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Parliamentary Joint Committee on Intelligence and Security Inquiry:

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

[1] I welcome the opportunity to provide a (belated) written submission in response to the presentation of and inquiry into the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) ("the proposed Bill") which aims to establish a regime of continuing detention orders ("CDOs") for "high risk terrorist offenders".

[2] I will be available in Canberra on Friday 14 Oct if the Committee may wish to seek further oral submissions from me in support of elaborating this written submission, though I note a full timetable: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/HRTOBill/Public_Hearings.

[3] I am also happy for my submission to be posted in its entirety to the Committee website to be available at the following URL which is linked to the PJCIS website: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/HRTOBill/Submissions.

[4] I make this submission in my personal capacity and the views expressed herein are not claimed to represent either consensus views of the Australian National University in general or the ANU College of Law in particular.

Academic Background and Scholarly Engagement With the Issue

[5] I am an interdisciplinary scholar whose research, teaching and public intellectual work mentioned in my CV (available at https://law.anu.edu.au/people/mark-nolan) reflects deep interest and expertise relevant to commenting on the proposed Bill.

[6] Most relevant publications include an article I have already emailed to the PJCIS Committee Secretary which was published earlier this year with an Honours student from the ANU College of Law, Ms Charisse Smith, who is also dual trained, like myself, in both law and psychology. That article was published in the Australian *Criminal Law Journal*. That article reinforcing earlier published thoughts on CDO regimes included in the 'Correction Management' chapter (Chapter 9) of an interdisciplinary legal psychological text I have co-authored with Prof Jane Goodman-Delahunty (CSU):

- Charisse Smith and Mark A Nolan, 'Post-sentence Detention of High-Risk Terrorist Offenders in Australia' (2016) 40(3) *Criminal Law Journal* 163-179;
- Mark A Nolan and J Goodman-Delahunty, *Legal Psychology in Australia* (Pyrmont: Thomson Reuters Law Book Co, 2015), pp 379-383.

[7] I have studied, taught and researched (with Honours research students) the operation of the continuing detention schemes for sex and violent offenders in States and Territories of Australia (excepting the ACT and Tasmania). At the 35th Annual Congress of the Australian and New Zealand Association of Psychiatry, Psychology and Law, I wrote, organised, and performed in a mock continuing detention order hearing for a serious sex offender as a conference presentation involving a judge (Justice Debra Mullins, Supreme Court of Queensland), lawyers (including Prof Bernadette McSherry), clinicians and academics.

[8] I have discussed the concept of continuing detention orders for terrorists in the Australian media, including on:

- Laura Jayes Skynews News day on the day of the COAG Communiqué announcement on 11 December 2015; and
- By giving comment on Lateline on 25 July 2016 http://www.abc.net.au/lateline.content/2016/s4507254.htm)

[9] I have presented academic papers at conferences on this topic including at the 27th Annual International Police Executive Symposium, August 8-16 2016, Washington DC http://ipes.info/ and will do so again, in good company of interdisciplinary terrorism scholars and other clinicians and (legal) psychologists at the 36th Annual Congress of the Australian and New Zealand Association of Psychiatry Psychology and Law to be held in Auckland on 23-26 November 2016 https://anzappl.org/wp-content/uploads/2014/09/Registration-and-Program-ANZAPPL-2016-Auckland.pdf

Main Themes Motivating this Submission

[10] The overarching themes motivating my recommendations against aspects of this proposal and suggesting specific reforms are:

(1) the **impact on Australia's international human rights reputation**;

(2) the **feasibility of some of the human rights promises** made by the Bill drafters as explained in the Explanatory Memorandum accompanying the Bill and in some of the Second Reading and other Senate speeches;

(3) the **absence of appropriate rehabilitation (deradicalisation or disengagement) and throughcare programming in Australian prisons** (or any other future places of detention) for offenders charged with and/or serving time for terrorist offences meaning that CDOs,

(4) the **lack of terrorism-specific and validated actuarial or structured professional judgement risk assessment tools** to assist in the clinical or other prediction of dangerousness and/or recidivism risk for convicts serving a sentence of imprisonment for terrorist offences, and/or achieving a national security risk classification (eg. "AA" in NSW) with or without a high level accompanying security designation (such as "Extreme High risk Restricted" in NSW);

Specific Comments and Recommendations

(1) Impact on our international human rights reputation

[10] Many of the human rights concerns (and, for example, concerns about the standard of proof in CDO matters) articulated for years now by Australian lawyers, clinicians and interdisciplinary scholars about Australian CDO regimes continue as reactions I support to the proposed Bill. For example, thorough national and international comparisons have been made in the work produced by Profs Keyser and McSherry. For example, see: Bernadette McSherry & Patrick Keyzer, *Sex Offenders and Preventative Detention: Politics, Policy and Practice* (Annadale: The Federation Press, 2009); Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (Oxford: Routledge, 2014).

[11] In two Communications to the UN Human Rights Committee ("HRC"), Tilman and Fardon complained that the NSW and Queensland sex offender CDO regimes, respectively, breached human rights under the International Covenant on Civil and Political Rights ("ICCPR"; *Tillman v Australia*, UN Doc CCPR/C/98/D/1635/2007 (12 April 2010); *Fardon v Australia*, UN Doc CCPR/C/98/D/1629/2007 (12 April 2010). In reaction to claiming two main ICCPR human rights breaches (arbitrary detention under art 9(1) ICCPR; and double punishment under art 14(7) ICCPR), the HRC found in a 11-2 majority decision three breaches were evident; adding the breach of the ICCPR protection against applying a heavier penalty than that applicable at time of offence effectively imposed (art 15(1), ICCPR).

[12] Available at one time, though difficult to find now on the relevant Commonwealth Attorney-General's Department website https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Humanrightscommunications.aspx , was the Australian Government's response to the UNHRC which was given belatedly in the following terms:

> ". . . in light of the Committee's previous jurisprudence on this issue, preventative detention must serve a legitimate purpose and have a number of safeguards in place . . . the community has a legitimate expectation to be protected from these offenders, and, at the same time, . . . **authorities owe these offenders a duty to try and rehabilitate them** . . . These schemes . . . [attempt] release into the community . . . in a way that is safe and respectful of the needs of both the community, and the offenders themselves." (emphasis added)

Recommendation (1)(a):

A more thorough human rights compliance analysis may be required in light of the specific human rights breaches the majority of the UNHRC outlined in their opinions *Tillman* and *Fardon*.

Recommendation (1)(b):

As noted below, consider if the CDO regime as proposed is faithful to the once-held statement that we "owe . . . offenders a duty to try to rehabilitate them".

Recommendation (1)(c):

Amend the proposed statement of Object of the Act in s 105A.1 to indicate that rehabilitation is a purpose of this CDO regime consistent with earlier statements by the Australian Government in response to the findings of the UN HRC in *Tillman* and *Fardon*.

(2) Feasibility of some of the human rights promises made by the bill drafters as explained in the Explanatory Memorandum accompanying the Bill and Second Reading and other Senate speeches

[13] One concern is that the Explanatory Memorandum to the proposed Bill may overstate the potential to realise adequate human rights compliance as promised. A number of examples of such overstatement are listed below.

[14] **Regarding open justice and disclosure of evidence to the respondent prisoner**, despite the Explanatory Memorandum championing the human rights compliance afforded by open justice disclosure provisions whereby the respondent must receive details of the case that the A-G (Cth) applicant (based on expert risk assessment) has against the prisoner (proposed sub-ss 105A.5(3)-(4)), this may not have to occur. This is because that the perceived national security importance of such information (eg. under *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)), as indicated at proposed s

105A.5(5)(a), and the other grounds listed in proposed s 105A.5(5)(b)-(d) could rob the respondent of full disclosure in CDO hearings.

[15] This means that in some of the proposed CDO hearings and pre-hearing processes relating to the determination of a CDO for a prisoner, the evidence *actually* disclosed to particular respondents may not be the full brief of evidence. This problem may be exacerbated in cases where the sole risk assessor appointed under proposed s 105A.6 is an intelligence officer or other person with security clearance to access sensitive information protected by the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth). That may have been the reality of disclosure of evidence relating to their hearings leading to conviction initially. The question is whether Australia should be prepared to use such disclosure practice in CDO hearings that are argued not to be determinations of criminal liability.

[16] The reality of potential non-disclosure in CDO matters distinguishes the proposed process from existing CDO schemes relating to prisoners serving sentences for serious sex and violent offences. The human rights implications for use of secret evidence in Australian CDO regimes was of course *not examined by the Human Rights Committee in the Tilman and Fardon communications cited above*. Perhaps Australia may need to be prepared for future human rights challenge to the UNHRC on this basis if secret evidence use in CDO hearings becomes problematic or provocative for prisoners otherwise due to be released upon the expiration of their sentences, especially those who served their sentences entirely under Supermax conditions.

[17] The aim that **post-sentence detention under a CDO will be served in a facility where mixing with sentence prisoners is not possible**. This promise is made, subject to exceptions under s 105A.4(2)(a)-(d), in proposed s 105A.4. I find it difficult to imagine that an offender remanded in custody in a Supermax facility, incarcerated there for the entirety of their sentence, and then subject to further CDO detention would be able to be assessed as suitable for transfer out of Supermax detention due to the further risk assessment to be made under proposed s 105A.4(2)(b) and (c). This may be especially the case for a prisoner who has been classified, say in NSW, as an 'AA' prisoner with something like the 'Extreme High Risk Restricted' style of security designation. As noted below, the lack of individually-focused rehabilitation alone, may be enough to expect that many offenders could even elect to remain in Supermax detention pursuant to proposed s 105A.4 (2)(d). It would be beneficial in throughcare terms to attempt socialisation outside of Supermax for rehabilitation purposes as contemplated under s 105A.4(2)(a).

[18] It is noteworthy that "rehabilitation" is mentioned in s 105.4(2)(a) despite it *not* being an object of regime expressed in s 105A.1

[19] However, I was intrigued by revelations broadcast this week on *ABC 730* that Corrective Services NSW are contemplating changes to the sole use of the Supermax facility (Goulburn's High Risk Management Correctional Centre) for remand detention, sentenced incarceration, and, potentially for those subject to CDOs, if that is the upshot of comments made by Commissioner Peter Severin on that program: http://www.abc.net.au/news/2016-10-10/supermax-prison-to-be-overhauled-due-to-radicalisation-fears/7918782. this seems to

suggest a creative rehabilitative focus, rather than mere punative "warehousing" of those charged with or sentenced for terrorism offences with sometimes remote and highly inchoate forms of liability and blameworthiness.

[20] I endorse comments on that program by Shandon Harris-Hogan and by ANU colleague Dr Clarke Jones, and in Jones's published academic work, that *integration of terrorist offenders across prison populations instead of automatic segregation for all stages of detention*, is a superior approach to the incarceration of terrorists. This approach is yet to be trialled in Australia though has been successful elsewhere in criminal justice systems with large populations of offenders charged with and sentenced for terrorist offences (see Jones's published work).

Recommendation (2)(a):

Acknowledge in Committee and Parliamentary discussions that these proposed CDO proceedings, unlike the CDO

Recommendation (2)(b):

Require the judges basing their CDO decisions on secret evidence to acknowledge that source of secret evidence as being influential in their decision to order a CDO.

Recommendation (2)(c):

Allow the Independent National Security Legislation Monitor to review periodically all uses of secret evidence under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) in CDO decision making.

Recommendation (2)(d):

Contemplate making it impossible to order a CDO purely on the basis of secret evidence from an national security intelligence source.

Recommendation (2)(e):

Make every attempt via subordinate legislation or otherwise to separate detainees under CDOs from sentenced or remand prisoners charged with terrorist offences to give them every opportunity to deradicalise and disengage, and, for Australia to honour its human rights promise not to mix remand, sentenced, and, arguably, prisoners detained via civil/administrative detention due to dangerousness under CDO regimes.

(3) Absence of appropriate rehabilitation (deradicalisation or disengagement) and throughcare programming in Australian prisons (or any other future places of detention) for offenders charged with and/or serving time for terrorist offences

[21] The proposed Bill focuses only on the "safety and protection of the community" as the sole object of the regime (proposed s 105A.1). This is despite the fact that the Australian Government earlier promised the HRC that CDO regimes found by the Committee to breach ICCPR rights would be persisted with *because* the regimes are focused on *both* community protection *and rehabilitation of the prisoner* who is detained beyond the expiration of their sentences under CDO regimes (see above at [12]).

[22] A concern relates to the fairness of the risk assessments being based on likelihood to offend (such as participation in rehabilitation programs during incarceration: see proposed s 105A.6(7)(d)(e)) when the level of rehabilitative programming available to likely CDO application respondents is at a very low level; especially compared to the level of rehabilitation available during incarceration to detained sex and violent offenders subject to another CDO regime.

[23] Despite the fact that, say in Corrective Services NSW, there is a form of deradicalisation support provided on a very limited basis in Supermax Goulburn called the Proactive Integrated Support Model (PRISM) being trialed, it may mean that only a few incarcerated offenders under sentence for terrorism, or detained elsewhere for non-terrorist offences but who have become radicalised, may be currently receiving any type for formal deradicalisation of disengagement rehabilitative therapy (the nature of the PRISM service currently on offer to selected inmates in NSW Corrections facilities is described by John Paget, 'Terrorism, Prisons – De-Radicalisation and Disengagement' available at https://www.academia.edu/22533291/TERRORISM_PRISONS_DERADICALISATION_AND_REHABILITATION).

[24] Perhaps the best reaction is to realise that some form of supervision orders (SOs) specifically tailored for released terrorism offenders, *that are not currently designed or being specifically proposed for High Risk Terrorist Offenders under this Bill*, may provide the best solution upon release. As the Preventative Detention Orders (PDOs) and Control Orders (COs) available under the *Criminal Code* (Cth) to detain and monitor people of interest were really designed for very different purposes, it may be an ill-fit to expect that they may be most appropriate orders upon release for a prisoner who is not subject to a CDO.

[25] One concern is that if parole conditions or PDOs or COs are thought to be inadequate for those prisoners serving relevant terrorism sentences who defeat the applications made by the A-G(Cth) for imposition of a CDO, the lack of any other supervision order tailored for High Risk Terrorist Offenders under the proposed regime *may increase the likelihood that a CDO instead of some form of supervision order will be ordered* when to do so is psychologically or otherwise inappropriate for the continued rehabilitation of a terrorism offender.

[26] An important realisation may be that SOs, *and not CDOs*, have been ordered most frequently in the sex offender and violent offender context and may allow for the achievement of better and richer and more targeted individual rehabilitative outcomes (at least disengagement if not deradicalisation).

[27] Recent work by Profs McSherry and Keyser in outlining the unique controversies surrounding such regimes has recently extended to judgments about the efficacy of CDOs *as*

opposed to use of Supervision Orders (P Keyser and B McSherry, 'The Preventative Detention of Sex Offenders: Law and Practice" (2015) 38(2) *UNSW Law Journal* 792). More detailed evaluation along these lines is expected by the forthcoming, though now extended, Harper Review in Victoria (http://www.vic.gov.au/news/harper-review.html; http://www.premier.vic.gov.au/extension-to-harper-review-into-serious-sex-offenders/).

[28] The worst outcome for a multicultural Australia would be that the CDO regime may result in mere warehousing of a class of offenders rather than individual rehabilitative work with particular offenders, including periods of monitored release post-sentence. The lack of release regimes perceived to be fair by radicalised others, perhaps risks further radicalising inmates and their associates and families who are not incarcerated; potentially creating even more radicalisation and a greater risk to the Australian community in the long run.

Recommendation (3)(a):

Increase the level of rehabilitative programming for offenders incarcerated for relevant terrorism offenders prior to and after the ordering of a CDO under the proposed regime.

Recommendation (3)(b):

Contemplate the drafting of Supervision Orders (SOs) for terrorists to add to the proposed CDO regime which are more appropriate to the long-term orders possible under the *Criminal Code* (Cth), such as Preventative Detention Orders and Control Orders.

(4) Lack of terrorism-specific and validated actuarial or structured professional judgement risk assessment tools to assist in the clinical or other prediction of dangerousness and/or recidivism risk for convicts serving a sentence of imprisonment for terrorist offences, and/or achieving a national security risk classification (eg. "AA" in NSW) with or without a high level accompanying security designation (such as "Extreme High Risk Restricted" in NSW).

[29] As has been discussed in Smith and Nolan (2016), the development of actuarial or structured professional judgement clinical assessment tools available globally for use to assess the recidivism risk of a range of offenders incarcerated for a range of types of terrorist activity is in its relative infancy compared with these tools as used in the sex offender and violent offender regimes in Australia. Perhaps risk assessment based solely on such tools used by clinicians will always be at a lower level in CDO regimes applying to terrorist offenders. That may mean that decisions made in CDO hearings effectively default to, often secret, risk assessments made of groups and classes of offenders rather than on the psychological orientations towards offending and the criminogenic thinking of a particular individual prison incarcerated for a relevant terrorism offence.

[30] It seems crucial that highly sound and detailed case management, psychological assessment of recidivism risk, and understanding of protective factors for prisoners serving terrorism offences is understood throughout their incarceration as well as just immediately prior to their scheduled release, or, upon reception to a Supermax facility.

If such a detailed longitudinal understand is not even attempted during incarceration, with the most valid actuarial or structured professional judgment style risk assessment tools, then the legitimacy of some of the risk assessments made under the proposed CDO regime should be doubted.

[31] Risk assessments should be doubted if they are not performed at the level of the individual prisoner, using best practice "structured professional judgment" ("SPJ") clinical assessments that allow actuarial risk assessments at the group or class of offender level to be qualified by clinical knowledge of the individual actually being assessed. Poorer types of risk assessment may, instead, be based on initial group-based and not individual assessments of risk (perhaps solely from group-level security intelligence analysis) rendering the risk assessment more prone to influence by group-level stereotypes of classes of offender rather than by detailed clinical understanding of the risk posed by an individual offender in any social milieu to which they may be released.

[32] Despite the unique challenges existing for those developing risk assessment tools to assess recidivism risk posed by terrorists at all stages of the criminal justice system (See Smith and Nolan, 2016), it is encouraging that there is some Australian involvement by Corrective Services NSW Senior Psychologist Dr John Flockton from the High Risk Management Correctional Centre in Goulburn in developing a terrorism risk assessment tool based on structured professional judgement principles: the Violent Extremism Risk Assessment (Version 2 Revised, 2016, "VERA-2R; http://cep-probation.org/vera-2r-measuring-the-likelihood-of-violent-extremist-action-in-prison/ (see E Pressman, N Duits, T Rinne, and J Flockton, *VERA–2R Violence Extremism Risk Assessment – Version 2 Revised: A Structured Professional Judgement Approach*, Nederlands Institut voor Forensische Psychiatrie en Psychologie, 2016).

[33] Despite some useful revisions and evaluative case-based studies of the VERA over the course of its development, the authors of the versions of the instrument themselves are careful to state that the validation of this instrument is still in progress (see work such as: Elaine Pressman and John Flockton, 'Calibrating Risk for Violent Political Extremists and Terrorists: The VERA 2 Structured Assessment' (2012) 14 *British Journal of Forensic Practice* 237; Nicola L Beardsley and Anthony R Beech, 'Applying the Violent Extremist Risk Assessment (VERA) to a Sample of Terrorist Case Studies' (2013) 5 *Journal of Aggression, Conflict and Peace Research* 4).

[34] Reassuring, too, have been attempts to design Australian "throughcare" programs for offenders incarcerated for terrorism offences (see B Spaccavento, N Dowel, and C Quilkey, 'Custody and Sentence Planning: A Throughcare Model for 'AA' Inmates' (2008) *Australasian Journal of Correctional Staff Development* available at http://csa.intersearch.com.au/csajspui/bitstream/10627/478/1/Custody_and_Sentence_Planning.pdf). This important work must continue alongside any regime that pits post-sentence detention via CDOs, against COs or PDOs under the *Criminal Code* (Cth) or under an new and not-yet-proposed SO designed for offenders released from sentences for terrorism.

[35] In the Australian sex offender CDO regime hearings there have been some recent controversies surrounding the lack of predictive validity of some of the actuarial tools used by Australian clinicians in CDO cases. A strong stance was taken, for example, on the crucial issue of whether the Static-99 tool that is used to predict sex offending recidivism has ever been adequately normed on Australian offender samples and whether it should be used with indigenous Australians (*DPP(WA) v Samson* [2014] WASC 199, [51] following the work of a psychological researcher from the Crime Research Centre at the UWA Dr Caroline Spiranovic) commissioned by the Department of Corrective Services WA).

Recommendation (4)(a):

Continue to develop research and international collaborations to validate the VERA-2R and to norm it on offenders incarcerated in Australia.

Recommendation (4)(b):

Continue to develop specific Throughcare plans for offenders released from incarceration having served the entirety of their sentences for terrorism offences so there are realistic options, beyond CDOs, for the release of these offenders on SOs (to be developed and added to this regime), or, less appropriately in some cases, under COs or PDOs.

Yours sincerely,