Australian Government
Attorney-General's Department

October 2016

Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016

Attorney-General's Department response to Questions on Notice

On 19 October 2016, the department provided the Committee with a response to questions on notice marked with an asterisk received from the Parliamentary Joint Committee on Intelligence and Security Secretariat on 17 October 2016.

This document responds to the remaining questions on notice.

1. **Limits on indefinite detention**

(a) Should the bill stipulate a maximum number of continuing detention orders that can be made in relation to each detainee, and how could this be determined?

(b) Should there be a maximum total number of years for successive continuing detention orders, and how could this be determined?

ANSWER:

The maximum duration of a continuing detention order is three years. At the expiry of that period, a further application can be made and the court will need to consider whether it 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 the offender is released into the community and that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.

If a court is satisfied that this test is met, it is appropriate for the offender to continue to be detained in order ensure the safety and protection of the community, regardless of how many previous continuing detention orders have been made in relation to that offender.

(c) Is there any evidence that the imposition of a continuing detention orders will lead to de-radicalisation of the offender or are successive orders inevitable?

ANSWER:

The department is not aware of any specific evidence that continuing detention orders would lead to de-radicalisation. However, the scheme is expected to promote community safety by ensuring terrorist offenders remain in detention until a point at which they no longer pose an unacceptable risk of committing a serious Part 5.3 offence.

It is expected that the proposed scheme will act as a deterrent factor for those individuals who would seek to engage in terrorist-related conduct in Australia as well as those individuals who are currently imprisoned for terrorism offences.

(d) The UK extended determinate sentence framework caps the total prison term and extension period by providing that the combined total of the prison terms and extension period cannot be more than the maximum sentence for the offence committed. Could a similar limitation be used for this bill?

ANSWER:

A court will re-assess an offender's risk each time a further order is sought (a continuing detention order cannot be in force for a period longer than three years). If a court still considers that a person poses an unacceptable risk, it is appropriate to continue to detain that person under this regime.

3. Housing of offenders

(a) The bill provides that persons subject to continuing detention orders are to be detained in prison and that there is a series of circumstances in which they may be detained in the same area or unit as those prisoners serving criminal sentences. How can the bill better ensure that detainees serving continuing detention orders are not incarcerated within the same prison regime as those serving criminal sentences?

ANSWER:

The Department refers the Committee to pages 12 and 13 of the Attorney-General's Department submission and:

- section 105A.4 of the Bill that provides for the treatment of a terrorist offender in a prison under a continuing detention order including a requirement at subsection 105A.4(2) to house the offender separately from sentenced prisoners unless one of the exceptions applies, and
- section 105A.21 of the Bill that provides for the Attorney-General to make arrangements with states and territories for the detention of terrorist offenders in relation to who a continuing detention order is in force.

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

(b) If detainees that are serving their continued detention are held in the same facilities under the same conditions as detainees serving their original sentences, does this make it more difficult to contend that the imprisonment is not 'punishment' and thus in breach of Article 14(7) of the ICCPR?

ANSWER:

As noted in the Explanatory Memorandum at paragraph 47, subject to certain exceptions (related to the management of the prison, the safety of others and the offender's preferences), terrorist offenders detained in prison under a continuing detention order or interim detention order must be treated in a way that is appropriate to their status as persons who are not serving a sentence of imprisonment and must not be accommodated or detained in the same area or unit of a prison as persons serving sentences of imprisonment.

The continued detention of a terrorist offender under the proposed scheme does not constitute additional punishment for their prior offending – the continued detention is protective, based on the risk the person presents to the community at the end of their custodial sentence.

4. Rehabilitation

(a) How do the State and Territory prison systems currently facilitate de-radicalisation and rehabilitation of terrorist offenders?

ANSWER:

Corrections Victoria and Corrections New South Wales provide inmates with access to prison based programs which aim to disengage individuals from advocating or using violence to further their goals or beliefs.

Jurisdictions other than Victoria and New South Wales have a range of general rehabilitation programs, which are not specifically tailored to violent extremist offenders.

(b) Is continuing detention likely to have a counter-productive radicalising effect on the offender and his or her community due to the perceived injustice of the process?

ANSWER:

Continuing detention orders are not expected to further radicalise offenders who are subject to the scheme. While perceptions of injustice can fuel grievance, particularly in the early stages of radicalisation to violence, individuals who fall within the scope of the scheme are already radicalised to violent extremism.

The Commonwealth will continue to engage with the community to address any perceptions of injustice about the regime.

(c) If the Court must consider the willingness of offenders to participate in rehabilitation programs, does this imply an obligation on the prison system to provide those programs?

ANSWER:

When making a continuing detention order, subsection 105A.8(e) requires the court to have regard to any treatment or rehabilitation programs in which the offender has had an opportunity to participate and the level of the offender's participation in any such programs.

As noted in the response to 4(a), rehabilitation programs are already available in all jurisdictions, and NSW and Victoria have specific programs targeted to violent extremism.

(d) Should the bill be amended to ensure the availability of rehabilitation programs to offenders that may be subject to the continuing detention order regime?

ANSWER:

This is not required. The court is not required to make a negative inference if the offender has not had an opportunity to participate in a relevant rehabilitation program.

(e) What research is currently being undertaken to improve the effectiveness of these programs?

ANSWER:

Prisons and corrective services are a state and territory responsibility, underpinned by support of the Australian Government for research, training and pilot programs to manage the particular risks and challenges of terrorist offenders and / or of further radicalisation in prisons. For example, Australian Government funding (provided through the CVE sub-committee (CVESC) of the Australia-New Zealand Counter Terrorism Committee) is supporting states and territories to deliver the Radicalisation and Extremism Awareness Program (REAP). REAP assists corrections staff to recognise and report indicators of radicalisation to violent extremism. In 2016-17, CVESC will fund a review and update of the REAP to ensure it reflects the current threat environment.

CVESC is also funding a Corrective Services NSW pilot for the Proactive Integrated Support Model (PRISM – a disengagement model that aims to target inmates who are at risk of radicalisation) and has previously funded the first four years of a prisons-based program in Victoria. Best practice and learnings are shared through a prisons working group under the CVESC. The prisons working group also draws on domestic and international research, some of which has been mentioned in submissions to the PJCIS.

The success of disengagement programs can be difficult to quantify. As with other areas of anti-social and criminal activity, there is no guarantee that prison based disengagement programs will work in every case. Success requires behavioural change and an acknowledgement by the individual that violent extremist activity is not the appropriate solution to their grievances. Some individuals will continue to actively engage, promote or support extremist activity. However, some participants for existing intervention and rehabilitation programs have successfully altered their behaviour.

Further consideration of rehabilitation programs for possible offenders under the proposed post-detention regime is being undertaken by the Implementation Working Group.

(f) Is this research being sufficiently funded?

ANSWER:

The PRISM pilot will be externally evaluated using project funding provided by CVESC.

Other funding requirements to support implementation will be considered by the Implementation Working Group.

(g) Should the Commonwealth, States and Territories fund rehabilitation programs for detainees?

ANSWER:

Violent extremism is a complex issue which all Australian governments are working together to address.

As stated in the response to question 4(e), through the CVESC the Australian Government is supporting states and territories to deliver and update the REAP training and deliver the PRISM pilot in NSW.

(h) Has the Department consulted with the States and Territories on funding for rehabilitation programs for detainees?

ANSWER:

The Commonwealth continues to consult with states and territories on funding and other implementation issues through the Implementation Working Group.

(i) Should the bill require a preliminary assessment of offenders to determine an appropriate rehabilitation program?

ANSWER:

This can be addressed administratively.

5. Risk assessment

(a) What are the limits of risk assessment methodology?

ANSWER:

Existing risk assessment tools for violent extremism are based on structured professional judgement. They enable professionals to integrate information in a coherent way to provide judgements about treatment options.

(b) What are the criticisms of predictive tools generally, and what are the particular criticisms in relation to predicting the future behaviour of terrorism offenders?

ANSWER:

There are no actuarial risk assessment tools available in relation to predicting violent extremism or future behaviour of terrorism offenders.

The Implementation Working Group will undertake further work to develop an assessment

tool that would be of assistance to an expert who is undertaking an assessment of an offender under the proposed regime.

(c) Do any predictive tools currently exist that can be used to assess risk of future behaviour of terrorism offenders?

ANSWER:

There are several structured professional judgement tools in existence, including the Violent Extremist Risk Assessment version 2 (VERA-2), and Radar (the assessment tool used in the Governments' national CVE Intervention Program), which could potentially be used to support experts' risk assessments in relation to future offending. However, these tools could not be relied on solely in their current formats, and would either need to be modified or a new tool developed for the specific needs of this legislation.

(d) How long is it likely to take to develop predictive tools?

ANSWER:

Radicalisation to violent extremism is complex and to date, all research (domestic and international) agrees that there is no single pathway. Recent research papers[1] have suggested that structured professional judgment tools may be more feasible and suitable for this application since they allow context to be taken into consideration and we do not yet have the volume of cases over a sufficiently long time to allow for any consideration as to whether violent extremism has a consistent underlying pathology that can be identified.

The Implementation Working Group will undertake further work to develop an assessment tool that could be of assistance to an expert who is undertaking an assessment of an offender under the proposed regime. This work will include consideration of additional research needs.

(e) How long is it likely to take for these tools to be validated?

ANSWER:

This is yet to be determined as it will depend on whether an existing tool can be adapted or new research is required.

(f) If tests are administered to people who have already served long sentences and will be aware of the purpose of the testing, does this undermine the effectiveness of the tools?

ANSWER:

Assessments will be carried out with knowledge that some offenders may feign compliance. Relevant experts will have access to other information sources that can help them to assess the validity of their assessments.

[1] John Monahan, "The Individual Risk Assessment of Terrorism," *Psychology, Public Policy, and Law 18*, (2012); John Monahan, "The Individual Risk Assessment of Terrorism: Recent Developments," *University of Virginia School Public Law and Legal Theory Research Paper Series 57*, (2015).

(g) Is there a particular body of knowledge that can be drawn on to determine whether an individual continues to be radicalised or has genuinely become de-radicalised?

ANSWER:

The goal of rehabilitation programs, whether in prison, or in the community, is not to 'de-radicalise' individuals, but to dissuade them from trying to achieve their goals through violence. Existing tools, such as the previously mentioned VERA-2 and Radar can support experts to determine whether an individual has disengaged from violent extremism.

(h) Is there an expert body of knowledge that would underpin the use of a risk assessment tool?

ANSWER:

The appropriate expert body of knowledge would include forensic psychological or psychiatric expertise, along with experience working with individuals who have radicalised to violent extremism.

(i) Is it likely that a tool will be developed in the near future which reliably predicts whether someone will commit a preparatory offence, such as collecting materials for possible use in a terrorist act?

ANSWER:

See response to 5(e).

(j) How can future dangerous behaviour be reliably predicted such that it would justify a continued detention order?

ANSWER:

Under section 105A.7 of the Bill, the Attorney-General bears the onus of satisfying the Court 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 the offender is released into the community, and that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.

(k) Have the States and Territories been consulted on the proposed measures regarding the appointment and assessment by relevant expert provisions to ensure the accuracy and efficacy of the proposed risk assessment methodology?

ANSWER:

Yes.

(l) Is there any precedent for using a predictive psychological tool for preventative detention for terrorist offences?

ANSWER:

The department is not aware of any precedents.

6. Experts

(a) Are there any experts in Australia qualified to give evidence on an application for a continuing detention order?

ANSWER:

Appropriately qualified experts currently exist within Australia.

(b) What are their names?

ANSWER:

It is not appropriate to provide names of potential experts.

(c) What qualifications should be held by a 'relevant expert'?

ANSWER:

Relevant experts will ideally be forensic psychologists and psychiatrists, preferably with experience working with individuals who have radicalised to violent extremism.

(d) How can the bill be amended to ensure that Courts are not put in an inappropriate position of appointing an expert and then having to rule on objections to the expertise of that expert?

ANSWER:

It is anticipated that a court would be provided with a list of suitable experts, enabling either or both parties to nominate a suitable expert, subject to the court's approval.

It is not suggested that the court would appoint experts independently of the parties, only that the court should ultimately appoint the expert for the purposes of the proceeding. Both parties will be able to challenge the status of the relevant expert in the normal fashion.

(e) Why does the bill include 'any other person registered as a medical practitioner under a law of a State or Territory' in the definition of 'relevant expert'?

ANSWER:

Section 105A.2 of the Bill defines 'relevant expert' for the purpose of conducting an assessment of the individual's risk. The definition includes:

- a psychiatrist – defined as 'a person who is registered as a medical practitioner under a law of a State or Territory, and a fellow of the Royal Australian and New Zealand College of Psychiatrists
- a psychologist – defined as 'a person registered as a psychologist under a law of a State or Territory
- a medical expert – defined as 'any other person registered as a medical practitioner under a law of a State or Territory, or
- any other expert.

While it is anticipated that the preparation of an expert report will most likely involve a psychiatrist or psychologist, it is possible that a medical practitioner with alternative specialist expertise may be able to assist the court.

(f) Why does the bill include 'any other expert' in the definition of 'relevant expert'?

ANSWER:

As above, it is anticipated that it is likely to be a psychiatrist or psychologist who is appointed as the relevant expert, given the nature of the assessment of the individual.

However, the Bill includes 'any other expert' in the definition to provide flexibility for the parties and the court, given that it is possible there may be additional categories of expert that do not fit neatly within the scope of 'medical practitioner', 'psychiatrist' or 'psychologist'.

(g) How will these experts make meaningful predictions based on one or more interviews of people who have already served lengthy sentences?

ANSWER:

The experts will be suitably qualified and have the necessary skills to make assessments.

(h) Should the Court be required to appoint two experts?

ANSWER:

While some state regimes require the appointment of two experts, the Bill does not limit the number of experts a court may appoint and provides the court with discretion in this regard.

Section 105A.6 allows a court to appoint one or more relevant experts if the court believes that the matters alleged in the application would, if proved, justify making a continuing detention order in relation to the offender.

If the court considers it is appropriate to appoint two or more experts, it is able to do so.

(i) Should the offender have input into the appointment of the expert, or be able to appoint their own expert?

ANSWER:

It is not suggested that the court would appoint experts independently of the parties, only that the court should ultimately appoint the expert for the purposes of the proceeding. Both parties will be able to challenge the status of the relevant expert in the normal fashion. Therefore, the offender will have input into the appointment of the expert or experts.

Section 105A.14 of the Bill also enables a party to a continuing detention order proceeding to adduce evidence (including by calling witnesses or producing material), or make submissions. This ensures that an offender could call their own expert to give evidence.

(j) Should an independent risk management body be established to accredit people for the purpose of becoming 'relevant experts' and develop best-practice risk-assessment and risk-management processes?

ANSWER:

An accreditation model is not considered necessary as the court is best placed to decide on the expertise of a particular expert.

The Commonwealth has convened an Implementation Working Group with legal, corrections and law enforcement representatives from each jurisdiction to progress all outstanding issues relating to implementation of the proposed post sentence preventative detention scheme. Oversight arrangements will be considered by the Working Group.

(k) Should a new independent Office of Risk Management Monitor be established with equivalent functions to the independent risk management body?

ANSWER:

The Commonwealth has convened an Implementation Working Group with legal, corrections and law enforcement representatives from each jurisdiction to progress all outstanding issues relating to implementation of the proposed post sentence preventative detention scheme. Oversight arrangements will be considered by the Working Group.

8. Constitutional validity

(a) Has the Department received advice on the constitutional validity of the bill?

ANSWER: Yes.

(b) Who provided the advice?

ANSWER: The Australian Government Solicitor and the Solicitor-General.

(c) Was the Solicitor-General asked to advise on the bill?

ANSWER: Yes.

(d) Were counsel at the private bar asked to advise on the bill?

ANSWER: No.

(e) Which counsel at the private bar were asked to advise on the bill?

ANSWER: Please see response to 8(d) above.

9. Scope

(a) What is the policy rationale for the extension of the proposed continuing detention order regime to treason offences, some of which are not 'terrorism-related offences'?

ANSWER:

The treason offences are part of a category of offences that seriously jeopardise Australia and its national security interests. They are very serious offences that attract penalties up to life imprisonment, and include conduct such as causing the death of the Sovereign or levying war against the Commonwealth.

Conduct falling under Subdivision B of Division 80 can overlap with terrorism offences, such as the offences in Part 5.3 of the Criminal Code. While not all conduct amounting to treason may constitute a terrorism offence, the conduct is closely related.

The gravity of the threat posed by acts of treason demonstrates a need to ensure that individuals who have been convicted of such offences are assessed for their ongoing threat to the community.

A continuing detention order will only be granted if the court is satisfied to a high degree of probability that the terrorist offender poses an unacceptable risk of committing a serious Part 5.3 offence if released into the community. It will not be sufficient that the Court is

satisfied to a high degree of probability that the offender will commit a treason offence if released into the community.

(b) Should the continuing detention order regime apply to the offence of entering or remaining in a declared area where a listed terrorist organisation is engaging in hostile activity?

ANSWER:

The object of the declared area offence in section 119.2 of the Criminal Code is to deter Australians from travelling to areas where listed terrorist organisations are engaged in a hostile activity, unless they have a legitimate purpose to do so. The offence enables prosecution of people who intentionally enter an area in a foreign country where they know, or are aware of a substantial risk, that the Australian Government has determined that terrorist organisations are engaging in a hostile activity and the person is not able to demonstrate a sole legitimate purpose or purposes for entering, or remaining in, the area. Those who travel to a declared area without a sole legitimate purpose or purposes might engage in a hostile activity with a listed terrorist organisation. These individuals may return from a declared area with enhanced capabilities which may be employed to facilitate terrorist or other acts in Australia.

Accordingly, it is appropriate that the proposed post-sentence preventative detention scheme should apply to individuals convicted of the declared area offence. Importantly, the regime will only apply where an individual is sentenced to a period of imprisonment for the declared area offence and where it can be shown that the person poses an unacceptable risk of committing a serious Part 5.3 offence upon the expiry of their custodial sentence.

(e) Should the continuing detention order regime apply to the 'association with person' offence?

ANSWER:

It is not appropriate to include the associating with terrorist organisations offence under section 102.8 of the Criminal Code as an offence to which the proposed post-sentence preventative detention scheme should apply. The offence in section 102.8 applies to the provision of support to the terrorist organisation as an entity, rather than with respect to the activities of the terrorist organisation, and carries a maximum penalty of three years' imprisonment. The offence is designed to address the fundamental unacceptability of the organisation.

Other offences in the Criminal Code capture more serious conduct – for example, providing support or resources to a terrorist organisation that would assist the organisation to engage in, prepare, plan, assist in or foster the doing of a terrorist act under section 102.7. This is reflected in the higher penalty for these offences in section 102.8.

On the basis that the offence under section 102.8 captures less serious forms of support to a terrorist organisation and the lower penalty that Parliament has associated with this conduct, it is not appropriate that the proposed post-sentence preventative detention scheme applies to individuals convicted of that offence.

10. Technical legal matters

(a) How can the bill be amended to ensure that detainees are not subjected to double punishment for the same conduct?

ANSWER:

The Bill does not currently provide for double punishment for the same conduct. The offender is not being tried or sentenced for their original crime for a second time, but assessed at the expiry of their sentence as to whether they pose an unacceptable risk of committing a serious terrorism offence if released into the community.

Their original offending conduct is not the determinative factor for whether or not they should be subject to a continuing detention order; it is only a qualifying factor – that is to confirm that the offender could be subject to the regime.

(b) Should there be a provision requiring service of all the evidence to be relied on in relation to the application if the Attorney-General does not take one of the steps set out in subsection 105A.5(5) within a specific period of time?

ANSWER:

Under subsection 105A.5(4) the offender must be given a copy of the application within two business days after the application has been made. This ensures the offender understands the allegations against them at a very early stage. It operates in addition to any other applicable procedural rights in a civil proceeding.

Subsection 105A.5(4) does not require the copy of the application that goes to the offender to contain any material over which the Attorney-General may seek protective orders. For example, the Attorney-General may wish to seek suppression orders to ensure the information in the application can be protected from release to the broader public. Given the offender must be provided the application within a very short period of time, there may be insufficient time for the court to have considered the suppression order application before the continuing detention order application is provided to the offender. Subsection 105A.5(4) will enable the Attorney-General to give a redacted copy of the application to the offender until the Court has dealt with the suppression order application. However, this will not prevent any material that the Attorney-General intends to rely upon in the continuing detention order proceeding from ultimately being provided to the offender. Accordingly, the offender is expected to be provided, in a timely manner, information to be relied on in an application for a continuing detention order. Subsection 105A.5(4) will not permit 'secret evidence'.

(c) Should an appeal to the Court of Appeal be by way of rehearing so that the Court of Appeal can re-exercise the discretion and have discretion to receive further evidence?

ANSWER:

Under subsection 105A.17(2), any appeal is to be by way of rehearing. The court of appeal will have all of the powers, functions and duties that the Supreme Court had in the continuing detention order proceedings. The court of appeal can draw inferences of fact which are not inconsistent with the findings of the Supreme Court and it may receive further

evidence as to questions of fact if the court of appeal is satisfied that there are special grounds for doing so.

(h) What would be suitable post-release programs for offenders?

ANSWER:

The Implementation Working Group has identified the need to consider how rehabilitation programs may need to continue into the post-release community environment, including support to family and friends that may strengthen the protective factors around an individual. Such programs would have a focus on reintegration with communities.

(i) Should the bill be amended to apply only to new offenders instead of having a possible retrospective application to past criminal offences?

ANSWER:

The Bill applies the post-sentence preventative detention scheme to persons convicted of terrorism offences prior to the enactment of the scheme. However, detention under a continuing detention order or interim detention order does not constitute a punishment. The continued detention of terrorist offences does not, therefore, constitute a prohibited form of retrospective punishment or the imposition of a penalty for an offence heavier than that which was applicable at the time the relevant offence was committed.

In light of this, the Bill does not need to be amended to apply to only new offenders instead of individual currently serving custodial sentences for terrorism-related offences.

11. Interim Detention Orders

(a) Should the offender be able to challenge the making of an interim detention order?

ANSWER:

An interim detention order is a temporary measure pending the determination of the substantive application. The offender has the opportunity to challenge whether they should be subject to continuing detention through the court processes for the substantive continuing detention order.

(b) Should a 'public interest' test be included in addition to the other matters a Court must be satisfied of before making an interim detention order?

ANSWER:

No. The threshold for granting an order implicitly requires the court to consider the public interest.

(c) Should there be a limit on the number of successive interim detention orders that can be applied for?

ANSWER:

Subsection 105A.9(6) provides that the total period of all interim detention orders made in relation to the offender before the court makes a decision on the application for the continuing detention order must not be more than three months. This provision imposes a time limit on the number of successive interim detention orders that may be granted.

(d) Should paragraph 105A.9(2)(a) be amended to 'will end or has ended'?

ANSWER:

The paragraph should not be amended. Section 105A.9 provides that an interim detention order can only be sought when a terrorist offender is in custody either as a result of their sentence of imprisonment or a continuing detention order or interim detention order.

If an individual is no longer in custody for the above reasons, the scheme will not apply to that individual.

12. Standard of proof

(a) Why is a continuing detention order considered civil rather than criminal in nature?

ANSWER:

Under the scheme there is no question of criminal guilt of an offence; it is a civil proceeding to determine whether an offender poses an unacceptable risk to community safety.

The *Crimes (High Risk Offenders) Act 2006* (NSW) and *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) adopt a similar approach.

(b) What impact does this have on the rights of the respondent?

ANSWER:

A civil proceeding provides the offender with important procedural rights that ensure they are able to properly contest an application for a continuing detention order. Importantly, the offender will be provided with all the information which the Attorney-General wishes to rely on to support a continuing detention order application.

Subdivision E of the Bill provides critical procedural protections for the offender including the application of the ordinary rules of evidence and procedure, the ability for the terrorist offender to adduce evidence and make submissions, the requirement for the court to provide reasons for decisions and the ability to appeal decisions.

(c) Should the bill apply criminal rules of evidence and procedure instead of civil rules?

ANSWER:

The application for a continuing detention order is a civil proceeding. It is appropriate that the rules applicable to such a proceeding are the rules of evidence and procedure for civil matters.

The Bill contains sufficient procedural safeguards to ensure that the terrorist offender may contest the evidence and the court may properly test that evidence.

(d) Is 'beyond reasonable doubt' a better standard of proof to apply to continuing detention orders than 'a high degree of probability'?

ANSWER:

The requirement that the court must be satisfied to a 'high degree of probability' is higher than the ordinary civil standard of 'more probable than not'.

In the context of the proposed post-sentence preventative detention scheme and in light of the procedural rights available to an offender, this standard strikes the right balance between protection of the community and safeguarding the rights of the individual.

(e) Is requiring 'reasonable grounds' to suspect that the person will engage in a terrorist act a better test than the 'unacceptable risk' test?

ANSWER:

The unacceptable risk test has been modelled on existing state regimes. There is a body of jurisprudence which has considered the use of this test within the context of high risk sex offender and violent offender matters. Unlike the 'reasonable grounds' test, 'unacceptable risk' requires the court to undertake a balancing exercise.

(f) Should the 'unacceptable risk' test be clarified as 'more probable than not'?

ANSWER:

As noted in the answer to (e), the unacceptable risk test requires the court to undertake a balancing exercise. This would not be required with a 'more probable than not' test.

13. Matters a Court must have regard to

(a) Should the court be required to consider the nature of the offending for which the offender was originally convicted, including its proximity to serious threats to public safety?

ANSWER:

A court may take into account any matter it considers relevant. In particular, a court must consider the offender's criminal history and the views of the sentencing court at the time the relevant sentence of imprisonment was imposed on the offender (paragraphs 105A.8(d)(g) and (h) respectively). This is likely to include a consideration of the original offending conduct.

(b) Should the court be required to consider the fault element of the crime, as well as to the view s of any parole authority concerning the release of the offender on parole?

ANSWER:

It is unclear which crime the question is referring to. If it is to the fault element of the original offending conduct then the same answer as above in (a) would apply.

In relation to parole, the court may have regard to any matters it considers relevant. This may include the views of corrective services at the time of consideration of parole.

(c) Should the court be required to consider the inability of the offender to test or challenge the information relied on in an application for a continuing detention order?

ANSWER:

An application for a continuing detention order is made on the basis of admissible evidence and the normal rules of evidence apply. The offender will have access to legal representation and will therefore be able to test or challenge the information relied on in an application in the normal way.

(d) Should the court be required to consider the conditions under which the offender will likely be detained, including the availability of de-radicalisation or other rehabilitation programs for terrorist offenders/detainees?

ANSWER:

When deciding an application, the court is not restricted in relation to the matters to which it can have regard. A court may consider the conditions under which an offender would be detained including the availability of de-radicalisation or other rehabilitation programs before deciding to make an order.

(e) Is the obligation on the Court to consider a list of matters set out in s 105A.8 subject to ss 105A.13 and 105A.7?

ANSWER:

Yes.

(f) Does this mean that information not subject to the rules of evidence may be adduced in these proceedings?

ANSWER:

All evidence must be admissible with one exception. Subsection 105A.13(2) provides that, despite anything in the rules of evidence and procedure, a court may receive in evidence in the proceeding, evidence of relevant offender's criminal history (including prior convictions and findings of guilt in respect of any offences).

15. Sunset Clause

(a) Should there be a sunset clause on this bill?

ANSWER:

The Independent National Security Legislation Monitor (INSLM) could, on his or her own initiative, review the operation, effectiveness and implications of the proposed scheme at any time. In addition the INSLM Act allows either the Prime Minister or the Parliamentary Joint Committee on Intelligence and Security to refer a matter relating to counter-terrorism or national security to the INSLM.

Due to the applicability of review mechanisms a sunset clause is not required.

(b) If so, what is an appropriate period for sunset?

ANSWER:

If the Committee minded to recommend a sunset clause, the date of the sunset clause should ensure that there has been adequate opportunity for the scheme to have been used. The department suggests that the appropriate period for a sunset clause would be at least 5 years from the date of commencement.

16. Review

(a) Should the Court be able to specify a review date sooner than 1 year after the order or review?

ANSWER:

Upon application by the offender, the court may review the order at any time if it is satisfied there are new facts or circumstances which would justify reviewing the order or it would be in the interests of justice to review the order. The court also has the flexibility to make an order for any period of time up to 3 years. Accordingly, the court can make an order for a shorter period of time if it considers that the risk the offender presents to the community needs to be reconsidered sooner than 1 year.

(b) Should the Attorney-General be allowed to make an application to the Supreme Court for review?

ANSWER:

The Bill does not currently provide for this and it is unclear in what situation this would be required. The purpose of a review is to determine if the offender still presents the relevant risk to the community.

17. Minors

(a) The Australian Human Rights Commission has submitted that post-sentence preventative detention of children may be inconsistent with Australia's obligations under international human rights treaties. What is the Department's view?

ANSWER:

Under the proposed scheme, only a person who is 18 years of age or older at the expiration of their head sentence is eligible to be subject to a continuing detention order.

(b) Should the continuing detention order regime apply where the original offence was committed by a person under the age of 18, but the offender has reached the age of majority while in prison?

ANSWER:

Yes. The purpose of the scheme is to ensure the protection of the community. Should an eligible offender be proven to continue to pose an unacceptable risk to the community at the expiry of their head sentence, the offender should continue to be detained to ensure community safety.

(c) Should the court be required to take this into account?

ANSWER:

The Court is not restricted to what matters it may take into account. However, the most important and most relevant consideration is for the court to assess the risk posed by the offender at the expiry of their head sentence, not to examine the original offending conduct which led to their imprisonment.

18. Legal representation

(a) Should the bill include provisions allowing the court to order proper funding for the

respondent's legal representation, where the offender cannot self-fund?

(b) What would be the resourcing implications of this?

ANSWER:

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

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

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

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

(d) Should section 105A.15 of the bill be amended to require documents to be provided to the person's legal representative?

ANSWER:

No. If an offender is legally represented, the documents can also be provided to the offender's legal representative without a specific requirement in the Bill to do so. Section 105A.15 is intended to ensure that, regardless of whether an offender is legally represented, there is a process for providing documents to an offender who is imprisoned and therefore not easily able to accept personal service of documents.

(e) Should the court be allowed to adjourn the review hearing to give the offender the opportunity to obtain legal representation or an independent report of any kind or both?

ANSWER:

An offender will be provided with adequate notice to obtain legal representation. Further, the Court has all of its usual powers to manage civil proceedings according to its usual rules, including adjourning proceedings as required.

19. General

(a) How many people are currently serving a prison sentence and how many have been charged and are currently before the courts, for an offence that falls within the scope of the continuing detention order regime?

ANSWER:

As of 20 October 2016, there are currently:

- 16 individuals who are serving custodial sentences who may be captured by the proposed post-sentence preventative detention scheme, and
- 37 individuals before the courts who may be captured by the proposed post-sentence preventative detention scheme.

(b) What are the names and sentences of people serving sentences who would be currently eligible for continuing detention under the bill?

ANSWER:

This information has been provided in a Confidential Attachment for privacy reasons.

(c) How many prisoners are released from prison in Australia each year, in total?

ANSWER:

The Department does not have data on the number of prisoners released in Australia each year.

(d) How many of these released prisoners are for serious offences such as murder, aggravated assault and rape?

ANSWER:

The Department does not have data on the number of prisoners released in Australia each year.

(e) What is the recidivism rate for released prisoners in each State and Territory?

ANSWER:

The Department does not have data about the rate of recidivism for released prisoners in each State and Territory.

(f) Have other countries, with comparable legal and democratic systems to Australia, enacted or adopted similar measures to those proposed in the bill, which may authorise the continuing detention of persons convicted of terrorism offences beyond their sentences of imprisonment?

ANSWER:

Chapter 5 of the *Criminal Justice Act 2003* (UK) and the *New Zealand (Public Safety (Public Protection Orders) Act 2014* (NZ) enact schemes which aim to manage 'dangerous' offenders through post-sentence controls including extended supervision or in some cases continuing detention.