Queensland Government's Submission to the Federal Government's Parliamentary Joint Committee on Intelligence and Security Inquiry into the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016

The Queensland Government has provided its agreement to the measures proposed in the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (the HRTO Bill) in accordance with the Inter-Governmental Agreement on Counter-Terrorism Laws.[1]

In providing this support the Queensland Government recognises that the paramount objective of the national framework of counter-terrorism laws lies in the protection of our communities. The HRTO Bill addresses the significant risk posed by terrorist offenders, who having served their term of imprisonment, have failed to rehabilitate and continue to pose an unacceptable risk to the community.

The concept of post-sentence preventative detention is now well established in Australian legislation, with most Australian jurisdictions possessing regimes for the post-sentence preventative detention and supervision of high risk sexual, and in some cases, violent offenders as well. In Queensland, the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (*"DPSO Act"*) is an important, and heavily relied on, feature of our public protection model with respect to a particular class of sexual offender. These existing post-sentence schemes were a significant resource in the development of the HRTO Bill.

The expansion of this kind of model to high risk terrorist offenders, however, is unique within Australia. Accordingly, while work to operationalise the HRTO Bill will be greatly assisted by learnings from Australia's existing post-sentence schemes, these learnings will only be helpful to a point. 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 the provision of effective rehabilitation programs, will require intensive development.

On 11 October 2016, the Queensland Government was provided with the Federal Attorney-General's Department draft submission in relation to this Inquiry. This submission canvasses a range of implementation issues associated with the proposed regime. Therefore, it is not proposed to detail such issues in this submission, other than to note that they provide an important context for the amendments the Queensland Government is suggesting could be made to the HRTO Bill as outlined in the following part of this submission below.

In addition, significant issues arise in relation to the interoperability of the proposed scheme and the existing control order scheme under the *Criminal Code Act 1995* (Cth) (*"Criminal Code"*). The Queensland Attorney-General raised these issues in a meeting with the Commonwealth and State Attorneys-General on 5 August 2016. The inability to apply for a control order in conjunction with an application for a continuing detention order is likely to present a number of practical challenges that will need to be addressed. It is understood that the Federal Attorney-General, Senator the Honourable George Brandis QC, specifically

[1] Council of Australian Governments, Commonwealth and States and Territories Agreement on Counter-Terrorism Laws, 25 June 2004.

requested this Committee consider this issue when he referred the HRTO Bill for inquiry. The Federal Government's draft submission to this Committee also articulates the complexities and technical issues involved in reconciling the control order regime with the proposed scheme for continuing detention. At this juncture the Queensland Government highlights the interoperability of applications for continuing detention and supervision orders under the *DPSO Act* and the important role this plays in the effective operation of this regime.

All jurisdictions are aware that successfully addressing these technical and practical implementation issues is vitally important and to this end the Federal Government has put in place arrangements to ensure this work is progressed in time to support the scheme's implementation. The Queensland Government takes this opportunity to reiterate its commitment to working together with its state and territory and federal counterparts to ensure the successful operation of the scheme.

Suggested amendments

This submission now turns to the proposed legislation itself and raises two options which the Queensland Government considers will enhance the future successful operation of the scheme.

Improving the risk assessment process

While the assessment of an offender's future risk of reoffending is at the crux of the new regime, the development of appropriate risk assessment tools, and finding appropriate experts to employ them, is likely to throw up unique and complex challenges. For this reason, the Queensland Government considers it would be prudent to require the Court to have regard to more than one expert testimony in reaching its decision.

Currently, the HRTO Bill allows the Court to appoint one or more relevant experts to conduct an assessment of the risk of the offender committing a serious terrorism offence if the offender is released into the community.[2] Existing Australian regimes for the post-sentence detention and supervision of sexual and violent offenders, however, generally require the court to appoint at least two experts to carry out a risk assessment of the prisoner.[3] Queensland's legislation allows for the Court to make a risk assessment order which authorises the examination of the prisoner by two psychiatrists. The Queensland Government submits that the Committee considers recommending amendments to the HRTO Bill to enhance the risk assessment process, for example, by replicating the process for risk assessment orders under the *DPSO Act*.

It is acknowledged that during the early stages of the operation of the scheme this may create difficulties given the likelihood that the pool of available and appropriately trained experts will be small. Nevertheless, the importance of ensuring a number of opinions are available to the court will act as an important safeguard as potential 'teething' problems with experts and

[2] Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 Schedule 1, cl 105A.6.
[3] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 9, *Dangerous Sexual Offenders Act 2006* (WA) s 14(2), *Crimes (High Risk Offenders) Act 2006* (NSW) s 15 and *Serious Sexual Offenders Act 2013* (NT) s 25(2).

the tools they will apply are addressed. This approach may also have a number of practical benefits. By increasing the demand for relevant experts at the outset of the scheme the number of experts capable of conducting these risk assessments may increase more rapidly and courts should develop a feel for the capacity of the experts and the nature of the evidence they can provide more rapidly than might have otherwise occurred.

A Role of the Queensland Public Interest Monitor

The control order provisions of the *Criminal Code* allow a role for the Queensland Public Interest Monitor (PIM). The PIM must be given a copy of any interim control order that is made, and subsequent notices to confirm, revoke or vary the control order, if the order relates to a person who is a resident of Queensland, or the relevant application was heard or will be heard in Queensland.[4] The PIM has a right of appearance in these applications.[5]

The PIM also plays a substantive role in applications made pursuant to the *Terrorism (Preventative Detention) Act 2005* (Qld) (*"TPD Act"*). Under the *TPD Act*, the PIM must be notified of all applications for initial and final orders and revocations of orders, including prohibited contact orders, and is entitled to be present during the hearing of applications and to question witnesses and make submissions.[6] The PIM also has an obligation to compile an annual report for the Minister in relation to the use of control orders under the *Criminal Code*, and in relation to the use of preventative detention orders and prohibited contact orders under the *TPD Act*. Additionally, where the PIM considers it appropriate, the PIM may give the commissioner a report on noncompliance by police officers with the *TPD Act*.[7]

The PIM exercises an important oversight role in ensuring the public interest is met, in circumstances, where the nature of the powers being exercised are extraordinary and sit outside of traditional legal processes. When speaking to the *TPD Act* in the Queensland Parliament, the former Premier, the Honourable Peter Beattie, discussed the role of the PIM:[8]

> *I have been widely quoted describing these laws as draconian. I do not back away from that. These laws are tough. They are almost unprecedented in our legal system. . . . . I do not wash my hands of the responsibility to act against terrorism where that is needed. In proposing draconian laws, however, I take seriously my responsibility and the responsibility of my government and my colleagues to ensure that every reasonable safeguard is in place. For example, I secured the Prime Minister's agreement to the inclusion of a role for Queensland's Public Interest Monitor, or PIM, in both the Commonwealth control order laws and in Queensland's preventative detention laws. This continues a recent tradition for Queensland of having stronger and better safeguards that do not impair the efficacy of law enforcement. . . . .*

[4] *Criminal Code* (Cth), ss 104.12, 104.14, 104.18, 104.19, 104.23.
[5] *Criminal Code* (Cth), s104.14
[6] *Terrorism (Preventative Detention) Act 2005* (Qld) s 14 (General provisions that apply when the PIM must be notified about an application to the issuing authority).
[7] *Terrorism (Preventative Detention) Act 2005* (Qld) s 86(4)(d).
[8] Hansard (Qld Parliament), Record of Proceedings 22 November 2015, pg 4064 (2nd reading speech).

> *In a civil society, law enforcement powers are strengthened, not compromised, by improving their public accountability and credibility. The PIM, or Public Interest Monitor, is a nationally unique mechanism for doing this at the 'front end' of the process. Other jurisdictions use reactive mechanisms that only apply after the event, such as complaints, inspections and reports. There is no doubt a role for those 'back end' accountability measures, but they are immeasurably enhanced by proactive safeguards like the Public Interest Monitor at the front end. . . . .*

It is submitted that a number of key points arise from the former Premier's observations that are equally applicable in relation to the proposed scheme. This is unprecedented legislation that will have significant repercussions for the individual liberty of persons who are subject to continuing detention orders. Despite existing parallels in post sentence and detention schemes for sexual and violent offenders, the making of an order for continuing detention based on assessment of the risk of the commission of future terrorism offences is without precedent. It goes without saying that sufficient oversight mechanisms will be required to ensure that the public interest in the effective and just operation of the scheme is met. A proactive and front-end oversight mechanism would be a significant safeguard. In addition, the functioning of the PIM does not detract from the effectiveness of either law enforcement or judicial processes but is instead a robust and functional safeguard.

As outlined above, 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. Such consistency is particularly pertinent given the necessarily close relationship between the existing control order regime and the proposed scheme. In making any continuing detention order the court will have regard to the possible application of a control order in determining whether or not any other less restrictive measure would be effective in managing the risk posed by the offender.[9] As discussed above, it is noted that the Committee has been tasked with specifically considering issues surrounding the potential interaction of the two types of orders. Regardless of any recommendations the Committee may determine to make in this regard, the Queensland Government submits that it would be a strange situation for the PIM to be notified and given a right of appearance in relation to an application for a control order for an offender where this application would presumably be based on the same evidence that had been used, or was being used, to support an application for a continuing detention order.

[9] Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 Schedule 1, cl 105A.7.