

# **Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016**

Submission to the Parliamentary Joint Committee  
on Intelligence and Security

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## Who we are

The Australian Lawyers Alliance is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence. While maintaining our plaintiff common law focus, our advocacy has since expanded to criminal and administrative law, in line with our dedication to justice, freedom and rights.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>

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<sup>1</sup> [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au).

## Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to respond to the *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (the Bill).
2. The Bill allows for the making of continuing detention orders (CDOs) regarding certain individuals in detention, if a court is satisfied to a high degree of probability on the basis of admissible evidence that the individual poses an unacceptable risk of committing a serious Part 5.3 offence, if the offender is released into the community: proposed s105A.7.
3. Proposed s105A.3 states that CDOs can be made in relation to persons who have been convicted of an offence against subdivision A of division 72 (international terrorist activities using explosive or lethal devices), subdivision B of division 80 (treason), a serious Part 5.3 offence (terrorism) or an offence against Part 5.5 (foreign incursions and recruitment) of the *Criminal Code*. If someone is currently serving a prison sentence for one of these offences, or a CDO or interim detention order is in force, the Attorney-General or their legal representative (the applicant) can apply for a CDO in relation to that person.
4. The maximum term for a CDO is three years, to be reviewed on a 12-monthly basis, but there is no limit as to the number of CDOs that can be made in relation to a particular individual. It is possible that this Bill could allow indefinite preventative detention. This is the sort of provision that had its origins in Nazi Germany.<sup>2</sup> It is odious to any civilised society to lock people away after they have completed their sentence. Australia, already a human rights pariah, will lower its colours even further if this Bill becomes law.

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<sup>2</sup> See *Fardon v Attorney-General* (Qld) [2004] HCA 46; (2004) 223 CLR 575, [188] per Kirby J.

5. The ALA has serious concerns about a number of provisions in the Bill. We strongly recommend that the Bill not proceed in its current format, and question whether it would survive legal challenge. If the Bill does proceed, we make a number of recommendations for improvement but be in no doubt the Bill is a pig with lipstick on it.

### Cases contemplating preventive indefinite detention

6. Traditionally, an individual can only be deprived of their liberty if they have been guilty of a crime and sentence to a term of imprisonment by a court:

‘the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt’.<sup>3</sup>

7. Aside from instances of detention in preparation for trial, or ‘in cases of mental illness or infectious disease’,

‘citizens of this country enjoy... a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth’.<sup>4</sup>

8. The idea of preventive indefinite detention is accordingly controversial, although it has been considered favourably by the positivist dominated High Court in recent years. However, the circumstances in those cases differ in two significant ways from

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<sup>3</sup> *Chu Kheng Lim v Minister for Immigration*, (1992) 176 CLR 1, at 27, per Brennan, Deane and Dawson JJ.

<sup>4</sup> *Chu Kheng Lim v Minister for Immigration*, (1992) 176 CLR 1, at 28-29, per Brennan, Deane and Dawson JJ.

those that arise in the Bill. In the case law, individuals sentenced to preventative detention have had histories of committing repeated, brutally violent crime, such as rape and manslaughter. They have also been found to be suffering from ‘mental impairment’ by medical experts, inhibiting their ability to control their behaviour and refrain from further acts of violence.

9. Much of the drafting of the Bill mirrors the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* (the Qld Act). The Qld Act introduced continuing detention orders for prisoners detained for serious sexual offences. Under that Act, if the court considers that the individual in question is a serious danger to the community, by posing an unacceptable risk that they would commit a serious sexual offence if they were released, a continuing detention order can be made near the end of the initial sentence imposed. The Act survived a High Court challenge in *Fardon v Attorney-General for the State of Queensland*,<sup>5</sup> but was found to be in contravention to Australia’s international human rights obligations by the UN Human Rights Committee.<sup>6</sup>
10. The appellant in that case, Robert Fardon, had twice been convicted of rape, the second offence occurring 20 days after his release from prison. He had been unwilling to engage in rehabilitation while in prison and there was a belief that he posed a continuing threat of committing serious acts of sexual violence.
11. In the Court of Appeal, before Fardon’s case reached the High Court, White J specified that the purpose of ongoing detention must be for rehabilitative purposes and that he must be treated while detained, to the extent that he cooperated. Staged reintegration as recommended by a doctor was also required. In the interim, White J allowed his detention to ensure adequate community protection.

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<sup>5</sup> [2004] HCA 46; (2004) 223 CLR 575.

<sup>6</sup> *Fardon v. Australia*, CCPR/C/98/D/1629/2007.

12. While it is understandable why the Bill mirrors some of the drafting of the Qld Act, given the Qld Act has survived a High Court challenge, the Bill also differs from the Qld Act in a number of key respects.
13. 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. The legislation challenged had originated from a state, Queensland, and sought to indefinitely detain individuals who posed an unacceptable risk to the community due to a disorder that meant that they could not control their impulse to cause harm by committing serious sexual assault.
14. Gummow J noted, however, that 'the outcome contemplated and authorised by the [Qld] Act, the making of a continuing detention order under s13, could not be attained in the exercise of federal jurisdiction by any court of a State'.<sup>7</sup> Earlier, he found that 'detention by reason of apprehended conduct, even by judicial determination on a *quia timet* basis, is of a different character [to valid administrative detention, to ensure an accused person is available for trial] and is at odds with the central constitutional conception of detention as a consequence of judicial determination of engagement in past conduct'.<sup>8</sup>
15. Prior to *Fardon*, in *Veen v the Queen (No. 2)*<sup>9</sup> the High Court allowed for a sentence of indefinite detention at the time of sentencing (as distinguished from the time the sentence was due to expire, as in the Qld Act and the Bill). The man sentenced had been convicted of manslaughter on three separate occasions, after similar attacks

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<sup>7</sup> At [106].

<sup>8</sup> At [84].

<sup>9</sup> (1988) 164 CLR 465.

on men involving multiple stab wounds. He was initially charged with murder, with the charges changed to manslaughter for reasons of ‘such abnormality of mind... as substantially impaired his mental responsibility’.<sup>10</sup> After his third conviction on similar facts, it was held by the majority that an indefinite sentence was appropriate to protect the public as it was ‘now known that the applicant [had] a propensity to kill when he is under the influence of alcohol and under stress’.<sup>11</sup> There was medical evidence to support this finding.

16. The Qld Act also required medical evidence to underpin the making of a CDO.
17. None of these cases provides a precedent for the highly unusual form of detention contemplated by this Bill. As such, the ALA believes that there would be a possibility that detention under a CDO ordered in accordance with the Bill would not survive legal challenge.

## **Evidence relied on in making CDO**

18. In deciding whether to grant the order under the Qld Act, the court is required to have regard to, *inter alia*, reports of two psychiatrists which must indicate the psychiatrists’ assessment of the level of risk that the prisoner will commit another serious sexual offence if released, or if released without a supervision order being made, and the reasons for that assessment. The court must also consider information indicating whether the individual has a propensity to commit serious sexual offences in the future, a pattern of offending behaviour, and efforts by the prisoner to address the cause(s) of the offending behaviour, among other things.

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<sup>10</sup> At 468, per Mason CJ, Brennan, Dawson and Toohey JJ.

<sup>11</sup> *Ibid*, at 470.



19. Evidence required before making a CDO under the Bill is much less onerous. Rather than requiring the reports of two psychiatrists, a ‘relevant expert’ can provide reports. A ‘relevant expert’ is defined as including a registered medical practitioner, psychiatrists, psychologists or ‘any other expert’, so long as they are ‘competent to assess the risk of a terrorist offender committing a serious Part 5.3 offence’: proposed s105A.2.
20. We note here the inherent danger of over prediction of reoffending. On a number of occasions the High Court has warned against courts being involved in what is little more than guess work.<sup>12</sup>
21. There is no requirement under the Bill for the court to consider whether the individual has a propensity to commit Part 5.3 offences in the future. While the expert’s report must consider the pattern or progression to date of behaviour and likely future behaviour, there is no explicit requirement for the court to consider these factors as there is in the Qld Act.
22. It is also useful here to recall the amorphous nature of the offences that the ‘experts’ and the court are being asked to predict. This issue is explored more fully below.

## **Risk of non-violent offences as the basis of indefinite detention**

23. The Bill permits the making of a CDO if an individual poses ‘an unacceptable risk of committing serious Part 5.3 offences [under the *Criminal Code*] if released into the community’: proposed s105A.1.

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<sup>12</sup> *Kable v DPP (NSW)* [1996] HCA 24; (1996) 189 CLR 51 at 122-123 per McHugh J; *Veen v The Queen* [1979] HCA 7; (1979) 143 CLR 458 at 463-465 per Stephen J; *McGarry v The Queen* [2001] HCA 62; (2001) 207 CLR 121 at 141-142 [61] per Kirby J.

24. Other than s101.1 of the *Criminal Code*, which prohibits engaging in a terrorist act, and thus may involve violence, none of the offences in Part 5.3 are violent in nature.
25. The term ‘terrorist act’ is defined in the *Criminal Code* in s100.1. According to that definition, a terrorist act may involve violence, including catastrophic and widespread death, injury or property damage. It may also be completely non-violent. It may comprise a property offence posing no risk to individuals, or a risk to health and safety that has no possibility of materialising.
26. We note that this definition – absurdly broad – would have seen those Australians who supported Nelson Mandela’s African National Congress go to jail if this law had been in place in the 1970s and 1980s.
27. Other offences under Part 5.3 are very broad. It would be possible to commit them with no intention to do any harm on an individual or individuals. The risk that someone might commit a Part 5.3 offence does not equate with a risk that a terrorist act would occur, nor indeed to a risk that harm to an individual, property or infrastructure might arise.
28. This contrasts starkly with the Qld Act, in which the risk that must be assessed is of a serious sexual crime being committed. It is clear that if this risk were realised, very real and immediate damage would befall the victim. While there is no doubt that the intention of the Bill is to avoid any damage to individuals or property, it is drafted much more broadly.
29. As currently drafted, the Bill permits indefinite detention to avoid non-violent crimes that have no potential to cause any damage to people or property.
30. Sections 101.4 (possessing things connected with terrorist acts) and 101.5 (collecting or making documents likely to facilitate terrorist acts) contain offences that are committed if an individual possesses a thing connected with, or collects or makes a document likely to facilitate, terrorist acts. If the individual knows of the connection,

the maximum penalty is 15 years imprisonment. If they are reckless as to the connection, the maximum penalty is 10 years.

31. If recklessness is proved, the accused has a defence if they can show that they did not intend to facilitate the preparation for, engagement of a person in or assistance in a terrorist act. However, the defendant bears the evidential burden in showing the absence of this intention. This shifting of the burden increases the likelihood that an individual will be wrongly convicted of a crime that they did not commit, even a crime as broad as those found in Part 5.3. The obvious difficulty in demonstrating the absence of an intention adds to this risk.
32. The ALA does not believe that indefinite preventative detention is appropriate in any circumstances and we wonder at the commitment to democratic values of those who sanction such evil. In particular, we question how it could be considered appropriate to indefinitely detain someone due to a risk that they might commit a property crime, or they might possess a thing or make a document related to terrorism but which actually poses no risk to the health and safety of any individual. To further require a court to assess whether an individual is liable to fall foul of such a provision, and make the individual concerned liable for indefinite detention if such an assessment is made, invites injustice into the Australian justice system.

## **The use of undisclosed evidence: civil proceedings and detention**

33. The proposed s105A.13 specifies that the rules of evidence and procedure for civil matters are to be applied during CDO proceedings.
34. In applying for the CDO, the applicant is required to give the offender a copy of the application that is the basis of the request. However, under proposed s105A.5(5), this requirement does not apply if any of the information included in the application if the Attorney-General is likely to:

- a. seek a certificate under the civil proceedings provisions of the *National Security Information (Criminal and Civil Proceedings) Act 2004*;
  - b. make arrangements under s38B of that Act (allowing for the Attorney-General and the defendant to make arrangements for the handling of national security information);
  - c. make a claim of public interest immunity; or
  - d. seek an order of the court preventing or limiting disclosure of the information.
35. Under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act), different protections exist regarding the withholding of evidence for national security reasons. If proceedings are characterised as criminal, the court must consider whether orders made in relation to non-disclosure certificates would have ‘a substantial adverse effect on the defendant’s right to receive a fair hearing, including in particular on the conduct of his or her defence’: s32(7)(b). While the greatest weight must be given to any risk to national security, s32(7)(b) is an important protection for defendants, who are at risk of being convicted and sentenced to a term of imprisonment on the basis of evidence they have not seen and thus have been unable to challenge.
36. Where proceedings are characterised as civil under the NSI Act, this protection does not exist. In those proceedings, courts are only required to consider whether an order ‘would have a substantial adverse effect on the substantive hearing in the proceeding’, according to s38M(7)(b). The same priority is given to any risk to prejudicing national security.
37. As it is currently drafted, this Bill allows evidence to be considered by a court in deciding whether to grant a CDO which the individual concerned has not seen and thus has not had an opportunity to examine or refute.

38. The fact that an individual could be convicted of a crime and sentenced to a term of imprisonment without seeing all of the evidence against them and having an opportunity to respond to or refute that evidence is a matter of great concern to the ALA. Section 32(7)(b) of the NSI Act offers a small but important added protection to individuals who are the subject of federal criminal proceedings, in recognition of the fact that the repercussions for the individual of an adverse finding are particularly serious.
39. The possibility that an individual could be subjected to a CDO, based on evidence that they have not seen, without the court being required to consider ‘the defendant’s right to receive a fair hearing, including in particular on the conduct of his or her defence’, poses an unacceptable risk to the operation of justice in Australia. While the court always retains the discretion to stay or dismiss a matter where a fair hearing is not possible, the characterisation of the matter as civil could change the nature of the protection this discretion affords.
40. These proposed exceptions have the potential to seriously undermine the offender’s right to a fair hearing in the assessment of a CDO. It is possible that an individual could be first convicted and later subjected to indefinite detention on the basis of evidence that they have not seen or had an opportunity to explain or refute.
41. Conviction of a crime and detention for any term on the basis of secret evidence is unacceptable. Continuing indefinite detention, where there is no suggestion that the individual has a history of violence or is likely to be violent in the future, is an outrage.
42. Conversely, the Qld Act is clear that ‘ordinary rules of evidence apply’, subject to a requirement to hear evidence called by the Attorney-General and evidence given or called by the prisoner, if they elect to provide it. There is no provision for any evidence to be considered by the court but withheld from the affected individual. If

preventative detention is to be allowed, the safeguard of having access to all of the evidence should be considered fundamental.

## **Characterising CDOs as administrative detention**

43. The provisions of this Bill seek to navigate an unclear line between administrative and criminal detention. Administrative detention arises where detention is ordered by the executive for administrative purposes such as immigration detention or community protection (for quarantine purposes, for example). More commonly, criminal detention is available where an individual has been found guilty of a crime and sentenced by a duly constituted state or federal court.
44. The basis of this characterisation appears to be protection of members of the community.
45. The Bill makes it clear that individuals detained pursuant to a CDO are 'not serving a sentence of imprisonment' in proposed s105A.4(1), and their conditions of detention are to be altered accordingly. The procedures by which the evidence underpinning the order of a CDO is assessed for national security purposes are the civil, rather than criminal, as discussed above. These elements suggest that the Bill is seeking to detain individuals under CDO outside of the usual criminal process.
46. However, CDOs are ordered by courts established by the Constitution, which must exercise judicial powers in line with their responsibilities thereunder. It is unclear what the precedent is for courts making orders for administrative detention in this manner.
47. Alternatively, if the detention is to be characterised as criminal, it is unclear on what basis a lower standard could be applied in making CDOs than is required for other crimes to which the NSI Act applies.

48. Given that CDOs can be made for anticipated non-violent crimes, it is hard to see a strict community protection purpose. While proponents of the Bill indicate that CDOs would be available to prevent terrorist acts, the drafting is significantly broader than that. In fact it is difficult to find any intention behind the detention other than a punitive, or potentially rehabilitative, one: both purposes for detention of individuals convicted of crimes. If this characterisation is accepted, then the rules of evidence and procedure that are appropriate are of a criminal standard. It is not possible to prove beyond reasonable doubt that a future event will occur.
49. In *Fardon*, Gummow J was clear that, ‘while the outcome contemplated and authorised by the [Qld] Act, the making of a continuing detention order under s13, could not be attained in the exercise of federal jurisdiction by any court of a State’.<sup>13</sup> This finding was not determinative in that case, however, as the issue for the court was whether a state law was requiring the Supreme Court to perform a function that was repugnant to its status as a Chapter III Court under the Constitution. Were the law in question a federal law, according to Gummow J the outcome is likely to have been different.
50. The reality is that this Bill seeks to impose a criminal penalty on someone who has been convicted of committing a crime, with none of the necessary protections required when the state deprives an individual of their liberty. This is unacceptable and as Kirby J noted (see footnote 2, above) it is legislation out of the statute book of Nazi Germany.

## Predicting future actions

51. In assessing whether a CDO should be granted, a court will have to consider whether an individual is likely to commit Part 5.3 offences in the future. If, according to

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<sup>13</sup> At [106].

proposed s105A.7(1)(b), the court 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 they are released, and that there is no other less restrictive measure that would be effective in preventing the unacceptable risk, it may make a CDO.

52. The amorphous nature of the crimes that the court is being asked to predict are particularly concerning, as outlined above.
53. These provisions can also be contrasted with those in the Qld Act. While not supporting the indefinite detention provisions that exist in that Act, it is clear that the predictions of future offending fulfil particular criteria. Two psychiatrists are required to report, indicating their assessments of the level of risk that the prisoner will commit another serious sexual offence as outlined above. The psychiatrists must have access to medical, psychiatric and other reports available.
54. In contrast, this Bill allows for an 'expert' to make this prediction. As noted above, the Bill does not specify what expertise such an 'expert' would have, meaning it is unclear how rigorous the framework for making this assessment would be.
55. The dangers of depriving an individual of their constitutional right to liberty based on predictions of future offending are clear. In relation to offences where the conviction is based on an individual's recklessness, however, the proposed law becomes farcical. It would effectively require a court to consider whether an individual, with a completely innocent mind and no intention to cause harm, might find themselves in a situation where they have not considered the possibility that a 'thing' in their possession could be connected with a terrorist act. Given virtually any 'thing' could be used in a terrorist act (as there is no standard as to how close that connection must be, so long as it is connected with preparation, engagement in or assistance in a terrorist act), the individual concerned would have to consider this



possibility with every 'thing' that came into their possession. Similar consideration would be required for every document that they collect or make.

56. If the court was satisfied to a high degree of probability that such consideration would not occur, they would under proposed s105A.7 be able to make a CDO. If the court was satisfied that such consideration had not occurred, it appears that it would then be up to the individual to show that no terrorist intent existed.
57. While the court is required to be satisfied that no other less restrictive measure would be effective in preventing the unacceptable risk that such an offence might take place under s105A.7(c), the fact remains that the offences themselves are so vague as to capture individuals who pose no actual threat to the safety of others.
58. It is worth setting out the powerful words of Kirby J in *Fardon*, who noted that we have seen preventative detention before, in 1930s Germany:

'Provision was made for punishment, or additional punishment, not for specific acts of proved conduct but for "an inclination towards criminality so deep-rooted that it precluded [the offender's] ever becoming a useful member of the ... community".

This shift of focus in the criminal law led to a practice of not releasing prisoners at the expiry of their sentences. By 1936, in Germany, a police practice of intensive surveillance of discharged criminals was replaced by increased utilisation of laws permitting "protective custody". The German courts were not instructed, advised or otherwise influenced in individual cases. They did not need to be. The basis of the law had shifted from the orthodox to the new, just as here. Offenders for whom such punishments were prescribed were transferred from civil prisons to other institutions, such as lunatic asylums, following the termination of their criminal

sentence. Political prisoners and "undesirables" became increasingly subject to indeterminate detention.<sup>14</sup>

## The rule of law and human rights

59. The rule of law is premised on liberty of the individual. All people are entitled to liberty which cannot be constrained without the judgement of a court in accordance with the law.

60. The proposed laws will be based on predictions of future offending. Needless to say punishing people pre-emptively for predicted actions is fraught with danger. The usual burden of proof for imprisoning people for criminal offences is 'beyond reasonable doubt'. Clearly this burden cannot be met in relation to future activities. As noted by Kirby J in his dissenting opinion in *Fardon*:

'Experts in law, psychology and criminology have long recognised the unreliability of predictions of criminal dangerousness. In a recent comment, Professor Kate Warner remarked:

"[A]n obstacle to preventive detention is the difficulty of prediction. Psychiatrists notoriously overpredict. Predictions of dangerousness have been shown to have only a one-third to 50% success rate. While actuarial predictions have been shown to be better than clinical predictions – an interesting point as psychiatric or clinical predictions are central to continuing detention orders – neither are accurate."<sup>15</sup>

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<sup>14</sup> *Fardon v Attorney-General* (Qld) [2004] HCA 46; (2004) 223 CLR 575, [188]-[189] (references omitted).

<sup>15</sup> References omitted, [124].

61. 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.
62. This Bill is also likely to infringe Australia's obligations under the *International Covenant on Civil and Political Rights* (ICCPR). Article 9 of that Covenant prohibits arbitrary detention: '[n]o one shall be deprived of his [or her] liberty except on such grounds and in accordance with such procedure as are established by law'. According to Article 12, everyone has the right to liberty, which can only be restricted by laws and are necessary to protect national security, public order, public health or morals or the rights and freedoms of others. Article 14 requires that all persons charged with a criminal offence be afforded a fair trial, and to be presumed innocent until proven guilty.
63. Given the detention envisaged by this Bill is based on predictions of future actions, that an individual will commit a non-violent crime that it is difficult to disprove, the ALA believes that it falls foul of the obligation in Article 9. For the same reasons, it is not possible to argue that this Bill proposes restrictions that protect national security or fit within the other exceptions permissible under Article 12. The use of secret evidence, and the reversal of the onus of proof in cases of recklessness, indicates that Article 14 is also infringed by the Bill.
64. The fact that *Fardon* was found to infringe Australia's obligations under the ICCPR by the Human Rights Committee supports these conclusions. In that case, the Committee found:

'This purported detention amounted, in substance, to a fresh term of imprisonment which, unlike detention proper, is not permissible in the

absence of a conviction for which imprisonment is a sentence prescribed by law.<sup>16</sup>

65. It further clarified:

‘The “detention” of the author as a “prisoner” under the [Qld Act] was ordered because it was feared that he might be a danger to the community in the future and for purposes of his rehabilitation. The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science. The [Qld Act], on the one hand, requires the Court to have regard to the opinion of psychiatric experts on future dangerousness but, on the other hand, requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available relevant evidence, the reality is that the Courts must make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise.’<sup>17</sup>

## Double jeopardy

66. In Australia, double jeopardy protections exist in each jurisdiction to prevent individuals from being tried for the same or similar crime more than once. This includes a strong presumption that a sentence imposed should not be increased on appeal.

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<sup>16</sup> *Fardon v Australia*, Human Rights Committee (2010) CCPR/C/98/D/1629/2007, [7.4(1)].

<sup>17</sup> *Ibid*, [7.4(4)].



67. While continuing detention was accepted by the majority of the High Court in *Fardon*<sup>18</sup> as the detention was not for punitive, but rather community protection purposes, it is hard to see how such an argument could be sustained with respect to the current Bill.
68. Offences against subdivision A of division 72 and subdivision B of division 80 already carry a maximum penalty of life imprisonment.
69. If a judge has deemed it appropriate to give the offender less than the maximum sentence, that decision should be respected at the time that the sentence expires. It is not appropriate for the Attorney-General to seek to have the initial sentencing judge's sentence extended by recourse to a continuing detention order. To allow such review would come dangerously close to infringing double jeopardy rules.
70. We further recall the words of the UN Human Rights Committee extracted above at [65]. A CDO is more accurately described as a fresh term of imprisonment based on the same facts for which the initial sentence was handed down. As such, it is likely to infringe double jeopardy protections being seen as additional punishment of an individual for crimes they have already been tried and sentenced for.

## Potential negative repercussions

71. Further, the ALA is particularly concerned that the Bill may in fact exacerbate tensions and compromise the potential to gather valuable intelligence to prevent terrorist acts in the future. If a particular community perceives it is being unfairly targeted for offences against laws that are so broad as to be almost meaningless, and then are continuously detained for a risk that similar offences could be

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<sup>18</sup> *Fardon v Attorney-General* (Qld) [2004] HCA 46; (2004) 223 CLR 575.

committed in the future, the ability to work with that community to gather intelligence and prevent offences is likely to be compromised.

72. Legislation that would allow for CDOs to prevent such offences would be extreme legislative overreach and would allow for significant injustice. It could also lead to further polarisation in the community, as people avoid engaging with law enforcement or intelligence personnel due to the extreme sanctions that might arise if they revealed information that might constitute an offence under Part 5.3. This could in fact make our community less safe, as sources of useful intelligence could evaporate.

## Recommendations

The Australian Lawyers Alliance makes the following recommendations:

- This Bill should not proceed in any form.
- If the Bill proceeds, a number of amendments should be made. These include:
  - Ensure that individuals who might be subjected to a CDO are able to see and respond to all evidence that a court might consider in deciding whether or not to make the Order.
  - Ensure that CDOs are only available if the court considers that a serious violent crime within Part 5.3 is likely to be committed;
  - Ensure that procedures to be followed in court are as close to criminal proceedings as possible, bearing in mind that it is not possible to prove that a future event will happen beyond all reasonable doubt;
  - Ensure that Constitutional Courts are not in a position where they are being asked to impose detention outside of their judicial functions;
  - Ensure that the rule of law and the international human rights obligations that Australia has agreed to be bound by are at all times respected in pursuing CDOs;



- Ensure that the prohibition on being tried and/or sentenced for the same crime more than once is not infringed.
- The Legislature and courts should be mindful of the potential for this Bill to in fact exacerbate the terrorist threat if particular segments of society feel that they are being persecuted under unfair laws.