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Parliamentary Joint Committee on Intelligence and Security

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Dear Committee

Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 – Inquiry

Thank you for receiving this submission. I address only the international law issues. I am Challis Chair of International Law at the University of Sydney, have expertise in global counter-terrorism law and human rights, and have acted as counsel in five successful cases against Australia before the United Nations Human Rights Committee (UNHRC) under the individual complaints mechanism of the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).

The Bill is likely inconsistent with Australia's international human rights law obligations. The Statement of Compatibility with Human Rights is arguably incorrect.

The UNHRC examined a Queensland law for post-sentence continuing detention of convicted sex offenders in *Fardon v Australia*, Communication No. 1629/2007 (18 March 2010) and *Tillman v Australia*, Communication No. 1635/2007 (18 March 2010). In each case it found (at paragraph 7.4) that the continuing detention order was arbitrary detention contrary to article 9 of the ICCPR because:

(1) Despite being characterized as 'detention', it involved 'continued incarceration under the same prison regime' and thus amounted 'to a fresh term of imprisonment which… is not permissible in the absence of a conviction for which imprisonment is a sentence prescribed by law';

(2) It involved additional punitive imprisonment applied retrospectively, and the later imposition of a heavier sentence, both contrary to article 15(1) of the ICCPR;

(3) Its civil law process did not meet criminal fair trial standards under article 14;

(4) It was not shown that less intrusive means for ensuring rehabilitation were unavailable (including meaningful rehabilitation measures during the period of prior imprisonment, as required by article 10(3) of the ICCPR).

The UN Committee emphasized that 'each' ground 'by itself' violated the ICCPR.

The present Bill is distinguishable from the Queensland law in two relevant respects. First, a court must be satisfied that no other less restrictive measure would be effective in preventing the unacceptable risk (cl. 105A.7(1)(c)). Second, a person held in prison under an order must not be detained in the same area as convicted persons, and must be treated in a way that is appropriate to their status as a person not serving a sentence of imprisonment (cl 105A.4). Both of these safeguards improve on the Queensland law.

The Bill nonetheless likely remains inconsistent with Australia's ICCPR obligations for a number of reasons. Applying the UNHRC's reasoning in the *Fardon* and *Tillman* cases to the Bill:

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(1) While the Bill formally characterizes the scheme as 'detention', an offender would be detained 'in a prison' (cl. 105.A3(2)). While the person must be separated from prisoners and treated as an unconvicted person, there are numerous, wide, discretionary exceptions to these protections. These include the management, security or good order of the prison; the safe custody or welfare of the offender; the safety and the protection of the community; or for rehabilitation, treatment, work, education, general socialisation or other group activities. In practice, the application of the exceptions is very likely to render illusory the special protections for non-prisoners. Prisons are built for prisoners, not non-prisoners. If non-prisoners are being held because they pose a risk of terrorism, they are necessarily likely to be subjected to the same security measures as high risk prisoners. Facilities and services are also not designed for non-prisoners, such that the mixing of non-prisoners and prisoners is highly likely if effective access is to be provided to rehabilitation, work, education, socialisation, group activities and so on. I am not aware of prison facilities where a person subject to a continuing detention order could be meaningfully separated from, and treated differently than, prisoners. Accordingly, in substance, the Bill would likely involve continued incarceration under a prison regime, despite being designated as preventive detention.

(2) The UNHRC found that '[i]mprisonment is penal in character' and 'can only be imposed on conviction for an offence in the same proceedings in which the author is tried' (*Fardon*, para. 7.4). Clause 105A.3(1) of the Bill requires that a person must have been convicted of a specified offence and must still be serving their sentence. Since a continuing detention order constitutes a further term of imprisonment following the original sentence, it would violate the prohibitions on retrospective punishment and a heavier sentence in article 15(1) of the ICCPR.

(3) The Bill prescribes a civil process for making an order (cl. 105A.7 and cl. 105A.13) and does not meet the criminal fair trial due process guarantees that are required when a penal sentence is imposed (ICCPR, article 14). In this respect the Bill is even less compatible with the ICCPR than the Queensland law because it explicitly enables the non-disclosure of security information to an affected person (cl. 105A.5(5)), thus further prejudicing a fair trial by depriving the person of their rights to substantively know and test the adverse evidence against them.

(4) The requirement on a court to be satisfied that no other less restrictive measure would be effective in preventing the unacceptable risk partially addresses this concern in *Fardon*. However, the legal question from *Fardon* is not whether less restrictive measures *at the time of applying for an order* could address the risk. Rather, the UNHRC asked whether Australia had pursued less restrictive measures by discharging its obligation to adopt meaningful measures of rehabilitation (to prevent the person's ongoing dangerousness) throughout the 14 years of prior imprisonment. The Bill does not require the court to be satisfied on this point in the case of terrorist offenders. The court is required to consider only whether a person has participated in treatment or rehabilitation (cl. 105A.8(e)). It does not preclude the making of an order if meaningful rehabilitation opportunities have not actually been continually available throughout the term of a person's imprisonment.

As in *Fardon*, 'each' of the above defects would render detention arbitrary under article 9. While the UNHRC did not decide the point in *Fardon*, it is arguable that an order under the Bill would also violate the prohibition on double punishment in article 14(7) of the ICCPR ('No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted…').

I note that Australia has not declared, under article 4(1) of the ICCPR, that terrorism presents a 'public emergency which threatens the life of the nation', so as to justify derogating from its article 9 obligation to ensure freedom from arbitrary detention. I note further that UN Security Council resolution 1373 (2001) and other international counter-terrorism instruments do not require or authorize detention that would be inconsistent with Australia's human rights obligations. To the contrary, the UN Security Council and UN General Assembly have repeatedly affirmed that measures to counter terrorism must comply with human rights.[1]

Yours sincerely
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[1] See, eg, UN General Assembly resolution 60/158 (2005), para. 1; Security Council resolutions 1456 (2003), annex, para. 6, and 1624 (2005), para. 4.