Australian Government
Department of Home Affairs

Australian Government
Attorney-General's Department

Submission to the review of the Counter-Terrorism Legislation Amendment Bill 2019

Parliamentary Joint Committee on Intelligence and Security

Department of Home Affairs and Attorney-General's Department

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Introduction

The Attorney-General's Department (AGD) and Department of Home Affairs (Home Affairs) welcome the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security's (PJCIS) review of the Counter-Terrorism Legislation Amendment Bill 2019 (Bill).

The Bill makes amendments to the arrangements in the *Crimes Act 1914* (Crimes Act) for bail and parole for federal offenders who have demonstrated support for, or have links to, terrorist activity. The Bill also makes amendments to Division 105A of the *Criminal Code* to improve the operation of the high risk terrorist offender (HRTO) scheme.

This submission provides further detail to the Explanatory Memorandum about the operation of the Bill.

Operational agencies, notably the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police (AFP) were consulted in the development of the Bill, and also in relation to this submission.

Schedule 1 – bail and parole in the *Crimes Act*

Current legislative framework

Bail

Section 15AA of the Crimes Act currently provides for a presumption against bail for persons being considered for bail as a result of a charge or conviction for a terrorism offence (as well as other serious Commonwealth offences). Specifically, section 15AA currently provides that a bail authority cannot grant bail to a person charged with or convicted of a terrorism offence (other than an offence against section 102.8 of the *Criminal Code* – Associating with terrorist organisations) unless the bail authority is satisfied that exceptional circumstances exist to justify bail.

Exceptional circumstances is not defined in the Crimes Act, as there is a body of case law on the meaning of the expression. The test places an onus upon the applicant to satisfy the court that exceptional circumstances exist. The applicant must show that there is a situation which is out of the ordinary or unusual in some respect to satisfy the bail authority that exceptional circumstances exist. A wide range of matters may be considered by the bail authority, and a range of factors may in combination constitute exceptional circumstances. The test does not prevent bail being granted, although it is a very high threshold for the applicant to meet. This is appropriate given the serious nature of terrorism offences and the need to protect the community. The bail authority maintains discretion to grant bail in appropriate cases having regard to all of the relevant circumstances.

Under subsection 15AA(3A) of the Crimes Act, the applicant as well as the Commonwealth Director of Public Prosecutions (CDPP) are able to appeal a decision of the bail authority. Where the bail authority is notified of the intention to appeal immediately after the decision is made, the decision to grant bail will be stayed for a maximum of 72 hours.

Parole

Before the end of a federal offender's non-parole period, the Attorney-General or his or her delegate must make, or refuse to make, a parole order for a federal offender. If the Attorney-General or his or her delegate refuses to make a parole order, the Attorney-General or his or her delegate must inform the terrorist offender of the refusal and the reasons for the refusal. The Attorney-General or his or her delegate must then reconsider the terrorist offender for parole within 12 months of that refusal.

Division 5 of Part IB of the Crimes Act sets out the existing arrangements for the conditional release on parole for all federal offenders, including terrorist offenders. The purposes of parole, as provided in section 19AKA, are the protection of the community, the rehabilitation of the offender, and the reintegration of the offender into the community.

Unlike the states and territories, which have independent parole boards, decisions relating to the making or revocation of a parole order are made by the Attorney-General, or by an SES-level delegate appointed in accordance with the *Law Officers Act 1964*. In deciding whether to make or revoke a parole order, the decision-maker may take into account relevant information including the remarks made by the sentencing court, reports from State and Territory corrective services and relevant Commonwealth agencies. All terrorism-related parole decisions are made personally by the Attorney-General.

Mandatory minimum non-parole period for terrorist offenders

Where a court determines that a sentence of imprisonment is the appropriate penalty for a terrorist offender, section 19AG of the Crimes Act requires the court to fix a non-parole period of at least three quarters of the sentence imposed for the terrorism offence. This applies to adults as well as children.

Section 19AG of the Crimes Act, in its current form, was introduced in 2004 through the *Anti-Terrorism Act 2004* to address concerns that the sentences for convicted terrorists should reflect community concern about terrorism. Prior to this, no mandatory non-parole period was in place. The change was to reflect the need to protect the community from the risk posed by terrorist offenders.

The mandatory minimum non-parole period only applies where the court has determined that another penalty is not appropriate and a term of imprisonment is to be imposed. In determining a head sentence, the sentencing court is able to take into account all factors relevant to the offender in determining an appropriate sentence. Section 19AG reflects the serious nature of terrorist offences and the need to protect public safety, while preserving the sentencing court's discretion to sentence the offender to imprisonment and, if so, the length of any head sentence.

Policy intention and rationale for the amendments

At the Council of Australian Governments (COAG) meeting on 9 June 2017, First Ministers agreed to ensure there will be a presumption that neither bail nor parole will be granted to those persons who have demonstrated support for, or have links to, terrorist activity. This decision followed the terrorist attack in Brighton, Victoria in June 2017. The perpetrator of that attack was on parole for State offences, and had previously been charged with conspiracy to commit a terrorist attack.

On 5 October 2017, COAG agreed that its 9 June 2017 decision should be underpinned by nationally consistent principles to ensure there is a presumption against bail and parole in agreed circumstances across Australia. The principles were developed in accordance with COAG's agreement and endorsed by the Australia-New Zealand Counter-Terrorism Committee, namely:

- Principle 1 – the presumption against bail and parole should apply to categories of persons who have demonstrated support for, or links to, terrorist activity
- Principle 2 – high legal thresholds should be required to overcome the presumption against bail and parole
- Principle 3 – the implementation of the presumption against bail and parole should draw on and support the effectiveness of the Joint Counter-Terrorism Team (JCTT) model, and
- Principle 4 – implementing a presumption against bail and parole should appropriately protect sensitive information.

Schedule 1 of the Bill gives effect to the COAG decisions and the principles above by expanding the application of the existing presumption against bail in section 15AA of the Crimes Act, and introducing a presumption against parole, for a broader group of offenders, namely:

- persons currently or previously charged with, or convicted of, a terrorism offence
- persons who are the subject of a control order within the meaning of Part 5.3 of the *Criminal Code*, and
- persons who have made statements or carried out activities supporting, or advocating support for, terrorist acts within the meaning of Part 5.3 of the *Criminal Code*.

Intended practical operation of the proposed amendments

Presumption against bail

Under the proposed amendments to the Crimes Act, the following persons will not be granted release on bail or parole unless the decision-maker is satisfied that exceptional circumstances exist to justify their release:

- persons currently or previously charged with, or convicted of, a terrorism offence
- persons who are the subject of a control order within the meaning of Part 5.3 of the *Criminal Code*, and
- persons who have made statements or carried out activities supporting, or advocating support for, terrorist acts within the meaning of Part 5.3 of the *Criminal Code*.

The expanded presumption against bail will operate in practice in largely the same way as the existing presumption against bail. However, where an applicant for bail is under the age of 18 years, the bail authority must consider the best interests of the child as a primary consideration, with the protection of the community the paramount consideration, when determining whether exceptional circumstances exist to justify bail.

Application of the minimum non-parole period where terrorist offender is under the age of 18 years

The Bill retains the existing application of section 19AG to children. However, this will be in the form of a presumption rather than a mandatory requirement. This means the sentencing court must fix a minimum non-parole period of three quarters of the head sentence for a child sentenced to imprisonment for a terrorism offence unless the child can show there are exceptional circumstances to justify a lower non-parole period.

In determining whether there is a situation which is unusual such that it satisfies the exceptional circumstances test, the Attorney-General may have regard to any relevant information consistent with the Attorney-General's existing discretion in federal parole matters. Additionally, where the prisoner is under the age of 18 years, the best interests of the child will be a primary consideration, with the protection of the community the paramount consideration, for the Attorney-General in determining whether exceptional circumstances exist to rebut the presumption against parole.

Safeguards

The amendments to the Crimes Act are consistent with Australia's international obligations and include appropriate protections and accountability mechanisms. For example:

- An applicant covered by the amendments may appeal the decision of the bail authority, as may the CDPP.

- If the Attorney-General is not satisfied that exceptional circumstances exist to justify parole, the Attorney-General must give the offender written notice informing them of the parole refusal and the reasons for the refusal, in accordance with the existing parole arrangements for all federal offenders under section 19AL of the Crimes Act.
- If the Attorney-General refuses parole to a terrorist or terrorism-related offender, the Attorney-General must reconsider the offender for parole within 12 months of the refusal (and within every 12 months thereafter as necessary), in accordance with the existing arrangements for all federal offenders under subsection 19AL(2)(b).
- Consistent with existing parole arrangements for all federal offenders, the decision of the Attorney-General whether to grant parole and the conditions of any such parole are reviewable decisions under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

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Schedule 2 – High Risk Terrorist Offender (HRTO) scheme in Division 105A of the *Criminal Code*

Current legislative framework

The HRTO scheme was introduced in 2016 as the Commonwealth's post-sentence preventative detention scheme for high risk terrorist offenders. The scheme seeks to ensure that offenders who continue to pose an unacceptable risk of committing a serious terrorism offence following the completion of their prison sentence can be appropriately managed through continuing detention.

HRTO eligibility criteria

Under the HRTO scheme, the Minister for Home Affairs (referred to in the *Criminal Code* as the 'AFP Minister') can apply to a State or Territory Supreme Court for a continuing detention order (CDO). The Minister for Home Affairs can only seek a CDO in relation to a 'terrorist offender'. A 'terrorist offender' is defined in subsection 105A.3(1) as an individual who:

- has been convicted of specified terrorism offences (outlined in paragraph 105A.3(1)(a)) (eligible terrorism offences)
- is either detained in custody and serving a sentence of imprisonment for the offence, or a CDO or interim detention order is in force in relation to them (paragraph 105A.3(1)(b)), and
- will be at least 18 years old when the sentence ends (paragraph 105A.3(1)(c)).

Under subsection 105A.7(1), the Supreme Court can only make a CDO if:

- The CDO application is made in accordance with section 105A.5.
- The court is 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 offence' if released into the community. A 'serious Part 5.3 offence' is an offence against Part 5.3 of the *Criminal Code* with a maximum penalty of seven or more years of imprisonment.
- The court must be satisfied that there are no less restrictive measures that would be effective in preventing the unacceptable risk posed by the terrorist offender.

Under the current eligibility criteria, paragraph 105A.5(2)(a) states that the Minister for Home Affairs may only apply for a CDO in relation to a terrorist offender not more than 12 months before the end of their eligible sentence, provided that the offender would be required to be released into the community at the end of that sentence.

This means that an otherwise eligible offender will not meet the legislative criteria in the HRTO scheme where they are serving sentences for a combination of eligible terrorism and other offences (i.e. a concurrent sentence), and their sentence for the eligible terrorism offence ends before the sentence for the other offence, or they remain in prison to serve another sentence at the conclusion of the sentence for the eligible terrorism offence (i.e. a cumulative sentence). This is because the offender would not be required to be released into the community following the conclusion of the sentence for the eligible terrorism offence.

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Information to be included in a CDO application

Under section 105A.5 of the *Criminal Code*, a CDO application must include:

- any report or other document that the applicant (the Minister for Home Affairs) intends, at the time of the application, to rely on in relation to the application (paragraph 105A.5(3)(a)) ("inculpatory material"); and
- a copy of any material in the possession of the Minister for Home Affairs and a statement of any facts that the Minister for Home Affairs is aware of that would reasonably be regarded as supporting a finding that a CDO should not be made (paragraph 105A.5(3)(aa)) ("exculpatory material").

Relevantly, subsection 105A.5(2A) also provides that the Minister for Home Affairs must 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 a CDO should not be made.

A copy of the application must be provided to the terrorist offender within two days of the application being filed in court (subsection 105A.5(4)). Subsection 105A.5(5) allows sensitive information in the application to be withheld from the terrorist offender for a period to enable the relevant Minister to seek orders under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act), or other protective orders such as suppression or non-publication orders, preventing disclosure to the broader public.

However, the requirement under subsection 105A.5(6) to provide the terrorist offender a 'complete copy' of the CDO application ultimately requires *all* information in the application to be given to the terrorist offender regardless of any information protection mechanisms. This currently restricts the Commonwealth's ability to protect information contained in the CDO application from disclosure to the terrorist offender by:

- relying on public interest immunity (PII) claims to withhold or redact sensitive exculpatory material; and
- obtaining protective orders under the NSI Act that withhold, redact or summarise sensitive material.

Under the current provisions, the Minister for Home Affairs is required to provide the terrorist offender with any exculpatory material in their possession or any exculpatory facts they are aware of, regardless of the sensitivity or probative value of the material. Furthermore, because of the requirement to provide a terrorist offender with a 'complete copy' of the CDO application, the Minister for Home Affairs currently does not have access to the full range of protections available under the NSI Act to regulate the disclosure of sensitive information to the terrorist offender.

Implications for sensitive information

Due to the nature of the prison environment, evidence gathered relating to the risks posed by a terrorist offender needs to be managed with additional extreme care. Disclosure of certain information to the terrorist offender can compromise sensitive sources and capabilities, with severe consequences for the safety of human sources, the integrity of law enforcement and security operations, and ultimately, public safety.

As a result, in considering the making of a CDO application against an offender, the Minister for Home Affairs must balance the risks posed to the community by the terrorist offender with the risks associated with providing the terrorist offender sensitive information that could reveal, for instance, sources, capabilities or ongoing investigations. This may result in circumstances where the Minister for Home Affairs must choose between one of three challenging options:

- not to make a CDO application for a high risk terrorist offender (because the consequences of disclosure of the sensitive inculpatory or exculpatory information outweigh the risk that the offender poses)
- make a CDO application without the sensitive inculpatory information (which may undermine the prospects of the application), or

- make a CDO application including the sensitive inculpatory or exculpatory information (because the risk posed by the terrorist offender outweighs the risks of compromising sensitive sources or capabilities or revealing ongoing investigations).

Policy intention and rationale for the amendments

It is critical that Australia's post-sentence preventative detention laws remain effective and responsive to the ongoing and evolving threat of terrorism. Schedule 2 of the Bill seeks to improve the effectiveness of the HRTO scheme by:

- amending the eligibility criteria for the scheme by ensuring that terrorist offenders who are currently serving a period of imprisonment for an eligible terrorism offence and another offence remain eligible for consideration for a CDO at the conclusion of their term of imprisonment, and
- amending the information disclosure obligations in respect of CDO applications to better align the protections available for sensitive national security information with those available in other contexts, including criminal prosecutions.

These proposed amendments to the HRTO scheme will ensure that the Commonwealth can act to protect the public from terrorist offenders who pose an unacceptable risk of committing a serious terrorism offence upon release. As at 1 March 2019, 41 offenders are serving periods of imprisonment for terrorism offences and will be eligible for continuing detention at the end of their sentences. Seven of these offenders will become eligible for a CDO from June 2019 - June 2020. It is critical that the HRTO scheme applies to all persons who have been imprisoned for an eligible terrorism offence and who would continue to pose a high risk were they to be released into the community, and that there are appropriate protections on sensitive information that may be used in proceedings for a CDO.

Eligibility under the HRTO scheme

The overall objective of the HRTO scheme is to ensure the safety and protection of the community from terrorist offenders who pose an unacceptable risk of committing a serious Part 5.3 offence if released.

The proposed amendments in Schedule 2 of the Bill will give better effect to this preventative purpose. The proposed amendments in Part 1 of Schedule 2 ensure that terrorist offenders remain eligible for a CDO where they continue to pose an unacceptable risk at the expiry of their custodial sentence, irrespective of whether the final custodial sentence from which they would be released relates to an eligible terrorism offence, or another offence.

Strengthening information protections

The proposed amendments to the information protection provisions seek to ensure that there are more appropriate options available to the Minister for Home Affairs in making a CDO application that would otherwise contain sensitive information. They are aimed at enabling the Minister to appropriately protect sensitive information included in a CDO application whilst ensuring that the terrorist offender receives sufficient information to enable a fair hearing.

Under the proposed amendments, the Minister for Home Affairs would be able to:

- make a CDO application:
    - with sensitive inculpatory and exculpatory information redacted or removed on PII grounds (such that it no longer forms part of the CDO application), or
    - containing sensitive inculpatory and exculpatory information, which is subject to NSI Act orders, enabling the information to be provided to the terrorist offender in the form of a summary or a statement of facts (see for example, NSI Act orders under paragraphs 38L(2)(e)-(f)).

- decide to not make a CDO application as the risk of any disclosure of sensitive information to the terrorist offender outweighs the risk posed by the terrorist offender if released into the community.

The proposed amendments will better align the protections available for sensitive national security information in CDO proceedings with those available in other comparable contexts, including criminal prosecutions. Importantly, the amendments do not allow the Commonwealth to rely upon information to support the CDO application that is not ultimately provided to the terrorist offender ('secret evidence').

The following table shows what information protections are available under the current regime, and what will be available under the amended regime.

	CURRENT REGIME		AMENDED REGIME	
	Exculpatory material	**Inculpatory material**	**Exculpatory material**	**Inculpatory material**
PII	Not available	Available	Available	Available
Suppression and other orders	Available	Available	Available	Available
NSI Act	Available only to the extent that it limits disclosure to the public	Available only to the extent that it limits disclosure to the public	Available	Available

Intended practical operation of proposed amendments

Amending gaps in the HRTO eligibility criteria

Proposed subparagraph 105A.3(1)(b)(ia) provides that a terrorist offender will be eligible for a CDO where they:

- are serving, or have served, a sentence of imprisonment for an eligible terrorism offence
- are detained in custody serving a sentence of imprisonment for an offence other than an eligible terrorism offence, and
- have been continuously detained in custody since being convicted of the eligible terrorism offence.

The proposed amendments will address the current gap in the HRTO scheme by ensuring that terrorist offenders are not rendered ineligible simply because they are serving a sentence of further imprisonment for an additional offence that ends following their imprisonment for an eligible terrorism offence. The Minister for Home Affairs can essentially seek a CDO irrespective of whether the terrorist offender's final day in prison is for the eligible terrorism offence or another offence, provided that they have been detained continuously since being convicted of the eligible terrorism offence.

There will be no impact on the robust safeguards already guaranteed under Division 105A, including that 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 terrorism offence if released into the community.

Example 1

Individual A is sentenced for committing a number of offences in relation to a plan to use firearms in a terrorist attack. The offender is sentenced to seven years imprisonment for the HRTO eligible terrorism offence of possessing things connected with terrorist acts (section 101.4 of the Criminal Code) and a further four years imprisonment for a state offence of unlawfully possessing a firearm. This additional sentence must be served subsequent to the eligible terrorism offence (i.e. the sentences are cumulative).

Under current subsection 105A.3(1), Individual A will not be eligible for a CDO as they will not be released into the community at the expiry of their sentence for the eligible terrorism offence, as required under paragraph 105A.5(2)(a).

However, under proposed subparagraph 105A.3(1)(b)(ia) will enable the Minister for Home Affairs to make a CDO application in the 12 months prior to the expiry of the state offence for unlawfully possessing a firearm, as Individual A will have been continuously detained since their conviction for the eligible terrorism offence, and at the end of their sentence for the further state offence, they would be required to be released into the community.

The Bill also clarifies that a terrorist offender who escapes from custody is taken to be detained in custody and serving a sentence of imprisonment until they resume serving their sentence. This clarification ensures that a terrorist offender who escapes custody will continue to remain eligible for a CDO at the conclusion of their time in prison.

Example 2

Individual B has served seven years of their combined 11 years for an eligible terrorism offence and state offence.

Individual B escapes from custody for one day before being recaptured. New section 105A.2A clarifies that for the purposes of subparagraph 105A.3(1)(b)(ia), despite escaping, Individual A has been 'continuously detained in custody' and therefore remains eligible for a CDO.

Application of the new eligibility criteria

Proposed section 106.10 ensures that the new eligibility criteria will apply immediately to any person who, on the day the Bill commences, is detained in custody or any person who subsequently commits an eligible terrorism offence. The amendments to the eligibility criteria will also apply to terrorist offenders who have served a sentence for an eligible terrorism offence but are still serving a sentence of imprisonment for another offence. Such offenders will still need to have been continuously detained in custody since being convicted of an eligible terrorism offence.

Information Protections

The proposed amendments in Part 2 of Schedule 2 of the Bill amend the information disclosure requirements by making two targeted amendments to section 105A.5 to:

- make PII available to remove sensitive exculpatory material from a CDO application, and
- ensure the full range of protections under the NSI Act are available for information included in a CDO application.

Availability of PII to protect sensitive information

Proposed paragraph 105A.5(3)(aa) will enable the Minister for Home Affairs to redact or withhold sensitive exculpatory material that is required to be included in a CDO application under paragraph 105A.5(3)(aa) on PII grounds. The proposed provision provides that exculpatory material does not need to be included in a CDO application where the relevant information, material or facts would be the subject of a claim for PII. As it has been redacted or withheld, this material would not form part of the CDO application or be able to be relied upon in the proceedings.

A PII claim could be made by the Minister for Home Affairs, or relevant operational agencies such as the AFP or ASIO. This is consistent with the ability of operational agencies to make PII claims in relation to their own sensitive material in other contexts, including criminal prosecutions.

Subsection 105A.5(9) provides an important safeguard to ensure the terrorist offender can contest the appropriateness of PII claims by requiring the Minister for Home Affairs to provide written notice to the terrorist offender stating that exculpatory information has been withheld from the application on the basis of PII. This notice allows the terrorist offender to contest the basis of the PII claim if they wish. It will then be a matter for the court to determine whether to uphold the PII claim, balancing the public interest in ensuring the terrorist offender receives a fair hearing with the public interest in ensuring there is no prejudice to national security. Where the PII claim is not upheld, the Minister for Home Affairs may choose to withdraw the CDO proceedings if the prejudice to national security in disclosing the sensitive exculpatory material is too great, or alternatively, provide the sensitive exculpatory material to the terrorist offender.

Importantly, nothing in amended paragraph 105A.3(aa) precludes the court from exercising its inherent powers to stay proceedings if the court upholds a PII claim over sensitive exculpatory material but considers that the terrorist offender cannot receive a fair hearing without access to that material.

Further information on how a PII claim in respect of sensitive exculpatory material will operate is at **Appendix A**.

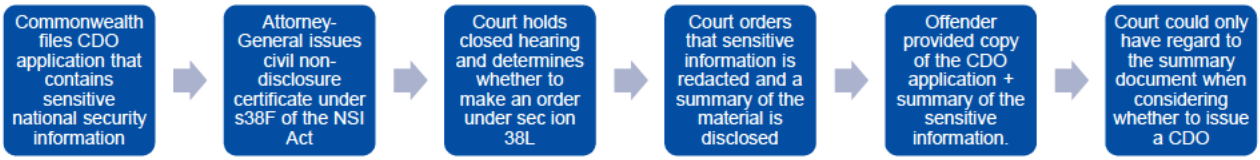
Information protection provisions under the NSI Act

The proposed amendments provide that the requirement for the Minister for Home Affairs to provide a 'complete copy' of a CDO application to the terrorist offender is subject to any court orders. Proposed subsections 105A.5(6) and 105A.5(7) have the effect that the Minister for Home Affairs' obligation to give a 'complete copy' of the CDO application to the terrorist offender is subject to any certificate issued by the Attorney-General under the NSI Act, or any orders made by the court.

Orders made by the court could include orders under the NSI Act, orders to uphold a PII claim or other court orders such as suppression or non-publication orders. Further information on the types of orders available under the NSI Act are contained in **Appendix B**.

None of the protective mechanisms available in proceedings for a CDO under the NSI Act enable the Minister for Home Affairs to rely on information that is not provided to the terrorist offender ('secret evidence'). Where information is entirely removed from the application, it cannot be relied upon by either party. Where sensitive information is provided to the terrorist offender in a redacted or summarised form, the court can only consider the redacted or summarised information.

Example of court orders under the NSI Act in civil proceedings



Ensuring the offender's right to a fair hearing

A range of safeguards apply to the HRTO scheme as a whole. Firstly, a high threshold must be reached for the court to issue a CDO – a court must be satisfied, to a high degree of probability, based on admissible evidence, that the terrorist offender poses an unacceptable risk of committing a serious terrorism offence if released into the community. The court must also be satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk before making a CDO, and the making of a CDO is a judicial process subject to civil rules of evidence and procedure. Where a CDO is made, it is subject to annual review and can be reviewed by a terrorist offender sooner where new facts or circumstances justify reviewing the order CDO or where it is in the interest of justice to review the CDO.

A number of important safeguards will ensure the information protections are appropriate and the right balance is struck between terrorist offenders' right to a fair hearing and the protection of national security information.

Firstly, the court would be responsible for upholding a PII claim or granting any other orders, such as those sought under the NSI Act to protect sensitive national security information. In doing so, the court will balance the risk of disclosing sensitive information and prejudicing national security with the need to ensure the terrorist offender receives relevant material to contest the CDO application. It is ultimately within the court's power to reject a Commonwealth claim of PII, or to not grant a protective order (such as those under the NSI Act), if it would result in the terrorist offender not being able to have a fair hearing.

Secondly, if information is redacted or withheld from the terrorist offender, the Minister for Home Affairs would not be able to rely on that information to support the CDO application. Such information would be excluded from the proceedings and the court would only be able to consider information in the proceedings that both parties have accessed. Accordingly, there is no scope for any secret evidence in relation to a CDO application.

Thirdly, even if the court did uphold a PII claim or grant a protective order under the NSI Act, nothing in the proposed amendments will limit the court's inherent jurisdiction to stay proceedings if the terrorist offender cannot be given a fair hearing. For example, if the court upheld the Commonwealth's claims for certain information protections but this resulted in the terrorist offender not receiving enough information to contest the CDO application, it would be open to the court to stay proceedings if they considered the terrorist offender would not receive a fair hearing.

Finally, the proposed amendments will add to the existing safeguards by requiring written notice to be provided to a terrorist offender if sensitive exculpatory material has been redacted or withheld from the terrorist offender on the basis of PII. This would ensure the terrorist offender is aware that information has been withheld and is able to contest the PII claim if they so choose.

Conclusion

The amendments to the Commonwealth's bail and parole laws and HRTO scheme will ensure that Australia's counter-terrorism legislation framework remains effective and responsive to the evolving threat of terrorism. The amendments to the bail and parole laws will go towards safeguarding the community from acts of violence perpetrated by people who have links to terrorist activity.

The amendments to the HRTO scheme will also be consistent with the preventative purpose of the scheme, which is to ensure the safety and protection of the community from high risk terrorist offenders who pose an unacceptable risk of committing a serious terrorism offence upon release from prison. These amendments are necessary to ensure that terrorist offenders remain eligible under the scheme, regardless of whether they are serving additional sentences of imprisonment for other offences that end after an eligible terrorism offence. The amendments also provide further protections for sensitive information included in CDO applications to prevent prejudice to Australia's national security or ongoing investigations whilst balancing an offender's right to a fair hearing.

Ultimately, the Bill will strengthen Australia's counter-terrorism framework by improving the operation of key tools used to manage the ongoing risks posed by dangerous terrorist offenders, and those with links to terrorism.

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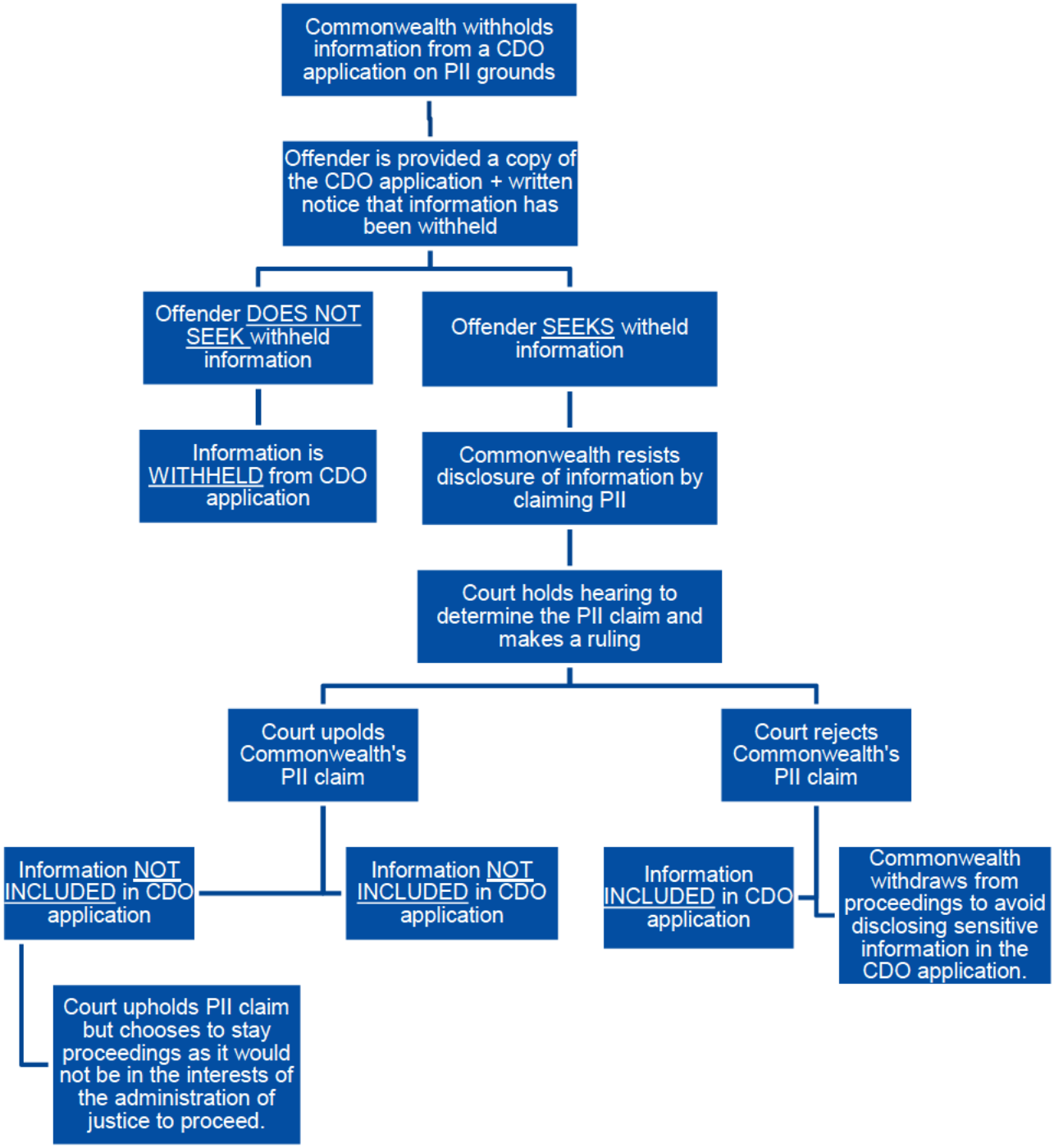
Appendix A – Public Interest Immunity in Continuing Detention Order (CDO) proceedings



Appendix B – Overview of information protections available under the NSI Act

The NSI Act provides two mechanisms for protecting sensitive information during civil proceedings.

Firstly, both parties can come to an agreed arrangement about the disclosure of national security information in a proceeding. An agreement between the parties may cover the storage, handling, destruction, access and preparation of sensitive national security information. Once parties have come to an agreement about the disclosure of national security information, the court can make an order giving effect to the arrangement.[1]

The alternative mechanism for protecting sensitive national security information under the NSI Act is the certificate regime. This process allows the Attorney-General to issue a civil non-disclosure certificate as an interim measure to protect national security information that may be disclosed during the proceedings. The certificate can allow the parties to access the relevant documents with the sensitive information redacted, or to access a summary of the original document that does not disclose the sensitive information.

The NSI Act then requires the court to hold a closed hearing to determine what protections should be in place over the sensitive information. The court may make one of three orders in relation to the source document:

- that the information the subject of a certificate may be disclosed with appropriate deletions, redactions and summaries of information or facts (subsection 38L(2))
- that the information that is the subject of the certificate must not be disclosed (subsection 38L(4)), or
- that the information that is the subject of the certificate must be disclosed (subsection 38L(5)).

The certificate will cease to have effect from the time the court makes one of these orders.