



Australian Government
Attorney-General's Department

October 2016

Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016

Attorney-General's Department response to
Questions on Notice

This document responds the questions on notice marked with an asterisk received from the Parliamentary Joint Committee on Intelligence and Security Secretariat on 17 October 2016.

A response to the remaining questions on notice will be provided as soon as possible.

2. Alternatives (including control orders)

- (a) How can the bill better ensure that the Court is able to provide for or assess less restrictive alternatives to continuing detention orders?***
- (b) In particular, should the bill be amended to ensure that the Court can make alternative orders to a continuing detention order?***
- (c) Should the control order regime be amended to ensure that the Court can make a control order as an alternative to a continuing detention order?***
- (d) If so, given that at present the control order regime uses different tests, how can the control order regime be meshed with the continuing detention order scheme in this bill?***

ANSWER:

The Department notes that the Independent National Security Legislation Monitor and the Parliamentary Joint Committee on Intelligence and Security (the Committee) will conduct reviews into the control order regime by 7 September 2017 and 7 March 2018 respectively. In light of these proposed reviews, it may be better to defer a detailed consideration of how the control order regime and the regime under the HRTO Bill might better interact with each other until those reviews occur.

3. Housing offenders

- (c) Are there currently facilities that could meet the bill's provisions for separate accommodation for detainees serving continuing detention orders?***
- (d) What is the likelihood that state and territory prison accommodation cannot be adapted for offenders subject to a continuing detention order?***
- (e) Have the States and Territories been consulted on adapting prisons for offenders serving continuing detention orders?***
- (f) Is it possible for detainees to serve their continued detention out of high risk security conditions, but not as prisoners?***
- (g) What would need to occur to ensure that detainees can serve their continued detention in dedicated facilities?**
- (h) What are the funding and resource implications of this?**
- (i) How will the State and Territory prison systems provide appropriate conditions for detainees?***

ANSWER:

The Commonwealth has convened an Implementation Working Group with legal, corrections and law enforcement representatives from each jurisdiction to progress all outstanding issues relating to implementation of the proposed post sentence preventative detention scheme. The matter of housing arrangements is currently under consideration by the

Implementation Working Group including whether existing state and territory prison accommodation could be adapted for offenders subject to a continuing detention order, and any resource implications this will have.

7. International human rights standards

- (a) What is the difference between this bill and the continuing detention schemes that were the subject of individual complaints to the UN Human Rights Committee (UNHRC) in *Fardon v Australia* and *Tillman v Australia*?***
- (b) To what extent does this bill address the specific concerns raised by the UN Human Rights Committee in respect of the regimes considered in *Fardon v Australia* and *Tillman v Australia*?***

ANSWER:

The scheme includes numerous features designed to ensure that detention is only authorised where it is non-arbitrary. The department refers the Committee to paragraph 37 of the Explanatory Memorandum to the *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*.

Secondly, section 105A.4 of the Bill provides for the treatment of a terrorist offender in a prison under a continuing detention order including a requirement at subsection 105A.4(2) to house the offender separately from sentenced prisoners unless one of the exceptions applies. This recognises the terrorist offender's status as an unconvicted prisoner.

Thirdly, the Bill states that the court may only make a continuing detention order if satisfied that there is 'no other less restrictive measure that would be effective in preventing the unacceptable risk'. This provides a safeguard against the application of a continuing detention order to a terrorist offender where there are alternatives to detention that would appropriately mitigate the risk posed by the individual.

9. Scope

- (c) Should the continuing detention order regime apply to preparatory offences?***

ANSWER:

The policy rationale behind the Division 101 offences in the *Criminal Code* (other than the offence of engaging in a terrorist act) is the need to criminalise preparatory conduct. The general policy intent underlying the offences, being the need to disrupt the preparatory stages of a terrorist act, has been accepted by Security Legislation Review Committee (Sheller Committee) and the Parliamentary Joint Committee on Intelligence and Security in 2006.

A number of significant terrorism prosecutions have had as their foundation preparatory offences in Division 101. The result of these prosecutions demonstrates the effectiveness of the offences in foiling serious terrorist attacks in Australia. Those prosecuted for preparatory offences have intended to cause serious damage to property and infrastructure and serious harm, or death, to people.

The gravity of these offences is reflected in the maximum penalties that apply to the preparatory offences which range from imprisonment for 10 years to imprisonment for life. It is appropriate that preparatory offences be included in the definition of a 'serious Part 5.3 offence' as part of the proposed scheme.

(d) Should the continuing detention order regime be limited to offenders whose original sentence (head sentence) was at least 7 years?*

ANSWER:

The sentence actually imposed on a terrorist offender by a sentencing court is not relevant for the purposes of the post-sentence detention scheme.

The offences listed in subsection 105A.3 all carry a maximum penalty of seven years' imprisonment or more. The maximum penalty of the offence is considered to be the best, most objective measure of the seriousness of an offence as compared to the sentence actually imposed by the sentencing court, which can take into account other factors not relevant to the seriousness of the offending, such as pleas of guilty.

10. Technical legal matters

(d) Should the Court be required to advise a person being sentenced for a terrorism offence of the existence of the continuing detention order scheme and its application to the offence?*

ANSWER:

There is nothing in the Bill that would preclude a court from notifying an individual who is being sentenced for a terrorism offence of the existence of the continuing detention order scheme and its application to the offence.

(e) How will bail be addressed?*

ANSWER:

There is not expected to be any interaction between bail and the continuing detention order scheme. Bail allows an individual charged with a criminal offence to be released into the community, generally to the condition that they undertake to appear in court and observe specific conditions the court considers appropriate. Bail for terrorism offences is governed by section 15AA of the *Crimes Act 1914* (Cth). Where the question of bail arises, an individual has not been convicted of a terrorism offence.

The continuing detention order scheme can only apply to individual following the determination of guilt by a court of an individual for a defined range of terrorism-related offences (See section 105A.3).

(f) Should bail laws be amended to reflect their application to offenders serving continuing detention orders?*

ANSWER:

As noted in response to question 10(e), there is not expected to be any interaction between bail laws and offenders serving continuing detention orders. An individual serving a continuing detention order will not be eligible for bail.

(g) How does the continuing detention order scheme interact with parole?*

ANSWER:

If a terrorist offender is granted parole under Part IB of the *Crimes Act 1914* (Cth) prior to the expiry of their head sentence, they would not be eligible for a continuing detention order.

The only exception to this is where parole is revoked, and the individual is returned to prison to serve the remainder of their sentence for the offence or offences for which they were originally convicted. Under these circumstances, the individual would be eligible for a continuing detention order at the expiry of their head sentence.

14. Right to a fair trial

(a) The bill allows for an application for a continuing detention order to be made within the final six months of the terrorist offender's sentence. What would be the benefits of requiring an application for a continuing detention order to be heard and determined well in advance of the expiry of the person's sentence or continuing detention order?*

ANSWER:

The purpose of this requirement is to ensure the offender is given as much time as possible to demonstrate that they no longer present a risk to the community before they are assessed by an independent expert or experts, and ultimately the Court, as to whether they continue to present an unacceptable risk to the community. This six month time period requirement has been modelled on the New South Wales, Western Australian and Queensland serious sex offender schemes.

However, jurisdictions that have recently reviewed or are currently reviewing their high risk offender legislation have noted that six months may be too short a time period for:

- the relevant expert or experts to complete an assessment and prepare the necessary report, and
- to allow offenders adequate time to prepare for their hearings, to instruct counsel, analyse evidence and to make arrangements for witnesses to give evidence.

- (b) The Law Council of Australia indicated in their submission that where public interest immunity is claimed, that information cannot typically be used by the party asserting the claim. Does this generally occur in civil or criminal proceedings?***
- (c) The bill allows the Attorney-General to refuse to serve particular material on the respondent and rely on that information as the basis of a public interest immunity claim. What impact does this stance have upon the respondent's right to a fair trial?***

ANSWER:

The primary way the Commonwealth would seek to protect sensitive information is to rely on the relevant provisions of the *National Security Information (Criminal and Civil Proceedings) Act 2004* or to seek an order of the Court preventing or limiting disclosure of the information referred to at paragraphs 105A.5(5)(a), (b) and (d) of the Bill.

18. Legal representation

- (c) Should the court be granted the power to stay proceedings to enable the offender to obtain legal representation?***

ANSWER:

No. The offender will be provided with adequate notice to obtain legal representation. Subsection 105A.5(4) of the Bill provides that the applicant must, subject to subsection (5), give a copy of the application to the offender personally within two business days after the application is made.

Further, the Australian Government funds Legal Aid Commissions, under the National Partnership Agreement on Legal Assistance Services (2015-2020), to provide legal assistance to disadvantaged and vulnerable people consistent with the Commonwealth's service priorities.

Over the course of the five-year Agreement, Legal Aid Commissions will receive \$1.07 billion in Commonwealth funding. This funding is available for commissions to provide grants of legal aid for Commonwealth family, civil and criminal law proceedings.

Under the Agreement, the Commonwealth's civil law priorities include assisting people with matters that are likely to have a significant adverse impact on them if not resolved. The Agreement also lists 'people in custody and prisoners' as a priority group for the targeting of services.

Eligibility for legal aid is a matter for legal aid commissions to determine on a case-by-case basis. Legal aid commissions are independent statutory bodies that determine eligibility for legal aid and the extent of assistance they provide to individuals. However, providing legal representation for an individual to oppose an application for a continuing detention application would likely be a high priority for commissions, given the potential for an offender's period in detention to be continued for up to three years.