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Supplementary submission to the review of the Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019

Parliamentary Joint Committee on Intelligence and Security

Attorney-General's Department

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Review of the Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019

Introduction

At the public hearing on 27 August 2019 on the Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019 (the Bill), the Committee requested the Attorney-General's Department (the department) provide a further submission to clarify the application of the legislative amendments to the current terrorist offender cohort, and additional information relating to proposed changes to the bail and parole arrangements.

The department notes separate information will be provided to the Committee by the Department of Home Affairs in an unclassified and classified format on the current terrorist cohort. The department does not propose to provide specific details of individuals in this submission, noting this will be addressed separately and in a classified format, mindful of avoiding actual or perceived prejudice to any future decision-making processes and relevant court proceedings, including parole decisions or treatment and rehabilitation options.

Amendments to CDO eligibility criteria

As mentioned in the department's submission of 22 August 2019 and the Attorney-General's media release of 1 August 2019, eleven terrorist offenders may become eligible for a continuing detention order (CDO) from August 2019 - December 2020. This is because their sentences for their eligible terrorism offences expire during this period and a CDO application may be made within the 12 month period before the expiry of those sentences.

Currently, paragraph 105A.5(2)(a) of the *Criminal Code* provides that the Minister for Home Affairs may only apply for a CDO in relation to a terrorist offender not more than 12 months before the end of their sentence for their eligible terrorism offence, at the end of which they would be required to be released into the community.

This means that the Minister for Home Affairs cannot make a CDO application in respect of an offender who has been sentenced for a further non-terrorism offence which is served immediately following their sentence for the eligible terrorism offence (cumulative sentence), or is served concurrently with their sentence for the eligible terrorism offence and concludes after their sentence for the eligible terrorism offence.

The Committee sought clarification as to how many of the 52 terrorist offenders, including the eleven eligible for release in the next 18 months, may not be eligible for a CDO because they are serving a concurrent or cumulative sentence for a non-terrorism offence. If *any* of the current 52 terrorist offenders, including the eleven offenders who become eligible for release over the next 18 months, were to commit a further offence under the current provisions, those offenders could become ineligible for the purposes of the HRTO scheme. It is desirable to address this gap as soon as possible to ensure the loophole is not misused to avoid eligibility for a CDO under the HRTO scheme.

To address this gap in the HRTO scheme, Part 1 of Schedule 2 of the Bill will amend Division 105A of the *Criminal Code* to provide that a 'terrorist offender' also includes an offender who is serving, concurrently or cumulatively with their sentence for an eligible terrorism offence, a further sentence of imprisonment for another Commonwealth, state or territory offence and the sentence of imprisonment for the further Commonwealth, state or territory offence concludes after the sentence of imprisonment for the eligible terrorism offence.

Further, the proposed amendments in the Bill relating to the protection of sensitive national security information also operate to ensure that eligible terrorist offenders, including the eleven offenders who will become eligible in the next 18 months, can properly be considered for a CDO. These amendments bring the options for protecting sensitive national security information contained in an application for a CDO into line with the protections available in other proceedings, whether criminal or civil. By ensuring that the information that must be given to a terrorist offender in a CDO application is subject to any protective orders made by the court, the amendments enhance the ability of the Minister for Home Affairs to properly consider offenders for CDO applications in circumstances where sensitive national security information is involved. Currently, if the Minister for Home Affairs was concerned that certain exculpatory information that must be provided would lead to sensitive national security information being disclosed and jeopardising the safety of human sources or disclosing law enforcement capabilities, the only options the Minister for Home Affairs has would be not to consider a CDO or risk sharing information that has significant national security implications, including the safety of individuals.

Application provisions – Part 3 of the Bill

The Committee also sought further information on how the Bill would apply to current terrorist offenders. If the legislation is enacted, the department confirms that these amendments will apply to the current terrorist offender cohort provided these offenders are still detained in custody for a Commonwealth, state or territory offence at the time the legislation passes. Item 17 of Part 3 of the Bill provides the relevant clarification.

The application of these amendments to current terrorist offenders is appropriate. The HRTO scheme is preventative in nature and seeks to ensure the safety and protection of the community by providing for the continuing detention of high risk terrorist offenders where an individual offender is assessed by a court at the end of their period of imprisonment as posing an unacceptable risk of committing a serious Part 5.3 offence if released into the public. In making a CDO, the court would also consider the safeguards already guaranteed under Division 105A of the *Criminal Code*. These include:

- the court must be satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk before making a CDO (paragraph 105A.7(1)(c) of the *Criminal Code*)
- the making of a CDO is a judicial process subject to civil rules of evidence and procedure (sections 105A.7, 105A.8 and 105A.13 of the *Criminal Code*)

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- a CDO is appealable as of right within 28 days of the decision, and by leave, within such further time as the court of appeal allows (section 105A.17 of the *Criminal Code*), and

- a CDO is subject to annual review, and the terrorist offender can seek review of a CDO sooner where new facts or circumstances justify reviewing the order, or where it is in the interests of justice to review the order (sections 105A.10 and 105A.11 of the *Criminal Code*).

Request for information about the Bill

The department did not receive any request from Ms Viellaris for information in relation to the Bill – or in relation to any of the matters referred to in the Attorney-General's press release – in advance of the Attorney-General issuing his press release on 1 August 2019.

The department is unaware of any request made directly to the Attorney-General or his office. It would be appropriate to refer that question to the Attorney-General.

***Bail and parole amendments – amendments to subsection 15AA(3A) of the* Crimes Act 1914**

The Committee asked for clarification whether the amendments to subsection 15AA(3A) of the *Crimes Act 1914* (Crimes Act) relating to appealing decisions of a bail authority only apply to persons under 18, or all persons.

The existing framework allows the decision of a bail authority to be appealed in relation to the granting or refusal of bail on the basis of exceptional circumstances. This ability to appeal is available to a defendant of any age.

Amendments to existing subsection 15AA(3A) are to ensure that the persons covered by the new subsection 15AA(2A), which relate to the expanded scope of presumption against bail, are also able to appeal against a decision of a bail authority in relation to exceptional circumstances. The amendments do not change the position that the ability to appeal the decision of a bail authority is available to a defendant of any age.

Bail and parole amendments – determining exceptional circumstances in relation to persons under 18 years of age

The Committee asked for information regarding the rationale for making community safety a paramount consideration and the best interests of the child a primary consideration when determining whether exceptional circumstances exist in relation to a person under the age of 18 years to justify displacing:

- the presumption against bail in section15AA of the Crimes Act
- the presumption to set a non-parole period at three quarters of the head sentence in section 19AG of the Crimes Act, and
- the presumption against parole in proposed section 19ALB of the Crimes Act.

The package of measures in the Bill implements the Council of Australian Governments' decisions of 5 June 2017 and 5 October 2017 (Special Meeting on Counter-Terrorism), that recognised that "the terrorist threat in Australia remains elevated, and Australia and Australians are viewed as

targets by people who want to do us harm. With the scale and tempo of the threat evolving, so too must our response. Leaders affirmed that we must get this right because the lives of Australians are at risk."[1]

In his *Report to the Prime Minister on the prosecution and sentencing of children for terrorism* the Independent National Security Legislation Monitor (INSLM) considered that the current threat of a terrorist act occurring in Australia remains at the 'probable' level, and this would remain unchanged from some time.[2] Further, as the department noted in the public hearing on 27 August 2019, the INSLM recognised that the terrorist threat includes a risk of children committing terrorism offences[3].

The legislative amendments relating to exceptional circumstances are intended to respond to this recognised terrorist threat while also responding to the concern raised by the INSLM that the interests of children terrorist offenders should be better taken into account at key stages of the criminal justice process.

After considering these factors in relation to the presumption against bail in section 15AA of the Crimes Act, the INSLM recommended that the balance could be struck in the formulation reflected in Recommendation 2a, being "that, in the case of children, and within the exceptional circumstances test, [section 15AA should be amended so that it] expressly provides for additional consideration of the best interests of the child in every case as a primary consideration, and protection of the community as a paramount consideration."[4] The government has decided to implement recommendation 2a of the INSLM report in full and adopt the same exceptional circumstances test in relation to the presumption to set a non-parole period at three quarters of the head sentence in section 19AG of the Crimes Act, and the presumption against parole in proposed section 19ALB of the Crimes Act.

This is intended to reflect the Government's view of the right balance between measures to protect the community from the threat of terrorism, and the need to take into account the interests of children terrorist offenders at the bail, sentencing and parole stages.

[1] Special Meeting of the Council of Australian Governments on Counter-Terrorism, Communiqué, Canberra, 5 October 2017.
[2] Commonwealth of Australia, Independent National Security Legislation Monitor, Children's Report, paragraph 1.9.
[3] *Ibid,* paragraph 1.10.
[4] *Ibid,* p.xxxvi