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POST-SENTENCE PREVENTATIVE DETENTION OF HIGH RISK TERRORIST OFFENDERS

IMPLEMENTATION PLAN

ATTORNEY-GENERAL'S DEPARTMENT



CONTEXT

The Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (the HRTTO Bill) will, if passed, introduce a framework into the Commonwealth *Criminal Code* dealing with high risk terrorist offenders.

The object of the regime is to ensure the safety and protection of the community by providing for the continuing detention of terrorist offenders serving custodial sentences who are considered by a court to pose an unacceptable risk of committing a serious terrorist offence if released into the community upon the expiry of their sentence.

The HRTTO Bill was introduced into the Senate on 15 September 2016 and referred to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) for inquiry and report.

In its report, the PJCIS recommended that the Commonwealth Attorney-General provide the PJCIS with a clear development and implementation plan that includes timeframes to assist detailed consideration of the HRTTO Bill prior to the second reading debate in the Senate (PJCIS Recommendation 22).

This Implementation Plan responds to that recommendation. The Plan will be updated as required as work progresses.

PROJECT SCOPE

The Commonwealth has convened an Implementation Working Group (the HRTTO Working Group) with all jurisdictions to progress outstanding issues relating to implementation of the proposed post sentence preventative detention regime.

The PJCIS indicated that the Implementation Plan should include information about:

- the general categorisation and qualifications of relevant experts
- the development and validation of risk assessment tools
- conditions of detention, including any agreements reached with States and Territories on housing arrangements, and
- progress in adapting the existing oversight mechanisms for use in the continuing detention order regime.

This Implementation Plan addresses these issues as well as issues relating to:

- subordinate legislation that will be required to formalise information sharing arrangements, and the funding of unrepresented offenders in continuing detention order proceedings, and
- resourcing implications.

Table 1 includes a timeframe for progressing work related to these issues.

ROLES AND RESPONSIBILITIES

Implementation of the regime will require collaboration between a range of Commonwealth, State and Territory government agencies including:

- State and Territory officials from
 - First Ministers' departments
 - justice
 - legal
 - corrections
 - law enforcement
- Attorney-General's Department
- Australian Federal Police
- Australian Security Intelligence Organisation

- Department of the Prime Minister and Cabinet.

The roles and responsibilities of each department, agency or other stakeholder will be formalised through a clearly articulated governance structure which will be agreed between the Commonwealth, States and Territories and documented.

It will be important for these arrangements to take into account existing co-operative arrangements between the Commonwealth and the States and Territories that provide a nationally consistent governance framework for the strategic management of counter-terrorism operations.

TABLE 1 - PROPOSED WORK STREAMS AND KEY DELIVERABLES – FORWARD PLAN FOR HRTO IMPLEMENTATION

Stream #	Phase 1	Phase 2	Phase 3
1. Operational arrangements	Determine operational requirements for the regime in conjunction with existing co-operative operational arrangements. <i>Responsible: Cth, States and Territories.</i> <i>Timeframe: by March 2017</i>	Finalise co-operative operational arrangements for the continuing detention order regime. <i>Responsible: Cth, States and Territories.</i> <i>Timeframe: by June 2017</i>	Ongoing review and assessment of cooperative operational arrangements. <i>Responsible: Cth, States and Territories.</i> <i>Timeframe: January 2018 onwards</i>
2. Housing of offenders	Determine minimum standards for housing offenders subject to continuing detention orders. Develop Cth-State/Territory arrangements in accordance with section 105A.21 of the HRTO Bill. <i>Responsible: Cth, States and Territories.</i> <i>Timeframe: by March 2017</i>	Finalise arrangements with States and Territories on housing arrangements. <i>Responsible: Cth, States and Territories.</i> <i>Timeframe: by June 2017</i>	Ongoing review and assessment. <i>Responsible: Cth, States and Territories.</i> <i>Timeframe: July 2017 onwards</i>
3. Risk Assessment Tools	International review and analysis of existing tools. <i>Responsible: Cth leading, in consultation with States and Territories.</i> <i>Timeframe: by April 2017</i>	Tool development. <i>Responsible: Cth leading, in consultation with States and Territories.</i> <i>Timeframe: May to December 2017</i>	Ongoing validation. <i>Responsible: Cth leading, in consultation with States and Territories.</i> <i>Timeframe: January 2018 onwards</i>
4. Experts	Develop expert requirements. <i>Responsible: Cth leading, in consultation with States and Territories.</i> <i>Timeframe: by April 2017</i>	Consult with existing experts. Identify training needs to develop the pool of experts. <i>Responsible: Cth leading, in consultation with States and Territories.</i> <i>Timeframe: by June 2017</i>	Develop tailored training to support CVE experts. <i>Responsible: Cth leading, in consultation with States and Territories.</i> <i>Timeframe: July to December 2017</i>
5. Rehabilitation Programs (including post-release)	Assess suitability of existing rehabilitation programs for post-sentence detainees. <i>Responsible: Cth, States and Territories.</i> <i>Timeframe: by April 2017</i>	Enhance existing programs to better support post-sentence detainees. <i>Responsible: Cth, States and Territories.</i> <i>Timeframe: May to June 2017</i>	Develop targeted rehabilitation options for post-sentence detainees (if needed). <i>Responsible: Cth, States and Territories.</i> <i>Timeframe: July 2017 onwards</i>
6. Oversight arrangements	Assess suitability of existing State and Territory oversight regimes for post-sentence detainees. <i>Responsible: Cth, States and Territories.</i> <i>Timeframe: by March 2017</i>	Adapt existing State and Territory oversight regimes and/or develop additional tailored oversight mechanisms in consultation with the States and Territories. <i>Responsible: Cth, States and Territories.</i> <i>Timeframe: by June 2017</i>	Review by the Independent National Security Legislation Monitor. Review by the Parliamentary Joint Committee on Intelligence and Security. <i>Responsible: Cth.</i> <i>Timeframe: 5 and 6 years after HRTO Bill passed</i>

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<p align="center">7. Regulations – information sharing and funding for legal representation</p>	<p>Determine agencies likely to hold information about terrorist offenders that is relevant to the administration or execution of the duties or functions under the Commonwealth regime.</p> <p>Review options to implement requirements including consideration of financial implications and existing Commonwealth legal and financial assistance models.</p> <p><i>Responsible: Cth leading, in consultation with States and Territories.</i></p> <p><i>Timeframe: by February 2017</i></p>	<p>Develop procedures for requesting and disclosing information for the purpose of the Commonwealth regime.</p> <p>Develop implementation method and finalise financial arrangements.</p> <p><i>Responsible: Cth leading, in consultation with States and Territories.</i></p> <p><i>Timeframe: by May 2017</i></p>	<p>Draft regulations to formalise information sharing and funding arrangements.</p> <p><i>Responsible: Cth leading, in consultation with States and Territories.</i></p> <p><i>Timeframe: by June 2017</i></p>
<p align="center">8. Resourcing</p>	<p>Preliminary analysis of resourcing implications for Commonwealth, State and Territory stakeholders required to implement the HRTTO regime.</p> <p><i>Responsible: Cth leading, in consultation with States and Territories.</i></p> <p><i>Timeframe: by March 2017</i></p>	<p>Develop detailed costings once work streams 1-6 have progressed (as these are likely to identify the extent of any resourcing implications).</p> <p><i>Responsible: Cth leading, in consultation with States and Territories.</i></p> <p><i>Timeframe: from June 2017</i></p>	<p>Provide detailed costings for any further resources required to the Law, Crime and Community Safety Council for their consideration.</p> <p><i>Responsible: Cth leading, in consultation with States and Territories.</i></p> <p><i>Timeframe: by December 2018</i></p>

OPERATIONAL ARRANGEMENTS

There are existing co-operative arrangements between the Commonwealth and the States and Territories that provide a nationally consistent governance framework for the strategic management of counter-terrorism operations. For example, there are Joint Counter-Terrorism Teams (JCTTs) established in each State and Territory that comprise AFP, State and Territory law enforcement and ASIO. The JCTTs provide a coordinated and consistent approach to combating terrorism.

There are also a number of existing offender management oversight mechanisms established for State and Territory post-sentence detention regimes that the Working Group will consider when assessing whether further coordination mechanisms are required.

For example, under NSW's current post sentence regime for high risk sex and high risk violent offenders, the High Risk Offenders Assessment Committee (HROAC) (which includes representatives from NSW Police, Family and Community Services, the Ministry of Health and a community agency nominated by the Minister) assists the Commissioner for Corrections in determining whether to make an application for a continuing detention order or an extended supervision order.

The Working Group will consider how these existing cooperative relationships and established offender management mechanisms can be used in the context of any application for a continuing detention order, including in determining whether an application should be initiated.

HOUSING OF OFFENDERS

Need for standards for the management of terrorist offenders subject to the continuing detention order regime.

States and Territories currently house federal terrorist offenders. Terrorist offenders subject to a continuing detention order will also be housed within State and Territory correctional facilities.

Under the HRTTO Bill, a terrorist offender who is detained in a prison under a continuing detention order must be treated in a way that is appropriate to his or her status as a person who is not serving a sentence of imprisonment, subject to certain exceptions. The offender must also not be detained in the same area or unit of the prison as persons who are in prison for the purpose of serving sentences of imprisonment, subject to certain exceptions.

It is important that housing arrangements under the proposed regime are, as far as practically possible, consistent across the country. At the same time, it is important to recognise that each jurisdiction has different infrastructure and approaches to the management of terrorist offenders, and sex/high risk violent offenders under State and Territory post sentence detention regimes.

It is proposed that the Commonwealth, in close consultation with the States and Territories, develop standard guidelines specifically for the management of offenders subject to a continuing detention order under the Commonwealth regime (the 'Management Standards'). The Management Standards would provide a minimum standard that State and Territory correctional authorities should meet, ensuring that conditions in correctional facilities are appropriate. The Management Standards would also take into account the differences in legislation between each jurisdiction as well as the different approaches taken to the

management of high risk offenders in each jurisdiction.

Similar national uniform guidelines have been developed previously between jurisdictions, for example the Standard Guidelines for Corrections in Australia. The Commonwealth will continue to consult with the States and Territories as to what the Management Standards may include.

At this early stage it is anticipated that the Management Standards would address a range of issues relevant to the detention of high risk terrorist offenders, for example:

Management Standards

- treatment and considerations noting the offender's status as a person not serving a sentence of imprisonment
- necessary physical security requirements
- fulfilling any requirements of the Court
- Australia's human rights obligations
- when an offender elects to be accommodated or detained with persons serving sentences of imprisonment
- individual case management plans including addressing issues such as:
 - appropriate conditions including rights and privileges, and
 - availability of employment and education
- availability of rehabilitation and treatment programs and appropriate services that will assist terrorist offenders to transition and reintegrate into the community where appropriate
- program suitability assessments and management of offender participation
- ensuring that the management, security and good order of the prison is maintained including the safe custody and welfare of the offender or any prisoner
- management of general non-compliance

Recent reviews, including the NSW Inspector of Custodial Service's current review of the

management of radicalised prisoners in NSW correctional centres, will greatly assist the development of the management standards.

Arrangements with States and Territories

Section 105A.21 of the HRTTO Bill enables the Attorney-General to 'arrange' for a terrorist offender in relation to whom a continuing detention order is in force to be detained in a prison of a State or Territory. Where such an Arrangement is made, the continuing detention order is taken to authorise the chief executive officer of the prison to detain the offender at the prison while the order is in force.

This provision will require the Commonwealth to enter into Arrangements with each State and Territory in relation to the detention of offenders subject to a continuing detention order. These Arrangements will more clearly articulate the processes by which an offender subject to a continuing detention order can be detained in State and Territory correctional facilities. The HRTTO Working Group will progress the development of these Arrangements in coming months.

RISK ASSESSMENT TOOL

Need for a tool

The HRTTO Bill includes provision for an expert to provide advice to a Court about the likelihood of an individual re-offending upon their release. A risk assessment tool will be required to support the experts' judgement.

Types of tool

Judgements about likely recidivism can be broadly classified as using three methodologies. These are: unstructured ('clinical') professional judgement; structured professional judgement (SPJ); and 'actuarial' tools.

‘Unstructured’ or ‘clinical’ judgements are where an expert provides their opinion without the use of a formal methodology. SPJ tools are designed to help an expert to combine judgement criteria in an explicit way. Research indicates that experts have a strong capacity to identify cues which predict outcomes of interest, but that they may not be good at combining these cues in a formally structured way. SPJ tools help ameliorate this problem by supporting experts to combine pieces of evidence systematically.

Existing research suggests that the use of clinical judgement without a supporting tool is not ideal in context of judgements about terrorism or violent extremism, as clinicians may not deal with enough cases to receive adequate feedback to calibrate their judgements. In addition, judgement and decision making research suggests that in general, the use of supporting tools provides more accurate judgements than unstructured professional judgement.

‘Actuarial’ risk assessment tools are well regarded in risk assessment for recidivism. These have been developed for sex offenders and violent offenders in an attempt to provide predictions about the likelihood that an individual will reoffend. The development of this type of tool is a difficult and lengthy process. The result is a model which is in principle able to provide a numerical risk assessment. To our knowledge, there are no existing actuarial tools for terrorist or violent extremist offenders. Some research has also indicated that an SPJ approach may be more appropriate for assessing the recidivism of violent extremist offenders.

Adapting/Developing an appropriate tool

An initial scoping exercise will be undertaken to review and analyse the full range of existing risk assessment tools to determine whether an

existing tool can be modified, or whether a new tool needs to be developed.

Scoping work will be undertaken in consultation with correctional services, law enforcement and intelligence agencies, and international partners. It will include consideration of risk assessment tools designed for predicting recidivism among high risk sex offenders and high risk violent offenders.

Following this work, a determination will be made as to whether an existing tool can be suitably adapted or whether a bespoke SPJ or actuarial tool needs to be developed to support assessments under the legislation.

Development and Validation

The Attorney-General’s Department will undertake a process either to adapt an existing risk assessment tool, or to develop a new tool. Initial validation of the modified/new tool will need to be undertaken with a select group of users.

Ongoing Validation

Longer term tracking will need to be undertaken and reviewed (e.g. at 5, 10 and 15 year intervals) to determine the validity and effectiveness of the tool in supporting predictive judgements about future behaviour. Revisions or additions may be required to the tool over the longer term in response to practical experience.

EXPERTS

The HRTTO Bill provides a definition of ‘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 terrorism offence if they were released into the community.

Define expertise and develop expert guidelines

In order to make informed judgements about the likelihood of future offending, the Implementation Working Group will consider what minimum qualifications the expert should have. For example, at a minimum the expert could have:

- forensic psychological or psychiatric qualification
- knowledge of/experience with violent extremist offenders
- knowledge of issues relating to recidivism in particular
- appropriate security clearance to access classified materials.

These requirements will be formalised in guidance documents, which would be developed by the Attorney-General's Department in partnership with relevant agencies.

Identify current experts

While there are a number of individuals who have the appropriate qualifications and expertise outlined above, the Working Group will consider ways to identify additional experts to support the function of the regime over the longer term. The Working Group will also undertake a 'gap analysis' to determine associated training needs to develop appropriate expertise.

Training and accreditation program

An appropriate set of training materials will be developed to help tailor expert focus on behavioural indicators of violent extremism within the prison setting. This could include formal accreditation for the purposes of the legislation. Whilst the legislation leaves it up to the discretion of the courts as to whether a particular person can be called as an expert,

this work will provide useful assistance to the courts.

It is also expected that training would be developed for judges, in collaboration with existing judicial training processes, to ensure they are equipped to deliberate effectively on this type of matter.

Develop process for obtaining expert security clearances

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 on holding an appropriate security clearance.

REHABILITATION PROGRAMS

Countering Violent Extremism (CVE) specific rehabilitation programs for violent extremist inmates are currently in place in Victoria and New South Wales. In addition, all States and Territories have general ameliorative programs in place within their prisons.

Existing programs will need to be assessed in light of the requirements of the HRTTO regime, and where necessary, enhancements made. This work could be undertaken by the Council of Australian Governments (COAG) Prisoner Management and Reintegration Working Group (PMR WG), which is responsible for considering CVE strategies in detention and post-release.

OVERSIGHT ARRANGEMENTS

Independent oversight of offenders in detention

Each State and Territory has existing independent oversight regimes in relation to offenders in detention.

For example, NSW has an Inspector of Custodial Services who is appointed to inspect adult

correctional facilities and juvenile justice centres and reports to the NSW Parliament on the findings of these inspections and reviews.

In Western Australia, the Inspector of Custodial Services has unfettered access and may review any aspect of custodial services at any time, and in the ACT two 'official visitors' receive and investigate prisoner complaints and grievances, and conduct inspections.

Victoria has an Office of Correctional Services Review (OCSR) that is overseen by an Advisory Committee that is independently chaired and comprises external independent members and senior departmental staff who are not involved in the delivery of correction services. The OCSR advises on whether the corrections system is operating in a fair, accountable and humane way that minimises the risk to the community while meeting the needs of offenders and staff.

The HRTO Working Group will consider which aspects of existing oversight regimes might be most useful in this context. The Group will consider whether there can be minimum standards in relation to oversight mechanisms and practices across each jurisdiction that will provide an adequate standard of oversight for offenders subject to a continuing detention order.

Oversight of the case management of serious offenders

Some jurisdictions have established bodies or advisory panels to provide additional monitoring and oversight of serious offenders to ensure they are managed appropriately.

In NSW for example, there is an independent statutory authority established under the *Crimes (Administration of Sentences) Act 1999* called the Serious Offenders Review Council (SORC). The SORC is made up of judicial members, officers of Corrective Services and community representatives who provide advice

to the Commissioner of Corrective Services on the security classification, placement and case management of inmates classed as serious offenders, including terrorist offenders.

Oversight of the case management of high risk and/or violent offenders

Some jurisdictions have specific mechanisms for the oversight of their high risk sex and/or violent offenders who are subject to post-sentence detention regimes.

In Victoria the Detention and Supervision Order Division of the Adult Parole Board is responsible for reviewing and monitoring the progress of offenders on continuing detention orders.

In NSW the HROAC, referred to above, also monitors and provides expert oversight of the exercise of the high risk offender functions of relevant agencies for the purpose of identifying opportunities for improved outcomes in individual cases.

The HRTO Working Group will identify where existing case management oversight mechanisms, such as those outlined above, might be adapted or extended to offenders who are subject to the HRTO regime, or if new mechanisms need to be created. For example, the group will identify whether there needs to be a committee, similar to the HROAC, and if so, consider how it will interact with current practices in relation to parole for terrorist offenders.

REGULATIONS - INFORMATION SHARING AND LEGAL FUNDING ARRANGEMENTS

The HRTO Bill includes two regulation making powers.

Subsection 105A.19(1) creates a regulation making power for persons to be prescribed by regulations for the purposes of information sharing in accordance with section 105A.19 of

the HRTTO Bill. These arrangements will be subject to consultation and agreement with States and Territories to ensure that agencies that are likely to hold information about terrorist offenders that is relevant to the administration or execution of the duties or functions in Division 105A are prescribed. Consultation with States and Territories will also involve establishing procedures for requesting and disclosing information for the purposes of the scheme.

Paragraph 105A.15A(2)(b) creates a regulation making power allowing for regulations to be made in respect of how the Commonwealth will bear all or part of the reasonable costs and expenses of the offender's legal representation for the proceeding as ordered by the Court. The Department administers a range of statutory and non-statutory legal financial assistance schemes as well as legal assistance programs. An examination of these schemes will form part of the consideration about how best to implement this statutory requirement.

It is anticipated that the Commonwealth will undertake the necessary consultation with States and Territories early in 2017, with the view to having the regulations drafted, approved by the Federal Executive Council, lodged and registered to commence at the same time as the HRTTO Act (six months after Royal Assent).

RESOURCING

The implementation of the HRTTO regime will have resource implications for both the Commonwealth and the States and Territories.

The HRTTO Working Group has already discussed areas where implementation of the regime is likely to impact on existing resources and where additional resourcing may be needed, including:

- resources required to assist the Commonwealth's preparation of an

application for a continuing detention order, including the collection of information from and by Commonwealth and State and Territory law enforcement and intelligence agencies,

- costs for housing offenders subject to a continuing detention order in State and Territory prisons,
- cost of developing and validating risk assessment tools,
- costs associated with experts – training and accreditation processes, security clearances, cost of preparing reports, and
- cost of training judicial officers.

The Implementation Working Group will develop a detailed costings proposal for consideration by the Law, Crime and Community Safety Council.

CONTINUING WORK

Table 1 summarises key aspects of this Implementation Plan and includes a timeframe for progressing the work of the Implementation Working Group.

The PJCIS recommended a further timetable for implementation of any outstanding matters being considered by the Implementation Working Group by 30 June 2017 (Recommendation 23).

The HRTTO Working Group will continue to progress, as quickly as practicable, its consideration of the issues identified above. Whilst it is expected that key milestones will be achieved by the reporting date of 30 June 2017, as identified in Table 1, some work of the Group will continue into the 2017-2018 year.

The Government has also accepted PJCIS Recommendation 16. The Government will consider whether the existing control order regime could be further improved to operate alongside the continuing detention order regime. Any potential changes will be

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developed in time to be considered as part of the reviews of the control order legislation to be completed by the Independent National Security Legislation Monitor (INSLM) by 7 September 2017 and the PJCIS by 7 March 2018.

In addition the regime will be subject to review by the INSLM five years after passage of the HRTTO Bill, as well as be the subject of further review by the PJCIS six years after passage (PJCIS Recommendations 19 and 20).