended that the Explanatory Memorandum be amended to clearly outline what type of qualifications should be held by a relevant expert.⁷⁸ Similarly, Ananian-Welsh et al recommended removing the reference to an ‘other relevant expert’ as it was unclear what type of individuals would fall within the scope of this definition.⁷⁹
- 3.67 In its supplementary submission, the Attorney-General’s Department stated that
- [w]hile it is anticipated that the preparation of an expert report will most likely involve a psychiatrist or psychologist, it is possible that a medical practitioner with alternative specialist expertise may be able to assist the court.⁸⁰
- 3.68 In their submission, Ananian-Welsh et al noted that the NSW post-sentence detention regimes require the assessments of at least two relevant experts, whether they be psychiatrists or psychologists.⁸¹ During the public hearings, Mr Graeme Edgerton of the Australian Human Rights Commission also noted that comparable regimes rely on risk assessments from at least two experts.⁸² Ananian-Welsh et al recommended that courts should be required to seek advice from at least two experts during CDO proceedings.
- 3.69 In response, the Attorney-General’s Department indicated that the Bill does not limit the number of experts that may be appointed by the Court, stating that ‘if the court considers it is appropriate to appoint two or more experts, it is able to do so’.⁸³

⁷⁷ Ananian-Welsh et al, *Submission 6*, p. 4.

⁷⁸ Law Council of Australia, *Submission 4*, p. 17.

⁷⁹ Ananian-Welsh et al, *Submission 6*, p. 4.

⁸⁰ Attorney-General’s Department, *Submission 9.3*, p. 9.

⁸¹ Ananian-Welsh et al, *Submission 6*, p. 4.

⁸² Mr Graeme Edgerton, Senior Lawyer, Australian Human Rights Commission, *Committee Hansard*, 14 October 2016, p. 16.

⁸³ Attorney-General’s Department, *Submission 9.3*, p. 10.

The use of risk assessment tools

3.70 Concerns regarding the use of risk assessment tools centred on two key issues:

- the validity of such tools to predict terrorist behaviour, and
- the time it may take to develop and verify such tools.

Validity of risk assessment tools

3.71 A number of submitters, including the Australian Human Rights Commission strongly supported the development of a risk assessment tool during the public hearings:

We support the calls in other submissions for the development of a reliable, validated risk assessment tool that can accurately measure this risk of individual committing terrorism offences in the future.⁸⁴

3.72 Associate Professor Mark Nolan's submission emphasised the importance of engaging with an offender with a detailed deradicalisation plan and psychological profile *throughout* their term of imprisonment rather than immediately prior to their release. Otherwise:

If such a detailed longitudinal understand is not even attempted during incarceration, with the most valid actuarial or structured professional judgment style risk assessment tools, then the legitimacy of some of the risk assessments made under the proposed CDO regime should be doubted.⁸⁵

3.73 During the public hearing, the Australian Human Rights Commission indicated that the best risk assessment tools combine statistical information with clinical judgement:

That is usually referred to as a structured decision. So it is a combination of an actuarial tool plus a clinical assessment from a psychologist or psychiatrist. There are a couple of tools that are being developed in relation to terrorist

⁸⁴ Mr Santow, Australian Human Rights Commission, *Committee Hansard*, 14 October 2016, p. 13

⁸⁵ Associate Professor Nolan, *Submission 13*, p. 9.

offenders, but they have not yet been validated over a population to show that they are reliable and can accurately predict.⁸⁶

3.74 However, numerous submitters also queried whether it was indeed possible to accurately predict the risk of that a terrorist offender will reoffend in the future.⁸⁷ In its submission, the Australian Lawyers Alliance stated that the

truth is that no one can predict the future with any degree of accuracy. Therefore any system of indefinite detention would court serious injustice.⁸⁸

3.75 A number of submitters cited a study by Professor Kate Warner which indicated that predictions of dangerousness only appear to be one-third to 50 percent accurate.⁸⁹ The Law Council of Australia also submitted that:

The criticisms made of the use of predictive tools are magnified in the case of predicting the future behaviour of terrorism offenders. Numbers of terrorist offenders come from backgrounds which are very different from the profile usually associated with repeat offenders. The differences include lack of prior offending, stable family background, secure employment, non-use of alcohol or drugs, and significant religious belief.⁹⁰

3.76 The Attorney-General's Department acknowledged that some offenders may attempt to obfuscate the assessment process:

Assessments will be carried out with knowledge that some offenders may feign compliance. Relevant experts will have access to other information sources that can help them to assess the validity of their assessments.⁹¹

⁸⁶ Mr Edgerton, Australian Human Rights Commission, *Committee Hansard*, 14 October 2016, p. 16.

⁸⁷ Civil Liberties Australia, *Submission 2*, pp. 1–2; ANU Law Students Counter-Terrorism Research Group, *Submission 6*, p. 1; Associate Professor Nolan, *Submission 13*, p. 5; Ms Jacinta Carroll, *Submission 7*, p. 5.

⁸⁸ Australian Lawyers Alliance, *Submission 3*, p. 19.

⁸⁹ Law Council of Australia, *Submission 4*, p. 14; Australian Lawyers Alliance, *Submission 3*, p. 18; Members of the Victorian Bar Human Rights Committee, *Submission 16*, p. 5; Australian Human Rights Commission, *Submission 8*, p. 18.

⁹⁰ Law Council of Australia, *Submission 4*, p. 15.

⁹¹ Attorney-General's Department, *Submission 9.3*, p. 7.

3.77 The Australian Human Rights Commission acknowledged that ultimately, courts must determine how much weight to give the evidence before them, including in relation to an expert's risk assessment. However,

the judge can only take note of the evidence that is before her or him. In other words, if there is no means to have a truly robust and reliable evidentiary material that can be adduced in court, that is going to pose all kinds of problems, probably at both ends of the spectrum. It could mean that some people who should not be subjected to one of these orders are, and it could mean the opposite of that, as well.⁹²

3.78 Similarly, Dr Ananian-Welsh emphasised that it is important not to overestimate courts' abilities to exercise independent review within the context of a CDO proceeding because

courts are not used to making future assessments of risk. It is absolutely what the government does but not what the court is necessarily comfortable or expert at doing. So in conducting these kinds of assessments the court is highly reliant on the information that is presented to it.⁹³

3.79 In its submission, the Australian Human Rights Commission stated that the Bill puts too much emphasis on courts' ability to discern who is qualified to make a valid risk assessment, indicating that there are:

Real risks that the incidence of both 'false positives' and 'false negatives' will be significant without some additional structure to provide confidence to the Court that experts are in fact competent to assess risk.⁹⁴

3.80 During the public hearing, the Attorney-General's Department was asked about courts' experience in determining future risks. The Department stated that

the majority of states and territories have schemes of a similar type. In those contexts, it is state and territory supreme courts that are responsible for making orders under those regimes ... each regime is slightly different, but the

⁹² Mr. Santow, Australian Human Rights Commission, *Committee Hansard*, 14 October 2016, p. 15.

⁹³ Dr Ananian-Welsh, *Committee Hansard*, 14 October 2016, p. 26.

⁹⁴ Australian Human Rights Commission, *Submission 8*, p. 19.

nub of it is that that process and that need to make a predictive decision is the same.⁹⁵

3.81 The Attorney-General's Department stated that an expert body of knowledge would

include forensic psychological or psychiatric expertise, along with experience working with individuals who have radicalised to violent extremism.⁹⁶

3.82 The Law Council of Australia was highly critical of the lack of an established body of knowledge upon which experts, and ultimately courts, can assess the risk that a terrorist offender poses to the community. During the public hearings, Dr Neal from the Law Council stated that

we do not know of any—and we have asked—psychologists or psychiatrists who would claim at the moment that there is a specialised body of knowledge about the future behaviour of terrorists. So, there is a first question. Then, secondly, we have also asked, in relation to either international or Australian work, whether there is any instrument that is used by psychologists and psychiatrists to do this task, and we are told that there is not—not internationally or nationally.⁹⁷

3.83 Dr Neal also indicated that courts cannot be confident that the risk of a terrorist offender can be properly assessed without a validated body of knowledge and risk assessment tool. He argued that medical professionals and psychologists are not immediately qualified to assess terrorist risk,⁹⁸ and questioned whether diagnostic tools can be used to assess terrorist behaviour in the same way that they are used to assess high risk sex offenders, stating that

in terms of the comparison between sex offenders and these people, the sex offenders fall in a whole range of diagnostic categories that the psychiatrists and psychologists use. We do not have those here.⁹⁹

⁹⁵ Mr Coles, Attorney-General's Department, *Committee Hansard*, 14 October 2016, p. 52.

⁹⁶ Attorney-General's Department, *Submission 9.3*, p. 8.

⁹⁷ Dr Neal, Law Council of Australia, *Committee Hansard*, 14 October 2016, p. 6.

⁹⁸ Dr Neal, Law Council of Australia, *Committee Hansard*, 14 October 2016, p. 6.

⁹⁹ Dr Neal, Law Council of Australia, *Committee Hansard*, 14 October 2016, p. 6.

Time to develop risk assessment tools

3.84 The Law Council of Australia recommended that any risk prediction tool be developed in an accountable manner with input from psychologists, psychiatrists, counter-terrorism experts, the courts, legal practitioners, the Attorney-General's Department and law enforcement and corrective services.¹⁰⁰

3.85 Likewise, the joint councils for civil liberties recommended that the Committee

seek comprehensive advice on current expert views and database research on the reliability of risk assessments and procedures and assures itself before it recommends implementation of this bill that there will be possible access to a reliable process.¹⁰¹

3.86 The Australian Human Rights Commission endorsed the views of the NSW Sentencing Council on how best to appoint experts in the high risk offenders scheme. In that report, the Council recommended establishing an independent risk management authority modelled on Scotland's Risk Management Authority. The Australian Human Rights Commission recommended establishing a similar authority for the CDO regime. The Commission stated that such an authority would facilitate best practice in relation to risk prediction by:

- accrediting people in the assessment of risk for the purpose of becoming 'relevant experts',
- developing best-practice risk-assessment and risk-management processes, guidelines and standards,
- validating new risk assessment tools and processes,
- undertaking and commission research on risk assessment methods, and
- providing education and training for risk assessors.¹⁰²

¹⁰⁰ Law Council of Australia, *Submission 4*, 14 October 2016, p. 16.

¹⁰¹ Dr Lynch, NSW Council for Civil Liberties, *Committee Hansard*, p. 39.

¹⁰² Australian Human Rights Commission, *Submission 8*, p. 20.

3.87 The Commission acknowledged that establishing a new risk management body would require significant resources and that the number of people likely to be subject to the CDO regime is low. However it argued that the costs are justifiable given the

importance of the objective of protecting community safety underlying the Bill, the extraordinary impingement on the human rights of any person who is the subject of a continuing detention order, and the need for assessments of risk to be as accurate as possible.¹⁰³

3.88 The Law Council indicated that it may take significant time to develop a specialised body of knowledge and risk assessment tools specifically related to terrorist offenders.¹⁰⁴ Similarly, the Human Rights Commissioner, Mr Edward Santow, indicated that it may take at least two years to develop and validate an appropriate risk assessment tool:

The more effective assessment tools tend to rely on audits. In other words, they tend to rely on looking at large numbers of people in a particular situation and drawing conclusions from that; but clearly you need to apply that to the individual circumstances. What we also know is that there is no off-the-shelf tool, as it were, that can simply be applied that would be highly reliable. That is why I guess there is some advantage in the government having at least two years, or more than two years, ahead of it to commission that research.¹⁰⁵

3.89 Likewise, Ananian-Welsh et al recommended delaying the introduction of the CDO regime until an appropriate risk assessment tool has been developed and validated.¹⁰⁶ Their submission cited research by Smith and Nolan which stated:

The deprivation of liberty a CDO regime imposes is only defensible if there are accurate and reliable risk assessment tools that can determine which offenders are at a high risk of reoffending and which offenders are not. Adopting tools that have not yet been shown to accurately do this would “undermine the

¹⁰³ Australian Human Rights Commission, *Submission 8*, p. 20.

¹⁰⁴ Dr Neal, Law Council of Australia, *Committee Hansard*, 14 October 2016, p. 6.

¹⁰⁵ Mr Santow, Australian Human Rights Commission, *Committee Hansard*, 14 October 2016, p. 15.

¹⁰⁶ Ananian-Welsh et al, *Submission 6*, p. 1.

objectives of the regime” and may unjustifiably deprive individuals who are not at risk of reoffending of their liberty.¹⁰⁷

3.90 In its supplementary submission, the Attorney-General’s Department indicated that the Implementation Working Group has not yet determined whether an existing tool can be adapted or whether new research is required.¹⁰⁸ As such, the Department could not provide an exact timeframe on the development of a risk assessment tool:

Radicalisation to violent extremism is complex and to date, all research (domestic and international) agrees that there is no single pathway. Recent research papers have suggested that structured professional judgment tools may be more feasible and suitable for this application since they allow context to be taken into consideration and we do not yet have the volume of cases over a sufficiently long time to allow for any consideration as to whether violent extremism has a consistent underlying pathology that can be identified.¹⁰⁹

3.91 At the public hearing, the Attorney-General’s Department was asked to comment on the time it would take to develop an effective risk assessment tool. Ms Jamie Lowe, Acting Deputy Secretary, stated

that will take some time ... certainly months and possibly years.¹¹⁰

3.92 During the public hearing, the Attorney-General’s Department was asked whether the CDO regime could be meaningfully implemented without a specific risk assessment tool being available. The Department stated that

the bill, as drafted, anticipates a range of experts, including psychologists and psychiatrists, but the expectation is that in order to advise the court in the exercise of its discretion those experts would need to have the use of [risk assessment] types of tools.¹¹¹

¹⁰⁷ Ananian-Welsh et al, *Submission 6*, p. 5.

¹⁰⁸ Attorney-General’s Department, *Submission 9.3*, p. 7.

¹⁰⁹ Attorney-General’s Department, *Submission 9.3*, p. 7.

¹¹⁰ Ms Jamie Lowe, Acting Deputy Secretary, Attorney-General’s Department, *Committee Hansard*, 14 October 2016, p. 50.

¹¹¹ Mr Coles, Attorney-General’s Department, *Committee Hansard*, 14 October 2016, p.54.

3.93 The Attorney-General's Department also confirmed that while the development of the risk assessment tools can be developed alongside this Bill, it is preferable to be able to refer to legislation during the development process:

[W]e are not waiting for the bill to be passed for us to commence the work, but we do need the clarity to make sure that we do not go too far down a particular path that is not consistent with the legislation.¹¹²

Committee comment

3.94 The Committee notes that the integrity of the CDO regime depends on the court decision-making process, and this process will be informed by the Court's capacity to draw on relevant experts providing assessments of predictive terrorist behaviour.

3.95 Evidence received regarding the availability and skills of relevant experts, as well as the validity and time to develop risk assessment tools have raised serious concerns. At this point in time it is apparent that no such risk assessment tools exist and the Committee has been unable to verify the numbers, skill base or expertise of the relevant experts who the Department claims exist in Australia.

3.96 On the one hand, the Committee acknowledges that this is a newly emerged threat and that significant work is still required to develop specialised risk assessment tools. The Committee also appreciates the sensitivities which may exist around naming suitable relevant experts. However, the integrity of the regime is predicated on courts being able to be informed by robust assessments by experts, and this Committee is tasked with ensuring the fair and proper operation of the regime. While the Committee appreciates that there is to be an extended development and implementation phase before operation of the regime, at this point in time it is difficult for the Committee to assure itself of the robust operation of a critical aspect of the regime that is yet to be developed.

3.97 Further, no clear development plan or implementation timeframe has been provided, which raises further concerns for the Committee. At the very least,

¹¹² Ms Lowe, Attorney-General's Department, *Committee Hansard*, 14 October 2016, p.54.

the Committee considers that a detailed development and implementation plan of many key operational elements of the Bill should have preceded introduction of the Bill to Parliament. It is not clear that such a plan currently exists.

- 3.98 Nonetheless, the Committee supports the process outlined in the Bill. In particular, the Committee is reassured that the onus of proof to establish ‘unacceptable risk’ rests with the Attorney-General and it is for courts to appoint those whom it considers to be ‘relevant experts’, and to determine the validity of and weight given to predictive risk assessments. The regime’s effective operation will be a matter for the courts.
- 3.99 The Committee acknowledges the concerns raised by submitters about the definition of relevant expert. Despite the lack of clarity on this point, the Committee can envisage situations where a relevant expert may be a person who is not a psychiatrist, psychologist or other medical practitioner. The Committee notes that in the Criminal Code a terrorist act is defined as an act committed with the intention of advancing a political, religious or ideological cause. It will be a matter for the Court to determine whether a relevant expert 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’. The Committee therefore supports the inclusion of the item ‘any other expert’, but considers that greater clarity should be provided about persons who might meet this definition in the Explanatory Memorandum.

Recommendation 7

- 3.100 The Committee recommends that the Explanatory Memorandum to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to provide greater clarity to the definition of ‘relevant expert’ in proposed section 105A.2. This should include examples of persons who may potentially fall within the category ‘any other expert’ at item (d) of the definition.**
- 3.101 Proposed subsection 105A.6(7) lists a range of matters that *must* be included in the expert’s report. The Committee considers that a relevant expert may not be in a position to provide an expert opinion on all matters listed in proposed paragraphs 105A.6(7)(c) to (g). Accordingly the Committee

recommends that subsection 105A.6(7) be amended to state that the expert's report *may* include the matters listed in the subsequent paragraphs.

Recommendation 8

- 3.102 The Committee recommends that proposed sub section 105A.6(7) of the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to replace the word 'must' with 'may' so that the expert's report may include the matters listed in paragraphs (a) to (h).**
- 3.103 The Committee notes that the Attorney-General's Department has clarified that the Court would not appoint experts independently of the parties. Rather, a list of suitable experts would be provided to the Court enabling either party to nominate a suitable expert subject to Court determination of the admissibility of each expert's evidence. Both parties would be able to challenge the status of the relevant expert in the normal fashion. The Committee considers that it is not clear from the drafting of the Bill that an offender can bring forward their own expert.
- 3.104 Accordingly, the Committee considers that the Bill and Explanatory Memorandum require amendment to more clearly reflect the intention of the Bill, namely that the onus is upon the Attorney-General to bring forward experts that meet the evidentiary burden, and that an offender may also bring forward their own expert or experts to refute this evidence.
- 3.105 The Committee supports the requirement outlined in proposed subsection 105A.6(5) that the offender must attend the assessment by a relevant expert.

Recommendation 9

- 3.106 The Committee recommends that the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 and Explanatory Memorandum be amended to make explicit that each party is able to bring forward their preferred relevant expert, or experts, and that the Court will then determine the admissibility of each expert's evidence.**

Recommendation 10

- 3.107 The Committee recommends that the Explanatory Memorandum to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be**

amended to make explicit that a Court may appoint a relevant expert at any point during continuing detention order proceedings.

- 3.108 The Committee also recommends that, given the important role of relevant experts and risk assessment tools, the Parliament should be informed of a clear development and implementation plan prior to its detailed consideration of the Bill and then be provided with annual implementation reports.
- 3.109 The Committee notes that there are a number of other operational elements of the regime still to be determined. In Chapter 4, the Committee makes recommendations around required reporting on the timeframes, development and implementation of relevant experts, risk assessment tools and other operational elements. The Committee considers this will strengthen the integrity of the regime's future operation.

Offender's access to information and legal representation

- 3.110 A strong procedural safeguard in the proposed regime is that the onus of proof rests with the Attorney-General and it is for the courts to determine if the threshold of 'a high probability of unacceptable risk' has been met. Placing the decision in the discretion of the Court provides the offender with the opportunity to contest proceedings.
- 3.111 The following sections consider the information in the CDO application that is provided to an offender and an offender's access to adequate legal representation.

Provision of the CDO application to the offender

- 3.112 The Bill requires the applicant (that is, the Attorney-General) to provide a copy of the CDO application to the offender within 2 business days after the application is made.¹¹³ However, the copy of the application provided to the offender at this point is not required to include information for which the Attorney-General is likely to:

¹¹³ Proposed section 105A.5(4).

- give a certificate under Subdivision C of Division 2 of Part 3A of the *National Security Information (Criminal and Civil Proceedings) Act 2004*,
- seek an arrangement under section 38B of that Act,
- make a claim of public interest immunity, or
- seek an order of the Court preventing or limiting disclosure of the information.¹¹⁴

3.113 The Explanatory Memorandum states that this provision allows the Attorney-General not to include in the copy of the application provided to the offender any material over which the Attorney-General is likely to seek protective orders preventing or limiting the disclosure of that information. For instance, the Attorney-General may seek protective orders to ensure that the information in the application can be protected from release to the public.¹¹⁵

3.114 In practice this means that the Attorney-General may give the offender

a redacted copy of the application to the offender until the court has dealt with the suppression order application. It will not prevent the material that the Attorney-General seeks to rely on in the application from ultimately being disclosed to the offender.¹¹⁶

3.115 A number of submitters have interpreted proposed section 105A.5(5) to mean that crucial evidence that will be relied upon during the CDO proceedings may be withheld from the offender.¹¹⁷ During the public hearings, the Law Council of Australia indicated that secret evidence provisions undermines an offender's ability to obtain a fair trial, stating:

We cannot have a situation, in our view, where an application is made, and then the authorities say, 'There is all this evidence; but, by the way, we cannot

¹¹⁴ Proposed section 105A.5(5).

¹¹⁵ Explanatory Memorandum, p. 20.

¹¹⁶ Explanatory Memorandum, p. 20.

¹¹⁷ Australian Lawyers Alliance, *Submission 3*, p.13; Human Rights Watch, *Submission 12*, p. 6; Professor Ben Saul, *Submission 1*, p. 2.

show you, we cannot tell you, we cannot let you challenge it, because it is all too secret' – particularly on the balance of probabilities issue.¹¹⁸

3.116 Human Rights Watch noted that in the United Kingdom, preventative detention cannot be based predominantly on secret evidence due to the importance of upholding procedural fairness and the right to a fair hearing.¹¹⁹ It argued that the ability to withhold evidence from the offender is far too broad, stating that

[t]he Attorney-General is not required to exercise any of the measures [listed in s105A.5(5)], but simply indicate an intention to. This furthers the already existing imbalance in the discretion of the court with regard to the NSI Act, which requires courts to give more weight to national security concerns rather than procedural fairness... ability of the subject of the order to defend against accusations and test the credibility of evidence is further, and significantly, limited.¹²⁰

3.117 The Australian Lawyers Alliance expressed concern that secret evidence provisions would amount to breaching Article 14 of the ICCPR, which relates to freedom from arbitrary detention.¹²¹ Similarly, Associate Professor Nolan indicated that secret evidence provisions may be in breach of Australia's international human rights obligations stating that

Australia may need to be prepared for future human rights challenge to the UNHRC on this basis if secret evidence use in CDO hearings becomes problematic or provocative for prisoners otherwise due to be released upon the expiration of their sentences, especially those who served their sentences entirely under Supermax conditions.¹²²

3.118 The joint councils for civil liberties recommended amending proposed section 105A.5

¹¹⁸ Mr Stuart Clark, President, Law Council of Australia, *Committee Hansard*, 14 October 2016, p. 5.

¹¹⁹ Human Rights Watch, *Submission 12*, p. 6.

¹²⁰ Human Rights Watch, *Submission 12*, pp. 6-7.

¹²¹ Australian Lawyers Alliance, *Submission 3*, p. 13.

¹²² Associate Professor Nolan, *Submission 13*, p. 5.

so that the terrorist offender has access to all information necessary to challenge the case against them, in the interest of procedural fairness¹²³

3.119 Similarly, the ANU Law Students Counter-Terrorism Research Group and others suggested appointing special advocates who were able to view redacted documents and represent the interests of the defendant, in order to balance national security concerns with the need to ensure that the offender had access to a fair trial.¹²⁴

3.120 The Attorney-General's Department's supplementary submission clarified this issue and emphasised that proposed subsection 105A.5(5) does not permit secret evidence. Rather, it is designed to balance the importance of providing the offender ample opportunity to prepare for a CDO with providing the Court adequate opportunity to consider any suppression orders connected to the application:

Given the offender must be provided the application within a very short period of time, there may be insufficient time for the court to have considered the suppression order application before the continuing detention order application is provided to the offender...Accordingly, the offender is expected to be provided, in a timely manner, information to be relied on in an application for a continuing detention order. Subsection 105A.5(4) will not permit 'secret evidence'.¹²⁵

Access to legal representation

3.121 A number of submitters raised concerns about terrorist offenders' access to adequate legal representation if they were the subject of CDO proceedings.¹²⁶ In its submission, the Law Council of Australia indicated that CDO proceedings are likely to attract extensive legal costs. It provided information about the cost of a control order proceeding, noting that in that

¹²³ Joint Councils for Civil Liberties, *Submission 14*, p. 10

¹²⁴ ANU Law Students Counter-Terrorism Research Group, *Submission 5*, p. 13. See also Mr Clark, Law Council of Australia, *Committee Hansard*, 14 October 2016, p. 9; Dr Lynch, NSW Council for Civil Liberties, *Committee Hansard*, 14 October 2016, p. 39.

¹²⁵ Attorney-General's Department, *Submission 9.3*, p. 13.

¹²⁶ Dr Lynch, NSW Council for Civil Liberties, *Committee Hansard*, 14 October 2016, p. 43.

scenario Victoria Legal Aid only granted aid on a limited basis and the majority of work was undertaken pro bono:

A recent contested control order case involved a 10-day hearing, thousands of pages of documents and surveillance records and expert evidence. The estimated cost of preparing and prosecuting that application with senior counsel, a junior and one to two instructors is \$300,000 – \$400,000.¹²⁷

3.122 During the public hearing, the Law Council of Australia stated that it was important that

the safeguards are realistic in terms of the hearing itself ... if you are not prepared to make the safeguards for this sort of legislation practically operate, really you should not be doing it. Much of the evidence—in fact, virtually all of the factual evidence—that was led in that hearing was rejected by the judge ... that was only because he was lucky enough to get pro bono assistance ... I cannot stress enough how important the practical operation of these safeguards is.¹²⁸

3.123 In addition, the Law Council indicated that Legal Aid Commissions do not necessarily have adequate procedures for assessing and funding civil matters such as a CDO proceeding:

[T]hey do not really have categories for these things and they do not really do much in civil, and so on. So, our argument is this: if you are going to take these extraordinary steps and you are going to justify that on the basis of safeguards then there must be a reality behind that and funding behind it.¹²⁹

3.124 As a result, the Law Council recommended that the Bill be amended to include provisions allowing the Court to order funding for reasonable legal expenses, should the respondent not be in a position to fund their own legal representation.¹³⁰

¹²⁷ Law Council of Australia, *Submission 4*, p. 17.

¹²⁸ Dr Neal, Law Council of Australia, *Committee Hansard*, 14 October 2016, p. 8.

¹²⁹ Dr Neal, Law Council of Australia, *Committee Hansard*, 14 October 2016, p. 11.

¹³⁰ Law Council of Australia, *Submission 4*, p. 18.

3.125 The Australian Human Rights Commission also emphasised the importance of the offender being able to access legal representation.¹³¹ In its submission it referenced *Dietrich v The Queen*, noting that

Australian law has not recognised a right to legal representation in criminal proceedings, but it has recognised the inherent power of the Court to stay criminal proceedings where an accused person does not have legal representation and where legal representation is essential to a fair trial.¹³²

3.126 During the public hearings, the Commission indicated that in its view, the *Dietrich* case

has made very clear the importance of legal representation in the context of serious criminal offences, and that is simply in order to arrive at a just outcome.¹³³

3.127 The Commission considered it unclear whether this legal principle applied to CDO proceedings because they are characterised as civil rather than criminal in nature.¹³⁴ The Commission recommended that

- the Committee seek advice from the Attorney-General's Department about whether legal aid will be available for offenders against whom applications for CDOs are made,¹³⁵ and
- the Bill be amended to clarify that the Court has the power to stay proceedings for a CDO if an offender, through no fault of his or her own, is unable to obtain legal representation and where legal representation is essential for the proceeding to be fair.¹³⁶

3.128 The Muslim Legal Network (NSW) indicated during the public hearings that the Muslim community are particularly concerned that individuals subject to the CDO regime be provided with meaningful legal representation:

¹³¹ Mr Santow, Australian Human Rights Commission, *Committee Hansard*, 14 October 2016, p. 22.

¹³² Australian Human Rights Commission, *Submission 8*, p.25; *Dietrich v The Queen* (1992) 177 CLR 292.

¹³³ Mr Santow, Australian Human Rights Commission, *Committee Hansard*, 14 October 2016, p. 22.

¹³⁴ Mr Santow, Australian Human Rights Commission, *Committee Hansard*, 14 October 2016, p. 22.

¹³⁵ Australian Human Rights Commission, *Submission 8*, p. 26.

¹³⁶ Australian Human Rights Commission, *Submission 8*, p. 26.

We have heard about people, should these orders come into play, having access to real, good legal representation as part of this particular regime.¹³⁷

3.129 The Attorney-General's Department commented on legal representation in its supplementary submission. Firstly, it noted that the offender would be provided with adequate notice to obtain legal representation as the offender must be informed of a CDO application within two business days of it being made.¹³⁸ As a result, it considered that the offender had adequate notice to obtain legal representation and that it was not necessary to require courts to stay proceedings for the offender to obtain legal representation.¹³⁹

3.130 Secondly, the Department stated that the Australian Government provides significant funding to Legal Aid Commissions under the National Partnership Agreement on Legal Assistance Services (2015–2020) to provide legal assistance to disadvantaged and vulnerable people, in accordance with the Commonwealth's service priorities. These priorities include assisting prisoners and other people in custody.¹⁴⁰ The submission stated that Legal Aid Commissions will receive \$1.07 billion over five years, which will be available for Commonwealth family, civil and criminal law proceedings.¹⁴¹

3.131 The Department stated that while eligibility for legal aid is determined on a case-by-case basis by each legal aid commission,

providing legal representation for an individual to oppose an application for a continuing detention application would likely be a high priority for commissions, given the potential for an offender's period in detention to be continued for up to three years.¹⁴²

¹³⁷ Mr Zaahir Edries, President, Muslim Legal Network (NSW), *Submission 11*, p. 35.

¹³⁸ Attorney-General's Department, *Submission 9.2*, p. 6.

¹³⁹ Attorney-General's Department, *Submission 9.2*, p. 6.

¹⁴⁰ Attorney-General's Department, *Submission 9.2*, p. 6.

¹⁴¹ Attorney-General's Department, *Submission 9.2*, p. 6.

¹⁴² Attorney-General's Department, *Submission 9.2*, p. 6.

Giving terrorist offenders documents

3.132 Proposed section 105A.15 provides the following requirements for the giving of CDO-related documents to an offender:

- (1) A document that is required to be given under this Division to a terrorist offender who is detained in a prison is taken to have been given to the offender at the time referred to in paragraph (3)(b) if the document is given to the chief executive officer (however described) of the prison or centre.
- (2) The chief executive officer must, as soon as reasonably practicable, give the document to the offender personally.
- (3) Once the chief executive officer has done so, he or she must notify the Court and the person who gave the officer the document, in writing:
 - (a) that the document has been given to the offender; and
 - (b) of the day that document was so given.

3.133 The Law Council of Australia recommended that this section be amended to require documents to also be provided to the person's legal representative.¹⁴³

Committee comment

3.134 The Committee notes the concerns raised by many submitters regarding the use of 'secret' evidence and the clarification, provided by the Attorney-General's Department, that all evidence relied on in the application is ultimately disclosed to the offender.

3.135 Concerns arose due to some information being able to be withheld from the initial copy of information provided to the offender. However, the Department has confirmed that this is to provide time for the Court to consider any suppression order, and that some information may be protected from public release but all information will be provided to the offender.

3.136 It is vital that there is clarity on this issue as it is an important protection of an offender's rights. Consequently the Committee recommends that the

¹⁴³ Law Council of Australia, *Submission 4*, p. 21.

Explanatory Memorandum be amended to make abundantly clear that, notwithstanding subsection 105A.5(4) which may enable some information not to be disclosed in the copy of the CDO application first provided to the offender, an offender is to be provided in a timely manner with information to be relied on in an application for a CDO.

- 3.137 Alongside access to information, an offender's access to adequate legal representation during CDO proceedings is considered a fundamental right and safeguard. The Committee acknowledges the complexity of such cases and that substantial costs may be associated with legal representation. The Committee also notes that some offenders may be entitled to access to legal aid.
- 3.138 However, given both the gravity and the complexity of proceedings for CDOs, the Committee considers that ensuring access to legal representation is a vital protection of an offender's rights. Therefore the Committee recommends that the Bill be amended to explicitly provide courts with the power to stay proceedings for a CDO if an offender is unable to obtain legal representation, through no fault of their own. The Committee also recommends that, in such circumstances, the Court be empowered to make an order for reasonable costs to be funded to enable the offender to obtain legal representation.
- 3.139 Further, the Committee considers that access to adequate legal representation should form part of the review of the regime once it is considered operational. The Committee discusses and makes recommendations regarding the review of the CDO regime in Chapter 4.
- 3.140 The Committee notes that the Bill, as currently drafted, enables documents that are required under the CDO regime to be given to the offender to instead be given to the chief executive officer of the offender's prison. While the Committee understands the practical reasons why it may not be possible to deliver the documents to the offender directly, the Committee considers that it would be preferable that the documents be provided to the person's legal representative (if they have one) rather than to the chief executive of the prison.

Recommendation 11

3.141 The Committee recommends that the Explanatory Memorandum to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to make explicit that an offender is to be provided in a timely manner with information to be relied on in an application for a continuing detention order.

Recommendation 12

3.142 The Committee recommends that the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended so that if an offender, through no fault of his or her own, is unable to obtain legal representation:

- **the Court has the explicit power to stay proceedings for a continuing detention order, and**
- **the Court is empowered to make an order for reasonable costs to be funded to enable the offender to obtain legal representation.**

Recommendation 13

3.143 The Committee recommends that the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to require documents related to a continuing detention order to be given to the offender's legal representative. If the offender does not have a legal representative, the documents may be delivered to the chief executive officer of the offender's prison as currently provided for in the Bill.

Review and appeal rights

Right of appeal

3.144 The offender may appeal the CDO decision to the Court of Appeal in the relevant state or territory. The appeal is to be by way of rehearing, which means that the Court of Appeal

- **has all the powers, functions and duties of the Supreme Court in relation to making the relevant CDO proceedings,**

- may draw inferences of fact which are not inconsistent with the findings of the Supreme Court, and
- may receive further evidence as to questions of fact if the Court is satisfied that there are special grounds to do so.¹⁴⁴

3.145 The Explanatory Memorandum does not define ‘rehearing’ or provide information on what special grounds additional evidence may be adduced.

3.146 Dr Ananian-Welsh et al commended the manner in which the Bill aims to preserve an offender’s ability to appeal CDOs as it is

acknowledging the fundamental importance of basic procedural fairness to human rights and the rule of law.¹⁴⁵

3.147 Likewise, in its submission to the Committee, the Australian Human Rights Commission recognised that the appeal provisions were one of the safeguards designed to limit the period of detention to what was reasonable, necessary and proportionate to the risk faced by the community, ensuring that detention was not arbitrary.¹⁴⁶

3.148 The Law Council of Australia noted that it is unclear to what extent the appeal can be considered a rehearing of the initial proceedings where there is a limited scope to introduce new evidence. Its submission suggested that the Court of Appeal could only consider questions of fact where the appellant could successfully demonstrate that the primary judge had made a ‘*House v the King*’ error.¹⁴⁷ The Law Council quoted a Queensland decision *AG (QLD) v Lawrence* which stated that an appellate court is not empowered to set aside such orders merely because they were not the

ones the appellate court would have made had it been exercising the discretion. Before an appellate court can interfere it must be shown that the primary judge acted on a wrong principle, failed to take a material

¹⁴⁴ Proposed section 105A.17.

¹⁴⁵ Ananian-Welsh et al, *Submission 6*, p. 7.

¹⁴⁶ Australian Human Rights Commission, *Submission 8*, pp. 14-15.

¹⁴⁷ Law Council of Australia, *Submission 4*, p. 21.

consideration into account, took into account an immaterial consideration or that the result “is unreasonable or plainly unjust”.¹⁴⁸

3.149 The Law Council stated that there may be merit in amending the appeal provisions in the Bill so that the appeal would be by way of rehearing, where the Court of Appeal can

re-exercise the discretion and also have discretion to receive further evidence. The argument may be that a person’s liberty should not be withdrawn in this way on the say so of one person.¹⁴⁹

Periodic review

3.150 Proposed section 105A.10 of the Bill states that the Supreme Court of a State or Territory must begin a review of a CDO that is in force within 12 months after:

- the order began to be in force, or
- if the order has previously been reviewed by the Court—the most recent review ended.

3.151 In its submission to the Committee, the Attorney-General’s Department stated that this provision was modelled on Victoria’s review provisions for CDOs issued for sex offenders. Other State-based schemes allow for a longer regular review period of two years, or allow ad hoc review upon application to the Court.¹⁵⁰ A review is not required if an application for a new CDO has been made in relation to that offender.

3.152 The Department noted that some States have indicated that an annual review may

- not allow offenders sufficient time to demonstrate changes in behaviour which are indicative of a reduced risk to society, and

¹⁴⁸ AG (QLD) v Lawrence [2011] QCA 347 at [27].

¹⁴⁹ Law Council of Australia, *Submission 4*, p. 21.

¹⁵⁰ Attorney-General’s Department, *Submission 9*, p. 7.

- create difficulties for corrective services and others in terms of their ability to obtain and provide to the Attorney-General current evidence for the purposes of these reviews.¹⁵¹

3.153 The Australian Human Rights Commission emphasised the importance of establishing meaningful, effective periodic review to avoid preventative detention being considered arbitrary in nature. The Commission endorsed the majority view in *Rameka v New Zealand*:

The requirement that such continued detention be free from arbitrariness must thus be assured by regular periodic reviews of the individual case by an independent body, in order to determine the continued justification of detention for purposes of protection of the public.¹⁵²

3.154 The Law Council of Australia considered that, in light of the significant impact that the Bill has upon the rule of law and human rights issues, the Bill should be amended to insert the following protective measures for review proceedings:

- a Court may adjourn the hearing of an application to give the offender an opportunity to obtain legal representation or an independent report or both,
- a Court making a CDO may specify a review date earlier than the 12 month deadline imposed by proposed section 105A.10, and
- the Attorney-General may make an application for review (under the Bill the review must be initiated by the relevant Supreme Court).¹⁵³

Committee comment

3.155 The Committee considers the ability of offenders to access effective, robust appeal mechanisms to be an important feature of the continuing detention regime. The Committee agrees with the Australian Human Rights Commission's view that effective appeal mechanisms protect against arbitrary detention and ensure that the CDO regime is a reasonable,

¹⁵¹ Attorney-General's Department, *Submission 9*, p. 7.

¹⁵² Australian Human Rights Commission, *Submission 8*, p. 8.

¹⁵³ Law Council of Australia, *Submission 4*, p. 22.

necessary and proportionate response to the risk of terrorism faced by the community.

- 3.156 The Committee notes the Law Council of Australia's concern that the extent to which an offender may appeal the initial CDO decision is unclear. There is some ambiguity as to the extent to which a Court of Appeal may reconsider matters of fact during an appeal, despite the Bill characterising it as a 'rehearing.' The Committee notes that while the Bill allows new evidence to be introduced if the Court is satisfied there are 'special grounds' to do so, the Explanatory Memorandum does not indicate what types of factors may be considered special grounds.

Recommendation 14

- 3.157 **The Committee recommends that the Explanatory Memorandum to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to clarify what is proposed by a 'rehearing' as set out in proposed section 105A.17, namely**
- **what matters may be considered within a rehearing, and**
 - **the types of circumstances that would constitute 'special grounds' to allow new evidence to be introduced during a rehearing.**
- 3.158 The Committee notes the Australian Human Rights Commission's statement that periodic review is an important safeguard against arbitrary detention. The Committee also recognises the need to balance regular reviews with allowing the offender, corrective services and other experts a reasonable amount of time to prepare for the review. The Committee considers that the initiation of a review within 12 months of an order being made or the last review being completed, as currently provided for in the Bill, is an appropriate balance.
- 3.159 The Committee notes that the Bill does not explicitly allow the Attorney-General to make an application to the Court to conduct a review of the CDO. Rather, the periodic review is to be initiated by the Court. Equivalent provisions in the existing post-sentence detention schemes in the Northern Territory, Queensland, Victoria and Western Australia all require an application to be made to the Court by the Attorney-General or Director of

Public Prosecutions, within a 12 month period, to cause the review to be initiated. It is unclear to the Committee how the Court-initiated periodic review provided for in the Bill will operate in practice. The Committee suggests that the operation of this provision should be clarified in the Explanatory Memorandum, and, if necessary, in the Bill.

Recommendation 15

3.160 The Committee recommends that the Government clarify the process for the initiation of a periodic review of a continuing detention order in the Explanatory Memorandum, and, if necessary, in the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016.

Alternatives to continuing detention orders

- 3.161 Proposed paragraph 105A.7(1)(c) provides that a Supreme Court may only make a CDO if it is ‘satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk’. A note to the section states that a control order is an example of a less restrictive measure.
- 3.162 Control orders are legislated for under Division 104 of the Criminal Code. Interim control orders are made on application of a senior member of the AFP (with the consent of the Attorney-General) to an issuing court, which may be either the Federal Court of Australia, the Federal Circuit Court of Australia, or the Family Court of Australia. While interim control orders are generally made through *ex parte* proceedings, they are subject to confirmation through contested proceedings in the issuing court.¹⁵⁴
- 3.163 Control orders may be sought for persons who have been convicted of terrorism offences (in Australia or abroad), have trained with a listed terrorist organisation or who have ‘engaged in a hostile activity’ in a foreign country (or supported or facilitated such engagement); or for the purposes of

¹⁵⁴ The Counter-Terrorism Legislation Amendment Bill (No. 1) 2016, which is currently before the Parliament, proposes to remove the Family Court of Australia as an issuing court for control orders.

preventing a terrorist act or preventing support for or facilitation of a terrorist act.¹⁵⁵

- 3.164 The terms of a control order may include prohibiting a person from being in a specified place, leaving Australia, or communicating with specified individuals; or requiring the person to remain at specified places at certain times, wear a tracking device or report to authorities at specified times and places. The issuing court must be satisfied ‘on the balance of probabilities’ that each of the obligations, prohibitions and restrictions imposed by the control order is ‘reasonably necessary, and reasonably appropriate and adapted’ for the purposes of protecting the public from a terrorist act; preventing the provision of support for or the facilitation of a terrorist act; or preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.¹⁵⁶
- 3.165 State and Territory continuing detention regimes for sex offenders and violent offenders also allow the Supreme Court to consider an ‘extended supervision order’ as an alternative to a CDO. Extended supervision orders generally allow for a range of supervision, monitoring and management conditions to be imposed on risk offenders after they are released into the community upon the expiry of their sentence. Conditions may include reporting regularly to a corrective services officer, residing at a specified address, wearing electronic monitoring equipment, and restrictions around who to associate with.¹⁵⁷
- 3.166 Some participants in the inquiry were supportive of the safeguard in paragraph 105A.7(c) of the Bill requiring the Court to consider alternatives to a CDO. For example, the joint councils for civil liberties indicated that, if the Bill becomes law, the provision ‘will be a critical safeguard against excessive imposition of CDOs’.¹⁵⁸ The ANU Law Students Counter-Terrorism Research Group commended the drafters for including the

¹⁵⁵ Paragraph 104.4(1)(c) of the Criminal Code.

¹⁵⁶ Attorney-General’s Department, *Submission 9*, p. 5.

¹⁵⁷ Attorney-General’s Department, *Submission 9*, p. 5.

¹⁵⁸ Joint councils for civil liberties, *Submission 14*, p. 6.

provision. However, the Group argued that the Bill should also include criteria to guide the Court in its assessment against the provision.¹⁵⁹

3.167 Other participants, however, raised concerns that, unlike in the State and Territory frameworks for high risk sex offenders and violent offenders— including the Queensland legislation upheld by the High Court in *Fardon*— there is no capacity in the Bill for the Court to make (as opposed to just consider) a control order or an extended supervision order.¹⁶⁰

Interoperability between CDO and control order regimes

3.168 In his letter referring the Bill to the Committee on 15 September 2016, the Attorney-General noted that the Court would not be able to make a control order as an alternative to a CDO because

the two regimes are distinct with different procedural and threshold requirements (for example, different courts issue control orders, there are different applicants, and different threshold requirements).

3.169 The Attorney-General made the following suggestion as to how the Committee should approach this issue:

The Independent National Security Legislation Monitor and the Committee will conduct reviews into the control order regime by 7 September 2017 and 7 March 2018 respectively, which are likely to be relevant to this issue. In light of these proposed reviews, it may be better to defer a detailed consideration of how the control order regime and the regime under the HRTTO Bill might better interact with each other until those reviews occur.

3.170 The Attorney-General's Department expanded on this issue in its initial submission to the inquiry. It noted that, given that the Supreme Court would not be able to make a control order as an alternative to a CDO, the AFP would need to 'separately request an issuing court to make an interim control order'. This would 'potentially lead to an undesirable situation in which the offender is subject to two court processes and there is a duplication of effort'. While repeating the Attorney-General's suggestion

¹⁵⁹ ANU Law Students Counter-Terrorism Research Group, *Submission 5*, pp. 12–13.

¹⁶⁰ Associate Professor Nolan, *Submission 13*, p. 7; Australian Human Rights Commission, *Submission 8*, p. 23; Queensland Government, *Submission 15*, pp. 1–2.

that a detailed consideration of these matters be deferred until the reviews by the INSLM and the Committee in 2017 and 2018 respectively, the Department offered two possible options for consideration:

One option is to create extended supervision orders under the proposed regime in the Bill that can be made in the alternative to a continuing detention order. Despite the apparent overlap between control orders and continued detention order regimes, there are nuanced differences in focus of the regimes in terms of the persons and behaviour to be managed. An alternative option is to amend the control order regime so that a control order could be obtained as an alternative to a continuing detention order. Both approaches would give the Court greater flexibility to make appropriate orders for managing the risk to the community posed by terrorist offenders.¹⁶¹

3.171 At the public hearing, AFP Deputy Commissioner National Security, Mr Michael Phelan, expanded on his concerns about the lack of interoperability between the two regimes:

What I am concerned about is that a judge making a decision not to grant an order based on the possibility of a control order being in place, and using that as the reason for not granting such an application, puts a burden on the Australian Federal Police to apply for a control order in that space. I would have thought it was reasonable, in the court of public opinion, that if a judge says, 'I'm not granting one of these orders because the AFP should turn their mind to a control order,' we should have our act together and start doing a control order. The issue for me, then, is that I am running two duplicate processes in two separate jurisdictions ... basically on the same set of facts, running parallel at the same time ...

My submission is: if a judge may be of a mind to dismiss something, because a control order may be granted or applied for, then why not make it part of a holistic process similar to how the state and territories operate with having the equivalent of an ESO, or extended supervision order?¹⁶²

3.172 A similar point was raised in the submission from the Australian Human Rights Commission, which noted that the Court hearing the application for a

¹⁶¹ Attorney-General's Department, *Submission 9*, p. 6.

¹⁶² *Committee Hansard*, 14 October 2016, p. 56.

CDO does not have the discretion to impose a control order if it considers that it would be more appropriate:

In this respect, the regime proposed in the Bill is different to that in every other Australian jurisdiction in which post-sentence preventative detention orders are available. In each of those other jurisdictions, the Court has the option of making a supervision order as an alternative to a continuing detention order.

If the Court hearing an application for a continuing detention order forms the view that a control order would be more appropriate, the safety of the community would be better served by the Court having the power to make that order, rather than making no order at all and relying on a subsequent application for a control order to be made by the AFP.¹⁶³

3.173 In its submission, the Queensland Government noted that its Attorney-General had raised the issue of interoperability between the regimes at the 5 August 2016 meeting of Attorneys-General, noting the practical challenges that would need to be addressed. The submission highlighted the interoperability of applications for continued detention and supervision orders under the *Dangerous Prisoners (Sexual Offenders) Act 2003(Qld)*, and the ‘important role this plays in the effective operation of this regime’.¹⁶⁴

Control orders for persons serving a prison sentence

3.174 In a letter, dated 13 October 2016, the day before the public hearing, the Attorney-General supplemented his earlier advice with the following:

There is, however, a pressing matter which you may wish to consider as part of the current inquiry. As you are aware, under the HRTD Bill, the Court will not be able to make a control order as an alternative to a continuing detention order. This is because the two regimes are distinct with different procedural and threshold requirements. If a Court does not make a continued detention order, the Australian Federal Police (AFP) will need to consider whether to seek a control order. A fundamental practical issue will be the timing of seeking a control order.

¹⁶³ Australian Human Rights Commission, *Submission 8*, p. 23.

¹⁶⁴ Queensland Government, *Submission 15*, pp. 1–2.

The control order regime is premised on an assumption that the persons who may pose a terrorist risk are already in the community. Currently, Division 104 requires the AFP to apply first for an interim control order (so that conditions can be applied to mitigate the risk) before a full hearing to confirm the order (so that the conditions can apply for the full duration of the order). It is unclear whether the legislation would support the AFP applying for a control order while a person is serving a sentence of imprisonment, with the conditions of the control order to apply on release.¹⁶⁵

- 3.175 The Attorney-General encouraged the Committee to explore these issues with the AFP at the hearing on 14 October 2016, and to consider whether appropriate amendments might be pursued to address this issue. The Committee subsequently discussed the matter with witnesses at both the private and the public hearings, and invited supplementary submissions on the issue from some of those in attendance.
- 3.176 A supplementary submission from the AFP and the Attorney-General's Department expanded on the Attorney-General's concern. It noted that, until the 'broader issue of integration is addressed', the AFP would need to run CDO proceedings in a Supreme Court of a State or Territory and the alternative control order proceedings, if required, in the Federal Court or Federal Circuit Court. The AFP would need to ensure that a control order would be available (if necessary) to coincide with the person's release.

The existing control order regime in Division 104 of the Criminal Code arguably allows for control orders to be sought and obtained over persons serving sentences of imprisonment. However, there may be logistical and practical challenges associated with obtaining such orders in cases where a continuing detention order is also being considered.

Division 104 of the Criminal Code does not explicitly allow an application for an interim control order to be made while someone is serving a sentence of imprisonment. In the interests of certainty, and for the avoidance of doubt, it may be prudent to clarify in Division 104 that an interim control can be made while an individual is in prison and that the controls imposed by that order will not apply until the person is released from prison.

¹⁶⁵ The full text of the Attorney-General's letter is at Appendix C.

From the AFP and Attorney-General's Department perspective, clarity on this issue is critical. In practice, if a court does not make a continuing detention order on the basis that a control order would be the least restrictive option available to protect the community, the community would expect that the AFP can apply for a control order and that the process to do so is clear.¹⁶⁶

- 3.177 In its supplementary submission, the Australian Human Rights Commission supported a Court being permitted to make a control order in respect of a person still in detention as an alternative to a CDO, to apply from the date that the person is released from detention.¹⁶⁷
- 3.178 The Law Council of Australia supported a single court process, with the Court being open to make a control order or extended supervision order as an alternative to a CDO. To ensure consistency within Australia's counter-terrorism framework, its preliminary view was that the control order option, rather than an extended supervision order option, would be preferable. However, in order to avoid an increase in applications for continued detention orders in the first instance rather than sole applications for control orders, the Law Council recommended that the Attorney-General should be required to be satisfied in an application for a continued detention order that there is no other less restrictive measure that would be effective.¹⁶⁸
- 3.179 The Law Council also considered that the scheduled reviews of the control order regime 'should be brought forward, prior to the enactment of the Bill, so that the control orders, preventative detention orders and [CDOs] can be harmonised and form a consistent counter-terrorism framework'.¹⁶⁹

Committee comment

- 3.180 The Committee notes the complexity of the two regimes operating through separate court processes and the limitations in the capacity of either process to consider the entire gradation in the levels of control that could be applied to a terrorist offender. These complexities need to be considered in a more

¹⁶⁶ Attorney-General's Department and Australian Federal Police, *Submission 9.1*.

¹⁶⁷ Australian Human Rights Commission, *Submission 8.1*, pp. 8–9.

¹⁶⁸ Law Council of Australia, *Submission 4.1*, p. 4.

¹⁶⁹ Law Council of Australia, *Submission 4.1*, p. 3.

comprehensive and integrated manner. Amendments aimed at better integrating the two regimes could reduce the duplication of effort inherent in the currently proposed arrangements while also enhancing the proportionality of the CDO regime. The Committee also notes the support of the Law Council of Australia and the Australian Human Rights Commission for a single court process for the making of CDOs (or extended supervision orders) and control orders, as was suggested by the Attorney-General's Department.

- 3.181 The Committee notes that control orders may be issued for a variety of purposes, including for preventative purposes, which enable early intervention to, for example, encourage deradicalisation and stop a person from associating with members of a violent group; as well as post-sentence purposes, where the person involved has been convicted of a terrorism offence. It is understood that all control orders issued in recent years have fallen into the former category, and a number of legislative reforms to the control order regime introduced since 2014 have been directed toward these purposes.
- 3.182 Given these differing purposes, an appropriate solution to the interoperability issue could be that, in the first instance, the application processes for the existing control order regime be retained for preventative cases. In addition, a separate application process could be introduced for post-sentence control orders that aligns more closely to the CDO regime. The Committee suggests that consideration is given to these options.
- 3.183 Significantly, the INSLM is required to review the control order regime (in addition to other legislation) by 7 September 2017, and the Committee is required to review the same legislation by 7 March 2018, ahead of current sunset clauses in the legislation coming into effect on 7 September 2018. The Committee accepts the Attorney-General's suggestion that these reviews provide an opportunity to more broadly consider the interoperability between the two regimes and the complexities that may arise. Between now and when those reviews commence, the Committee recommends that the Attorney-General's Department give further consideration to the interoperability issues raised in this inquiry with a view to developing a preferred solution.

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- 3.184 The Committee notes that, of the 16 persons currently serving a sentence of imprisonment for an offence within the scope of the regime, the earliest head sentences expire in 2019 – well after the reviews are completed. While the non-parole periods for some of these offenders may expire earlier than 2019, it is unlikely that any offender who is liable to meet the threshold for a CDO would be successful in obtaining early release on parole. As such, the Committee is not convinced that there is a need to urgently bring forward its review of the control order regime.
- 3.185 In regard to the discrete issue of clarifying in the legislation whether a control order may be sought for a person who is currently serving a sentence of imprisonment, the Committee acknowledges the need for clarity and supports this matter being explicitly addressed in the control order legislation.

Recommendation 16

- 3.186 **The Committee recommends that, for the avoidance of doubt, the Government should amend Division 104 of the Criminal Code to make explicit that a control order can be applied for and obtained while an individual is in prison, but that the controls imposed by that order would not apply until the person is released.**
- 3.187 **The Committee further recommends that the Government consider whether the existing control order regime could be further improved to most effectively operate alongside the proposed continuing detention order regime. Any potential changes should be developed in time to be considered as part of the reviews of the control order legislation to be completed by the Independent National Security Legislation Monitor (INSLM) by 7 September 2017 and the Parliamentary Joint Committee on Intelligence and Security (PJCIS) by 7 March 2018.**

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

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.

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

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

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

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.

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 of 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.

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.

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- 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

A. List of submissions

- 1 Professor Ben Saul
- 2 Civil Liberties Australia
- 3 Australian Lawyers Alliance
- 4 Law Council of Australia
 - 4.1 Supplementary
- 5 ANU Law Students Counter-Terrorism Research Group
- 6 Dr Rebecca Ananian-Welsh, Dr Nicola McGarrity, Dr Tamara Tulich and Professor George Williams
- 7 Ms Jacinta Carroll
- 8 Australian Human Rights Commission
 - 8.1 Supplementary
- 9 Attorney-General's Department
 - 9.1 Attorney-General's Department and Australian Federal Police
 - 9.2 Attorney-General's Department
 - 9.3 Attorney-General's Department

- 10 Lebanese Muslim Association
- 11 Muslim Legal Network (NSW)
- 12 Human Rights Watch
- 13 Associate Professor Mark Nolan
- 14 Joint councils for civil liberties
- 15 Queensland Government
- 16 Victorian Bar Human Rights Committee
- 17 NSW Government
- 18 Northern Territory Government

B. Witnesses appearing at public and private hearings

Friday, 14 October 2016 (public hearing)

Parliament House

Canberra

Attorney-General's Department

Ms Jamie Lowe, Acting Deputy Secretary

Mr Anthony Coles, Assistant Secretary

Ms Julia Galluccio, Principal Legal Officer

Australian Federal Police

Deputy Commissioner Michael Phelan

Assistant Commissioner Neil Gaughan, National Manager Counter Terrorism

Mr Peter Whowell, Manager, CT Engagement/Operations Support

Ms Elsa Sengstock, Coordinator, Legislation Program

Australian Human Rights Commission

Mr Edward Santow, Human Rights Commissioner

Mr Graeme Edgerton, Senior Lawyer

Individuals

Dr Tamara Tulich

Dr Rebecca Ananian-Welsh

Joint councils for civil liberties

Dr Lesley Lynch, Vice-President, NSW Council for Civil Liberties

Mr Michael Cope, President, Queensland Council for Civil Liberties

Law Council of Australia

Mr S Stuart Clark AM, President

Dr David Neal SC, Member, National Criminal Law Committee

Dr Natasha Molt, Senior Legal Advisor, Policy Division

Muslim Legal Network (NSW)

Mr Zaahir Edries, President

Ms Rabea Khan, Executive Member

Friday, 14 October 2016 (private hearing)

Parliament House

Canberra

Attorney-General's Department

Ms Jamie Lowe, Acting Deputy Secretary

Mr Anthony Coles, Assistant Secretary

Ms Julia Galluccio, Principal Legal Officer

Australian Federal Police

Deputy Commissioner Michael Phelan

Assistant Commissioner Neil Gaughan, National Manager Counter Terrorism

Mr Peter Whowell, Manager, CT Engagement/Operations Support

Ms Elsa Sengstock, Coordinator, Legislation Program

C. Letter from the Attorney-General dated 13 October 2016



ATTORNEY-GENERAL

CANBERRA

13 October 2016

Michael Sukkar MP
Chair
Parliamentary Joint Committee on Intelligence and Security
Parliament House
CANBERRA ACT

Dear Chair

A handwritten signature in blue ink that reads "Michael".

I am writing to you regarding the Parliamentary Joint Committee on Intelligence and Security (the Committee) inquiry into the provisions of the *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (the HRTO Bill).

Previously, I wrote to you regarding the interaction between the regime under the HRTO Bill and the control order regime in Division 104 of the *Criminal Code Act 1995*. In that letter, I suggested that detailed consideration of how the two regimes might better interact with each other could be deferred for consideration by the reviews of the control order regime by the Independent National Security Legislation Monitor and the Committee on 2017 and 2018 respectively.

There is, however, a pressing matter which you may wish to consider as part of the current inquiry. As you are aware, under the HRTO Bill, the Court will not be able to make a control order as an alternative to a continuing detention order. This is because the two regimes are distinct with different procedural and threshold requirements. If a Court does not make a continued detention order, the Australian Federal Police (AFP) will need to consider whether to seek a control order. A fundamental practical issue will be the timing of seeking a control order.

The control order regime is premised on an assumption that the persons who may pose a terrorist risk are already in the community. Currently, Division 104 requires the AFP to apply first for an interim control order (so that conditions can be applied to mitigate the risk) before a full hearing to confirm the order (so that the conditions can apply for the full duration of the order). It is unclear whether the legislation would support the AFP applying for a control order while a person is serving a sentence of imprisonment, with the conditions of the control order to apply on release.

I would encourage you to explore these issues with the AFP when they appear before the Committee at the hearing on 14 October 2016, and consider whether appropriate amendments might be pursued to address this issue.

Yours faithfully

(George Brandis)