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POST-SENTENCE PREVENTATIVE DETENTION OF HIGH RISK TERRORIST OFFENDERS

Report to Parliamentary Joint Committee
on Intelligence and Security

ATTORNEY-GENERAL'S DEPARTMENT



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Introduction

The *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* introduced into the Commonwealth Criminal Code Division 105A—a scheme designed to ensure the safety and protection of the community through providing for the post-sentence preventative detention of high risk terrorist offenders. To progress the implementation of the scheme, the Commonwealth convened the High Risk Terrorist Offenders (HRTO) Implementation Working Group, which includes representatives from State and Territory justice and first ministers' departments, police, and corrections agencies.

In its advisory report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016, the Parliamentary Joint Committee on Intelligence and Security recommended that “the Attorney-General provide the Committee a timetable for implementation of any outstanding matters being considered by the [HRTO] Implementation Working Group by 30 June 2017.” This report sets out the work already completed by the HRTO Implementation Working Group following the passage of the Bill, and outlines the matters to be progressed from July 2017 onwards.

The HRTO scheme commenced on 7 June 2017. An application for a continuing detention order (CDO) under the scheme may only be made in the last 12 months of an offender's sentence for a serious terrorism offence. There are currently 20 offenders serving sentences that fall within the scope of the HRTO scheme. At present, the earliest an application could be made is mid-2018, and the earliest an order could commence is mid-2019. Figure 1. summarises the timetable for implementation of matters being considered by the HRTO Implementation Working Group.

1. Operational arrangements

Completed work

The HRTO Implementation Working Group has analysed existing co-operative relationships and established offender management mechanisms between the Commonwealth, States, and Territories, to identify how they can be appropriately leveraged and/or adapted to support the operation of the HRTO scheme. This analysis focused on how an application for a CDO will be initiated, and what information will be required, as well as how an offender's case will be managed and reviewed.

The HRTO Implementation Working Group noted that the existing co-operative arrangements already provide for a nationally consistent governance framework for the strategic management of counter terrorism operations. The analysis noted the importance, and success, of joint Commonwealth/State/Territory mechanisms, such as the Joint Counter Terrorism Teams (JCTTs) in gathering and sharing information to support counter terrorism investigations and prosecutions. It also noted that any governance mechanisms responsible for progressing CDOs should avoid duplication of other processes wherever possible.

The HRTO Implementation Working Group has agreed in-principle to the establishment of a cross-jurisdictional committee—the Terrorist Offenders Review Committee (TORC)—to ensure effective gathering, sharing, and analysis of information between relevant agencies on terrorist offenders serving a sentence of imprisonment. The core function of the TORC will be to consider the risks posed by terrorist offenders, and make recommendations on how best to mitigate them through considering a range of options, including CDOs. In making these recommendations the TORC will rely on the information and reports already generated by State and Territory corrections, policing, and the JCTTs, as well as any further relevant information from other Commonwealth, State and Territory agencies. The TORC will also have a role in gathering, sharing, and analysing information necessary for a review of a CDO. Membership of the TORC will comprise officials from the:

- Commonwealth Attorney-General's Department (AGD)
- Australian Federal Police

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- Australian Security Intelligence Organisation
- Department of Immigration and Border Protection (as needed)
- relevant Joint Counter Terrorism Team/s
- relevant State/Territory corrections services
- relevant State/Territory police
- relevant State/Territory justice agencies.

Ongoing work

In the short-term, the HRTO Implementation Working Group will finalise the co-operative operational arrangements for the HRTO scheme through the development of a Memorandum of Understanding, which will:

- establish the TORC
- set out its Terms of Reference
- define its purpose and scope
- detail the processes for requesting and sharing information
- detail the processes for making recommendations.

In the medium to long-term, following its initial meetings, the Commonwealth, States and Territories will review and assess the performance of the TORC to ensure the effectiveness of the scheme's operational arrangements.

2. Housing of offenders

Completed work

Sections 105A.3 and 105A.4 of the *Criminal Code* require that, for an offender subject to a CDO to be housed in the prison of a State or Territory:

- an arrangement with a State or Territory must be in force
- subject to certain exceptions, the offender must be treated in a way that is appropriate to their status as a person who is not serving a sentence of imprisonment
- subject to certain exceptions, the offender must be accommodated or detained in a different area or unit of the prison as persons who are in the prison for the purpose of serving a sentence of imprisonment.

The HRTO Implementation Working Group is currently considering a draft arrangement for the provision of housing for offenders. The arrangements will formalise the necessary administrative requirements for the accommodation and management of offenders detained under the scheme. The arrangements will also contain management standards, with a view to providing guidance to States and Territories on the treatment and accommodation of offenders detained under the HRTO scheme. These standards are designed to provide flexibility, in recognition of the differences across jurisdictions, to ensure the effective management of offenders subject to a CDO in line with the legislative provisions for their treatment that distinguish them from offenders serving a sentence of imprisonment.

Ongoing work

In the short-term, following consultation on the draft arrangement, the HRTO Implementation Working Group will finalise and implement individual arrangements between the Commonwealth and each State and Territory.

In the medium to long-term, the Commonwealth, in conjunction with the States and Territories, will monitor and review the effectiveness of the arrangements.

3. Risk assessment tools

Completed work

Section 105A.6 of the *Criminal Code* provides for the Court to appoint one or more experts, if doing so will materially assist the Court to decide whether to make a CDO. The expert is required to conduct an assessment of the risk of the offender committing a serious Part 5.3 offence if they are released into the community, this being the required threshold for the Court to make a CDO.

The HRTO Implementation Working Group identified the Violent Extremism Risk Assessment Version 2 Revised (VERA 2R) as the best available violent extremism risk assessment tool to assist experts. VERA 2R is a tool relevant to a prison environment that is administered by trained psychological and psychiatric staff. This decision was informed by consultations with eight Australian psychologists experienced in assessing high risk sex and violent offenders, and an international literature review.

While the HRTO Implementation Working Group selected the VERA 2R as the best available tool, it noted that experts should supplement their assessments with other psychometric instruments relevant to the specific issues of each case. These could include deception detection techniques, trauma instruments, or instruments for assessing specific psychopathology.

The key advantages in using the VERA 2R include that:

- it has been developed based on evidence from offenders relevant to the HRTO scheme
- it addresses a broad range of important factors, including those relating to mental health and youth
- it is relatively easy to use by a trained VERA practitioner and well structured, which enables experts to generate user friendly reports.

The primary author and original creator of the VERA, Dr Elaine Pressman, an internationally-recognised Canadian expert in violent extremist risk assessment, will deliver VERA 2R training in Australia in June and July 2017 for 30 corrective services psychologists and psychiatrists nationwide.

Ongoing work

Following participation in initial VERA 2R training, leading VERA practitioners in Australia will be invited to participate in train-the-trainer training in the first quarter of 2018. Once certified as VERA trainers, these practitioners will ensure that Australia has the necessary capability and capacity to sustain and increase the pool of Australian VERA users in all jurisdictions.

The VERA practitioner community of practice will expand throughout 2018, and beyond, as Australian trainers deliver 'on-request' training to the public and private sectors. The community of practice will convene at least annually to share lessons learned and to ensure that HRTO risk assessment knowledge is appropriately disseminated to the entire community of practice. The community of practice will seek information and lessons learned from international counterparts experienced in administering the VERA where necessary.

While VERA 2R is currently deemed the best available tool for use with the HRTO scheme, the HRTO Implementation Working Group will seek to further strengthen its empirical basis. AGD will work with Dr Pressman and international and Australian experts over the next 12 months to scope how the validity of the VERA 2R could be strengthened in the Australian context. In the medium to long-term, the tool will be subject to ongoing review and assessment.

4. Experts

Completed work

The *Criminal Code* defines 'relevant expert' as including a medical practitioner, a psychiatrist, a psychologist, or any other expert who is competent to assess the risk of a terrorist offender committing a serious Part 5.3 terrorism offence if released into the community. The HRTO Implementation Working Group has agreed that experts nominated by the Commonwealth Attorney-General, or legal representatives of the Commonwealth Attorney-General, to advise the Court in HRTO cases should meet the following minimum criteria:

1. knowledge of and experience in the assessment of high risk offenders, including experience in administering psychometric assessment instruments
2. an understanding of recidivism issues
3. an understanding of radicalisation and violent extremism
4. training in the use of the VERA 2R, or other tool or process developed specifically to assess the risk of a terrorist offender re-offending on release into the community.

Experts are expected to meet criteria 1. and 2. through general work experience with corrective service agencies or private practice. Selected experts nationwide have been offered VERA 2R training to meet criterion 4. Criterion 3. will be addressed as part of the ongoing HRTO work.

Ongoing work

The HRTO Implementation Working Group will continue work to identify how best to help experts meet criterion 3. given an understanding of radicalisation and violent extremism is central to conducting a robust risk assessment. While some elements of violent extremism risk assessment will be generic, understanding the specific issues that relate to this type of offender, including their ideological beliefs and behaviours, will be crucial to assessing the significance of their behaviour and its potential future course.

Experts will be offered basic information about radicalisation and violent extremism through the VERA 2R training, access to recent academic literature, and positions on existing courses on understanding violent extremism and radicalisation. In the second half of 2017, the HRTO Implementation Working Group will consider whether a further level of understanding of radicalisation and violent extremism will be required to enable an expert to advise the Court.

To make informed judgements, experts may require access to information held by law enforcement and intelligence agencies about the individual being assessed. Access to this information is contingent upon holding an appropriate security clearance. The HRTO Implementation Working Group will assess the need for experts to hold security clearances in the second half of 2017, as information sharing and operational arrangements for the HRTO scheme are further settled.

5. Rehabilitation programs

Completed work

AGD has worked with States and Territories through the Australia-New Zealand Counter-Terrorism Committee's Prisoner Management and Reintegration Working Group (PMRWG) to analyse Australian rehabilitation programs that are, or could be, used to seek to rehabilitate terrorist offenders, including programs that could be applied to offenders subject to a CDO.

Victoria and New South Wales currently have voluntary rehabilitation programs that are applied to some terrorist offenders that could be applied to post-sentence detainees. In addition, all States and Territories have

general prison programs and community-based intervention programs that could assist with rehabilitation and community integration.

The Victorian and New South Wales programs apply internationally-recognised good practices in terrorist rehabilitation, including:

- clearly defining goals and objectives, as well as indicators of success and failure
- developing individualised interventions, informed by risk assessment and needs analysis
- incorporating an integrated multidisciplinary case management approach for initial assessment, needs identification, goal setting, intervention activities and periodic review to measure progress (staff from corrective services, State police, federal police, and community or religious organisations and psychologists can be involved in the process)
- developing psychosocial interventions that assist offenders in defining the issues that pushed them towards terrorism in the first place and subsequently taking steps to disengage from supporting the use of violence to achieve political or ideological goals.

Implementing effective terrorist rehabilitation programs is complex, with many sensitivities to consider, including offender reluctance to participate and the challenges involved in engaging communities, community leaders or other mentors to assist with rehabilitation activities. In particular, it is important to consider the involvement of religious leaders, family, and friends in the rehabilitation process.

Ongoing work

Australian rehabilitation programs could be enhanced to seek to more effectively disengage terrorist offenders and post-sentence detainees from violent extremism, by:

- increasing efforts to secure a body of credible community and religious leaders to provide mentoring services (where this is not already occurring)
- expanding post-release intervention activities, to increase the likelihood of positive community integration
- strengthening evaluation of the effectiveness of rehabilitation programs by developing a robust evidence base to guide program enhancements.

In the second half of 2017, the Prisoner Management and Reintegration Working Group will consider how these enhancements could be implemented. In most cases, the scope of existing programs will have to be expanded to ensure programs can provide appropriate rehabilitation services to terrorist offenders, post-sentence detainees and offenders released into the community. Consideration will also be given to the transition points between these different rehabilitation phases.

AGD is organising a terrorist rehabilitation conference and series of jurisdictional workshops that are expected to take place in the last quarter of 2017. International terrorist rehabilitation experts will participate in these events and will provide additional recommendations for enhancing Australian programs. These experts will share lessons learned and experiences from implementing similar programs in other countries, which will be fed into the development of policies and programs where relevant.

6. Oversight arrangements

Completed work

In accordance with its undertaking in the HRTO Implementation Plan, the HRTO Implementation Working Group examined existing State and Territory oversight regimes in relation to offenders in detention. In general, the purpose of these regimes is to ensure that prison conditions and standards are maintained, and that complaints and enquiries made by prisoners can be resolved. The HRTO Implementation Working Group noted

three key characteristics, common to each jurisdiction, which could serve as the minimum standards for the oversight of offenders subject to a CDO under the HRTO scheme:

- the existence of an independent statutory authority
- the ability to inspect places of detention
- the ability to investigate complaints.

The HRTO Implementation Working Group concluded that the existing State and Territory arrangements provide appropriate oversight of offenders subject to a CDO under the HRTO scheme, noting that some States and Territories have indicated that they will need to make minor amendments to legislation to ensure that offenders subject to CDOs under the HRTO scheme fall within the jurisdiction of their various oversight bodies.

Ongoing work

In the short-term, States and Territories will progress these amendments to ensure that appropriate oversight arrangements are finalised prior to the consideration of the first CDO applications in each jurisdiction under the HRTO scheme.

In the medium to long-term, the Commonwealth, States and Territories will review and assess the oversight arrangements to ensure their continued effectiveness and suitability for the HRTO scheme. In particular, members of the TORC will evaluate the suitability of any additional oversight arrangements established in States and Territories, such as the Inspectorates of Custodial Services proposed for Queensland and the Australian Capital Territory.

7. Regulations—Information sharing and funding for legal representation

Completed work

Information sharing

Section 105A.19 of the *Criminal Code* creates a regulation-making power for the purposes of sharing information relevant to the administration or execution of Division 105A of the *Criminal Code*. In order to ensure that all relevant information in relation to a terrorist offender is able to be gathered, shared, and analysed by the TORC, the HRTO Implementation Working Group has agreed on a list of persons to be prescribed under these regulations that reflects the membership of the TORC. This list seeks to ensure that all agencies that are likely to hold relevant information about terrorist offenders are able to receive information from, and disclose information to, the Attorney-General in order to progress applications for CDOs under the HRTO scheme.

Funding for legal representation

In a CDO proceeding under the HRTO scheme, a circumstance may arise where a terrorist offender is unable to engage a legal representative. Where this lack of legal representation is due to circumstances beyond the offender's control, the scheme allows the Court to make two types of orders. The first is an order staying the proceeding for such a period and subject to such conditions as the Court thinks fit. The second is an order requiring the Commonwealth to bear all or part of the reasonable costs and expenses of the offender's legal representation for the proceeding. Regulations may prescribe matters which the Court may, must or must not take into account in determining whether the circumstances are beyond the offender's control, and what are reasonable costs and expenses.

Section 105A.15A of the *Criminal Code* creates a regulation-making power for the purposes of prescribing matters that the Court may, must or must not take into account in determining whether circumstances are beyond the offender's control, and the reasonable costs and expenses of the offender's legal representation for the proceeding.

Draft regulations for information sharing and the funding of legal representation are currently being drafted.

Ongoing work

In the short-term, AGD will work to finalise and support the making of regulations for both information sharing and funding for legal representation. Under section 105A.20, AGD will also progress a delegation of powers from the Attorney-General to appropriate staff within AGD, to allow them to facilitate requests for, and disclosure of, information through the TORC. Procedures for requesting and disclosing information under the regulations will be developed and finalised in consultation with the HRTO Implementation Working Group, for inclusion in the Memorandum of Understanding (see 2. Operational arrangements).

In the medium to long-term, the TORC will monitor and review the effectiveness of its information sharing arrangements.

8. Resourcing

Completed work

The HRTO Implementation Working Group has conducted a preliminary analysis of the resourcing implications for Commonwealth, State and Territory stakeholders required to implement the HRTO scheme. Estimates for these costings rely heavily upon the progression of work streams one to six under the Implementation Plan. The Working Group will be able to develop more detailed estimates as this work progresses.

Operational arrangements

One of the main expenses associated with the HRTO scheme will relate to the application for a CDO.

Costs will include the human resources required for Commonwealth, State and Territory agencies to progress applications, including:

- requesting, collecting, and analysing information and intelligence, and converting this to evidence
- compiling applications and making recommendations to the Attorney-General on whether to apply for a continuing detention order
- legal and court costs for the application itself.

The HRTO Implementation Working Group is continuing to discuss the calculation of these costs and how they will be met.

Housing of offenders

The cost of housing offenders under the scheme depends upon several factors:

- how many CDOs are made under the scheme
- whether offenders are housed within existing facilities, or whether new facilities are built
- the extent to which offenders are treated differently to those within the prison serving a sentence of imprisonment.

The HRTO Implementation Working Group is continuing to discuss the calculation of these costs and how they will be met.

Risk assessment tools and experts

The main costs under these two work streams are likely to come in the form of additional training for experts, the development of a community of practice for the nominated risk assessment tool (VERA 2R), and costs associated with administering and validating the VERA 2R in the Australian context. While some funding to train relevant experts in the nominated risk assessment tool has already been allocated through the Australia New Zealand Counter-Terrorism Committee Special Fund, the HRTO Implementation Working Group has also

considered the possibility that further specific training on understanding the dynamics of violent extremism should be offered to relevant experts.

Rehabilitation programs

Work progressed to date on rehabilitation programs has focused on the effectiveness of existing programs, and how they could be applied or adapted to post-sentence detainees. Primary expenses under this work stream would therefore be likely to focus on the extension or adaptation of existing programs, and their continued evaluation.

Oversight arrangements

Any costs related to the oversight arrangements for the scheme are likely to manifest through an increase or extension of the current workload of relevant oversight agencies within each jurisdiction. Given offenders who are eligible for CDOs under the HRTO scheme already fall under the remit of these oversight agencies, any additional costs would therefore be associated with a continuation of their oversight functions for a further period of time, dependent on the length of any CDOs made by the Court.

Regulations—information sharing and funding for legal representation

Any costs relating to information sharing will likely be connected to the human resources required to request, gather, collate, and distribute information to members of the TORC.

An order for the Commonwealth to pay costs under section 105A.15A(3) is likely to be limited to circumstances where an offender is unable to secure alternative funding for legal representation. Any costs ordered would be dependent on the length and complexity of the hearing, and could likely be similar to the costs of a control order proceeding.

Ongoing work

Following the progression of work streams one to six, the HRTO Implementation Working Group will develop detailed costings for the operation of the scheme, to be provided to the Law, Crime and Community Safety Council by December 2018.

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Figure 1: Timetable for implementation of matters being considered by the Implementation Working Group

Stream #	Short term	Medium term	Long term
1 Operational arrangements	Finalise co-operative operational arrangements through the development of a Memorandum of Understanding.	Ongoing review and assessment of co-operative operational arrangements.	
	Responsible: Cth, States, and Territories.	Responsible: Cth, States, and Territories.	
	Timeframe: by November 2017.	Timeframe: from November 2017.	
2 Housing of offenders	Finalise arrangements with States and Territories on provision of housing for offenders.	Ongoing review and assessment of housing arrangements.	
	Responsible: Cth, States, and Territories.	Responsible: Cth, States, and Territories.	
	Timeframe: by December 2017.	Timeframe: from December 2020.	
3 Risk assessment tools	Train experts to administer risk assessment tool.	Certify some experts as risk assessment trainers, develop plan for validation of risk assessment tool.	Validation of risk assessment tool.
	Responsible: Cth leading, in consultation with States and Territories.	Responsible: Cth leading, in consultation with States and Territories.	Responsible: Cth leading, in consultation with States and Territories.
	Timeframe: by July 2017.	Timeframe: by June 2018.	Timeframe: from July 2018.
4 Experts	Identify training needs and develop plans to expand the pool of experts.	Deliver tailored training to support experts (if needed).	
	Responsible: Cth leading, in consultation with States and Territories.	Responsible: Cth leading, in consultation with States and Territories.	
	Timeframe: by June 2018.	Timeframe: from July 2018.	
5 Rehabilitation programs	Start enhancing existing programs to better support post-sentence detainees; agree to new programs that may be required.	Finalise enhancements to existing programs and develop new programs for post-sentence detainees (if needed).	
	Responsible: Cth, States, and Territories.	Responsible: Cth, States, and Territories.	
	Timeframe: by June 2018.	Timeframe: from July 2018.	
6 Oversight arrangements	Adapt existing State and Territory oversight regimes to ensure applicability to the HRTO scheme.	Ongoing review and assessment of oversight arrangements.	Review by the Independent National Security Legislation Monitor. Review by the Parliamentary Joint Committee on Intelligence and Security.
	Responsible: States and Territories, in	Responsible: Cth, States, and Territories.	Responsible: Cth.

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	consultation with Cth. Timeframe: by November 2018.	Timeframe: from November 2018.	Timeframe: December 2021 and 2022.
7 Regulations – information sharing and funding for legal representation	Finalise regulations to formalise information sharing and funding arrangements. Responsible: Cth leading, in consultation with States and Territories. Timeframe: by November 2017.	Ongoing review and assessment of information sharing arrangements. Responsible: Cth, States, and Territories. Timeframe: from November 2017.	
	Develop detailed costings as work streams 1-6 progress (as these are likely to identify the extent of any resourcing implications). Responsible: Cth leading, in consultation with States and Territories. Timeframe: from June 2017.	Provide detailed costings for any further resources required to the Law, Crime and Community Safety Council for their consideration. Responsible: Cth leading, in consultation with States and Territories. Timeframe: by December 2018.	Ongoing review and assessment of resourcing implications. Responsible: Cth leading, in consultation with States and Territories. Timeframe: from January 2019.