Australian Human Rights Commission

Human Rights Commissioner
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Our Ref: GDE:2016/349

20 October 2016

Parliamentary Joint Committee on Intelligence and Security
Parliament House
Canberra ACT 2600

Inquiry into the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth)

Thank you for the opportunity to appear at the Committee's hearing in relation to the above Bill on Friday, 14 October 2016.

We have now had the opportunity to review the transcript of that hearing, which was circulated by the secretariat on 17 October 2016. During the hearing, we were asked to take three questions on notice. This letter responds to those questions.

1 Risk assessment tools for violent offenders

On page 16 of the transcript, the following question was asked:

> **CHAIR:** In respect of New South Wales and South Australia, particularly, was there a tool for violent offenders ready to go when those regimes started, or were those tools developed at some point following? My understanding is that they were developed following the commencement of that extension to violent offenders.

Answer:

The *Criminal Law (High Risk Offenders) Act 2015* (SA) commenced on 25 January 2016.

The amendments in New South Wales, which extended the post-sentence preventative detention scheme to violent offences, were introduced by the *Crimes (Serious Sex Offenders) Amendment Act 2013* (NSW). These amendments commenced on 19 March 2013.

In May 2012, the New South Wales Sentencing Council provided a report to the New South Wales Attorney General titled *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options*. One of the recommendations of that report was that the government should introduce a continuing detention and extended supervision scheme for high-risk violent offenders, subject to the safeguards and support structures outlined in the report (Recommendation 4).

The report discussed two tools that had been used in assessing the risk of a person committing a violent offence in the future. Those tools were:

- the Historical Clinical Risk Management-20 tool (HRC-20);[1] and
- the Level of Service Inventory – Revised tool (LSI-R).[2]

The report relevantly said:

> HRC-20 is a commonly used SPJ [structured professional judgment] tool that provides clinicians with a list of 20 risk factors for assessment, including 10 historical factors, 5 clinical factors and 5 risk management factors. It results in a final judgement of low, medium or high risk, based on the rating of each risk factor and the degree of intervention required to manage the identified risks.
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> …
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> Some tools focus heavily on identifying criminogenic needs, by assessing a wide variety of dynamic factors. A strong needs-based predictor of recidivism among certain offender populations is the LSI-R assessment, which is extensively used in a number of jurisdictions, including NSW.
>
> The LSI-R assesses 54 items, many of which are dynamic risk factors and determines the needs which are most associated with offending behaviour and require priority interventions. This enables specific targeting of resources to the areas where offenders most need intervention. The heavy focus on criminogenic needs can assist in changing the dynamic risk factors and reducing the probability of offending.[3]

In making reference to these tools, the report cited the following articles:

- K Douglas and J Ogloff, 'The Impact of Confidence on the Accuracy of Structured Professional and Actuarial Violence Risk Judgements in a sample of Forensic Psychiatric Patients' (2003) 27(6) *Law and Human Behaviour* 573.

- J Ogloff and M Davis, 'Assessing Risk for Violence in the Australian Context' in D Chappell and P Wilson (Eds), *Issues in Australian Crime and Criminal Justice* (2005) 294.

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1 See http://hcr-20.com/ (viewed 20 October 2016).
2 See http://www.psychassessments.com.au/Category.aspx?cID=59 (viewed 20 October 2016).
3 NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012), pp 23-24 [2.82], [2.85]-[2.86], at http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Sentencing_Serious_Violent_Offenders/online%20final%20report%20hrvo.pdf (viewed 20 October 2016).

- M Wong, 'The Need Principle: Knowing what to target in offender rehabilitation and how to apply it in corrections' (2012) *Australasian Journal of Correctional Staff Development*.

2 Extended detention of terrorist offenders in the United Kingdom

At page 17 of the transcript, the following question was asked:

> **CHAIR:** … In examining the human rights implications, what are the views of your counterparts in relation to the regime that is applied in the UK, for instance, to this class of terrorist offenders broadly? How have they dealt with the same question? Is there much that we can learn from them swiftly in getting this regime in place and ensuring that those evidentiary issues are dealt with?

Answer:

Over the past decade, there have been a number of changes to the United Kingdom's sentencing regime, which permit a court to impose an additional period of either detention or supervision on licence on an offender for the purposes of protecting the public from a risk of serious harm.

The first such regime was established by the *Criminal Justice Act 2003* (UK) and became available to the courts in April 2005. It permitted a court to impose an indefinite sentence of Imprisonment for Public Protection (IPP) when a person was convicted of a specified violent offence or a specified sexual offence and was found to pose a 'significant risk of serious harm' in the future.[4] Serious harm was defined as 'death or serious personal injury, whether physical or psychological'. Once sentenced, offenders were given a 'tariff' (the minimum period of imprisonment required for punishment and deterrence) but would only be released after that point if they could show the Parole Board that they had reduced their risk to the public.

The scope of offences that were captured by the scheme was wide, covering 95 different offences. There was no minimum sentence in order for the scheme to apply and there was a rebuttable presumption that an offender was dangerous if the person had a previous conviction for a violent or sexual crime. As a result, there was a rapid increase in the number of people receiving an indeterminate sentence, reaching 2,000 people by the end of 2006.[5]

A joint report published by HM Chief Inspector of Prisons and HM Chief Inspector of Probation in September 2008 was critical of the regime. The report noted:

> This report should be required reading for all those within the criminal justice system, but particularly those who propose and put in place new sentences or are responsible for implementing them. It is a worked example of how not to do so. First, the breadth

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4 *Criminal Justice Act 2003* (UK), at http://www.legislation.gov.uk/ukpga/2003/44/contents (viewed 20 October 2016).

5 HM Chief Inspector of Prisons and HM Chief Inspector of Probation, *The indeterminate sentence for public protection: A thematic review* (September 2008), p 2, at http://www.ohrn.nhs.uk/resource/policy/IPP.pdf (viewed 20 October 2016).

> of the definition meant that this expensive and long-term sentence could be, and indeed was, over-used and insufficiently focused on the population for which it was designed. Second, there was no planning or resourcing to ensure that the already overstretched systems into which these prisoners were to be decanted were capable of dealing with them. Third, this created a vicious circle, in which IPP prisoners were both casualties and contributory causes of a severely overcrowded prison system.[6]

The report was also critical of the risk assessment undertaken in an audit of 48 prisoners sentenced to IPP, finding that: 'Risk of harm assessments were deficient in a substantial number of cases, and inaccurate classifications meant that the court was not properly advised as to whether some offenders reached the threshold of dangerousness'.[7]

The range and scope of IPP sentences was restricted in amending legislation in 2008.[8] Key changes were to:

- set a seriousness threshold for the principal offence in order for an IPP sentence to be imposed;
- remove the presumption that an offender was dangerous if the person had a previous conviction for a violent or sexual crime;
- provide greater discretion to the court about whether to impose an IPP sentence.

In January 2010, the list of offences to which the IPP regime applied was expanded to include four offences under the *Terrorism Act 2000* (UK), three offences under the *Anti-terrorism, Crime and Security Act 2001* (UK) and five offences under the *Terrorism Act 2006* (UK).[9] From this point on, the scheme applied to violent, sexual and terrorism offences.

A second report was published by HM Chief Inspector of Prisons and HM Chief Inspector of Probation in March 2010, which contained the result of an audit of 176 cases.[10] In relation to risk assessment, the report found that 38% of assessments conducted were not of a sufficient standard. It noted:

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6 HM Chief Inspector of Prisons and HM Chief Inspector of Probation, *The indeterminate sentence for public protection: A thematic review* (September 2008), p 4, at http://www.ohrn.nhs.uk/resource/policy/IPP.pdf (viewed 20 October 2016).

7 HM Chief Inspector of Prisons and HM Chief Inspector of Probation, *The indeterminate sentence for public protection: A thematic review* (September 2008), p 19 [3.7], at http://www.ohrn.nhs.uk/resource/policy/IPP.pdf (viewed 20 October 2016).

8 *Criminal Justice and Immigration Act 2008* (UK), at http://www.legislation.gov.uk/ukpga/2008/4/contents (viewed 20 October 2016).

9 This amendment was made by the *Coroners and Justice Act 2009* (UK) and included the offences listed at paragraphs 59A to 59D, 60A to 60C and 63B to 63F of Schedule 15 to the *Criminal Justice Act 2003* (UK). A description of these offences is provided below in the text of this letter.

10 HM Chief Inspector of Prisons and HM Chief Inspector of Probation, *Indeterminate Sentences for Public Protection* (March 2010), at http://www.ohrn.nhs.uk/resource/policy/IndeterminateSentencesPublicProtection.pdf (viewed 20 October 2016).

> These assessments were so central to the purpose of the report and the overall judgement of the court, that to find that over one-third were not satisfactory was of considerable concern.[11]

In June 2010, the Prisons Minister noted that there were then 6,000 IPP prisoners and that 2,500 of them were prisoners who had already reached the 'tariff' point at which parole was an option but continued to be detained. He noted that prisons were wholly overcrowded and unable to address offending behaviour and that this was not a defensible position.[12]

Further amendments were made to the *Criminal Justice Act 2003* (UK) by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK).[13] These amendments abolished IPPs and replaced them with an Extended Determinate Sentence framework. This framework allows a court to impose an extended licence period following the expiration of a custodial sentence in order to protect the public from risk of harm. The sum of the custodial term and the extended licence period cannot exceed the maximum penalty applicable for the offence for which the person was convicted.

The UK Sentencing Council describes the new regime in the following way:

> An extended sentence may [be] given to an offender aged 18 or over when:
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> - the offender is guilty of a specified violent or sexual offence;
> - the court assesses the offender as a significant risk to the public of committing further specified offences;
> - a sentence of imprisonment for life is not available or justified; and
> - the offender has a previous conviction for an offence listed in schedule 15B to the Criminal Justice Act 2003 or the current offence justifies an appropriate custodial term of at least four years.
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> These sentences were introduced to provide extra protection to the public in certain types of cases where the court has found that the offender is dangerous and an extended licence period is required to protect the public from risk of harm. The judge decides how long the offender should stay in prison and also fixes the extended licence period up to a maximum of eight years. The offender will either be entitled to automatic release at the two thirds point of the custodial sentence or be entitled to apply for parole at that point.

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11 HM Chief Inspector of Prisons and HM Chief Inspector of Probation, *Indeterminate Sentences for Public Protection* (March 2010), p 20 [4.10], at http://www.ohrn.nhs.uk/resource/policy/IndeterminateSentencesPublicProtection.pdf (viewed 20 October 2016).

12 United Kingdom, *Parliamentary Debates*, House of Commons, 15 June 2010, Column 730 (C Blunt, Parliamentary Under-Secretary of State for Justice), at http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100615/debtext/100615-0002.htm#10061522000454 (viewed 20 October 2016).

13 *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK), at http://www.legislation.gov.uk/ukpga/2012/10/contents (viewed 20 October 2016).

> If parole is refused the offender will be released at the expiry of the prison term. Following release, the offender will be subject to the licence where he will remain under the supervision of the National Offender Management Service until the expiry of the extended period.
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> The combined total of the prison term and extension period cannot be more than the maximum sentence for the offence committed.[14]

The offences currently in schedule 15 of the *Criminal Justice Act 2003* (UK), which are covered by the new Extended Determinate Sentence framework, include a number of terrorism offences, for example:

37	An offence under section 1 of the *Taking of Hostages Act 1982* (c. 28) (hostage-taking).
38	An offence under section 1 of the *Aviation Security Act 1982* (c. 36) (hijacking).
50	An offence under section 9 of the *Aviation and Maritime Security Act 1990* (c. 31) (hijacking of ships).
59A	An offence under section 54 of the *Terrorism Act 2000* (weapons training).
59B	An offence under section 56 of that Act (directing terrorist organisation).
59C	An offence under section 57 of that Act (possession of article for terrorist purposes).
59D	An offence under section 59 of that Act (inciting terrorism overseas).
60	An offence under section 51 or 52 of the *International Criminal Court Act 2001* (c. 17) (genocide, crimes against humanity, war crimes and related offences), other than one involving murder.
60A	An offence under section 47 of the *Anti-terrorism, Crime and Security Act 2001* (use etc of nuclear weapons).
60B	An offence under section 50 of that Act (assisting or inducing certain weapons-related acts overseas).
60C	An offence under section 113 of that Act (use of noxious substance or thing to cause harm or intimidate).
63B	An offence under section 5 of the *Terrorism Act 2006* (preparation of terrorist acts).
63C	An offence under section 6 of that Act (training for terrorism).
63D	An offence under section 9 of that Act (making or possession of radioactive device or material).

[14] Sentencing Council, *Extended sentences*, at https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/extended-sentences/ (viewed 20 October 2016).

63E An offence under section 10 of that Act (use of radioactive device or material for terrorist purposes etc).

63F An offence under section 11 of that Act (terrorist threats relating to radioactive devices etc).

As noted above, the offences listed in paragraphs 59A to 59D, 60A to 60C and 63B to 63F were added to the *Criminal Justice Act 2003* (UK) in early 2010.

A detailed legal description of the current position in the UK in relation to the sentencing of dangerous offenders has been published by the Crown Prosecution Service.[15]

3 Control orders

On page 22 of the transcript, the following question was asked:

> **Mr DREYFUS:** … The Attorney-General, in referring the bill to the committee, suggested that it may not be necessary for the committee to examine the interaction of this proposed scheme with the current control order regime. Late last night the Attorney-General suggested to the contrary: that the committee should look at the interaction with the control order regime. Is that something the Human Rights Commission would be able to make a further submission to the committee about?

As Inquiry Secretary, you provided the Commission with some additional information about this issue, namely, that on 13 October 2016 the Attorney-General wrote to the Committee in the following terms:

> 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 made 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.
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> 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 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.

The Attorney-General then asked the Committee to consider whether appropriate amendments might be pursued to address this issue.

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[15] The Crown Prosecution Service, *Sentencing Dangerous Offenders*, at http://www.cps.gov.uk/legal/s_to_u/sentencing_and_dangerous_offenders/ (viewed 20 October 2016).

Answer:

The Commission's primary submission deals in section 10 with the interaction between the current control order regime and the proposed continuing detention order regime.

The key point made by the Commission is that control orders may only be made by an 'issuing court' (currently the Federal Court, the Family Court or the Federal Circuit Court) while the Bill proposes that continuing detention orders be made by the Supreme Court of a State or Territory.

The fact that different courts are required to deal with each of these regimes means that if the Supreme Court decides that it should not make a continuing detention order because a control order would be more appropriate, a separate application would need to be made by the Australian Federal Police to a different court in order for a control order to be made.

The Commission's Recommendation 9 was that the Committee seek advice from the Attorney-General's Department (AGD) about whether there are any obstacles to a Court, which is considering an application for a continuing detention order, also being granted the power to make orders that would be less restrictive of an offender's liberty.

Similar submissions were made by the AGD. One proposal made by the AGD was to 'amend the control order regime so that a control order could be obtained as an alternative to a continuing detention order'.

In the Commission's view, the safety of the community would be better served by the Court having the full range of powers available to it, so that it can, in a single proceeding, make the most appropriate order if indeed any order should be made. This means giving the Court hearing an application for a continuing detention order the power to make a control order if that would be more appropriate, thereby allowing all issues about any continuing restrictions to be determined in a single hearing. It would also be more consistent with the existing continuing detention order regimes in the States and Territories that have such regimes.

The issue raised in the Attorney-General's letter is slightly different to the one addressed in the submissions by the Commission and the AGD. The Attorney says that 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'. This is said to have the potential to duplicate proceedings for a different reason: namely that an application for a control order may only be made after a person has already been released from detention.

The Commission's submission was focussed on ensuring that, if a court has the power to make a continuing detention order, it also has the power to impose less restrictive measures if they would be effective in preventing the anticipated risk. It would therefore be consistent with the Commission's submission to:

- give to the Court that issues continuing detention orders the power to also make control orders; and

- permit the Court to make a control order in respect of a person still in detention as an alternative to a continuing detention order, to apply from the date that the person is released from detention.

As the Assistant Secretary for the Counter-Terrorism and Intelligence Unit of the AGD noted during the public hearing last Friday, there are amendments to the control order regime that have been proposed in the Counter-Terrorism Legislation Amendment Bill (No. 1) 2016 (Cth) which is currently before the Senate.

One of these amendments deals with the appointment of special advocates to try to address the procedural fairness issues that arise when there is a proposal that a person not be permitted to have access to certain evidence on national security grounds. As I noted in my opening statement to the Committee, the application of these processes to continuing detention order proceedings would need to be considered.

If I can be of any further assistance to the Committee, please let me know.

Yours sincerely

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