

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.