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Parliamentary Joint Committee on Intelligence and Security
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Parliamentary Joint Committee on Intelligence and Security Inquiry: Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016

Australian National University Law Students Counter-Terrorism Research Group (ANU LSCTRG) welcomes the opportunity to provide a submission in response to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 ('the proposed Bill').

The ANU Law Reform and Social Justice (LRSJ) is a program at the ANU College of Law that supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are ANU law students, who are engaged with a broad range of projects with the aim of exploring law's complex role in society, and the part that lawyers play in using and improving law to promote both social justice and social stability.

A student research group (ANU LSCTRG) was formed within the LRSJ program in responding to certain issues regarding the proposed Bill.

We commend to the Committee this quote endorsed by the High Court in a recent decision as a good summary of some of our concerns with the proposed Bill.

'Unless indeterminable sentences are awarded with great care, there is a grave risk that this measure, designed to ensure the better protection of society may become an instrument of social aggression and weaken the basic principle of individual liberty'¹

If we can provide further information, please do not hesitate to contact us

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¹ *Pollentine v Bleijie* (2014) 311 ALR 332, 337 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) quoting Leon Radziowicz, 'The Persistent Offender' in L Radziowicz and J W C Turner (eds), *The Modern Approach to Criminal Law* (Macmillan, 1945) 162, 167.

1. The Fallibility of Terrorist Risk Assessments

Under s 105A.6 of the proposed Bill, a Court may appoint one or more relevant experts who then are obliged to:

- a) Conduct an assessment of the risk of the offender committing a serious Part 5.3 offence if the offender is released into the community; and
- b) Provide a report of the expert's assessment to the Court, the Attorney General and the offender

Section 105A.2 (the Definitions provision) defines 'relevant expert' broadly. It encompasses medical practitioners, psychiatrists, psychologists and any other experts competent to assess the risk of a terrorist offender committing a serious Part 5.3 offence. These experts are guided in what must be contained within their expert report as per s 105A.7. Indeed, a court in making a continuing detention order under s 105A.8(b) and (c) 'must have regard' to the results of the relevant expert(s)' reports in deciding to make an order.²

On the face of it this proposed law merely replicates the type of risk assessment processes that are routinely undertaken under sex offender and violent offender post sentence detention regimes across Australia.³ It was recognised in *Fardon* that these relatively well-established risk assessment regimes are not unproblematic. Justice Kirby noted that 'experts in law, psychology and criminology have long recognised the unreliability of predictions of criminal dangerousness'.⁴ The situation regarding the assessment of risk of re-offending regarding terrorism is much more perilous. As Smith and Nolan noted, in early 2016 'there are no validated tools that specifically assess risk for terrorism'.⁵

² (emphasis added)

³ See, eg, *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 11, 13(4)(a); *Crimes (High Risk Offenders) Act 2006* (NSW) 5D, 5G, Part 4A; See also Tamara Tulich, 'Post-Sentence Preventative Detention and Extended Supervision of High Risk Offenders in New South Wales' (2015) 38 *UNSW Law Journal* 824; Michelle Edgely, 'Preventing Crime of Punishing Propensities? A Purposive Examination of Preventative Detention in Queensland and Western Australia' (2007) 33(2) *University of Western Australia Law Review* 351.

⁴ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [124] (Kirby J); see also NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-custody Management Options* (2012) 25 [2.93].

⁵ Charise Smith and Mark Nolan, 'Post-sentence continued detention of high-risk terrorist offenders in Australia' (2016) 40 *Criminal Law Journal* 163, 169.

While several such tools are now available,⁶ these are still very much in their infancy and have not necessarily been proven in the Australian context.⁷ It would be premature to enact laws that allow terrorist offenders to be detained on a civil standard of proof where the validity of the results of expert assessments applicable to Australian offenders cannot yet be verified.⁸ As argued by Smith and Nolan, '[t]he controversial deprivation of liberty resulting from a CDO [continuing detention order] is only justifiable if informed by valid and accurate risk assessments'.⁹ On this point it is submitted that the risk is twofold. While the danger to the liberty of the terrorist offender must be considered, the flipside of relying on relatively novel risk assessment tools is that these could just as readily underestimate the danger of re-offending posing an unacceptable risk to the community should the offenders be improperly judged as less of a risk to the community than they in fact are.

1.1 Recommendations

Given that s 105A.8 of the proposed Bill obliges Courts to take into account expert terrorist risk assessments it would be prudent for the Federal Government to create an Independent Risk Management Authority similar to that recommended in the NSW Sentencing Authority Report into High Risk Violent Offenders post-custody options.¹ This statutory body would:

- Outline best-practice risk-assessment practices and develop guidelines and standards for such processes.
- Validate new risk assessment tools and process.
- Provide standards of accreditation for practitioners to become accredited for assessing terrorist risk.

2. Sunset Clause and Mandatory Review by PCIJS and INSLM

As noted below, and within the Explanatory Memorandum, the proposed Bill engages a range of rights including Articles 9, 10, 14 and 17 of the *International Covenant on Civil and Political Rights*. The proposed Bill fundamentally challenges some of the basic premises of a

⁶ See D Elaine Pressman, Nils Duits, Thomas Rinne, and John S Flockton, *VERA-2R Violence Extremism Risk Assessment Version 2 Revised: A structured professional judgment approach* (Nederlands Instituut voor Forensische Psychiatrie en Psychologie, 2016); See, eg, Alana Cook et al, *Threat Assessment Tools for the Individual Assessment of Terrorism: A Content Evaluation of the MLG, VERA-2, and the HCR-20* Canadian Network for Terrorism, Security, & Society <https://www.academia.edu/18897216/Threat_Assessment_Tools_for_the_Individual_Assessment_of_Terrorism_A_Content_Evaluation_of_the_MLG_VERA-2_and_HCR-20V3>. See also Council of Europe 'Draft Council of Europe Handbook for prison and probation services regarding radicalization and violent extremism' (European Committee on Crime Problems (CDPC), 12 September 2016).

⁷ Atta Barkindo and Shane Bryans 'De-Radicalising Prisoners in Nigeria: developing a basic prison based de-radicalisation programme' (2016) 7 *Journal of Deradicalization* 1, 12.

⁸ Charise Smith and Mark Nolan, 'Post-sentence continued detention of high-risk terrorist offenders in Australia' (2016) 40 *Criminal Law Journal* 163, 169.

⁹ Ibid.

liberal society where detention is only permitted after a finding of guilt beyond reasonable doubt for past offences. With this in mind it is important for additional safeguards to be inserted into Division 105A (with appropriate reference made to the consequentially amended provisions referenced in *Schedule 2*) of the proposed Bill.

2.1 Recommendations

1. A sunset provision should be inserted into Division 105A requiring that:
 - A continuing detention order that is in force at the end of 1 January 2021 ceases to be in force.
 - A continuing detention order cannot be applied for or made after 1 January 2021.
2. A mandatory review of the Division 105A is to be undertaken after three years by the PCJIS that must report on:
 - The ongoing need for continuing detention orders.
 - The effectiveness of the reliance on reports by relevant experts.
 - International best practice.
3. A review is to be undertaken annually following the release of the Attorney-General's report by the Independent National Security Legislation Monitor regarding the matters outlined in section 6 of the *Independent National Security Legislation Monitor Act 2010* (Cth).

3. Effectiveness and efficacy of continuing detention orders

The post-sentence preventative detention regimes for sex offenders, and in some Australian jurisdictions, for violent offenders, is perhaps the most analogous regime to the one proposed by the Bill.

Fundamentally, the success of any post-sentence preventative detention regime turns on being able to accurately identify those who have a high risk of causing harm to the community if they were to be released.¹⁰ Furthermore, a key consideration is the need to limit the scope of those who may be subject to such orders, such that potential human rights contraventions, particularly to article 9(1) of the ICCPR are not made to occur through the detention of those who do not have, in actuality, a high risk of causing harm to the community, post-serving their custodial sentence.

¹⁰ Dominic J Doyle and James R P Olgoff, 'Calling the Tune Without the Music: A Psycho-Legal Analysis of Australia's Post-Sentence Legislation' (2009) 42(2) *The Australian and New Zealand Journal of Criminology* 179–203, 198.

Additionally, there is a not negligible cost of operating such a post-sentence detention regime. There is the cost of keeping a person imprisoned and/or supervised, legal costs, court time and the use of resources to fund continuing assessments.¹¹

3.1 Recommendations

- The focus in achieving the object of the proposed Bill should be on the risk terrorist offenders intended to be subject to this proposed Bill pose to society.
- Emphasis should be placed on pre-sentencing assessments, rather than post-sentence detention regimes.
- Rehabilitation and participation in deradicalisation programs should be emphasised during custodial sentences, informed by pre-sentencing assessments, so that the need for complex yet uncertain assessments, judgments and applications being made post-sentence is avoided as much as possible.

4. International Human Rights Law Implications

4.1 Relevant rights

Several obligations set out in the *International Covenant on Civil and Political Rights* (ICCPR) are engaged by the proposed Bill. Australia agreed to be bound by the ICCPR on the 13 August 1980.¹² Australia is also party to the First Optional Protocol to the ICCPR,¹³ allowing the Human Rights Committee to hear complaints of individuals alleging that Australia has breached its human rights obligations.

Under Australian law, the *Australian Human Rights Act 1986* (Cth) was enacted to establish the Australian Human Rights Commission, the body responsible for monitoring Australia's compliance with international human rights obligations (including the ICCPR). The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) established the Joint Parliamentary Committee on Human Rights, who are able to review the consistency of new bills with human rights. In addition, the Act requires the tabling of a statement of compatibility outlining the consistency of a bill with Australia's human rights obligations.

Australia's national human rights framework demonstrates its acknowledgement of its human rights obligations, including those under the ICCPR and its commitment to meeting them.

The following rights will be focused on in the analysis undertaken in this submission:

¹¹ Ibid 198.

¹² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

¹³ *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

4.1.1 Right to Liberty

Article 9 of the ICCPR provides that everyone has the right to liberty which can only be restricted by non-arbitrary grounds and procedures established by law.¹⁴ Other relevant guarantees in article 9 include a right to be informed for reasons of arrest¹⁵ and a right for the person detained to take proceedings to a court to determine the lawfulness of their detention.¹⁶ It should be noted that detention that is initially legal may become 'arbitrary' if it is unduly prolonged or not subject to periodic review.¹⁷

4.1.2 Right to Equality before the law and due process

The procedural rights of persons in the legal determination of their rights and obligations are provided in Article 14 of the ICCPR. These include the right to a fair public hearing by an impartial judicial authority,¹⁸ minimum guarantees in criminal trials¹⁹ and a prohibition on double punishment.²⁰

4.1.3 Right to non-retroactivity of criminal punishment

Article 15 of the ICCPR provides that a person should not be found guilty of an offence that on the basis of conduct that did not constitute a criminal offence at the time it was committed.²¹

4.2 Detention standards under international human rights law: Article 9 ICCPR

When considering the interpretation of article 9 of the ICCPR, the Human Rights Committee made a number of observations in General Comment 35.²² While Australia does not regard the views of the committee as binding, they are nonetheless persuasive as the considered views of experts in the field. In General Comment 35, the committee emphasised the importance of preventative detention being based on sufficient grounds, being a proportionate response to the perceived threat, and being non-punitive in nature.²³

These requirements are discussed in additional detail below.

¹⁴ ICCPR art 9(1).

¹⁵ Ibid art 9(2).

¹⁶ Ibid art 9(4).

¹⁷ *A v. Australia*, UN Doc. CCPR/C/59/D/560/1993 (30 April 1997) para 9.4.

¹⁸ Ibid art 14(1).

¹⁹ Ibid arts 14(2)-(3).

²⁰ Ibid art 14(7).

²¹ Ibid art 15(1).

²² Human Rights Committee, *General comment no. 35, Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) ('*General Comment 35*').

²³ Ibid paras 15 – 35.

4.2.1 Grounds

Detention must be based on reasons arising from the gravity of the crimes committed and the likelihood of the detainee committing similar crimes in future.²⁴ The level of threat has been described by the Human Rights Committee as ‘present, direct and imperative’ which the state must demonstrate.²⁵

4.2.2 Proportionality

Detention should only be carried out as a last resort, and the state party must demonstrate that alternative less restrictive measures are insufficient.²⁶ Furthermore, detention must not be for a period longer than absolutely necessary, and the total period of detention must be limited.²⁷

4.2.3 Safeguards

There must be prompt and regular review of the detention.²⁸ Furthermore, there must not be periods where the detention is not subject to challenge or review.²⁹ There is also a requirement that some basis of the decision for detention is made available to the detainee.³⁰

4.2.4 Nature of detention

Detention should be aimed at rehabilitation and reintegration into society.³¹ To avoid the prohibition on double punishment, the detention must be non-punitive.³² Part of this is that conditions for the detainee must be distinct from those serving a sentence of imprisonment. Detention that is equivalent to a prison regime will be characterised as punitive notwithstanding the fact that it is formally characterised as civil in nature.³³

4.3 Interim detention under the proposed Bill

4.3.1 Grounds for interim detention

Interim detention orders may be made to detain the offender while a continuing detention order is being determined. The requirements for an interim order to be made are (i) that the court is satisfied the offender’s sentence or current period of detention will end before the

²⁴ Ibid para 35.

²⁵ Ibid para 15.

²⁶ Doug Cassel, ‘International Human Rights Law and Security Detention’ (2009) 40 *Case Western Reserve Journal of International Law* 383, 385.

²⁷ *General Comment 35* UN Doc CCPR/C/GC/35, para 15.

²⁸ Ibid.

²⁹ *Rameka v New Zealand*, 76th sess, UN Doc CCPR/C/79/D/1090/2002 (15 December 2003) para 7.2.

³⁰ Cassel, above n 26, 398.

³¹ *Dean v New Zealand*, 95th sess, UN Doc CCPR/C/95/D/1512/2006 (29 March 2009) para 7.5.

³² *Fardon v Australia*, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (10 May 2010) para 7.4.

³³ Ibid.

application for continuing detention is determined and (ii) the court believes that the allegations in the application would, if proved, justify the making of the order.³⁴

This system of interim detention has many similarities to the more familiar procedure of pre-trial detention in criminal cases. To avoid arbitrariness, pre-trial detention must be necessary in the circumstances, based on reasons such as preventing flight, interference with evidence or the recurrence of a crime.³⁵

Given that the only real substantive grounds justifying interim detention under the proposed Bill relate to allegations brought against the offender by the state, this may not be sufficient to make the detention non-arbitrary. In order to ensure the compatibility of this section with Australia's human rights obligations additional grounds should be inserted into the legislation requiring a judge to meet one or more of the criteria justifying detention.

4.3.2 Proportionality of interim detention

4.3.2.1 Appropriateness of detention

Clause 105A.9 of the proposed Bill contains no specific language requiring interim detention only where other less restrictive measures are available. The only substantive ground for interim detention relates to the court's belief that the matters in the application would justify continuing detention. While this may be intended to incorporate the requirement in clause 105A.7(1)(c) that a court is satisfied no less restrictive option is available, this is currently not clearly set out in the proposed Bill.

Some available alternatives to interim detention include requirements placed on the offender that they observe certain conditions such as regularly reporting to authorities, not meeting specified persons or submitting themselves to electronic monitoring.³⁶ The *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) which deals with continued detention of sex offenders gives the court the option of imposing a supervision order rather than a continuing detention order.³⁷ A similar provision within the proposed Bill would help to ensure that even when used as an interim measure, detention is imposed only if other requirements are insufficient.

4.3.2.2 Period of interim detention

Sub-clause 5 of cl 105A.9 provides that interim detention orders must be for a period that the court is satisfied is reasonably necessary to determine the continuing detention order and this period must not be longer than 28 days. Furthermore, the total period of interim detention must not exceed 3 months.³⁸

³⁴ Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) 'High Risk Terrorist Offenders Bill' cl 105A.9(2).

³⁵ *Hill v Spain*, 59th sess, UN Doc CCPR/C/59/D/526/1993 (2 April 1997) para 12.3.

³⁶ American Bar Association Rule of Law Initiative, 'Handbook of International Standards on Sentencing Procedure' (2010) 5.

³⁷ *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ('*Dangerous Prisoners Act*') s 13(5).

³⁸ High Risk Terrorist Offenders Bill cl 105A.9(6).

While it is appropriate to require a court to be satisfied that the period of detention is reasonably necessary, the only criteria in the proposed Bill relate to the period of time the continuing detention order would take to determine. It may not be necessary for a court to impose detention for the entire period of time that it takes to determine an application for continuing detention. A court may consider that an interim detention order is only appropriate for part of the process of reviewing an application and this should be allowed. Furthermore, committing the offender to detention for the duration of the determination of a continuing detention order may mean that they are unable to make effective use of their rights to participate in continuing detention order proceedings under cl 105A.14.

If the above concerns relating to the grounds and proportionality of the detention are addressed, then a three month limit on interim detention orders is appropriate and in line with Australia's human rights obligations.³⁹ However, as it currently stands, the proposed Bill allows a person to be detained for up to three months solely on the basis of unproven allegations.

4.3.3 Safeguards

4.3.3.1 Right to challenge interim detention

While there appears to be no explicit process for review of an interim as opposed to a continuing detention order, orders may only be made for a maximum period of 28 days.⁴⁰ After the interim order is no longer in force then the court must order a new interim detention order or release the offender.

In the context of detention prior to judicial review, human rights law requires a person to be brought promptly before a judge. This requirement has been interpreted by the Human Rights Committee to mean that such detention must not exceed a few days, or up to four days in exceptional circumstances.⁴¹

As it currently stands, an offender may be detained for up to 28 days based only on allegations made by the state and has no explicit recourse to challenge the lawfulness of their detention during this time. An inability for a detainee to challenge their detention during a defined period of time has previously been found to be a violation of article 9(4) of the ICCPR.⁴²

³⁹ *General Comment 35* UN Doc CCPR/C/59/D/526/1993 para 15.

⁴⁰ High Risk Terrorist Offenders Bill cl 105A.9(5).

⁴¹ American Bar Association Rule of Law initiative above n 35, 10.

⁴² *Rameka v New Zealand* para 7.2.

4.3.3.2 Procedural protections

Unlike the fair trial protections given to offenders in continuing detention order proceedings,⁴³ there are no references to any participation on the part of the offender. As a result, there is a risk that the proceedings may be carried out *ex parte*. While in some situations *ex parte* proceedings may be necessary where there is a need to act urgently and avoid the risk of serious harm being done, it is important that the affected party has the option to state their case at an early opportunity.⁴⁴

If proceedings are intended to be *ex parte*, it is important that an offender is able to have their case heard within a reasonable time frame. This would be accomplished via a right to review an interim detention order. Alternatively, if interim proceedings were held in the presence of an offender or their legal representative, and they were given procedural rights equivalent to those granted in s 105A.14, a right to review interim detention may be of lesser importance to ensure that an offender is not detained arbitrarily.

4.3.3.3 Availability of reasons for interim detention

While the proposed Bill requires that an offender is given the reasons for a continuing detention order and is personally provided with a copy of the application of the order after it is made, there are no equivalent guarantees with regard to interim detention orders. It is important that an offender is provided with the reasons for any period they continue to remain in detention after the expiry of their conviction or previous order. The Human Rights Committee recently stressed the importance of reasons being provided to the detainee for their detention to be compatible with article 9(1) of the ICCPR, and found failure to provide reasons may be relevant towards violations of other obligations under the Convention.⁴⁵ Furthermore, being provided with reasons for detention is vital for the effective operation of any right to review an interim detention order.

⁴³ For example, the rights of parties to proceedings to adduce evidence and make submissions to the Court in cl 105A.14.

⁴⁴ *Manuel v New Zealand*, 91st sess, UN Doc CCPR/C/91/D/1385/2005 (14 November 2007) para 6.4.

⁴⁵ *F.J et al. v Australia*, 116th sess, UN Doc CCPR/C/116/D/2233/2013 para 10.4.

4.3.4 Recommendations:

1. Grounds of detention:

Interim detention orders should be made conditional on the court being satisfied of the likelihood of the offender:

- committing a serious offence;
- attempting to evade authorities; or
- interfering with the application for continuing detention

2. Appropriateness of detention:

Interim detention should only be implemented when alternative measures such as supervision orders are not appropriate, a specific list of alternative options should be provided for including requirements on offenders:

- To periodically report to authority.
- To accept supervision by an agency.
- To submit to electronic monitoring.
- To reside at a specified address for specified hours.
- Not leave or enter specified areas without authorisation.
- To surrender their passports.

3. Period of detention:

- Remove the phrase ‘to determine the application for the continuing detention order’ from sub-clause 5 to allow the court to impose an interim order for less than the full period of time it takes to determine a continuing application.
- The proposed Bill should provide additional safeguards to ensure that interim detention is not used to effectively deny to offenders their right to participate in continuing detention proceedings.

4. Safeguards

- Offenders subject to an interim detention order should either:
 - have the explicit right to challenge the order, or
 - have the explicit right to participate in the interim detention proceedings, with powers equivalent to those in cl 105A.15, allowing the adducing of evidence and making of submissions to the court.
- Offenders should be provided with a copy of the reasons for their interim detention.

4.4 Continuing detention safeguards

As acknowledged in the Explanatory Memorandum to this proposed Bill, '[d]etention may be arbitrary where there are less restrictive alternatives available.'⁴⁶

Detention is the most restrictive form of supervising a person's behaviour. Preventative detention, where detainees have already been convicted of an offence and served their sentence, should only be considered where it is sufficiently demonstrated that other means of imposing obligations, prohibitions and restrictions on that person are inappropriate and insufficient to mitigate and control the risk they may pose to society.⁴⁷

Detention should be a last resort. Thus, it is of utmost importance that other approaches to achieving the purpose of the legislation be considered, and alternative measures be available and seriously considered for use in place of post-sentence preventative detention.⁴⁸

4.4.1 Control Order System

Australia has an existing control order system,⁴⁹ as well as preventative detention orders available at Commonwealth (for a maximum of 48 hours)⁵⁰ and State and Territory level (for a maximum of 14 days),⁵¹ to monitor acts of those who may be deemed to pose a risk to society through terrorist acts. The proposed bill imposing continuing detention orders must justify why the existing regime for those convicted of a terrorism offence is inadequate. Merely stating that the threat of terrorism has increased is not sufficient as it does not explain why that person deemed to pose a risk cannot be adequately monitored to prevent terrorist acts through less restrictive means than continuing detention. In addition to the above options, authorities have even less restrictive alternatives available to them, including simply placing the offender under surveillance.

4.4.2 Need for clear criteria for necessary levels of restrictive measures

We commend the drafters for including provision 105A.7(c) which directs courts to first be satisfied that less restrictive measures such as control orders would not be effective in preventing the unacceptable risk posed by that person, such as control orders. This provision, however, provides no guidance to courts, nor a test to be applied, that frames such an inquiry.

⁴⁶ Explanatory Memorandum, Criminal Code Amendment (High Risk Offenders) Bill 2016 (Cth) 7.

⁴⁷ Cassel, above n 26, 385.

⁴⁸ See generally Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) sch 1 item 105A.7(1)(c).

⁴⁹ *Criminal Code Act 1995* (Cth) pt 5.3 div 104.

⁵⁰ *Ibid* pt 5.3 div 105.

⁵¹ *Terrorism (Police Powers) Act 2002* (NSW) pt 2A; *Terrorism (Preventative Detention) Act 2005* (Qld); *Terrorism (Preventative Detention) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (Tas); *Terrorism (Community Protection) Act 2003* (Vic) pt 2A; *Terrorism (Preventative Detention) Act 2006* (WA); *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT); *Terrorism (Emergency Powers) Act* (NT) pt 2B.

There are no directions in the legislation as to how courts may undertake and make such a determination. For these reasons, we recommend that criteria be set out for the assessment of whether the risk posed really necessitates the complete, extended deprivation of liberty.

4.4.3 Special Advocates

We recommend that decisions relating to continuing detention orders involve a special advocate to assist in balancing the right to a fair trial and the need to redact certain security information relevant to the case against the person in preventative detention. Such procedures are practiced in several countries including the UK and Canada. In the UK, special advocates are appointed to view closed or redacted materials concerning the defendant then to represent the interests of that defendant.⁵² The UK special advocates system was adopted in accordance with the European Court of Human Rights judgment in *Chahal v United Kingdom* (1996).⁵³ In this case the European Court of Human Rights decided that the security-cleared counsel model in Canada provided an effective way to ‘accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice’.⁵⁴ Under the Canadian Immigration Act 1976 the confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, a security-cleared counsel instructed by the Court takes their place, who may advocate for greater disclosure of protected information to the defendant.⁵⁵ We recommend the implementation of a similar special advocate scheme in determinations of continuing detention orders.

The special advocate mechanism has been favoured by the Independent National Security Legislation Monitor in relation to counterterrorism orders, which stated in its 2016 report concerning control orders that the “[special advocate] facility would assist in satisfying the constitutional requirement for procedural fairness and in complying with international obligations”.⁵⁶ It recommends that the special advocate monitor protected information to determine if that “information needs to be protected if at all; the most helpful way of redacting the information and providing summaries or particulars of it; and the admissibility of the information and the lack of, or limited, probative value the information might have to support the case for the orders.”⁵⁷ The Law Council of Australia also welcomes the addition of a special advocate facility to the continuing detention order scheme, subject to that facility

⁵² Constitutional Affairs Committee, United Kingdom, *Select Committee on Constitutional Affairs Seventh Report*, House of Commons Paper No 7, Session 2004-05 (2005).

⁵³ *Chahal v United Kingdom* (1996) 23 Eur Court HR 413.

⁵⁴ *Chahal v United Kingdom* (1996) 23 Eur Court HR 413, 131.

⁵⁵ *Chahal v United Kingdom* (1996) 23 Eur Court HR 413, 144.

⁵⁶ Commonwealth of Australia, Department of the Prime Minister and Cabinet, *INSLM Report – Control Order safeguards (INSLM Report) Special Advocates and the Counter-terrorism Legislation Amendment Bill (No. 1) 2015*, (2016), 6-7.

⁵⁷ *Ibid.*

being immediately reviewed by the Parliamentary Joint Committee on Intelligence and Security.⁵⁸

However, in line with the decision of the European Court of Human Rights in *A. and Others v. the United Kingdom*, efforts must be made to ensure that the person subject to the continuing detention order has ‘sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.’⁵⁹

4.4.4 Recommendations:

Continuing detention orders should be sought as a last resort. The Attorney-General should provide the Court with reasons why this particular measure should be imposed. Specifically, the proposed Bill should:

- Require that the Court consider specific alternatives, such as control orders and preventative detention orders, to the imposition of a continuing detention order (inserted into the text of schedule 1 item 105A.7(1)(c)).
- Require that the Court, having considered these specific alternatives, specify the reasons, under schedule 1 item 105A.16, as to why these such alternatives are unsuitable, (insert such requirements under schedule 1 item 105A.8).
- Require that the Court involve a special advocate in decisions relating to continuing detention; to assist in balancing the right to a fair trial and the need to redact certain security information relevant to the case against the person in preventative detention.

4.5 Nature of detention under interim and continuing detention orders

4.5.1 Rights of detainees

The effect of an interim detention order is to commit the offender to prison.⁶⁰ While detained in prison the proposed Bill provides that an offender must be treated appropriately with their status as a person who has not been convicted of an offence,⁶¹ and, except in exceptional circumstances, must be detained separately to those serving a sentence of imprisonment.⁶² The proposed Bill’s Explanatory Memorandum expresses the view that the purpose of the detention is protective rather than punitive.⁶³

⁵⁸ Law Council of Australia, ‘Special advocate regime a vital inclusion in new counter-terrorism bill, but further parliamentary scrutiny necessary’, (Media Release, 15 September 2016).

⁵⁹ *A. and Others v. the United Kingdom* (2009) Eur Court HR 301, 220.

⁶⁰ High Risk Terrorist Offenders Bill cl 105A.9(3).

⁶¹ *Ibid* cl 105A.4(1).

⁶² *Ibid* sub-cl(2).

⁶³ Explanatory Memorandum, Criminal Code Amendment (High Risk Offenders) Bill 2016 (Cth) 9.

The protections in s 105A.4 are a welcome and necessary feature, however they may prove insufficient to make the detention non-punitive. The requirement to be ‘treated appropriately’ does not make clear how the offender will be treated differently to those serving a punitive sentence. It is important that the offender is not in fact subject to the same regimes of detention as if they were serving a sentence of imprisonment, otherwise the detention may be regarded as a fresh term of imprisonment contrary to Australia’s human rights obligations.⁶⁴

In New Zealand, the *Public Safety (Public Protection Orders) Act 2014* (NZ) regulates the continuing detention of sex offenders. The Act has a two-tiered structure where detainees subject to a Public Protection Order (PPO) are ‘residents’ who maintain all the rights of individuals not subject to PPO, except to the extent these are limited by the order⁶⁵ and should be provided with as much autonomy and quality of life as possible.⁶⁶ Only where a court is satisfied that the individual would pose an unacceptably high risk to themselves or other prisoners, and all other less restrictive measures have been considered, the court may order the offender to be detained in prison rather than a residence via the making of a Prison Detention Order (PDO).⁶⁷ This order must be revoked when an individual no longer poses an imminent threat.

The advantage of such a system is that it makes clear the substantive differences between the detention of an offender subject to a PDO and a regular prisoner. Furthermore, by only allowing detention in a prison where a court is satisfied about an unacceptably high risk, and less restrictive options have been exhausted, the Act goes some way to making sure that detention, especially within a prison, continues to be a measure of last resort.

4.5.2 Rehabilitation of offender

The proposed Bill and its Explanatory Memorandum explain that the detention is protective or preventative in nature. While the court is to have regard to any rehabilitation program the offender has undertaken,⁶⁸ this is only within the context of making a continuing detention order. Once the order is made there is no on-going purpose of treatment or rehabilitation to the detention. The *Dangerous Prisoners Act* imposes a similar regime of continuing detention for convicted sex offenders. One of the objectives of the detention in the *Dangerous Prisoners Act* is rehabilitation.⁶⁹ On the other hand the only object listed by the proposed Bill is ‘protection of the community’.⁷⁰ A failure to provide opportunities for rehabilitation may make such detention punitive in nature and thus no longer justifiable.⁷¹

⁶⁴ *Fardon v Australia* para 7.4(2).

⁶⁵ *Public Safety (Public Protection Orders) Act 2014* (NZ) (*‘Public Safety Act’*) s 24.

⁶⁶ *Ibid* s 5.

⁶⁷ *Ibid* s 72.

⁶⁸ The Bill cl 105A.8(e).

⁶⁹ *Dangerous Prisoners Act* s 3(b).

⁷⁰ High Risk Terrorist Offenders Bill cl 105A.1

⁷¹ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 620 (Gummow J).

Rehabilitation or de-radicalisation programs for terrorist offenders have been successfully implemented overseas⁷² and the framework for a similar program in Australia has been proposed.⁷³ Introducing similar programs into Australia would provide a valuable service in helping to reintegrate these offenders into the community and prevent escalation or reoffending based on their radical beliefs. Including a rehabilitative component in the proposed Bill would help to clearly differentiate the detention it imposes from a punitive sentence and would be compatible with the views of the Human Rights Committee.⁷⁴

4.5.3 Separate detention of terrorists

It can be problematic when provision is made to keep certain prisoners detained separately from others. In these situations, international law regarding the human rights of prisoners must be taken into account. Section 105A.4(2) of the proposed Bill provides for separate detention of ‘terrorist offenders’, defined in s 105A.2 and s 105A.3. While it is subject to certain exceptions, allowing offenders to be held with other prisoners if, among other reasons, it is ‘reasonably necessary for the purposes of rehabilitation’,⁷⁵ it is possible that human rights breaches could arise here.

Under rule 38(2) of the 2015 UN’s *Standard Minimum Rules for the Treatment of Prisoners* (the ‘Mandela Rules’),⁷⁶ adopted by the UN General Assembly and hence binding on Australia,⁷⁷ when prisoners have been kept separately to others, ‘the prison administration shall take the necessary measures to alleviate the potential detrimental effects of their confinement on them and on the community following their release from prison’. While this section of the proposed Bill currently makes no mention of the measures that will be taken once ‘terrorist offenders’ have been released, it is evident that this must incorporate some kind of rehabilitative process.

The Mandela Rules additionally provides that indefinite, or prolonged, solitary confinement is prohibited,⁷⁸ and care must be taken to ensure that keeping prisoners ‘separate’ does not entail solitary confinement.

We recognise that the need to protect ‘terrorist offenders’ from the negative consequences of separate detention must be balanced with the prevention of radicalisation among other prisoners. This was a key concern behind the 2016 UK laws that sought to introduce similar

⁷² Charisse Smith and Mark Nolan, ‘Post-sentence continued detention of high-risk terrorist offenders in Australia’ (2016) 40 *Criminal Law Journal* 163, 175.

⁷³ *Ibid* 175-178.

⁷⁴ *Dean v New Zealand* para 7.5

⁷⁵ *Criminal Code Act 1995* s 105A.4(2)(a).

⁷⁶ UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, 70th sess, Agenda Item 106, A/RES/70/175 (adopted 17 December 2015).

⁷⁷ *UN’s new ‘Mandela Rules’ shine a light on sub-standard Australian prison conditions and practices* (2015) Human Rights Law Centre <<http://hrlc.org.au/uns-new-mandela-rules-shine-a-light-on-sub-standard-australian-prison-conditions-and-practices/>>.

⁷⁸ The Nelson Mandela Rules, rule 43.

legislation whereby convicted terrorists would be kept separately from other prisoners.⁷⁹ Nonetheless, it is important that Australia's international human rights obligations are complied with. We therefore recommend that Australia manage the separation of prisoners carefully, providing rehabilitative services as required by the Mandela Rules, ensuring that the exceptions from rule 38(2) are applied when necessary, and ensuring that separation does not lead to solitary confinement.

4.5.4 Recommendations:

- A dual system of detention should be set up so that most offenders are treated as residents within prison grounds and are not in fact subject to the same prison regime as those convicted of an offence.
- Only where a court is satisfied of the high level of risk posed by an offender to others within detention, or to themselves, and the inappropriateness of less restrictive measures should the offender be detained within a prison.
- The rights of those in detention under continuing detention orders as opposed to under sentences for terrorist offences should be explicitly stated to be as close as possible to individuals who are not detained.
- De-radicalisation programs should be established within all Australian prisons that detain terrorist offenders subject to a continuing or interim detention order.
- The proposed Bill should have rehabilitation or de-radicalisation of terrorist offenders as one of its objects, and allow orders to be made for offenders to attend such programs.
- If offenders are to be kept separately from other prisoners, rehabilitative processes must be in place to respond to this
- Care must be taken to ensure that this does not lead to excessive solitary confinement

⁷⁹ Peter R. Neumann 'Prisons and terrorism: Radicalisation and De-radicalisation in 15 Countries' (International Centre for the Study of Radicalisation and Political Violence, 2010) <<http://icsr.info/wp-content/uploads/2012/10/1277699166PrisonsandTerrorismRadicalisationandDeradicalisationin15Countries.pdf>>