



Yours sincerely,

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## Part A Bail and parole

### Proposed amendments with respect to bail

The presumption in favour of bail is closely aligned with the presumption of innocence and the right to liberty. In granting bail to Aruran Vinayagamoorthy and two others whilst awaiting trial on charges of providing funds to the Liberation Tigers of Tamil Eelam, Justice Bongiorno explained that:

The offences ... are undoubtedly serious ... but it must be kept in mind that they are entitled to the full benefit of the presumption of innocence. If that principle is abandoned, or even modified, for political expediency we risk the legal foundation of our whole criminal justice system.<sup>1</sup>

In its current form, s 15AA of the *Crimes Act* relevantly establishes a presumption against bail for any person charged with or convicted of a terrorism offence (excluding the offence of associating with a member of a terrorist organisation in s 102.8). Where this applies, the onus of proof is reversed such that the bail authority may only grant bail if extraordinary circumstances can be established by the defendant. The desirability of a presumption against bail for terrorism offences per se goes beyond the terms of this inquiry. However, it should be noted that this presumption was controversial when it was introduced in 2004 and continues to be so. The Australian Human Rights Commission described it ‘as a disproportionate interference with the right to liberty under art 9 of the ICCPR as well as the presumption of innocence under art 14(2) of the ICCPR’.<sup>2</sup> Furthermore, it limits the discretion of bail authorities by assuming that the conduct captured by the terrorism offences is homogenous. In actuality, that conduct not only includes terrorist acts, but also conduct which is far removed from these acts. For example, the supply of office equipment to a terrorist organisation would fall within the federal terrorism offences. This is not to say that terrorism and related activities are not serious, but rather that a blanket requirement to prove exceptional circumstances before being granted bail is not commensurate with the risk posed by each and every terrorist offender.

The proposed amendments would significantly expand the categories of conduct to which the presumption against bail applies.

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<sup>1</sup> *Vinayagamoorthy v DPP (Cth)* (2007) 212 FLR 326, 331.

<sup>2</sup> Australian Human Rights Commission, Submission No 18, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Inquiry into the National Security Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010, 6 May 2010, 24.

- a. It reverses the amendment made by the *Anti-Terrorism Act (No 2) 2004* (Cth), which clarified that a ‘terrorism offence’ for the purposes of the presumption against bail does not include the association offences in s 102.8. As a result, the presumption would apply to all terrorism offences in the *Criminal Code Act 1995* (Cth) (‘*Criminal Code*’).
- b. It extends the presumption against bail to any person who is subject to a control order, regardless of whether the criminal offence for which bail is sought involves a breach of that order, is a terrorism federal offence or is a non-terrorism federal offence.
- c. It extends the presumption against bail to any person who the bail authority is satisfied has made statements or carried out activities supporting, or advocating support for, terrorist acts. Such speech or conduct might be captured by the federal terrorism offences, for example: advocating terrorism, doing an act in preparation for terrorism, or providing support to a terrorist organisation. However, despite the Second Reading Speech referring to people in this category as ‘offenders’,<sup>3</sup> the laying of such charges is not a pre-requisite. This amendment would capture people who have never been either charged with or convicted of terrorism offences. Rather, the issue of bail arises in relation to non-terrorism federal offences.
- d. It extends the presumption against bail to any person who has been charged with or convicted of a terrorism offence. Whilst this is not explicit on the face of the Bill, the Explanatory Memorandum interprets this as including ‘not just to those who are charged with or convicted of a terrorism offence at the time of the bail ... consideration but also those who are charged with or convicted of a terrorism offence in the past who are now being considered for bail or parole for another offence’.<sup>4</sup>

We have two major concerns with these amendments. First, they are the product of an agreement by the Council of Australian Governments (‘COAG’) to put in place ‘nationally consistent principles to ensure there is a presumption against bail and parole in agreed circumstances across Australia’.<sup>5</sup> However, there has been insufficient coordination between the Commonwealth, States and Territories in drafting the relevant legislation. As a result, there are material differences in the scope and operation of the presumption against bail in each jurisdiction that has drafted and/or enacted legislation to date (South

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<sup>3</sup> House of Representatives, Parliament of Australia, *Parliamentary Debates*, 20 February 2019, 7.

<sup>4</sup> Explanatory Memorandum, Counter-Terrorism Legislation Amendments Bill 2019, 9 [38].

<sup>5</sup> Council of Australian Governments, *Communique*, 5 October 2017, 2.

Australia, Victoria, Tasmanian and Queensland).<sup>6</sup> Both the categories of people to whom the presumption applies and the standard of proof differs between jurisdictions. In relation to the former, there are inconsistencies in terms of whether the presumption against bail applies to: (i) people who have merely been *charged* with a terrorism offence (regardless of whether they were ultimately acquitted); (ii) people subject to a *preventative detention order*; (iii) people who have *previously* been the subject of a control order (even if it was an interim order issued in their absence, not subsequently confirmed or if it was later revoked as unnecessary); and (iv) people who have merely *associated* with a terrorist organisation or individual terrorists. Some jurisdictions, such as Victoria, have also extended the presumption against bail to any person who is assessed by specific agencies, such as the police, the Australian Security Intelligence Organisation and the relevant State and Commonwealth Departments, to be a terrorist risk. In relation to the standard of proof applicable, they range from ‘exceptional circumstances’ to ‘special circumstances’ to a two-tiered ‘exceptional circumstances’ / ‘compelling circumstances’ model depending upon the identified level of risk. These two sets of differences undermine the goal of creating a ‘nationally consistent’ regime. The reality is that defendants seeking bail will be treated differently depending upon their geographical location and the legislation under which charges are laid.

Second, incursions into the presumption of innocence and right to liberty should not be done lightly. A clear justification must be demonstrated before the presumption against bail is expanded to new categories of people. We submit that no evidence has been put forward to justify the amendments.

Looking first to a. above, the Explanatory Memorandum to the Bill simply states that this amendment is ‘part of implementing the COAG agreement of 9 June 2017’.<sup>7</sup> However, neither the Communique for that meeting nor the Communique for the follow-up Special Meeting on 5 October 2017 provides a clear justification for extending the presumption against bail to the association offences in s 102.8. Whilst it no doubt simplifies the legislative framework to apply the same procedures for bail applications to *all* terrorism offences, this is not an adequate justification for making incursions into the presumption of innocence. We submit that a better approach – if simplification is the desired outcome – would be to

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<sup>6</sup> The relevant legislation is: Statutes Amendment (Terror Suspect Detention) Act 2017; Justice Legislation Amendment (Terrorism) Act 2018; Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018; and Terrorism (Restrictions on Bail and Parole) Bill 2018 (Tas).

<sup>7</sup> Explanatory Memorandum, Counter-Terrorism Legislation Amendments Bill 2019, 24 [116].

repeal s 102.8 as prior inquiries have frequently recommended.<sup>8</sup> The fact that no person has been charged with an association offence in the 15 years that the section has been in effect indicates that repeal would not leave a gap in Australia's national security framework.

The primary justification given in the Explanatory Memorandum for b. to d. is that these amendments would capture people who have been identified as posing a risk to society.<sup>9</sup> This justification applies most persuasively to any person seeking bail prior to sentencing for a federal terrorism offence (as currently provided for by s 15AA). However, we submit that the amendments go too far in capturing people with only a tenuous connection to terrorism. For example, in relation to b. above (concerning those subject to a control order), the Explanatory Memorandum asserts that the threshold for issuing a control order 'is very high'.<sup>10</sup> However, as civil orders, they involve no determination of criminal guilt and are issued on the balance of probabilities, not on the higher criminal standard of beyond reasonable doubt. In other words, the threshold for identifying people who pose a risk to society is a low one. This is particularly concerning with respect to interim control orders. These orders are issued by a federal court on the basis of a balance of probabilities assessment of risk, however, they are issued in ex parte proceedings in which the person has had no opportunity to put their case before the judge. Interim orders are designed to apply only briefly, until the contested confirmation hearing for the control order can be held.

Another example of the over-breadth of the amendments involves the situation where a person who has previously been convicted of a terrorism offence (see d. above) now faces federal non-terrorism charges. Whilst that person may have been identified as posing a risk to society in the past, that risk is not necessarily current. It is inconsistent with the rehabilitative purpose of our criminal justice system to assume that a person who has served their sentence for a terrorism offence continues to pose a risk to society. This is especially so given the possibility under the continuing detention regime for a convicted terrorist to be detained after the end of their sentence if they are still regarded as posing a risk to society.<sup>11</sup> The Bar Association of Queensland has also noted the counter-productive effects of extending the

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<sup>8</sup> See, for example, Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) 13 (Recommendation 15) and Council of Australian Governments, *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013) xiii (Recommendation 23).

<sup>9</sup> Explanatory Memorandum, Counter-Terrorism Legislation Amendments Bill 2019, 25 [120].

<sup>10</sup> Ibid 10 [41].

<sup>11</sup> *Terrorism (High Risk Offenders) Act 2017* (Cth).

presumption against bail to people on the basis of a previous offence.<sup>12</sup> In relation to the Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018 (Qld) ('Queensland Bill'), it stated that 'a person who has been sentenced and whose rehabilitation is progressing well could easily regard a justice system that ignores that progress when considering bail on a later offence unrelated to terrorism as a basis for reengaging with radical ideology as a result of perceived injustice'.<sup>13</sup>

The final – and most problematic – example is where a person has previously been *acquitted* of a terrorism offence and now faces federal non-terrorism charges (see d. above). Given that a jury of their peers has found such a person to be innocent of terrorism, it is not possible in such circumstances to claim that they have been identified as posing a risk to society. The Victorian Expert Panel on Terrorism and Violent Extremism ('Victorian Expert Panel') rejected a proposal that the presumption against bail should extend to people who have merely been charged with a terrorism offence on the basis that it would capture 'tenuous, incidental links to terrorism'.<sup>14</sup> It continued that '[a]ny real risk posed by such individuals will be captured by the [other] categories'.<sup>15</sup>

In relation to c. above, the Explanatory Memorandum provides that where a person supports, or advocates support for, terrorist acts, it is appropriate that the decision-maker can take this factor into account when considering bail. It 'is reasonable, necessary and proportionate' to apply the presumption against bail to this group.<sup>16</sup> However, the Explanatory Memorandum fails to recognise that there is a fundamental difference between being able to take a person's prior actions into account as part of an unweighted balancing exercise and requiring the decision-maker to refuse bail to a person unless they are able to demonstrate exceptional circumstances. We submit that this interference with the court's discretion to grant bail is unnecessary, as it is already possible for the bail authority to take into account the character, antecedents and background of a defendant in granting bail. This includes a person's history as a

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<sup>12</sup> Bar Association of Queensland, Submission No 1, Legal Affairs and Community Safety Committee, Inquiry into the Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018 (Qld) 2.

<sup>13</sup> Ibid.

<sup>14</sup> Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers, Victorian Government, *Report No 1* (2017) 61.

<sup>15</sup> Ibid 62.

<sup>16</sup> Explanatory Memorandum, Counter-Terrorism Legislation Amendments Bill 2019, 9 [37].

convicted terrorist, prior associations with terrorist organisations or individual terrorists, and advocacy of terrorism.

It is important to note the breadth of conduct caught by c. above. The definition of terrorism under s 100.1 the Commonwealth Criminal Code captures political, religious or ideological violence (and threats of violence) intended to coerce, or influence by intimidation, Australian or foreign governments, or to intimidate the public. Terrorism is a global concern and the definition reflects this. The proposed extension of the presumption against bail would capture adults and minors who have made a statement supporting terrorism. Whilst this would capture present recruiters and advocates of ISIS, it would also capture individuals who have at some stage stated their support of political movements that meet this broad definition of terrorism. For instance, some pro-democracy and anti-authoritarian movements meet the present definition of terrorism. Under the proposed provisions, a statement on, for example, social media supporting one of these movements could render the individual subject to a presumption against bail throughout their life, regardless of the statement, the person's actual links to terrorism, or the charges against them.

For the most part, and other than where provided by federal legislation, bail is governed by the legislation of the State or Territory in which the charges have been laid. Each of these jurisdictions currently provides for the refusal of bail on the ground of the protection of the community. For example, under s 19 of the *Bail Act 2013* (NSW), a bail authority must refuse bail if it is satisfied that there is unacceptable risk that the defendant will commit a serious offence or endanger the safety of victims, individuals or the community. Therefore, if the bail authority believes that there is a risk that the defendant will commit a federal terrorism offence whilst on bail, they will be remanded to await trial or sentencing. We acknowledge the desire of the Victorian Expert Panel to 'maximise[...] the likelihood that [terrorism-related] risks will be included as part of the bail decision-making process with a rigour that is commensurate with the seriousness of the potential risk to the community'.<sup>17</sup> However, rather than extending the categories of people to whom the presumption against bail applies, our preferred approach is to include in the *Crimes Act* a specific list of factors, including any material support that the person has provided for terrorism, that the bail authority must take into account in deciding whether to grant bail. A provision along these lines has been included as part of the Queensland Bill.<sup>18</sup>

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<sup>17</sup> Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers, Victorian Government, *Report No 1* (2017) 63.

<sup>18</sup> Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018 (Qld) cl 8.

### Proposed amendments with respect to parole

There is currently no presumption against parole with respect to terrorism-related activities under federal legislation. The Bill proposes to introduce such a presumption for three categories of people. Where any of these are applicable, the Attorney-General may only grant bail if extraordinary circumstances can be established. The reality is that the burden of proving exceptional circumstances means that most prisoners falling into one of the three categories will have little hope of parole. Whilst there is no legislative definition, it has been interpreted by the courts as ‘something unusual or out of the ordinary in the circumstances relied on by the applicant before those circumstances can be characterised as exceptional’.<sup>19</sup>

The introduction of a presumption against parole undermines the important role played by parole in facilitating the reintegration of the offender back into the community. In the first place, the possibility of parole being granted provides an incentive for the offender to be actively involved in rehabilitation programs and to disengage from extremism. Furthermore, parole offers a structured mechanism for defendants to be monitored and for conditions, such as reporting to the authorities and curfews, to be imposed upon their release so as to limit the prospect of reoffending. Cherney notes that the introduction of a presumption against parole ignores the well-documented benefits relating to reintegration when a person, including a convicted terrorist or radicalised prisoner, is on parole.<sup>20</sup> Unsupervised and unconditional release into the community after serving the totality of the sentence, even if surveillance by law enforcement and intelligence agencies is available, is not an adequate substitute. The Victorian Expert Panel noted that ‘[w]hereas parole provides an opportunity for an orderly transition, and thereby materially increases community safety, unconditional release may remove that opportunity altogether’.<sup>21</sup>

Despite this, the Bill proposes to introduce a new presumption against parole for three categories of people. These categories are narrower than those which apply in the bail context, however, they are not unproblematic. The first category is people who have been convicted of a terrorism offence, including a person currently serving a sentence for a terrorism offence. Like the expanded presumption against bail, this category includes people who have previously been convicted of a terrorism offence, regardless of

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<sup>19</sup> *Re Scott* [2011] VSC 674 [14].

<sup>20</sup> Adrian Cherney, ‘The Release and Community Supervision of Radicalised Offenders: Issues and Challenges that Can Influence Reintegration’ (2018) *Terrorism and Political Violence*, 1-19.

<sup>21</sup> Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers, Victorian Government, *Report No 1* (2017) 39.

whether that is the specific offence in respect of which they are now seeking parole or not. Our concerns in relation to this category are set out above in the discussion of the presumption against bail. It is notable that this category does not include people who have previously merely been charged with – as opposed to convicted of – a federal terrorism offence. This is anomalous given that the COAG Agreement was a response to the siege of the Brighton Apartments by Yacqub Khayre, who had previously been charged with, but acquitted of, a terrorism offence and was subsequently on parole for an unrelated federal offence. The new presumption against parole would therefore not prevent a repeat of this incident. This does not mean that we advocate an extension of the presumption to people who have merely been charged with a terrorism offence. We agree with the Victorian Expert Panel that ‘merely being charged with a terrorism offence is not in itself sufficient to sustain the presumption against parole’.<sup>22</sup> Rather, it goes to demonstrate that the Bill is not a necessary and proportionate response to the national security issues that COAG was grappling with in June 2017.

The second category of people to whom the new presumption against parole will apply is anyone who is currently subject to a control order. The final category includes any person who the Attorney-General is satisfied has made statements or carried out activities supporting, or advocating support for, terrorist acts. As set out above in relation to the presumption against bail, we are concerned about the breadth of these categories. They have the potential to capture people who have merely a tenuous connection with terrorism and/or who may have posed a real risk to the community in the past but have since rehabilitated.

#### Proposed amendments dealing specifically with respect to bail and parole for minors

The current presumption against bail and the parole arrangements in Part IB of the *Crimes Act* apply to both adults and minors charged with or convicted of a federal offence. The Bill proposes that this would also be the case for the expanded presumption against bail and the new presumption against parole. Our concerns regarding the presumptions against bail and parole per se and the expanded categories of people to whom those presumptions apply are heightened in the context of young offenders. The immaturity and vulnerability of minors means that flexibility on the part of judges should be jealously guarded, even where the defendant is involved (either directly or indirectly) in terrorism. In addition to the concerns above, we note that the presumptions against bail and parole likely violate key provisions of the Convention on the Rights of the Child (‘CROC’). Of particular importance is art 37(b), which provides that the detention or imprisonment of a child shall be used only as a measure of last resort and for the

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<sup>22</sup> Ibid 45.

shortest appropriate period of time. Blanket presumptions against bail and parole for all children who have engaged in terrorism-related activities would seem to violate this provision.

As a means of safeguarding young people, the Bill also proposes to include new provisions to ensure that the best interests of the child must be taken into account in bail and parole decision-making. For example, proposed subsection 15AA (3AA) states that in determining whether exceptional circumstances exist to justify granting bail to a person who is under 18 years of age, the bail authority must have regard to:

- (a) the protection of the community as the paramount consideration; and
- (b) the best interests of the person as a primary consideration.

The same factors must be taken into account by the sentencing court when determining whether exceptional circumstances exist to justify a departure from the minimum non-parole period (subsec 19AG(4B)) and the Attorney-General when determining whether exceptional circumstances exist to rebut the presumption against parole (subsec 19ALB(3)).

The Explanatory Memorandum notes that these new provisions respond to issues raised during the Independent National Security Legislation Monitor's ('INSLM') inquiry into the prosecution and sentencing of children for Commonwealth terrorist offences.<sup>23</sup> However, as the INSLM's report has not yet been tabled in Parliament, we would urge the Committee to delay consideration of these aspects of the Bill until the public has had an opportunity to read the report and make informed submissions in light of it.

As the Explanatory Memorandum acknowledges, bail and parole authorities already take into account the protection of the community and the best interests of minors.<sup>24</sup> However, the system which the Bill proposes is different to that which is currently in place in that it would establish a clear hierarchy of factors for the decision-maker to consider. The Second Reading Speech describes the paramount / primary consideration drafting formulation as 'aligned with [that] currently provided in Commonwealth legislation underpinning control orders'.<sup>25</sup> However, as noted in relation to the presumption against bail, control orders are civil orders. Unless they are breached, they do not result in the detention of a minor.

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<sup>23</sup> Explanatory Memorandum, Counter-Terrorism Legislation Amendments Bill 2019, 5 [19].

<sup>24</sup> Ibid 25 [123].

<sup>25</sup> House of Representatives, Parliament of Australia, *Parliamentary Debates*, 20 February 2019, 7.

Given the very different sanctions which are applicable, the decision-making framework for one is not necessarily transferrable to the other.

We acknowledge that the paramount / primary drafting formulation does not explicitly contravene the CROC. The minimum standard set out in art 3.1 of the CROC for all actions involving minors is that the best interests of the child shall be a primary consideration. In making this *a primary* rather than *the paramount* consideration, art 3.1 allows decision-makers to balance the best interests of the child against other considerations. The problem with the Bill is that by directing the decision-making that the protection of the community is the paramount consideration, it makes it extremely difficult (if not impossible) for a minor to rely upon their 'best interests' as extraordinary circumstances to be granted bail or parole, or to have a parole period of less than three quarters of the head sentence imposed. We submit that any determination that it is appropriate to incarcerate, or continue to incarcerate, a minor should only be made after the exercise of unfettered discretion by the decision-maker taking into account the full range of relevant factors, including, but not limited to, the best interests of the child. This is particularly important when the child is yet to be proven guilty of any offence, or has been subject to a civil control order and may be facing relatively minor federal charges. For this reason, we recommend that the protection of the community and the best interests of the person be placed on an equal footing, each as 'primary' considerations to be considered in the decision-making process.

## Part B Continuing detention

### Concurrent and cumulative sentences

The continuing detention order regime for ‘terrorist offenders’ commenced operation as Division 105A of the *Criminal Code* in June 2017.<sup>26</sup> The Minister for Home Affairs may apply to a State or Territory Supreme Court for a ‘continuing detention order’ (‘CDO’) that commits a terrorist offender to detention in prison at the end of his or her prison sentence.<sup>27</sup>

To fall within the definition of a ‘terrorist offender’ in s 105A.3, the person must have been convicted of a terrorism-related offence, namely, international terrorist activities using explosive or lethal devices, a Part 5.3 offence that carries a maximum penalty of at least 7 years imprisonment, or a foreign incursions and recruitment offence. The person must be either in custody serving a sentence of imprisonment for the terrorism-related offence or in custody pursuant to an interim or continuing detention order, and, furthermore, must be at least 18 years old when the sentence ends.

The Bill proposes to expand the eligibility criteria for the CDO scheme to include people who are serving sentences for non-terrorism-related offences and have ‘been *continuously detained in custody* since being convicted of’ a terrorism-related offence. As we have previously submitted to the Committee,<sup>28</sup> we acknowledge that the objective of the continuing detention regime is legitimate. It seeks to prevent those who have served sentences for terrorism offences – but have not been rehabilitated during that period – from being released into the community. The changes proposed by the Bill are consistent with this objective.

However, we have argued that a CDO scheme can only ever be justified if:

- a. a mechanism exists to accurately assess the level of risk that a convicted terrorist poses upon his or her release; and,

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<sup>26</sup> *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth) s 2.

<sup>27</sup> *Criminal Code Act 1995* (Cth) s 105A.3(2).

<sup>28</sup> Rebecca Ananian-Welsh, Nicola McGarrity, Tamara Tulich and George Williams, *Submission to the Parliamentary Joint Committee on Intelligence and Security to the inquiry into the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (October 2016).

- b. effective rehabilitation programs are available for convicted terrorists in jail.

Neither of these is currently in place. Further research is needed into the assessment of risk and the most effective tools for reducing recidivism in the counter-terrorism context in Australia, so that effective rehabilitation programs and a validated terrorism-specific risk assessment tool can be developed. In the absence of effective rehabilitation programs and validated risk assessment tools for terrorist offenders, the continuing detention regime runs the considerable risk of being ineffective. Therefore, whilst we do not have any objection to the specific changes made by the Bill, we are opposed to the existence of a continuing detention regime at the present time.

#### Giving information in applications to offenders

Section 105A.5(3) of the *Criminal Code* provides that an application for a CDO must include, amongst other things, inculpatory material, namely ‘any report or other document’ the Minister intends to reply on, and exculpatory material, namely:

- a. a copy of any material in the possession of the applicant; and
- b. a statement of any facts that the applicant is aware of that would reasonably be regarded as supporting a finding that the order should not be made.

The Minister is obliged to ‘ensure that reasonable inquiries are made to ascertain any facts known to any Commonwealth law enforcement officer or intelligence or security officer that would reasonably be regarded as supporting a finding that the order should not be made.’

A copy of the application must be provided to the offender within 2 days after the application is made. However, the Minister is not required to give an offender any information in the application if they are likely to:

- a. give a certificate under Subdivision C of Division 2 of Part 3A of the *National Security Information (Criminal and Civil Proceedings) Act 2004*;
- b. seek an arrangement under section 38B of that Act; or
- c. seek an order of the Court preventing or limiting disclosure of the information.

Section 105A.5(6) requires a complete copy of the application to be given to the offender:

- a. if the decision-maker later decides not to take any of the actions referred to in any of paragraphs (5)(a) to (d), or after the decision-maker takes such action the Court makes an order—within 2 business days of the decision-maker’s decision or the order (as the case requires); and
- b. in any case—within a reasonable period before the preliminary hearing referred to in section 105A.6.

The Bill proposes to exclude from the exculpatory material which must be provided ‘any information, material or facts that are likely to be protected by public interest immunity (whether the claim for public interest immunity is to be made by the AFP Minister or any other person).’ The proposed changes provide that should information be excluded on this basis, the applicant must give written notice to the offender stating the information has been excluded when the applicant provides the offender with a copy of the application.

We recognise the need to protect national security information in court proceedings, while also protecting the right of an individual to a fair trial and the integrity of the CDO process. The inclusion of provisions related to exculpatory material reflects the fact that intelligence material is produced by the executive and is difficult, if not impossible, to independently source or challenge. In *Thomas v Mowbray*, Justice Hayne commented:

Intelligence information, gathered by government agencies, presents radically different problems. Rarely, if ever, would it be information about which expert evidence, independent of the relevant government agency, could be adduced. In cases where it could not be tested in that way (and such cases would be the norm rather than the exception) the court...would be left with little practical choice except to act upon the view that was proffered by the relevant agency.<sup>29</sup>

The requirement that exculpatory material be provided to the offender and the related requirement that the Minister must ensure that reasonable enquiries are made to ascertain exculpatory material were inserted into the 2016 Bill following the recommendations of this Committee in its *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*. The Committee commented:

It is vital that there is clarity on this issue as it is an important protection of an offender’s rights. Consequently, the Committee recommends that the Explanatory Memorandum be amended to make abundantly clear that, notwithstanding subsection 105A.5(4) which may enable some

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<sup>29</sup> (2007) 233 CLR 307, 477 [511].

information not to be disclosed in the copy of the CDO application first provided to the offender, an offender is to be provided in a timely manner with information to be relied on in an application for a CDO.<sup>30</sup>

The Revised Explanatory Memorandum to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 explains:

These measures ensure that the terrorist offender and the Court are provided with all the material that may be relevant in the determination of a continuing detention order application. Accordingly, the terrorist offender will be given the opportunity to put forward their case in light of all the available material that is relevant to the proceeding.<sup>31</sup>

The Second Reading Speech to the Counter-Terrorism Legislation Amendment Bill 2019 states that the proposed changes to the protection of national security information in continuing detention proceedings are necessary to bring the CDO applications ‘into line with criminal prosecutions’.<sup>32</sup> This is a curious justification in relation to post-sentence civil orders, particularly as the proposal seeks to reduce the amount of exculpatory material provided to an offender without providing any of the attendant protections of the criminal justice process, such as the heightened standard of proof.

The proposed exclusion of exculpatory material is of significant concern. The existing provisions relating to exculpatory material were carefully considered by the Committee and the Senate when the amendments were agreed to by the Government and included in the 2016 Bill. They constitute important safeguards that protect the fairness of CDO proceedings by ensuring that the offender and the Court are apprised of all relevant material and, in particular, material that is difficult to independently source or challenge. These safeguards are commensurate with the extraordinary nature of the regime. We submit that the amendments made by the Bill should be rejected.

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<sup>30</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (4 November 2016), [3.136]

<sup>31</sup> Explanatory Memorandum, Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016, 9 [45].

<sup>32</sup> House of Representatives, Parliament of Australia, *Parliamentary Debates*, 20 February 2019, 8.

## Part C Recommendations

1. The Bill should not be enacted.
2. In the alternative, we make the following specific recommendations:
  - a. In relation to the presumptions against bail and parole for *adults*:
    - i. No amendments should be made to the presumption against bail in s 15AA of the *Crimes Act*.
    - ii. The presumption against parole should be limited to people seeking parole in relation to a conviction for a terrorism offence.
  - b. In relation to the presumptions against bail and parole for *minors*:
    - i. Section 15AA of the *Crimes Act* should be amended so that it does not apply to minors.
    - ii. The presumption against parole should not apply to minors.
    - iii. In the event that the presumptions against bail and parole *are* applied to minors, the bail authority and Attorney-General should be required to consider the protection of the community and the best interests of the person as ‘primary’ considerations of equal weighting.
  - c. In relation to continuing detention:
    - i. We have no objection to the amendments in relation to cumulative and concurrent sentences.
    - ii. No amendments should be made to the Minister’s obligation to disclose exculpatory material.