



**Australian  
Human Rights  
Commission**

# Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016

**AUSTRALIAN HUMAN RIGHTS COMMISSION  
SUBMISSION TO THE PARLIAMENTARY JOINT  
COMMITTEE ON INTELLIGENCE AND SECURITY**

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## 1 Introduction

1. The Australian Human Rights Commission makes this submission to the Parliamentary Joint Committee on Intelligence and Security in its Inquiry into the Australian Government's Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) (the Bill).

## 2 Summary

2. The Commission welcomes the opportunity to make a submission in relation to this Bill.
3. The Bill would allow the continued detention of people convicted of a range of terrorism-related offences after the expiration of their sentences in circumstances where those people are assessed as posing an unacceptable risk to community safety and that risk cannot be managed in a less restrictive way.
4. Ensuring community safety is one of the most important tasks of government. Taking steps to prevent the commission of terrorist acts promotes the human rights of members of the Australian community<sup>1</sup> and is an obligation on Australia under international law.<sup>2</sup>
5. It is also important that the steps taken to prevent the commission of terrorist acts are themselves consistent with human rights.<sup>3</sup> As the UN General Assembly has said:

[T]he promotion and protection of human rights for all and the rule of law is essential to all components of the [United Nations Global Counter-Terrorism] Strategy, recognizing that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing ... .<sup>4</sup>

6. The United Nations Human Rights Committee has previously considered the post-sentence preventative detention schemes in Queensland and New South Wales and found their application in relation to two people convicted of sex offences was contrary to their rights under the *International Covenant on Civil and Political Rights* (ICCPR). However, preventative detention regimes are not necessarily prohibited under international law.
7. There is a range of elements in the current Bill, which have been designed to achieve a scheme that is not arbitrary and that is reasonable and proportionate to the purpose of ensuring community safety.
8. The Commission's submissions focus first on establishing whether there is a sufficient evidence base for the proposed scheme and, secondly, on a number of additional safeguards that could improve the operation of the scheme to achieve better human rights outcomes if the Committee decides that the Bill should be passed.
9. The additional safeguards relate to: the scope of offenders that come within the scheme, how their risk of future offending is assessed, the factors that

need to be taken into account in making a continuing detention order, the power of the court to make orders for less restrictive alternatives if appropriate, the availability of legal advice, the provision of warnings about the operation of the scheme, and a statutory review of the effectiveness of the scheme after three years.

### **3 Recommendations**

10. The Australian Human Rights Commission makes the following recommendations.

#### **Recommendation 1**

The Commission recommends that, before the Bill is passed, an audit be carried out of people who have been convicted of offences falling within the definition of ‘terrorist offender’ to assess the degree of risk that they would pose to the community if released, and whether this risk is able to be adequately managed through currently available measures including the imposition of control orders.

#### **Recommendation 2**

The Commission recommends that the offence in s 119.2 of the *Criminal Code* (Entering, or remaining in, declared areas) be excluded from the scope of the definition of a ‘terrorist offender’ in proposed s 105A.3(1)(a).

#### **Recommendation 3**

The Commission recommends that further consideration be given to whether the offences in s 119.7(2) and (3) of the *Criminal Code* (Publishing recruitment advertisements) should be included within the scope of the definition of a ‘terrorist offender’ in proposed s 105A.3(1)(a). If these offences are to be so included, their inclusion should be appropriately justified in the Explanatory Memorandum accompanying the Bill.

#### **Recommendation 4**

The Commission recommends that the list in proposed s 105A.6 – namely, the matters that an expert’s report must contain – be amended to include any limitations on the expert’s assessment of the risk of the offender committing a serious Part 5.3 offence if the offender is released into the community, as well as the expert’s degree of confidence in that assessment.

#### **Recommendation 5**

The Commission recommends that an independent risk management body be established to:

- (a) accredit people in the assessment of risk for the purpose of becoming ‘relevant experts’

- (b) develop best-practice risk-assessment and risk-management processes, guidelines and standards
- (c) validate new risk assessment tools and processes
- (d) undertake and commission research on risk assessment methods; and
- (d) provide education and training for risk assessors.

### **Recommendation 6**

The Commission recommends that 'relevant experts' be required to be accredited by the independent risk management body in order to be appointed under proposed s 105A.6 of the Bill.

### **Recommendation 7**

In the alternative to recommendation 5, the Commission recommends that a new independent Office of Risk Management Monitor be established with equivalent functions to the proposed independent risk management body.

### **Recommendation 8**

The Commission recommends that proposed s 105A.8 be amended to require the Court to have regard to the impact of the order on the particular circumstances of the offender when the Court is deciding whether it is relevantly satisfied that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community.

### **Recommendation 9**

The Commission recommends that the Committee seek advice from the Attorney-General's Department about whether there are any obstacles to a Court, which is considering an application for a continuing detention order, being granted the power to make orders that would be less restrictive of an offender's liberty.

### **Recommendation 10**

The Commission recommends that the Committee seek advice from the Attorney-General's Department about whether legal aid will be available for offenders against whom applications for continuing detention orders are made.

### **Recommendation 11**

The Commission recommends that the Bill be amended to clarify that the Court has the power to stay proceedings for a continuing detention order if an offender, through no fault of his or her own, is unable to obtain legal representation and where legal representation is essential for the proceeding to be fair.

## **Recommendation 12**

The Commission recommends that the Bill include a provision requiring a court sentencing a person in relation to an offence to which the Bill applies to warn the person about the operation of the continuing detention order regime.

## **Recommendation 13**

The Commission recommends that the Bill include provision for a statutory review of its provisions after three years.

# **4 Background**

## **4.1 Development of the Bill**

11. The Council of Australian Governments (COAG), at its meeting on 11 December 2015, agreed to task the Australia-New Zealand Counter-Terrorism Committee (ANZCTC) with developing a nationally consistent post-sentence preventative detention scheme to enable a continuing period of imprisonment for high risk terrorist offenders.<sup>5</sup>
12. At the following meeting on 1 April 2016, COAG reported that First Ministers supported the development of a nationally consistent post-sentence preventative detention scheme, with appropriate protections, that covers high risk terrorist offenders. They agreed that the Commonwealth would draft legislation, to be introduced as soon as practicable, following consultation with States.<sup>6</sup>
13. The Commonwealth Attorney-General met with State and Territory Attorneys-General on 5 August 2016. At the meeting, the Attorneys-General:<sup>7</sup>
  - a. agreed in principle to consideration by their respective Cabinets, with the Commonwealth's proposed legislation to amend Part 5.3 of the *Criminal Code Act 1995* (Cth)
  - b. noted that the Commonwealth will seek formal approval for the proposed amendments from State and Territory Premiers and Chief Ministers in accordance with the Intergovernmental Agreement on Counter-Terrorism Laws
  - c. noted that the legislation, after introduction by the Commonwealth Attorney-General, will be subject to further review and report by the Commonwealth Parliamentary Joint Committee on Intelligence and Security
  - d. subject to the foregoing, agreed to work together to ensure the successful implementation of the proposed scheme within their jurisdictions, with matters to be discussed including resourcing, operational matters and appropriate oversight.

14. The Attorneys-General said that the highest priority for their governments is to ensure the safety of the community. They also recognised the importance of balancing that with the protection of basic human rights.

#### **4.2 Similar regimes**

15. As noted in the Explanatory Memorandum, there is a range of post-sentence preventative detention schemes currently in operation in Australia. New South Wales and South Australia have schemes that cover both sex offenders and violent offenders.<sup>8</sup> Queensland, Victoria, Western Australia and the Northern Territory have schemes that cover sex offenders only.<sup>9</sup> Tasmania and the Australian Capital Territory do not have post-sentence preventative detention schemes.
16. The Queensland scheme was the subject of a constitutional challenge in *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575. The High Court found, by a 6:1 majority, that the Queensland scheme was constitutionally valid. The Court was split on the question whether it would have been valid for the Commonwealth Parliament to confer the functions of making post-sentence preventative orders on a Chapter III court.<sup>10</sup> That question did not need to be determined in *Fardon*. It is not clear whether concerns about the constitutionality of the Bill are one reason why the powers to make orders have been vested in State and Territory courts rather than Commonwealth courts. The Commission notes some practical difficulties that this creates in section 10 below. The Commission does not make any submissions about the constitutionality of the current Bill.
17. The United Nations Human Rights Committee found, by a 13:2 majority, that the application of the Queensland and New South Wales schemes in relation to particular sex offenders was contrary to the ICCPR.<sup>11</sup> The reasoning in each case was substantially the same. In *Fardon v Australia*, the Committee said:<sup>12</sup>
  - a. the continuing detention order imposed on Mr Fardon at the end of his sentence amounted, in substance, to a fresh term of imprisonment
  - b. imprisonment is penal in character and can only be imposed on conviction for an offence
  - c. the Queensland scheme purported to be civil and therefore did not meet the necessary due process guarantees for criminal trials under article 14 of the ICCPR
  - d. the additional term of imprisonment amounted to retrospective punishment, because the Queensland Act was not in force when Mr Fardon was first convicted, and was therefore contrary to article 15(1) of the ICCPR
  - e. as a result of each of these factors, Mr Fardon's detention was arbitrary, contrary to article 9(1) of the ICCPR.

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18. The finding in relation to article 15(1) of the ICCPR meant that the Committee did not need to consider whether the scheme contravened the prohibition in article 14(7) of the ICCPR on double punishment for the same offence.

19. On the question of arbitrariness, the Committee said:

The “detention” of the author as a “prisoner” under the DPSOA [*Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld)] was ordered because it was feared that he might be a danger to the community in the future and for purposes of his rehabilitation. The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science. The DPSOA, on the one hand, requires the Court to have regard to the opinion of psychiatric experts on future dangerousness but, on the other hand, requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available relevant evidence, the reality is that the Courts must make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise. To avoid arbitrariness, in these circumstances, the State Party should have demonstrated that the author’s rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention ...<sup>13</sup>

20. The two dissenting members of the Committee referred to three previous cases in which the Committee had found that New Zealand’s sentencing system for sexual offenders, which included separate elements for punitive and preventative purposes, was not arbitrary.<sup>14</sup> In the first of these cases, *Rameka v New Zealand*, the majority view said:

The Committee considers that the remaining authors’ detention for preventive purposes, that is, protection of the public, once a punitive term of imprisonment has been served, must be justified by compelling reasons, reviewable by a judicial authority, that are and remain applicable as long as detention for these purposes continues. The requirement that such continued detention be free from arbitrariness must thus be assured by regular periodic reviews of the individual case by an independent body, in order to determine the continued justification of detention for purposes of protection of the public. The Committee is of the view that the remaining authors have failed to show that the compulsory annual reviews of detention by the Parole Board, the decisions of which are subject to judicial review in the High Court and Court of Appeal, are insufficient to meet this standard.<sup>15</sup>

21. The two dissenting members who considered the Australian schemes noted the previous findings of the Committee that preventative detention could avoid arbitrariness if it was justified by compelling reasons and if detention was reviewed periodically by an independent body to test whether it continued to be justified.

22. The most recent General Comment by the Committee refers to the principles developed in both the *Fardon* and the *Rameka* cases. In relation to the kind of regime proposed in *Rameka*, the Committee noted that any period of non-punitive detention ‘must be justified by compelling reasons arising from the

gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future'.<sup>16</sup>

23. Finally, in Concluding Observations on Germany's sixth periodic report under the ICCPR, the Committee said that Germany should ensure that post-conviction preventative detention was only used as a measure of last resort, that conditions of detainees should be different from that of convicted prisoners, that detention should be aimed at the rehabilitation and reintegration of the detainee into society, and that there should be legal guarantees to preserve the rights of those detained, including periodic psychological assessment of their situation which can result in their release or the shortening of the period of their detention.<sup>17</sup>

### **4.3 Rationale for the Bill**

24. In describing the rationale for the introduction of the Bill, the COAG communiques, the second reading speech and the Explanatory Memorandum make reference to recent terrorist events and the need to protect the community.
25. Those materials assess the *general* threat of terrorism. As such, they provide general justification for a robust legislative response to that general threat. However, the materials are not directed towards the more specific risk of terrorist recidivism, which is the subject of the current Bill. In other words, in assessing the appropriateness of this Bill, it is necessary to ask: is there an unacceptable risk that someone convicted of a terrorist offence will commit a further offence once they are released, and can any such risk be addressed through currently available measures including the imposition of control orders?
26. The highest that this is put in the second reading speech is that:

there may be some circumstances where, even with controls placed on them, the risk an offender presents to the community is simply too great for them to be released from prison.<sup>18</sup>
27. There are currently 15 people in Australia who are serving a sentence of imprisonment for an offence that would come within the proposed regime as presently drafted. A further 37 people are before the courts and, if convicted of a relevant offence, would also come within the proposed regime.<sup>19</sup>
28. It is not clear whether any assessment has been carried out as to the risk that the 15 people currently in custody would pose to the community if they were released. Neither the second reading speech for the Bill nor the Explanatory Memorandum makes any reference to such an assessment. This is an important question because it goes to the rationale for implementing the Bill.
29. The Commission notes that prior to the introduction of post-custody preventative detention of high risk violent offenders in New South Wales, the then Premier directed Corrective Services NSW to conduct an audit of 750 serious offenders in New South Wales, described as the 'worst of the worst'.<sup>20</sup>

The audit identified 14 of these offenders (approximately 2% of the relevant offender population) to be a high risk of reoffending if released.<sup>21</sup>

30. The scope of the offences that come within the current Bill is broad and is of a different nature to the offences covered by other preventative detention regimes in Australia. It cannot be assumed that data about the risk of recidivism among those convicted of violent offences under New South Wales criminal law will be applicable to the offences covered by the current Bill.
31. Similarly, the characteristics of offenders covered by other preventative detention regimes may be different to the characteristics of offenders convicted of offences covered by the current Bill. A review of the audit conducted by the New South Wales Department of Justice and Attorney-General considered common characteristics of the 14 identified high risk violent offenders. It concluded that:
  - a. most offenders were serving sentences in relation to multiple offences
  - b. most offenders had a substantial history of prior convictions or criminal justice interventions
  - c. most offenders had a history of institutional misconduct involving violent incidents such as assault and property damage
  - d. many offenders had intellectual disability and cognitive functioning deficits
  - e. at least four of the inmates were, or had previously been, mentally ill, two had significant intellectual disabilities and one was to become the subject of a guardianship order upon release.
32. It is not clear whether the 15 people currently in custody for terrorism related offences have any of the above characteristics. Again, this is relevant information when assessing the need for the measures proposed in this Bill. The Commission notes that indefinite detention of people with cognitive and psychiatric impairment raises a range of other issues which are currently being considered by the Senate Standing Committee on Community Affairs.
33. In order for this Committee to properly evaluate the need for the current Bill, it is important to have evidence about the degree of risk that those convicted of offences covered by this Bill are likely to pose to the community once released.

### **Recommendation 1**

The Commission recommends that, before the Bill is passed, an audit be carried out of people who have been convicted of offences falling within the definition of 'terrorist offender' to assess the degree of risk that they would pose to the community if released, and whether this risk is able to be adequately managed through currently available measures including the imposition of control orders.

## 5 Post-sentence preventative detention and human rights

34. The Bill proposes a regime that would allow the continued detention of people convicted of a range of terrorism related offences after the expiration of their sentences in circumstances where those people are assessed as posing an unacceptable risk to community safety and that risk cannot be managed in a less restrictive way.
35. Ensuring community safety is one of the most important tasks of government. The fact that a person has previously been convicted of a particular crime does not of itself establish that, at the expiration of their sentence, they pose a significant risk of committing further such offences and, thereby, threatening community safety. Rationally assessing such risk requires careful consideration of the person's ongoing dangerousness at the time that their sentence is due to expire. This issue was considered by the Independent National Security Legislation Monitor (INSLM) in his second annual report:
- Proof of terrorist crime plus proven dangerousness would be much less disturbing of the principle of legality than the latter without the former. And susceptibility to this future supplement to sentence could be seen as fitting the deserts of terrorist convicts. Their established guilt of offences with the defining characteristics of terrorism, including its motivations, amounts to a badge of dangerousness to society. Those who can be shown at the end of their (usually rather long) sentences of imprisonment to have resisted CVE [countering violent extremism] attempts or to have failed to show rehabilitation easily fit a *Fardon* model. That is, they are the very type of convict – not just suspect – against whom restraints after expiry of sentence are justifiable.<sup>22</sup>
36. In referring to the 'the defining characteristics of terrorism, including its motivations', the INSLM referred to cases in Australia, Canada and the UK where the presence of extreme views motivating a terrorist act, a lack of remorse and a lack of prospects for rehabilitation were taken into account by a sentencing judge in setting an appropriate length of sentence to reflect the need to protect the community.<sup>23</sup> The INSLM was suggesting that if these factors were also present at the end of a sentence, it would provide a justification for post-sentence restraints of some kind. The significance of terrorist 'motivations' is important when considering the scope of the offences that should come within this regime. The Commission discusses this issue in section 7 below.
37. Risk can be managed in a number of different ways. The comments by the INSLM were made in relation to the potential for control orders to be imposed on a convicted terrorist offender under Div 104 of Part 5.3 of the Criminal Code (rather than the imposition of post-sentence preventative detention).<sup>24</sup> Control orders allow obligations, prohibitions and restrictions to be imposed on a person in order to:
- a. protect the public from a terrorist act
  - b. prevent the provision of support for or the facilitation of a terrorist act
  - c. prevent the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.<sup>25</sup>

38. The kinds of obligations, prohibitions and restrictions that can be imposed pursuant to a control order relate to:<sup>26</sup>
- a. the areas a person can go
  - b. not travelling overseas
  - c. curfews
  - d. wearing a tracking device
  - e. communicating or associating with particular people
  - f. accessing certain telecommunications or technology (including the internet)
  - g. possessing or using certain articles or substances
  - h. carrying out specified activities (including working in particular jobs)
  - i. regular reporting
  - j. being photographed
  - k. having fingerprints taken
  - l. participating in counselling or education.
39. The Explanatory Memorandum says that, in some cases, control orders may not be sufficient to adequately deal with risk to the community. In some cases, it may be that the only way that a risk to community safety can be adequately addressed is by continuing to detain a person for a period of time after the expiration of their sentence.
40. In deciding how to manage a risk posed by a person, international human rights law demands that the method chosen be the least restrictive of the person's individual liberty that is consistent with ensuring community safety. That is, the right of the convicted person to liberty may only be infringed to the extent that is reasonable, necessary and proportionate to achieving this important and legitimate objective.<sup>27</sup>
41. This principle was also recognised by the INSLM in considering the differences between control orders (in Division 104 of the *Criminal Code*) and preventative detention orders (in Division 105 of the *Criminal Code*):<sup>28</sup>

Another aspect of the relation between COs and PDOs themselves is that the more effective COs are to prevent terrorist activity, the harder it becomes to justify PDOs as a proportionate response to the threat of terrorist activity. And proportionality is a critical quality to be considered, given the real difference between detention under a PDO and observance of a CO. The House of Lords recognized a similar relation in the course of finding earlier United Kingdom legislation for preventive detention to be wrongly discriminatory, in *A v Secretary of State*. It had been argued that if the relevant terrorist threat could be addressed by measures short of infringing the right to personal

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liberty by authorizing indefinite detention (as were available for UK nationals), then the indefinite detention authorized for foreign nationals was disproportionate (and discriminatory). Lord Bingham of Cornhill ... illustrated his Lordship's conclusion by reference to bail conditions that resembled what could be imposed by a CO in Australia:-

... it seems reasonable to assume that those suspected international terrorists who are UK nationals are not simply ignored by the authorities. When ... one of the appellants, was released from prison ... on bail ... it was on condition (among other things) that he wear an electronic monitoring tag at all times; that he remain at his premises at all times; that he telephone a named security company five times each day at specified times; that he permit the company to install monitoring equipment at his premises; that he limit entry to his premises to his family, his solicitor, his medical attendants and other approved persons; that he make no contact with any other person; that he have on his premises no computer equipment, mobile telephone or other electronic communication device; that he cancel the existing telephone link to his premises; and that he install a dedicated telephone link permitting contact only with the security company. The appellants suggested that conditions of this kind, strictly enforced, would effectively inhibit terrorist activity. It is hard to see why this would not be so.

42. Clearly the kind of conditions imposed in the above example are extreme, but the point made is whether there are less restrictive options available than detention to adequately manage risk.
43. Article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR) provides that everyone has the right to liberty. In particular, it provides that no one shall be deprived of his or liberty except on such grounds and in accordance with such procedure as are established by law. This means that any detention of a person must be lawful.
44. In addition, article 9(1) provides that laws which provide for detention must not be arbitrary. The requirement that detention not be arbitrary extends beyond a requirement of lawfulness and requires in addition that detention not be inappropriate or unjust and that it be predictable.<sup>29</sup> Lawful detention may become arbitrary when a person's deprivation of liberty is not necessary or proportionate to achieving a legitimate aim such as ensuring community safety.<sup>30</sup> One aspect of proportionality is assessing whether less restrictive alternatives to detention were available (for example, control orders) that could achieve the particular objectives said to justify detention. Detention should not continue for longer than can be justified in this way.<sup>31</sup>
45. A person who has been sentenced to a period of imprisonment following conviction for a criminal offence is ordinarily entitled to be released at the expiration of that period. Unless there is a legal basis to continue to detain a person, such as a post-sentence preventative detention regime, a person who has served his or her time must be released.
46. In designing a post-sentence preventative detention regime, it is necessary to ensure that the detention it authorises is not arbitrary.

47. Provided that there is sufficient evidence to support it (see the Commission's first recommendation), the Commission considers that a post-sentence preventative detention regime can be a reasonable and necessary response to the potential for risk to be posed by people convicted of terrorism related offences after the expiration of the period of their imprisonment. However, the scope of any such regime should be narrowly confined so that it applies only in the most serious of cases and only to the extent necessary to address an unacceptable risk to the community. The majority of the Commission's comments in this submission are directed to whether the degree to which the right to liberty is infringed by the proposed regime is proportionate to achieving the objective of community safety.

## **6 Key elements of proposed regime**

48. The Commission agrees that many of the elements of the proposed regime have been designed to achieve a post-sentence preventative detention scheme that is not arbitrary and that is reasonable and proportionate to the purpose of ensuring community safety.
49. Without dealing with these points in detail, the Commission refers to the following aspects of the regime:
- a. an application for a continuing detention order may only be made close to the expiration of the sentence of imprisonment (within 6 months of release), meaning that any assessment of future conduct is more likely to be accurate than an assessment made at the commencement of a long term of imprisonment;<sup>32</sup>
  - b. the power to make a continuing detention order or an interim detention order lies with an independent judicial authority (the Supreme Court of a State or Territory), rather than the executive;<sup>33</sup>
  - c. there is a relatively high threshold for making a continuing detention order: the Court must be satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 (terrorism) offence with a maximum period of imprisonment of seven years or more;<sup>34</sup>
  - d. the Court must be satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk;<sup>35</sup>
  - e. the Attorney-General (being the only person who can apply for an order) bears the onus of satisfying the Court to the requisite standard;<sup>36</sup>
  - f. the period for a continuing detention order must be limited to a period that the Court is satisfied is reasonably necessary to prevent the unacceptable risk, and any single continuing detention order must be no longer than 3 years (noting that a further continuing detention order can be applied for within 6 months of the expiry of a previous continuing detention order);<sup>37</sup>

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- g. the Supreme Court must conduct an annual review of each continuing detention order and may only affirm the order if at the time of the review the Court is satisfied:
    - i. to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 (terrorism) offence with a maximum period of imprisonment of seven years or more; and
    - ii. there is no other less restrictive measure that would be effective in preventing the unacceptable risk;<sup>38</sup>
  - h. on review, the Court must vary the continuing detention order to a shorter period if the Court is not satisfied that the period currently specified is reasonably necessary but it is satisfied that a shorter period is reasonably necessary to prevent the unacceptable risk;<sup>39</sup>
  - i. on review, the Court must revoke the continuing detention order if it is not satisfied of the matters in paragraphs g.i and g.ii above;<sup>40</sup>
  - j. independently of the annual review, the offender may apply for a review at any time and the Court may conduct a review if there are new facts or circumstances that would justify it, or if it would be in the interests of justice to conduct a review;<sup>41</sup>
  - k. the Court must give reasons for any decision making, affirming, varying or revoking a continuing detention order and provide a copy to the parties,<sup>42</sup> and these decisions can be the subject of an appeal.<sup>43</sup>
50. These provisions are designed to limit any period of detention to a period that is reasonable, necessary and proportionate to the risk faced to the community. The Commission notes that there is no limit to the number of continuing detention orders that may be granted, provided the Court has the requisite degree of satisfaction on each occasion (and at each review). If the application of this process resulted in detention that was indefinite, issues of proportionality and reasonable necessity may arise.<sup>44</sup>
51. The following sections of this submission deal with a range of other provisions which require further consideration, in particular:
- a. the scope of the offences to which this regime will apply – that is, who may have a continuing detention order imposed on them?
  - b. how the risk of future conduct is to be assessed
  - c. the factors that the Court must have regard to in deciding whether or not to make a continuing detention order
  - d. whether the Court should have the option of imposing less restrictive alternative measures
  - e. the availability of legal aid for people in proceedings for a continuing detention order

- f. the giving of statutory warnings at the time a person is convicted of a terrorist offence
- g. provision for a mandatory statutory review of the proposed regime.

## **7 Scope of offences to which regime will apply**

- 52. One issue that this Committee should consider is whether the proposed regime set out in the Bill is appropriately targeted to offences where there is a high risk to community safety once a person is released after serving their term of imprisonment.
- 53. The scope of relevant offences is described in proposed s 105A.3. A person must have been convicted of one of the following kinds of offences:
  - a. an offence against Subdivision A of Division 72 (international terrorist activities using explosive or lethal devices)
  - b. an offence against Subdivision B of Division 80 (treason)
  - c. a serious Part 5.3 offence, that is, one for which the maximum penalty is 7 or more years of imprisonment; or
  - d. an offence against Part 5.5 (foreign incursions and recruitment).
- 54. The majority of these offences are very serious offences which include an element of intention to engage in conduct that is a threat to community safety. For these offences, there is a reasonable basis to include them in a post-sentence preventative detention regime. However, such a regime is an extraordinary measure. It should be reserved for offences where there is a high risk of future conduct that is a threat to community safety. The Commission has concerns about whether some of the offences against Part 5.5 of the Criminal Code should be included in the regime.
- 55. In particular, the offence in section 119.2 of the Criminal Code relates to entering or remaining in an area of a foreign country declared by the Foreign Affairs Minister as an area that he or she is satisfied is an area where a listed terrorist organisation is engaging in hostile activity. The Commission made submissions to this Committee in October 2014 about this offence when it was first proposed.<sup>45</sup>
- 56. As the Commission noted at the time, the offence does not require any intent to engage in terrorist activity, or any other insurgent or violent activity. There is a list of legitimate purposes for which a person may enter or remain in a declared area in s 119.2(3), but this list is limited. For instance, the list of legitimate purposes does not include visiting friends, transacting business, retrieving personal property or attending to personal or financial affairs. It includes making a news report, but only if the person is 'working in a professional capacity as a journalist'. It does not include undertaking religious pilgrimage.

57. As a result, there are likely to be many innocent reasons a person might enter or remain in a declared zone that would not bring a person within the scope of the exception in s 119.2(3). Further, in order to come within the exception, a person is required to show they were in the zone *solely* for one or more of the limited specified purposes. So, for instance, if a person travelled to a declared zone to visit their parents (a 'legitimate purpose'), and also to attend a friend's wedding (not a 'legitimate purpose'), they would not be protected by the exception.
58. Given the scope and nature of this offence, the Commission considers that there is not a sufficient basis for it to be included in a post-sentence preventative detention regime. Satisfaction of the elements of this offence does not give rise to an inference that a person poses a risk to community safety. In any event, the breadth of this offence provision means that there are many situations in which a convicted person would not pose a relevant risk to community safety.

### **Recommendation 2**

The Commission recommends that the offence in s 119.2 of the *Criminal Code* (Entering, or remaining in, declared areas) be excluded from the scope of the definition of a 'terrorist offender' in proposed s 105A.3(1)(a).

59. Some other offences that are included within the scope of s 105A.3(1)(a), which do not require an intention to engage in conduct that threatens community safety, include:
- a. section 119.7(2): publishing an advertisement or a paid news item where the publisher is reckless as to whether or not the material is for the purpose of recruiting persons to serve in any capacity in or with an armed force in a foreign country (including an armed force of the government of that foreign country)
  - b. section 119.7(3): publishing an advertisement or a paid news item (regardless of any intention), if the material relates to:
    - i. the place at which or the manner in which, persons may make applications to serve, or obtain information relating to service, in any capacity in or with an armed force in a foreign country
    - ii. the manner in which persons may travel to a foreign country for the purpose of serving in any capacity in or with an armed force in a foreign country.
60. The Commission recommends that further consideration be given to whether these offences should be included within the scope of proposed s 105A.3(1)(a). If they are to be so included, their inclusion should be justified in the Explanatory Memorandum accompanying the Bill.

### **Recommendation 3**

The Commission recommends that further consideration be given to whether the offences in s 119.7(2) and (3) of the *Criminal Code* (Publishing recruitment

advertisements) should be included within the scope of the definition of a 'terrorist offender' in proposed s 105A.3(1)(a). If these offences are to be so included, their inclusion should be appropriately justified in the Explanatory Memorandum accompanying the Bill.

## 8 Risk assessment

61. For any system of preventative detention to be justifiable, it must be possible to make robust predictions about the likelihood of future risk. This is a difficult thing to do.<sup>46</sup>

62. In *Fardon*, Kirby J (in dissent) noted:

Experts in law, psychology and criminology have long recognised the unreliability of prediction of criminal dangerousness. In a recent comment, Professor Kate Warner remarked:

'[A]n obstacle to preventative detention is the difficulty of prediction. Psychiatrists notoriously overpredict. Predictions of dangerousness have been shown to have only a one-third to 50% success rate [Ashworth, *Sentencing and Criminal Justice*, 3<sup>rd</sup> ed (2000), p 180]. While actuarial predictions have been shown to be better than clinical predictions – an interesting point as psychiatric or clinical predictions are central to continuing detention orders – neither are accurate.'

Judges of this Court have referred to such unreliability. Even with the procedures and criteria adopted, the Act ultimately deprives people such as the appellant of personal liberty, a most fundamental human right, on a prediction of dangerousness, based largely on the opinions of psychiatrists which can only be, at best, an educated or informed 'guess'.<sup>47</sup>

63. According to the Victorian Sentencing Advisory Council, research suggests that the predictive accuracy of unguided clinical assessments is typically only slightly above chance. Actuarial risk assessment tools may be able to increase predictive accuracy into the moderate range, but with very broad margins of error.<sup>48</sup> However, actuarial tools typically predict the prevalence of particular conduct within a group of people sharing the same static characteristics. It is therefore problematic in assessing the propensity of an individual within that group offending, or the potential of an individual to respond to management.<sup>49</sup> It appears that best practice currently involves a combination of structured tools and individualised expert clinical assessment but that there are still significant limitations in this approach.<sup>50</sup>

64. The Bill proposes to assess risk in the following way. When an application for a continuing detention order is made, the Supreme Court must hold a preliminary hearing to determine whether to appoint one or more 'relevant experts'.<sup>51</sup>

65. A 'relevant expert' can be a psychiatrist, a psychologist, any other medical practitioner or any other expert, provided that the person 'is competent to assess the risk of a terrorist offender committing a serious Part 5.3 offence if the offender is released into the community'.<sup>52</sup> No procedures are prescribed

to ensure that the expert has the requisite competence. Presumably this will be a matter for the Court to determine on a case-by-case basis.

66. At the preliminary hearing, the Court has a discretion to appoint one or more relevant experts if the Court believes that there is a prima facie case for making a continuing detention order.<sup>53</sup> If a relevant expert is appointed, he or she must conduct an assessment of the offender and prepare a report setting out the expert's assessment of the risk of the offender committing a serious Part 5.3 offence (along with a number of other prescribed matters).<sup>54</sup> The Court must have regard to any such report in considering whether or not to make a continuing detention order.<sup>55</sup>
67. The matters that an expert report must contain are listed in proposed s 105A.6(7). This list does not require the expert to include in the report any limitations on the expert's assessment of the risk of the offender committing a serious Part 5.3 offence if released into the community. As noted above, the methodologies used to assess risk are limited in their predictive capacity and often contain significant margins of error. The Commission considers that this information should be before the Court when considering what weight to give to an expert's report.

#### **Recommendation 4**

The Commission recommends that the list in proposed s 105A.6 – namely, the matters that an expert's report must contain – be amended to include any limitations on the expert's assessment of the risk of the offender committing a serious Part 5.3 offence if the offender is released into the community, as well as the expert's degree of confidence in that assessment.

68. The Commission considers that the Bill as currently drafted does little to ensure that relevant experts are appropriately qualified and that their assessments of risk make use of best practice methodology. Too much reliance appears to be placed on the definition of relevant experts as being 'competent' to make the relevant assessment.<sup>56</sup> There are real risks that the incidence of both 'false positives' and 'false negatives' will be significant without some additional structure to provide confidence to the Court that experts are in fact competent to assess risk.
69. When this issue was considered by the New South Wales Sentencing Council, it recommended that:<sup>57</sup>
- a. risk assessment should be undertaken independently of the corrections system in order to avoid any apprehension of bias as a result of the involvement of the executive in the process; and
  - b. in order to be eligible to be appointed as a relevant expert, the expert should be accredited by an independent authority.
70. The recommendation for the establishment of an independent authority was modelled on Scotland's Risk Management Authority.<sup>58</sup> The New South Wales Sentencing Council said that establishing an independent risk management body would facilitate best practice in relation to risk-prediction by:<sup>59</sup>

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- a. setting out best-practice risk-assessment and risk-management processes and developing guidelines and standards with respect to such processes
  - b. validating new risk assessment tools and processes
  - c. providing for rigorous procedures by which practitioners become accredited for assessing risk
  - d. providing education and training for practitioners
  - e. increasing the pool of experts available to give evidence in matters which require risk-prediction
  - f. facilitating risk assessment by an independent panel of experts
  - g. developing an individual risk-management plan when an offender likely to become subject to post-sentence restraints enters custody.
71. The Commission considers that the recommendations made by the New South Wales Sentencing Council should also be adopted in relation to the current Bill in order to improve the process for assessing risk.

**Recommendation 5**

The Commission recommends that an independent risk management body be established to:

- (a) accredit people in the assessment of risk for the purpose of becoming 'relevant experts'
- (b) develop best-practice risk-assessment and risk-management processes, guidelines and standards
- (c) validate new risk assessment tools and processes
- (d) undertake and commission research on risk assessment methods; and
- (d) provide education and training for risk assessors.

**Recommendation 6**

The Commission recommends that 'relevant experts' be required to be accredited by the independent risk management body in order to be appointed under proposed s 105A.6 of the Bill.

72. The Commission recognises that the establishment of a new risk management body would require the commitment of significant resources by government and that the number of people likely to be subject to the regime set out in the Bill is small. However, given the importance of the objective of protecting community safety underlying the Bill, the extraordinary impingement on the human rights of any person who is the subject of a continuing detention order, and the need for assessments of risk to be as accurate as possible, the

Commission considers that the costs associated with a risk management body are justifiable. If such an authority were established, it could also have a role in the decision-making process surrounding control orders under Division 104 of the *Criminal Code*.

73. An alternative to a statutory authority would be the creation of an office of Risk Management Monitor with similar functions. Such a proposal was recommended by the Victorian Sentencing Advisory Council.<sup>60</sup>

### **Recommendation 7**

In the alternative to recommendation 5, the Commission recommends that a new independent Office of Risk Management Monitor be established with equivalent functions to the proposed independent risk management body.

## **9 Factors to be taken into account**

74. Proposed s 105A.8 sets out the factors that the Court must have regard to in deciding whether or not to make a continuing detention order. In summary, these factors are:
- a. the safety and protection of the community
  - b. any report received from a relevant expert under s 105A.6 and the level of the offender's participation in the assessment by the expert
  - c. the results of any other assessment conducted by a relevant expert
  - d. any report on the extent to which the offender can be reasonably and practicably managed in the community
  - e. the level of participation by the offender in any treatment or rehabilitation programs
  - f. the level of compliance by the offender with parole or other obligations
  - g. the offender's criminal history
  - h. the views of the sentencing court at the time the sentence was imposed
  - i. any other information as to the risk of the offender committing a serious Part 5.3 offence
  - j. any other matter the Court considers relevant.
75. The Commission agrees that these factors are appropriate for the Court to take into account. Missing from this list is any factor relating to the impact of the order on the particular circumstances of the offender. For example, when a Court is considering imposing a control order under Division 104 of the *Criminal Code*, the following assessment must be made:

In determining whether each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and

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reasonably appropriate and adapted, the court must take into account the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances).<sup>61</sup>

76. The Commission considers that an equivalent consideration should be included in s 105A.8 in order to reflect the fact that an assessment of 'unacceptable risk' and the necessity for post-sentence preventative detention involves striking an appropriate balance between the need to protect the community and the ordinary, basic right of an offender to be released from prison at the end of his or her sentence.
77. The Commission notes that proposed s 105.8 provides a non-exhaustive list of considerations, and so it does not prevent this matter being taken into account. The corollary is that the Court is not prompted to give due weight to this matter, and the Court's failure to consider it altogether would not be considered an error. It should be noted, for example, that there have been differences in the interpretation of the phrase 'unacceptable risk' in the New South Wales legislation.<sup>62</sup> By contrast, if the Bill were amended to require the Court to consider the impact of an order on the particular circumstances of the offender, it would better reflect the balancing process that international human rights law mandates, as well as providing greater practical assistance to the Court in the weighing-up process.
78. In *Richardson (No 2)*,<sup>63</sup> Davies J adopted a 'balancing' formulation developed by the Supreme Court of Western Australia in determining whether a risk was 'unacceptable'. This formulation balanced the negative impacts and likelihood of a further serious sexual offence against the serious consequences for the offender 'either because he will be detained beyond the period of his sentence although he has not committed any further offence or he will be subject to an onerous supervision order'.
79. Earlier this year, the Court of Appeal of the Supreme Court of New South Wales held that the right of an offender to his or her personal liberty at the expiry of the sentence of imprisonment being served is not a relevant consideration in the determination of whether a person poses an 'unacceptable risk' for the purposes of s 5E(2) of the *Crimes (High Risk Offenders) Act 2006* (NSW).<sup>64</sup> The Court of Appeal held that the approach previously taken by Davies J should not be followed. In reaching this finding, the Court of Appeal noted that the Supreme Court had a discretion about whether or not to make a relevant order and that the interests of the offender could be taken into account in deciding whether or not to exercise that discretion.<sup>65</sup>
80. The structure of the NSW Act differs from that in the current Bill. To avoid any risk that the interests of the offender are not taken into account, either adequately or at all, the Commission recommends that they be explicitly provided for in s 105A.8.

### **Recommendation 8**

The Commission recommends that proposed s 105A.8 be amended to require the Court to have regard to the impact of the order on the particular

circumstances of the offender when the Court is deciding whether it is relevantly satisfied that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community.

## **10 Availability of less restrictive alternatives**

81. The Bill grants the Supreme Court discretion to make a continuing detention order if it is satisfied that the offender poses an unacceptable risk and that no other less restrictive measure would be effective in preventing the unacceptable risk. A note at the end of proposed s 105A.7 provides that an example of a less restrictive measure is a control order.
82. However, a Court hearing an application for a continuing detention order does not have the discretion to impose a control order if it considers that this would be more appropriate than making a continuing detention order. The Explanatory Memorandum notes that, subject to the Attorney-General's consent, a senior Australian Federal Police member would need to separately request an issuing court make an interim control order pursuant to s 104.3 of the *Criminal Code*.<sup>66</sup> An 'issuing court' is defined by s 100.1(1) of the *Criminal Code* as the Federal Court of Australia, the Family Court of Australia or the Federal Circuit Court of Australia.
83. This means that the choice available to the Supreme Court of a State or Territory in considering whether to make a continuing detention order is binary: either to make the order or not make the order. If the Court decides not to make the order because a control order would be more appropriate, a separate application to an issuing court would be necessary for this to occur.
84. In this respect, the regime proposed in the Bill is different to that in every other Australian jurisdiction in which post-sentence preventative detention orders are available. In each of those other jurisdictions, the Court has the option of making a supervision order as an alternative to a continuing detention order.<sup>67</sup>
85. If the Court hearing an application for a continuing detention order forms the view that a control order would be more appropriate, the safety of the community would be better served by the Court having the power to make that order, rather than making no order at all and relying on a subsequent application for a control order to be made by the AFP.
86. The Commission is not aware of whether there were constitutional impediments that meant the powers in the current Bill to make continuing supervision orders were given to the Supreme Courts of the States and Territories. The Commission has also not considered whether there would be constitutional impediments in giving Supreme Courts the power to make control orders, or supervision orders in the nature of control orders. The Commission recommends that further consideration be given to this issue so that the Court considering an application for a continuing detention order also has the power to make orders that would be less restrictive of an offender's liberty if such an order would be appropriate in the circumstances.

## Recommendation 9

The Commission recommends that the Committee seek advice from the Attorney-General's Department about whether there are any obstacles to a Court, which is considering an application for a continuing detention order, also being granted the power to make orders that would be less restrictive of an offender's liberty.

## 11 Nature of proceedings and availability of legal aid

87. The Bill provides that a Supreme Court hearing a 'continuing detention order proceeding' (being any proceeding covered by these amendments) must apply the rules of evidence and procedure for civil matters.<sup>68</sup> The Explanatory Memorandum says that, because the proceedings are civil, the due process protections in articles 14(2) and (3) of the ICCPR do not apply.<sup>69</sup> These due process rights include the right:
- a. to be presumed innocent until proven guilty
  - b. to be informed promptly of the nature and cause of the charge
  - c. to have adequate time and facilities to prepare a defence and to communicate with a lawyer
  - d. to be tried without undue delay
  - e. to be tried in person and to have the choice of defending the charge personally or using a lawyer
  - f. to have a lawyer assigned without charge if the person does not have the means to pay for a lawyer and the interests of justice so require
  - g. to examine witnesses for the prosecution and to call witnesses in support of the defence case
  - h. to have the free assistance of an interpreter if necessary
  - i. not to be compelled to testify against him or herself or to confess guilt.
88. Although these proceedings have been characterised as civil, in practice the distinction between the nature of these proceedings and the nature of criminal proceedings is difficult to maintain. In *Fardon*, Gummow J made the following observation:

In *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*, Hayne J, after referring to the unstable nature of a dichotomy between civil and criminal proceedings, went on:

"It seeks to divide the litigious world into only two parts when, in truth, that world is more complex and varied than such a classification acknowledges. There are proceedings with both civil and criminal characteristics: for example, proceedings for a civil penalty under companies and trade practices legislation. The purposes of those

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proceedings include purposes of deterrence, and the consequences can be large and punishing.”

However, what is involved here is the loss of liberty of the individual by reason of adjudication of a breach of the law. In such a situation, as Kirby J remarked in *Labrador*, that loss of liberty is “ordinarily one of the hallmarks reserved to criminal proceedings conducted in the courts, with the protections and assurances that criminal proceedings provide”.<sup>70</sup>

89. The Commission notes that in Western Australia, proceedings for a continuing detention order are criminal (although, like other jurisdictions, the standard of proof is still the satisfaction of the Court to a high degree of probability).<sup>71</sup>
90. Some commentators have observed that by characterising post-sentence preventative regimes as civil rather than criminal, the state may impose significant restrictions upon an individual’s liberty while ‘side-stepping’ the enhanced procedural and evidentiary safeguards that attach to the criminal justice system.<sup>72</sup>
91. Some of the protections of articles 14(3) and (5) (right to appeal against sentence) of the ICCPR are contained in the Bill. For example, offenders have the right:
  - a. to be informed within 2 business days of an application for a continuing detention order and to be given information included in the application;<sup>73</sup>
  - b. to adduce evidence or make submissions to the Court in relation to the application;<sup>74</sup>
  - c. to be provided with reasons for the Court’s decision;<sup>75</sup> and
  - d. to appeal against the imposition of a continuing detention order.<sup>76</sup>
92. The Commission considers that, given an application for a continuing detention order has the potential to result in a further period of detention, it is appropriate that most, if not all, of the due process protections in article 14(3) apply. In particular, it is vital that offenders are able to access legal representation.
93. Australian law has not recognised a right to legal representation in criminal proceedings, but it has recognised the inherent power of the Court to stay criminal proceedings where an accused person does not have legal representation and where legal representation is essential to a fair trial.<sup>77</sup> This is likely to be the case in most cases where an accused is charged with a serious offence. Given that proceedings for a continued detention order have been characterised as civil, it is less clear whether the same principle applies.
94. The Commission recommends that steps be taken to clarify the availability of legal representation for offenders in relation to applications for continuing detention orders and the power of the Court to stay proceedings if an offender, through no fault of his or her own, is unable to obtain legal representation and where legal representation is essential for the proceeding to be fair.

## **Recommendation 10**

The Commission recommends that the Committee seek advice from the Attorney-General's Department about whether legal aid will be available for offenders against whom applications for continuing detention orders are made.

## **Recommendation 11**

The Commission recommends that the Bill be amended to clarify that the Court has the power to stay proceedings for a continuing detention order if an offender, through no fault of his or her own, is unable to obtain legal representation and where legal representation is essential for the proceeding to be fair.

## **12 Other issues**

95. The Commission considers that there are two additional aspects of the New South Wales legislation that should be incorporated into the Bill.

### **12.1 Statutory warnings**

96. The first relates to warnings given to people who are convicted of offences that come within the scope of the Bill. Section 25C of the *Crimes (High Risk Offenders) Act 2006* (NSW) provides:
- (1) A court that sentences a person for a serious violence offence is to cause the person to be advised of the existence of this Act and of its application to the offence.
  - (2) A failure by a court to comply with this section does not affect the validity of a sentence or prevent the making of an order against a person under this Act.
97. In the second reading speech for the Bill that introduced s 25C, the New South Wales Attorney-General and Minister for Justice provided the following rationale for the inclusion of the requirement to give a warning:
- Offenders who meet the definition of a violent offender under the Act will be on notice from the earliest possible opportunity that an order may be sought against them at the end of their sentence, if they pose a high risk of serious violent reoffending. Offenders therefore will know that there may be implications for refusing to participate in programs that address their offending behaviour. This is in keeping with the principal Act's objective of encouraging high-risk offenders to undertake rehabilitation. ... the opportunities given to and taken by an offender to participate in rehabilitation programs will be relevant to the Supreme Court in determining an application for an extended supervision or continuing detention order.<sup>78</sup>
98. Rehabilitation is an objective central to the Australian criminal justice system. It is also an objective both of the initial sentencing of 'terrorist offenders' and the making of continuing detention orders. This is apparent from the terms of the current Bill. As to the initial sentence, one of the factors that the Court must have regard to in deciding whether to make a continuing detention order

is the level of the offender's participation in any rehabilitation programs.<sup>79</sup> Further, people who are detained under a continuing detention order must not be accommodated or detained in the same area or unit of the prison as persons who are in prison for the purpose of serving sentences of imprisonment.<sup>80</sup> This is appropriate, given the requirements of article 10(2) of the ICCPR. One exception to this is where 'it is reasonably necessary for the purposes of rehabilitation'.

99. Given the clear goals of rehabilitation, the Commission considers that it would be appropriate for the Bill to provide for a warning along similar lines to that in s 25C of the *Crimes (High Risk Offenders) Act 2006* (NSW).

### **Recommendation 12**

The Commission recommends that the Bill include a provision requiring a court sentencing a person in relation to an offence to which the Bill applies to warn the person about the operation of the continuing detention order regime.

## **12.2 Statutory review of amendments**

100. The second aspect relates to a statutory review of the provisions contained in the Bill. Section 32 of the *Crimes (High Risk Offenders) Act 2006* (NSW) provides for a statutory review of the extension of that Act to serious violent offenders after three years. The review is to determine whether the policy objectives of the amendments remain valid and whether the terms of the Act, as amended, remain appropriate for securing those objectives.
101. Similar statutory reviews or sunset provisions have been included in other national security legislation passed by the Commonwealth Parliament.<sup>81</sup>

### **Recommendation 13**

The Commission recommends that the Bill include provision for a statutory review of its provisions after three years.

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<sup>1</sup> For example, the right to life (article 6 of the ICCPR) and the rights to bodily integrity (an aspect of article 7 of the ICCPR) and security of person (article 9(1) of the ICCPR).

<sup>2</sup> United Nations Security Council, *Resolution 1373* (2001), UN Doc S/RES/1373 (2001), paras 2(b) and (e).

<sup>3</sup> Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws* (2008). At <http://www.humanrights.gov.au/human-rights-guide-australias-counter-terrorism-laws#fnB8> (viewed 12 October 2016).

<sup>4</sup> United Nations General Assembly, *Resolution 60/288 The United Nations Global Counter-Terrorism Strategy*, UN Doc A/RES/60/288 (2006), p 9.

<sup>5</sup> Council of Australian Governments, *COAG Communiqué*, 15 December 2015, p 3. At <https://www.coag.gov.au/node/529#4> (viewed 12 October 2016).

<sup>6</sup> Council of Australian Governments, *COAG Communiqué*, 1 April 2016, pp 3-4. At <https://www.coag.gov.au/node/537#7> (viewed 12 October 2016).

<sup>7</sup> Senator the Hon George Brandis QC, Commonwealth Attorney-General, 'Meeting of Attorneys-General on post sentence preventative detention', *Communiqué*, 5 August 2016. At <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/ThirdQuarter/Communiqué->

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- [Meeting-of-Attorneys-General-on-post-sentence-preventative-detention.aspx](#) (viewed 12 October 2016).
- <sup>8</sup> *Crimes (High Risk Offenders) Act 2006* (NSW) and *Criminal Law (High Risk Offenders) Act 2015* (SA).
- <sup>9</sup> *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic); *Dangerous Sexual Offenders Act 2006* (WA); *Serious Sex Offenders Act* (NT).
- <sup>10</sup> Justices Gummow and Kirby JJ considered that the Commonwealth Parliament could not validly confer on a Ch III court the functions under s 13 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (at 608-614 [68]-[89] and 631 [145]); the reasons of Gleeson CJ, Callinan and Hayne JJ suggest that such functions could have been conferred on a Ch III court (at 592 [19] and 653-654 [214]-[217]); Hayne J reserved his opinion on this issue (at 647 [196]); McHugh J did not directly address the issue; on the one hand his Honour noted that the Supreme Court was exercising judicial power and that the Act was not designed to punish the prisoner (at 597 [34]), on the other hand his Honour noted that State legislation may alter the burden of proof and the rules of evidence and procedure in civil and criminal courts in ways that are repugnant to the traditional judicial process, and which would not be permitted at the federal level as a result of Ch III (at 601 [41], which appeared to be a response to problems with the Act identified by Kirby J at [147]-[186]).
- <sup>11</sup> United Nations Human Rights Committee, *Fardon v Australia*, Communication No. 1629/2007; UN Doc CCPR/C/98/D/1629/2007 (10 May 2010), at <http://juris.ohchr.org/Search/Details/1574> (viewed 12 October 2016); *Tillman v Australia*, Communication No. 1635/2007, UN Doc CCPR/C/98/D/1635/2007 (10 May 2010), at <http://juris.ohchr.org/Search/Details/1576> (viewed 12 October 2016).
- <sup>12</sup> United Nations Human Rights Committee, *Fardon v Australia*, Communication No. 1629/2007; UN Doc CCPR/C/98/D/1629/2007 (10 May 2010), para 7.4.
- <sup>13</sup> United Nations Human Rights Committee, *Fardon v Australia*, Communication No. 1629/2007; UN Doc CCPR/C/98/D/1629/2007 (10 May 2010), para 7.4(4).
- <sup>14</sup> United Nations Human Rights Committee, *Rameka v New Zealand*, Communication No. 1090/2002, UN Doc CCPR/C/79/D/1090/2002 (15 December 2003) at <http://juris.ohchr.org/Search/Details/1090> (viewed 12 October 2016); *Manuel v New Zealand*, Communication No. 1385/2005, UN Doc CCPR/C/91/D/1385/2005 (14 November 2007), at <http://juris.ohchr.org/Search/Details/1379> (viewed 12 October 2016); *Dean v New Zealand*, Communication No. 1512/2006, UN Doc CCPR/C/95/D/1512/2006 (29 March 2009), at <http://juris.ohchr.org/Search/Details/1510> (viewed 12 October 2016).
- <sup>15</sup> United Nations Human Rights Committee, *Rameka v New Zealand*, Communication No. 1090/2002, UN Doc CCPR/C/79/D/1090/2002 (15 December 2003), para 7.3.
- <sup>16</sup> United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014), para 21. At [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en) (viewed 12 October 2016).
- <sup>17</sup> United Nations Human Rights Committee, *Concluding observations on the sixth periodic report of Germany*, UN Doc CCPR/C/DEU/CO/6 (12 November 2012), para 14. At [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fDEU%2fCO%2f6&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fDEU%2fCO%2f6&Lang=en) (viewed 12 October 2016).
- <sup>18</sup> Commonwealth, *Parliamentary Debates*, Senate, 15 September 2016, p 40 (Senator the Hon George Brandis QC, Attorney-General, second reading speech for the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016).
- <sup>19</sup> Commonwealth, *Parliamentary Debates*, Senate, 15 September 2016, p 40 (Senator the Hon George Brandis QC, Attorney-General, second reading speech for the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016).
- <sup>20</sup> The Hon Kristina Keneally MP, Premier of New South Wales, 'State to audit worst of the worst', Media Release, 11 April 2010, referred to in Department of Justice and Attorney-General, *Review of the Crimes (Serious Sex Offenders) Act 2006* (2010), p 80; at [www.justice.nsw.gov.au/justicepolicy/Documents/statutory\\_review\\_251110.doc](http://www.justice.nsw.gov.au/justicepolicy/Documents/statutory_review_251110.doc) (viewed 12 October 2016). See also: New South Wales Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012), pp 1-2; at [http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Sentencing\\_Serious\\_Violent\\_Offenders/online%20final%20report%20hrvo.pdf](http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Sentencing_Serious_Violent_Offenders/online%20final%20report%20hrvo.pdf) (viewed 12 October 2016).
- <sup>21</sup> Department of Justice and Attorney-General, *Review of the Crimes (Serious Sex Offenders) Act 2006* (2010), p 81-82; at

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- [www.justice.nsw.gov.au/justicepolicy/Documents/statutory\\_review\\_251110.doc](http://www.justice.nsw.gov.au/justicepolicy/Documents/statutory_review_251110.doc) (viewed 12 October 2016).
- 22 Independent National Security Legislation Monitor, *Declassified Annual Report* (2012), p 37. At <http://dpmc-prod-s3.s3-ap-southeast-2.amazonaws.com/inslm/s3fs-public/publications/inslm-annual-report-2012.pdf> (viewed 12 October 2016).
- 23 Including *R v Elomar* [2010] NSWSC 10 at [93] (Whealy J).
- 24 Independent National Security Legislation Monitor, *Declassified Annual Report* (2012), p 37. At <http://dpmc-prod-s3.s3-ap-southeast-2.amazonaws.com/inslm/s3fs-public/publications/inslm-annual-report-2012.pdf> (viewed 12 October 2016).
- 25 *Criminal Code*, s 104.1.
- 26 *Criminal Code*, s 104.5(3).
- 27 Parliamentary Joint Committee on Human Rights, *Guide to human rights*, pp 8 [1.22] and 17 [1.54]. At [http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights\\_ctte/resources/Guide\\_to\\_Human\\_Rights.pdf?la=en](http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/resources/Guide_to_Human_Rights.pdf?la=en) (viewed 12 October 2016).
- 28 Independent National Security Legislation Monitor, *Declassified Annual Report* (2012), p 11. At <http://dpmc-prod-s3.s3-ap-southeast-2.amazonaws.com/inslm/s3fs-public/publications/inslm-annual-report-2012.pdf> (viewed 12 October 2016).
- 29 *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]-[42], (Hammond J). See also the views of the United Nations Human Rights Committee in *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990); *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); and *Spakmo v Norway*, Communication No. 631/1995, UN Doc CCPR/C/67/D/631/1995 (1999).
- 30 United Nations Human Rights Committee, General Comment 31 (2004) at [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004) p 308, at [11.10].
- 31 United Nations Human Rights Committee, *A v Australia*, Communication No. 900/1993, UN Doc CCPR/C/76/D/900/1993 (1997); and *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002).
- 32 Proposed s 105A.5(2).
- 33 Proposed ss 105A.5(1), 105A.7, and 105A.9.
- 34 Proposed s 105A.7(1)(b).
- 35 Proposed s 105A.7(1)(c).
- 36 Proposed s 105A.7(3).
- 37 Proposed ss 105A.7(5) and (6), and 105A.5(2)(b).
- 38 Proposed s 105A.12(4).
- 39 Proposed s 105A.12(7).
- 40 Proposed s 105A.12(5).
- 41 Proposed s 105A.11.
- 42 Proposed s 105A.16.
- 43 Proposed s 105A.17.
- 44 United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014), para 15. At [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en) (viewed 12 October 2016).
- 45 Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Intelligence and Security in relation to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth)*, pp 10-12.
- 46 Sentencing Advisory Council (Victoria), *High Risk Offenders: Post-Sentence Supervision and Detention* (2007), pp 11-16, at <https://www.sentencingcouncil.vic.gov.au/publications/high-risk-offenders-final-report> (viewed 12 October 2016); NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012), pp 20-29, at [http://www.sentencingcouncil.justice.nsw.gov.au/Pages/sent\\_council\\_index/publications/completed\\_projects/svo/svo.aspx](http://www.sentencingcouncil.justice.nsw.gov.au/Pages/sent_council_index/publications/completed_projects/svo/svo.aspx) (viewed 12 October 2016).
- 47 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 623 [124]-[125] (most footnotes omitted).
- 48 Sentencing Advisory Council (Victoria), *High Risk Offenders: Post-Sentence Supervision and Detention* (2007), pp 12-13, at <https://www.sentencingcouncil.vic.gov.au/publications/high-risk-offenders-final-report> (viewed 12 October 2016).
- 49 NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012), pp 21-22, at

- [http://www.sentencingcouncil.justice.nsw.gov.au/Pages/sent\\_council\\_index/publications/completed\\_projects/svo/svo.aspx](http://www.sentencingcouncil.justice.nsw.gov.au/Pages/sent_council_index/publications/completed_projects/svo/svo.aspx) (viewed 12 October 2016).
- 50 NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012), pp 22-26, at [http://www.sentencingcouncil.justice.nsw.gov.au/Pages/sent\\_council\\_index/publications/completed\\_projects/svo/svo.aspx](http://www.sentencingcouncil.justice.nsw.gov.au/Pages/sent_council_index/publications/completed_projects/svo/svo.aspx) (viewed 12 October 2016).
- 51 Proposed s 105A.6(1).
- 52 Proposed s 105A.2.
- 53 Proposed s 105A.6(3).
- 54 Proposed s 105A.6(4) and (7).
- 55 Proposed s 105A.8.
- 56 Proposed s 105A.2. See *Explanatory Memorandum for the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth)*, p 18 [105].
- 57 NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012), p 28, at [http://www.sentencingcouncil.justice.nsw.gov.au/Pages/sent\\_council\\_index/publications/completed\\_projects/svo/svo.aspx](http://www.sentencingcouncil.justice.nsw.gov.au/Pages/sent_council_index/publications/completed_projects/svo/svo.aspx) (viewed 12 October 2016).
- 58 *Criminal Justice (Scotland) Act 2003* (asp 7), ss 3-13. At <http://www.legislation.gov.uk/asp/2003/7/contents> (viewed 12 October 2016).
- 59 NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012), pp 130-131, at [http://www.sentencingcouncil.justice.nsw.gov.au/Pages/sent\\_council\\_index/publications/completed\\_projects/svo/svo.aspx](http://www.sentencingcouncil.justice.nsw.gov.au/Pages/sent_council_index/publications/completed_projects/svo/svo.aspx) (viewed 12 October 2016).
- 60 Sentencing Advisory Council (Victoria), *High Risk Offenders: Post-Sentence Supervision and Detention* (2007), pp 115-117 and 119, at <https://www.sentencingcouncil.vic.gov.au/publications/high-risk-offenders-final-report> (viewed 12 October 2016).
- 61 *Criminal Code*, s 104.4(2).
- 62 NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012), pp 103-104, at [http://www.sentencingcouncil.justice.nsw.gov.au/Pages/sent\\_council\\_index/publications/completed\\_projects/svo/svo.aspx](http://www.sentencingcouncil.justice.nsw.gov.au/Pages/sent_council_index/publications/completed_projects/svo/svo.aspx) (viewed 12 October 2016).
- 63 *New South Wales v Richardson (No 2)* [2011] NSWSC 276 [90].
- 64 *Lynn v State of New South Wales* [2016] NSWCA 57, [44] (Beazley P), [127] (Basten JA), [148] (Gleeson JA).
- 65 *Lynn v State of New South Wales* [2016] NSWCA 57, [48] (Beazley P), [116] and [128]-[131] (Basten JA), [149] (Gleeson JA).
- 66 *Explanatory Memorandum for the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth)*, pp 21-22 [125].
- 67 *Crimes (High Risk Offenders) Act 2006* (NSW), s 17(1); *Criminal Law (High Risk Offenders) Act 2015* (SA), s 18; *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), s 13(5); *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic), s 36(4); *Dangerous Sexual Offenders Act 2006* (WA), s 17; *Serious Sex Offenders Act* (NT), s 31.
- 68 Proposed s 105A.13(1).
- 69 *Explanatory Memorandum for the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth)*, p 9 [43].
- 70 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 612 [79] (footnotes omitted).
- 71 *Dangerous Sexual Offenders Act 2006* (WA), s 40.
- 72 T Tulich, 'Post-Sentence Preventative Detention and Extended Supervision of High Risk Offenders in New South Wales' (2015) 38(2) *UNSW Law Journal* 823 at 840, citing L Zedner, 'Seeking Security by Eroding Rights: The Side-Stepping of Due Process' in B Goold and L Lazarus (eds), *Security and Human Rights* (2007) 257 and K Roach, 'The Criminal Law and Its Less Restrained Alternatives' in V Ramraj et al (eds), *Global Anti-Terrorism Law and Policy* (2012) 91.
- 73 Proposed s 105A.5(4) and (5).
- 74 Proposed s 105A.14.
- 75 Proposed s 105A.16.
- 76 Proposed s 105A.17, see article 14(5) of the ICCPR.
- 77 *Dietrich v The Queen* (1992) 177 CLR 292.
- 78 New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 February 2013, p 17,682 (The Hon Greg Smith MP, Attorney-General and Minister for Justice, second reading speech for the Crimes (Serious Sex Offenders) Amendment Bill 2013).

<sup>79</sup> Proposed s 105A.8(e).

<sup>80</sup> Proposed s 105A.4.

<sup>81</sup> For example, the COAG Review of Counter-Terrorism Legislation in 2012 and the sunset provisions for the control order (s 104.32) and preventative detention (s 105.53) regimes.