SUBMISSION TO PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

BY MEMBERS OF THE VICTORIAN BAR HUMAN RIGHTS COMMITTEE

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

1. This submission is made in their personal capacity by members of the Victorian Bar who are members of the Bar's Human Rights Committee.

2. The Government's intention to enact legislation in the form of the *Criminal Code Amendment (High Risk Terrorist Offenders Bill*) 2016 (Cth) (**Bill**) (amongst other measures) was publicly announced on 25 July 2016 during a joint press conference involving the Prime Minister and the Attorney General.[1] The Bill was introduced in the Senate on 15 September 2016. On that same day, the Attorney-General asked the Parliamentary Joint Committee on Intelligence and Security (**JPCIS**) to inquire into and report on the Bill. The Parliamentary Joint Committee on Intelligence and Security intends to report by Friday, 4 November 2016.

3. The Bill proposes to amend Part 5.3 of the *Criminal Code Act* 1995 (Cth) (**Criminal Code**) to provide for the continuing detention of high risk terrorist offenders who 'pose an unacceptable risk to the community at the conclusion of their custodial sentence'.[2] The Supreme Court is authorised to make a continuing detention order (**CDO**) for no more than three years. [3] However, a successive CDO, commencing immediately after a previous order ceases to be in force, can then be made by the Court[4,] for another period of up to three years.[5]

4. If enacted, the Bill has the potential to result in an offender, whose sentence had been served in full, to be held in detention indefinitely following the conclusion of their sentence.[6] The Bill does not stipulate a maximum number of CDOs that can be made in relation to each offender, or the cumulative maximum number of years for such detention if more than one CDO is made for an offender.

5. **Introduction – more time required**. Public submissions to the JPCIS concerning the Bill closed on 12 October, 2016. Given the importance of the subject-matter and the detail and complexity of the proposals, the time available for comment is

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[1] https://www.pm.gov.au/media/2016-07-25/joint-press-conference

[2] A CDO may only be made upon application by the Commonwealth Attorney-General. The application must be made prior to the end of the offender's custodial sentence or any earlier Order. The Court will have power to make an interim detention order if an application for a CDO has been made; the person's custodial sentence or earlier Order would end before the application can be finally determined; and the Court believes that the matters asserted in the application would, if proved, justify the making of a CDO.

[3] Proposed s. 105A.7(5).

[4] The CDO is subject to 12 monthly review by the Court; see s. 105A.10(1).

[5] Proposed s. 105A.7(6).

[6] The CDO can only be made after the Court has been satisfied of each of the elements set out in proposed section 105A.8. The Attorney-General carries the burden of proving the requisite elements: s 105A.7(3).

unreasonably short. Accordingly, an extension of time is sought for the filing of this submission.

6. **Terrorism and human rights**. It is axiomatic that both by legal doctrine and cultural inclination, Australia's Government is a democracy, and its society is pluralist in outlook. Pluralistic democracy based on the rule of law is the only system of government suitable to guarantee human rights effectively.[7] Fundamental to the operation of a democratic society is the liberty of the person from arbitrary interference with their home and possessions, freedom of opinion and thought and expression, freedom of communication and freedom of movement. Essential to the exercise of those rights is freedom from arbitrary detention, and the removal of that freedom in accordance with due process and the rule of law. Any interference with such a basic right must be justified, proportionate and subject to accountability and scrutiny.

7. The Explanatory Memorandum concerning the Bill (**EM**)[8] helpfully identifies, primarily by reference to the International Covenant on Civil and Political Rights, certain of the human rights issues which must be considered. We do not repeat the references to those rights. Suffice to say that they form part of Australia's legal heritage through the common law, as well as through Australia's acceptance and adoption of each of the international instruments concerned.

8. **Terrorism: the proper role of Government**. We acknowledge that the Australian Parliament and Government have a responsibility to ensure the security of Australia.[9] We also acknowledge the legitimate objective of addressing terrorism and providing consequences for citizens who commit terrorist offences against Australia and its people. However, the Bill is not of this kind. Detention of persons who have been convicted of terrorism related offences and who are about to complete the period of imprisonment imposed upon them as a result of having committed those offences cannot be assumed to be a necessary, reasonable or proportionate response to potential terrorist threats. Where the Parliament introduces laws which are not necessary, reasonable or proportionate, the rule of law is undermined.[10]

9. **Executive summary: primary areas of concern**. In the time available, we have been able to consider in a summary manner the following main issues:
   (a) the regime to be established under the Bill is inconsistent with freedom from arbitrary detention;

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[7] See for example, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (1990 Copenhagen Document), Preamble. Available at http://www.osce.org/documents .
[8] Explanatory Memorandum, Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth).
[9] *Countering Terrorism and Protecting Human Rights: A Manua*l (Office for Democratic Institutions and Human Rights) available at http://www.osce.org/odihr/29103?download=true .
[10] It is incumbent on those who propose to alter the law in ways which restrict liberties to demonstrate that:
   (a) There is a need for those intrusions which the law does not presently address; and
   (b) There is effective oversight of the exercise of such power.

(b) the making of a CDO is subject to the rules of evidence in civil matters, and may be made on the basis of expert evidence of dubious forensic quality;
(c) the making of a CDO may require the Court to intrude into matters relating to freedom of political thought and religious belief;
(d) as formulated, the Bill has an inherent bias in favour of the making of a CDO;
(e) as formulated, the Bill does not adequately safeguard the rights of the child.

10. The Bill requires amendment or redrafting as a result of the following matters.

A. Freedom from arbitrary detention

11. In the EM, much is made of the features in the Bill that are said to stamp the proposed amendments as appropriate and adapted to a legitimate end, namely protection of the community.[11] Article 9(1) of the International Covenant on Civil and Political Rights (**ICCPR**) provides that everyone has the right to liberty and security of person. The ICCPR also provides that no one shall be subjected to arbitrary arrest or detention, and no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

12. Involuntary detention is punitive[12], and detention[13] based on a prediction of possible future conduct is necessarily arbitrary, unless capable of being justified on other grounds.[14] Whether this is the case depends on the content of the law which authorises the detention, upon its proper characterisation.[15] If enacted, the Bill would authorise further punishment for past crimes beyond the period assessed by a Court as proportionate to the nature and gravity of the offender's conduct. The Bill purports to confer the judicial power of the Commonwealth on a State Court to detain offenders in circumstances divorced from punishment or guilt. Further, detention would be permitted for periods of up to 3 years solely on the basis of a prediction of prospective conduct that has not and may never occur. This conflicts with the fundamental rule of law principle as expressed in international human rights law, that no person should be

[11] And it is inferred protection of communities outside Australia who may be affected by persons who engage in acts of terror overseas contrary to the Code.
[12] McDonald, S. 'Involuntary Detention and the Separation of Judicial Power' (2007) 35 *Federal Law Review* 25.
[13] *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; per Brennan, Deane and Dawson JJ at page 27, save in the case of certain recognized exceptions: at page 28. *Lim* was cited for this proposition in *North Australian Aboriginal Justice Agency Ltd v Northern Territory* [2015] HCA 41 per French CJ, Kiefel and Bell JJ at [37], per Gageler J at [94], [98] and [128]; per Nettle and Gordon JJ at [236].
[14] Coyle, I.R. *The Cogency of Risk Assessments*, Bond University, Robina, Queensland, Australia, available at http://dx.doi.org/10.1080/13218719.2010.543406 .
[15] In *North Australian Aboriginal Justice Agency Ltd*, Gageler J said at [98] that: "Cases subsequent to *Lim* have illustrated the difficulty of seeking to draw a bright-line distinction between penal or punitive detention and protective or preventive detention (citing for this proposition *Fardon*, below). The difficulty of drawing any distinction between detention which is penal or punitive and detention which is not highlights the significance of default characterisation: any form of detention is penal or punitive unless justified as otherwise. The question is always one of characterisation of the detention, in respect of which the object sought to be achieved by the law authorising detention is a relevant consideration, but not the only consideration."

subjected to a punishment that was not provided for by the law at the time they committed the offending act.[16]

13. The making of a CDO in the manner proposed by the Bill is inconsistent with Article 9 of the ICCPR. Using the cloak of judicial authority, the Bill would permit the imposition of a further period of detention in circumstances that cannot be justified. In this respect, the Bill may be usefully compared with similar State legislation that in certain circumstances permits the detention of serious sex offenders after the period of their sentence has elapsed. [17]

False Analogy with State Sex Offender Legislation

14. In Victoria, a similar regime to that proposed to be established under the Bill exists under the *Serious Sex Offenders (Detention and Supervision) Act* 2009 (Vic) (**Detention and Supervision Act**). The Bill largely reproduces the scheme for post-sentence detention set out in the Detention and Supervision Act, adopting the same language in terms of risk assessment and triggers for the exercise of the Court's discretion to impose a further period of detention for the protection of the community. However, important differences exist between the operation of the regime established under the Detention and Supervision Act on the one hand, and the Bill on the other.

15. First, in the case of serious sexual offenders in Victoria, there are specifically designed clinical measures used by psychiatrists to predict the danger of sexual recidivism. The *STATIC-99* or *STATIC – 99R* provides for the evaluation of dangerousness according to categories of seriousness: low, low-moderate, moderate-high and high. It does so by reference to static criteria, including whether the offender has lived with a lover for more than two years; convictions for non-contact sex offences, consideration of whether a male victim was involved as well as prior convictions that do not involve sexual violence. These are then adjusted to take into account more dynamic features relevant to the individual.

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[16] ICCPR, especially art. 15(1), which relevantly provides that a heavier penalty shall not be imposed than the one that was applicable at the time when the criminal offence was committed.

[17] In *Fardon v Queensland* (2004) 223 CLR 575 the High Court upheld Queensland laws for post-sentence detention of sex offenders. However, very strong doubt was expressed by the High Court that the Commonwealth Parliament could confer Chapter III judicial power on a Court (whether Federal or State) of the kind conferred by the Queensland Parliament on Queensland's Supreme Court: per Gummow J at 608-614 [69]-[89], per Kirby J at 631 [145], per Callinan and Haydon JJ at 655-6 [219]. Additionally, Gleeson CJ and Hayne J left open whether, as the Commonwealth had submitted in that case, under the Constitution the federal Parliament could enact a valid law imposing on a court a function comparable to that imposed by the State Parliament in *Fardon*: at 591 [18]; 647-8 [196] – [197]. McHugh J upheld the laws in *Fardon* expressly because they were not federal laws: at 598 [37] ff. Commonwealth judicial power can only be conferred in accordance with Chapter III of the Constitution: *Alqudsi v The Queen* [2016] HCA 24 per Kiefel, Bell and Keane JJ at [168]. In *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, Brennan, Deane and Dawson JJ stated at p. 27 that Chapter III judicial power does not permit the conferral of power to detain a person in custody notwithstanding that the power is conferred in terms which seeks to divorce such detention from both punishment and guilt.

16. In relation to persons convicted of terror offences, there is no established clinical measure directed to predicting future risk of committing that type of offence, nor is there any evidence of specific treatment available for rehabilitation in relation to that type of offending.

17. The difficulties inherent in the prediction of dangerousness were identified by the Human Rights Committee of the United Nations in *Fardon v Australia* (**Fardon**)[18] and *Tillman v Australia* (**Tillman**)[19]. The UNHRC criticised the capacity for medical experts to properly predict dangerousness in the following terms:

> *"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 legislative regime] 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 evidence, the reality is that the Courts must make a finding of act on the suspected future behaviour of a past offender, which may or may not materialise."*

18. In *TSL v Secretary to the Department of Justice* (2006) 14 VR 109 at 122 (*TSL*) Callaway JA cited an issues paper prepared by Professor Bernadette McSherry concerning the dangers of evidence provided by mental health professionals, especially in light of the '…potential for judges and juries to misunderstand and misuse risk assessments, assigning greater accuracy and inevitability to predicted behaviours than is warranted.' Callaway JA also referred to Kirby J's reasons for judgment in *Fardon v Attorney-General*[20] where his Honour held[21] that:

> *"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 over predict. Predictions of dangerousness have been shown to have only a one-third to 50% success rate."*

19. The inherent inaccuracies in predictive methodology are readily apparent. These concerns are compounded in the case of the Bill, where, unlike in the case of serious sexual offending, there is no established framework or measure that addresses factors

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[18] UNHRC, Communication No 1629/2007, 18 March 2010.
[19] UNHRC, Communication No 1635/2007, 18 March 2010.
[20] (2004) 223 CLR 575.
[21] Ibid at 623 [124].

specific to the risk of future terror related offending. The generality of the matters referred to in s. 105A6.7 reinforce this point.

20. Secondly, in the case of serious sexual offenders, there is rehabilitative treatment available, specifically designed to address the risk of sexual recidivism. Indeed, this is an express purpose of the legislation: rehabilitation and treatment of an offender to reduce risk to the community.[22] In contrast, the Bill makes no attempt to focus on rehabilitation as an object of further detention. The absence of this consideration results in the inevitable conclusion that a CDO merely extends the term of imprisonment for arbitrary periods of up to 3 years, subject to review.

21. Further, the lack of any focus in the Bill on the rehabilitation of the offender itself constitutes a serious departure from the views of the UNHRC as expressed in *Fardon* and also *Tillman*. That is, the absence of any provision in the Bill for the rehabilitation of the offender reinforces the impression that the CDO regime to be established by the Bill constitutes a form of arbitrary detention in contravention of the ICCPR.

22. We have not overlooked proposed s 105A.4. That provision would provide that the detained person must be treated "in a way that is appropriate to his or her status as person who is not serving a sentence of imprisonment." How is this to be achieved, and how is it capable of being enforced? The Bill contains no guidance. Further, the provision is subject to wider-ranging and generalised exceptions. The result is that, in practical terms, s 105A.4 may be little more than window-dressing. If the only specific outcome a detained person can expect if a CDO is made is that he or she will be denied their freedom, then the law proposed by the Bill is properly characterised as one intended to extend a sentence of imprisonment for the crimes for which the person has already been punished. If so, it is undoubtedly punitive, and falls within the prohibition established by article 15(1) of the ICCPR. Alternatively, the effect of the Bill is to provide for detention (that is, imprisonment) in advance of any fresh conviction, on the ground of an apprehension that the offender may commit a further offence in the future. This is objectionable as detention without any overt act, proof of intention or proper criminal trial or conviction.

23. Worse, it may be that the satisfaction which sustains a CDO is sufficient to find that the necessity referred to in s 105A.4(2)(b)[23] exists, resulting in the detained person remaining in prison with prisoners who are serving a sentence. There is reason to think that it does. A Court must be satisfied to a high degree of probability on admissible evidence of the requisite risk, and that the risk cannot be satisfied by less

[22] *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic), s 1.
[23] The engagement of one of these exceptions is sufficient to negate the duty not to accommodate a detained person in the same unit of the prison where other prisoners are held. Section 105A.4(b) refers to accommodation in the same prison as prisoners under sentence being "necessary for the safety and protection of the community".

restrictive measures. In the face of such a finding, the necessity standard prescribed by s. 105A.4(2)(b) is not hard to reach. In that event, detention under a CDO is indistinguishable from imprisonment.

B. The civil standard and the definition of "Relevant Expert"

24. Under s. 105A6.7, the Court may appoint a 'relevant expert'. It is noted that the definition of "relevant expert" in the Bill anticipates that opinion evidence of apprehended risk may be given by specified medical practitioners, registered psychologists, and a final category of person identified as "any other expert". However, this is permitted only if the person is determined to be "competent to assess the risk of a terrorist offender committing a serious Part 5.3 offence". This begs the question. The definition contains no guidance as to the criteria that will used to decide whether someone is "competent" to make the contemplated assessment. Indeed, given category (d), it may be anyone.

25. As to this, section 79(1) of the *Evidence Act* 1995 (Cth) permits a person who has specialised knowledge based on that person's training, study or experience to give opinion evidence. The Bill intends that the rules of evidence will apply, but does not explain how s. 79(1) is to interact with the evidence of a "relevant expert". Indeed, the Bill posits an inferior standard as the basis for receiving evidence from a person who somehow meets the definition of "relevant expert". The Court must take into account these expert opinions under s. 105A.8.

26. Further, the matters to be assessed by the "relevant expert" do not contemplate much in the way of actual evidence derived from specialised knowledge that could not be discovered by the Court itself by application of the usual forensic process. The very generality of the definition exposes the offender to a risk of prejudicial evidence in circumstances where the Bill would mandate that it be received by the Court because of its centrality to the discretion to make a CDO. It is to be observed that a person accused of actually committing a crime could not be exposed to incarceration from evidence of this kind.

C. Intrusion into matters of political thought and/or religious expression

27. A Court may only make a CDO in respect of a "terrorist offender". Such a person is one who has been convicted of an offence of the kinds stipulated in s. 105A.3. In relation to these types of offence, political opinion and/or religious conviction may be one of the motivations for the crimes that engage s. 105A.3(1), and may lie behind, if not be the basis upon which, it is feared the offender may commit a further offence, being a "serious Part 5.3 Offence", if released at the end of their sentence.

28. It goes without saying that a political opinion or religious conviction does not justify acts of terror, or acts intended to prepare plan or assist in acts of terror, or threatened acts of any of these kinds.

29. However, the jurisdiction conferred under the Bill requires the Court to speculate, albeit in an informed way, as to the likelihood of the offender (who may have been imprisoned for many years) engaging in further crimes of terror. That assessment is one of criminal propensity. Necessarily, the Court must form a view as to the person's likely motivation or intention. That being so, there is a material risk that due to the nature of the crimes upon which the propensity turns (and which enliven the Court's jurisdiction), the offender's liberty may hinge on, or include, assessments of the worthiness of a person's religious and/or political opinions. We consider this to be a breach of article 2(1) of the ICCPR, which provides that:

> *"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*[24]

30. Derogations are permitted from this Article in times of public emergency which threatens the life of the nation. However, article 4(1) of the ICCPR applies a strict test, including that the emergency is officially proclaimed and that the derogations are only to the "extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". No mention is made of article 4(1) of the ICCPR in the EM. Further, the EM does not consider how the Bill will ensure that the Court will not be placed in a position where it is required to determine whether a political or religious opinion may justify a conclusion (wholly or in part) that the offender should be deprived of their liberty longer than the period assessed as an appropriate period to punish the offender for their crimes. Some of the criteria proposed by the Bill as the basis for the assessment of propensity appear to weigh the discretion in favour of a CDO.[25]

31. Additionally, treatment or rehabilitation, one of the assessment criteria stipulated in s. 105A6.7 and 105A.8, is of doubtful relevance in assessing the propensity of a person motivated by political views or religious beliefs. A person so motivated may not regard themselves as requiring either. This issue draws attention to a number of assessment factors that tip the balance in favour a CDO being made.

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[24] See also the observations of Kirby J in *Fardon v Queensland* [2004] HCA 46 at [126] referring to *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.
[25] We address these matters further below.

D. Inherent bias in favour of the making of a CDO

32. In the context of a civil proceeding, the Bill requires the Court to assess whether the offender the subject of an application for a CDO is highly likely to commit a terror offence, if released. It should not be overlooked that the propensity which is the subject of assessment is a propensity to commit a crime. A number of issues arise from that observation.

33. First, the determination the Court must make is that the offender "poses" an unacceptable risk of committing a serious Part 5.3 offence if released in the community. This test is expressed in purely hypothetical terms. Given the seriousness of the making of a CDO to the offender, it may be expected that the Court will be required to make a finding of fact, for example that the offender "would likely commit a serious Part 5.3 offence if released in the community".

34. The offender's presumptive right to liberty after he or she has completed the stipulated period of incarceration for actually committing a serious Part 5.3 offence would be subject, under the Bill, to a procedure and standard that is lower than would apply if they had engaged in criminal conduct. Despite the nature of the assessment as one of criminal propensity (and the hypothetical nature of the assessed risk), the period of detention of which an offender is at risk if a CDO is made is for periods of up to 3 years at a time, determined in accordance with the inferior standard of proof in civil proceedings.

35. Secondly, the criteria the "relevant expert" and the Court must consider for the purposes of assessment include factors that may be said to weigh the absence of overt compliant behaviour by the offender in favour of continuing detention. For example, whether the offender has actively participated in treatment or rehabilitation, or participated in the expert's assessment, are relevant to the assessment process. Moreover, compliance with any parole obligations (as opposed perhaps to any relevant parole obligations) must be taken into account. It may be observed that the Bill would impose on the offender a positive obligation to attend an assessment with an expert.[26] No sanction is imposed for failure to do so. In this connection, the EM refers to article 17(1) of the ICCPR which proscribes arbitrary and unlawful interference with a person's privacy. It is asserted in the EM that this right is not engaged on the basis that:

> *"The Terrorist Offender is under no obligation to participate in the assessment or to disclose any private information. The fact that the Court must consider the level of the terrorist offender's participation in the expert's assessment does not create a <u>de facto</u> obligation to participate."*[27]

[26] Proposed s105A.6(5).
[27] Paragraph 59 of the EM.

36. This may be so, but the obligation to attend and the fact that the level of participation by the offender is one criterion upon which the assessment of likelihood is made by the Court puts the person at risk of an adverse assessment if he or she does not attend or participate, or participates in a manner asserted to be below the expected level of cooperation (perhaps because he or she does not wish to disclose private information). By contrast, if the offender had been accused of committing a serious Part 5.3 offence (as opposed to whether he or she is likely to do so), that person could invoke the privilege against self-incrimination. No adverse inference could be drawn if that privilege was invoked.[28]

37. Thirdly, despite the specific obligation imposed on the Court by the Bill to apply the rules of evidence, the offender's criminal history must be taken into account by the Court. That history extends to any offences the person may have committed.[29] Evidence of this kind would normally be inadmissible in a criminal proceeding to prove that the person engaged in conduct forbidden by the criminal law. It is not obvious why it should be admissible to prove that the offender has a propensity to do something that has not been done, if released. This is especially so when the original crime for which the person has been punished may have occurred years before the Court is required to make the assessment.

38. Fourthly, the third criterion for the Court's satisfaction under s. 105A.7(1)(c) of the Bill is that the Court be satisfied that there is no less restrictive measure that would be effective in preventing the unacceptable risk. This is a high threshold and one that may be difficult to apply. The threshold tends to favour detention. The focus on risk is also misplaced.

39. By the time the Court gets to this criterion, it has already concluded that there is a high probability that the person poses the requisite risk. The true focus of the less restrictive measure criteria should be on the need for the person who poses the risk to be detained. The current criterion tends to favour detention by maintaining the focus on risk, and as observed above does so by imposing a very high threshold.

40. Consistent with the approach of the UNHRC in *Tillman*, the less restrictive measures criterion ought to require that the Attorney-General prove that there is no other less restrictive measure available that would *manage* the risk *in a manner that is less restrictive of the liberty of the person concerned*. In this way, the Attorney-General would be required to establish that other, less restrictive, ways of managing the offender have been examined with a focus on measures that do not result in detention, leaving this as a last resort. Legislation with respect to the involuntary detention of

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[28] See Stephen Odgers, *Uniform Evidence Law*, 12th edition (2016), commenting on s 128 of the *Evidence Act 1995* (Cth) [EA.128.690] pp 1073-4.
[29] Proposed ss. 105A.8(g); 105A.13.

patients with mental illness offers an appropriate analogy: see eg s 12 of *Mental Health Act 2007* (NSW).

E. Effect on the Rights of the Child

41. Offenders who were convicted whilst still children are at risk of being detained under a CDO pursuant to s. 105A.3(1)(c). That being so, whilst punished as a child for the crimes he or she has previously committed, if before the end of the period of imprisonment the child turns 18, he or she may be further detained under a CDO as an adult. Such an outcome is particularly harsh and inconsistent with the United Nations Convention on the Rights of the Child.[30]

42. These arrangements also result in the incongruous result where a child offender is at risk of passing from a form of detention that specifically takes account of that status and the need for rehabilitation, to one that does not - at all. In the criminal law, children under a certain age are exempted from criminal responsibility because of their incapacity to understand the consequences of their acts and because they have not fully developed an appreciation of the difference between right and wrong. [31] Moreover, capacity is usually a matter for determination by a court after psychological evaluations have been conducted and the child has been appropriately examined and assessed. It is unclear whether and to what extent the Bill requires the Court to take into account the offender's previous status as a child when considering whether to impose a CDO on the offender who has reached adulthood while imprisoned.

Conclusion

43. In the limited time available, this submission has been prepared in summary form and has focused on limited aspects of the Bill, only. However, the importance and complexity of the Bill warrant further consideration. Suffice to say that the Bill is deeply flawed, and before enactment must be amended to conform with human rights norms. This can only be achieved by the revision of the Bill to address and overcome the deficiencies referred to above.

44. Members of the Victorian Bar subscribing their names below are available to give evidence in support of this submission or otherwise assist the Committee further, if required.

19 October 2016

[30] See UN, Committee on the Rights of the Child, General Comment No. 10 (2007): Children's rights in juvenile justice (CRC/C/GC/10 - 25 April 2007)
[31] See for example sections 7.1 and 7.2 of the Criminal Code.

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