

## Dissenting Report by Labor and Greens members<sup>1</sup>

1.1 Australian Labor Party and Australian Greens members (the dissenting members) of the Parliamentary Joint Committee on Human Rights (the committee) seek to issue dissenting remarks in relation to the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020.

1.2 The dissenting members consider it regrettable that it has again become necessary to prepare yet another dissenting report for this once non-partisan legislative scrutiny committee.

1.3 This committee has a specific legislative scrutiny function: to inform both houses of Parliament as to the compatibility of proposed and existing Australian legislation with international human rights law. It has been established to contribute meaningfully to the consideration of human rights by the Parliament.<sup>2</sup> To achieve this, committee members carefully consider expert legal advice as to the application of international human rights law, and draw on this advice to form their own opinions as to the weight of those conclusions and recommendations. The dissenting members consider that just as the legal advice to the committee must be evidence-based and well reasoned, any substantial deviation from, or rejection of, the legal advice as to the compatibility of a measure with international human rights law likewise requires a persuasive foundation, and must be based on convincing evidence.

1.4 Additionally, dissenting members consider that, in order for the committee to properly fulfil its function of informing both houses of Parliament as to the compatibility of Australian legislation with international human rights law, it is important that the committee endeavour to provide genuine concluding advice to the Parliament as to that compatibility. The dissenting members consider that it will not generally be sufficient for the committee to identify where legislative measures limit human rights, without providing advice to the Parliament as to the committee's view as to whether such limitations are permissible as a matter of international human rights law. The dissenting members consider that this is particularly important where the legal advice to the committee indicates that there are significant human rights concerns with respect to a proposed measure.

1.5 It is for these reasons that the dissenting members issue the following remarks.

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, Advice Only, *Report 13 of 2020*; [2020] AUPJCHR 164.

2 Mr Harry Jenkins MP, Chair, Parliamentary Joint Committee on Human Rights, *House of Representatives Hansard*, 20 June 2012, p. 7176.

## Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020

1.6 This bill seeks to amend the *Criminal Code Act 1995* (Criminal Code) to establish an extended supervision order scheme for 'high-risk terrorist offenders'. On application<sup>3</sup> a State or Territory Supreme Court could make an extended supervision order.<sup>4</sup> The effect of an extended supervision order would be to impose conditions on the person, for a period of up to three years, contravention of which would be an offence punishable by imprisonment of up to five years.<sup>5</sup> Another extended supervision order could be made after the original three year period expires.<sup>6</sup>

### *Extended supervision order scheme*

1.7 The dissenting members agree that, to the extent that a supervision order may have the effect of protecting the public from harmful acts, this scheme promotes the right to life and security of the person. The dissenting members likewise note that the introduction of extended supervision orders would constitute a less rights-restrictive alternative to the existing continuing detention order scheme, as an individual subject to a supervision order would not be subject to continued imprisonment in a prison. In this respect, the dissenting members agree that these measures may promote the right to liberty.

1.8 The dissenting members further agree that given the breadth of potential conditions which could be imposed under a supervision order, extended supervision orders also engage a number of human rights. In particular, the dissenting members consider that should a court order the home detention of a person for long periods of time, this deprivation of liberty risks amounting to a penalty, which in such circumstances risks being incompatible with the absolute prohibition on retrospective criminal laws.

1.9 Dissenting members agree that, in relation to other human rights that may be limited by this bill, it has generally been established that the measure is prescribed by law, seeks to achieve the legitimate objective of addressing a risk of future harm to the community posed by persons convicted of terrorism offences, and is rationally connected to that objective (although notes the legal advice that some questions remain in relation to this). In relation to the proportionality of the proposed measure, the dissenting members note the Attorney General's advice as to why it is appropriate to apply the civil standard of proof; the safeguards available to seek to vary an extended supervision order or to be exempted from specified

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3 By the Australian Federal Police Minister (or their legal representative), Schedule 1, Part 1, item 62, proposed subsection 105A.5(1).

4 Schedule 1, Part 1, item 82, proposed section 105A.6A.

5 Schedule 1, Part 1, item 59, proposed subsections 105A.3(3); and sections 105A.18A-18B.

6 Schedule 1, Part 1, item 87, proposed subsection 105A.7A(5).

conditions; and the matters a court must consider before making an extended supervision order. However, the dissenting members also note the legal advice that as a court could impose any number of conditions which it was satisfied is reasonably necessary, and reasonably appropriate and adapted to protect the community from the unacceptable risk of the person engaging in terrorist conduct (which could include home detention), it does not appear proportionate to apply the civil standard of proof rather than the comparable 'satisfied to a high degree of probability' that applies in relation to continuing detention orders. In addition, the dissenting members are concerned that extended supervision orders, while limited to a maximum of three years in duration, could be sought consecutively without limit. Further, it is not clear that the capacity to apply for a variation of an order, and to seek a temporary exemption from a condition, would provide practical flexibility such that these could operate as safeguards in practice, and assist in the proportionality of the measure.

**1.10 The dissenting members consider that the proposed supervision order scheme fundamentally inverts basic assumptions of the criminal justice system: that persons may only be punished on the basis of offences, the existence of which has been proven beyond reasonable doubt. This bill proposes that persons who have committed offences and have completed their sentences for those offences may continue to be subject to coercive and invasive supervisory measures, because, on the balance of probabilities (that is, it being more likely than not), the offender poses an 'unacceptable risk' of committing a terrorism offence in the future. This inverts a fundamental assumption of democratic systems of criminal law: that a person should not be punished for a crime which they *may* commit in the future.**

**1.11 The dissenting members consider that if the conditions imposed by a court under an extended supervision order were extensive, and noting the balance of proof that applies, there is a significant risk that the extended supervision order scheme could impermissibly limit multiple human rights, including the rights to liberty, freedom of movement, a private life, protection of the family, freedom of expression, assembly and association, and the right to work.**

**1.12 The dissenting members draw these human rights concerns to the attention of the minister and the Parliament.**

*Withholding of certain evidence from the offender*

**1.13 The bill sets out the requirements for providing offenders and their legal representatives with a copy of applications and materials where the AFP minister (or their legal representative) applies to the court in relation to a supervision order.<sup>7</sup> However, it also sets out mechanisms whereby sensitive information may be**

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<sup>7</sup> Schedule 1, Part 1, item 120, proposed sections 104A.14A.

excluded from applications or materials where the information is national security information, subject to a claim of public interest immunity, or is terrorism material.<sup>8</sup>

1.14 The dissenting members agree that these measures seek to achieve the legitimate objective of protecting Australia's national security, as the inappropriate disclosure of national security information has the potential to prejudice Australia's national security and the security of all Australians. The dissenting members note that where a court has ordered a closed hearing, there is a process whereby a special advocate may be appointed where the offender is not able to receive certain highly sensitive information, and that the offender will be given sufficient information about the allegations to enable instructions to be given in relation to those allegations. However, the dissenting members also note the advice that the *National Security Information (Criminal and Civil Proceedings) Act 2004* places restrictions on communications between the special advocate and the offender.

1.15 While the special advocate scheme may work in practice to ensure an offender is able to obtain a fair hearing when restricted evidence is relied on in the making of an extended supervision order, the dissenting members consider there is a risk that the offender may not be able to adequately contest the arguments or evidence against them as they may be excluded from part of the hearing and from adequately instructing the special advocate so that they are able to effectively challenge such evidence.

**1.16 The dissenting members consider that as there are restrictions on communications between special advocates and the offender, questions remain as to whether a court would be able to, in all instances, ensure the right to a fair trial where to do so may risk prejudicing national security.**

**1.17 The dissenting members draw these human rights concerns to the attention of the minister and the Parliament.**

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**Graham Perrett MP**  
**Deputy Chair**  
**Member for Moreton**

**Steve Georganas MP**  
**Member for Adelaide**

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8 Schedule 1, Part 1, item 120, proposed sections 104A.14B–104A.14D.

**Senator Nita Green**  
**Senator for Queensland**

**Senator Pat Dodson**  
**Senator for Western Australia**

**Senator Lidia Thorpe**  
**Senator for Victoria**

