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Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

October 12, 2016

Re: Submission to the Australian Parliamentary Joint Committee on Intelligence and Security – *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*

Dear Committee,

This submission raises concerns about the continuing detention provisions introduced in the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (“The Bill”). The amendments enable a judge to extend custodial sentences of persons, already detained for certain classes of offenses, deemed “high risk terrorist offenders.”

The Australian government already has ample and broad powers to counter terrorism. The proposed measures are far broader than is necessary or proportionate to the goal of protecting national security. Australia’s parliament should withdraw the continuing detention order scheme.

Background

The Bill forms part of a bundle of counterterrorism legislation introduced by the federal government in response to the threat of “home-grown terrorism.”

Under existing Australian law, preventive detention orders allow persons suspected of terrorism to be detained for questioning before charge. Police can detain an individual for an initial period of 24 hours. This period may be extended by a judicial officer for an additional 24 hours if necessary.

Existing law also allows control orders to be imposed by an issuing court, on a person, to protect the public from a terrorist act, or the support or facilitation of a terrorist act.¹ Control orders include prohibitions and restrictions on freedom of movement, including the use of a tracking device; communicating or associating with specified people; using

¹ Criminal Code, s 100.1 definition “issuing court”.



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specified technologies such as the Internet; possessing specified substances; and engaging in specified activities including those involved in one's occupation. The court may impose the order for an initial period of up to 12 months, and may make successive orders in relation to the same person.

Continued Detention Orders

This Bill is modeled on post-sentence detention legislation used in some States and Territories to manage persons convicted of serious sexual offenses that continue to “pose a danger to the community.”²

This Bill introduces provisions for interim and continued detention of those deemed “terrorist offenders.”

1. **Interim detention orders:** the attorney general may apply for an interim detention order in relation to a “terrorist offender” if an application to the court has been made for a continuing detention order. Any order must be for a period of no more than 28 days, and if renewed, for a total period of no more than 3 months.
2. **Continued detention order:** a Supreme Court of a State or Territory may make a continued detention order if satisfied to a high degree of probability, on the basis of admissible evidence, that the “terrorist offender” poses an unacceptable risk of committing a serious offense and that no other less restrictive measure would be effective in preventing the risk. The period must be for no more than 3 years, but a court may make successive continuing detention orders.

Under the proposed amendments, a “terrorist offender” is any person currently detained for,³ or who is convicted of,⁴ the following terrorism offenses contained in the Criminal Code:⁵

- international terrorist activities using explosive or lethal devices;⁶
- treason;⁷
- a serious terrorism offense⁸ (which is defined in the Bill as an offense against Part 5.3 for which the maximum penalty is 7 or more years of imprisonment); or
- foreign incursions and recruitment offenses.⁹

² New South Wales and South Australia have schemes which cover both sex offenders and violent offenders, while Queensland, Victoria, Western Australia, and the Northern Territory have limited their schemes to only sex offenders. Tasmania and the Australian Capital Territory do not have post-sentence detention regimes for sex offenders or violent offenders: Explanatory Memorandum, *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, 3 [5].

³ Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 s 106.8(a).

⁴ Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 s 106.8(b).

⁵ Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 s 105A.3.

⁶ Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 s 105A.3(a)(i).

⁷ Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 s 105A.3(a)(ii).

⁸ Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 s 105A.3(a)(iii).

⁹ Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 s 105A.3(a)(iv).

Recommendations

Human Rights Watch is particularly concerned about the potential for continued detention orders to:

1. facilitate the indefinite and arbitrary detention of persons;
2. apply overly broad definitions of terrorism;
3. subject a person to criminal and punitive sanction using a low standard of proof; and
4. detain persons using secret evidence.

Human Rights Watch opposes continued detention laws because they invariably result in violations of due process rights. So long as such orders are in effect, the Australian Parliament should implement the following minimum safeguards. Any detention should be for the shortest duration possible, subject to intensely rigorous judicial oversight and frequent review, be used only exceptionally, and under no circumstances be indefinite or effectively indefinite in nature.

1. Indefinite and Arbitrary Detention

Continued detention orders result in the detention of persons—sometimes indefinitely—without charging them with a criminal offense or bringing them to trial. Human Rights Watch is concerned that continued detention orders can be renewed successively and therefore imposed in a cumulative manner so as to be tantamount to indefinite detention.

The European Court of Human Rights has made it clear that detention without charge violates the right to liberty under the European Convention on Human Rights. The court has upheld non-punitive post-sentence detention in circumstances where the individual is determined to be of “unsound mind” and poses a risk to the public. In Germany, for example, a preventive detention law is used to administratively detain people for therapeutic treatment purposes when the person is deemed to pose a danger to the public. But in considering post-sentence detention, the European Court stated in *James, Wells and Lee v United Kingdom* that in cases concerning indeterminate sentences of imprisonment for the protection of the public, “a real opportunity for rehabilitation is a necessary element” of the justification of the detention.¹⁰ Applying this analysis to the proposed Bill, the primary function of the continuing detention order is not to rehabilitate offenders. The Explanatory Memorandum outlines the purpose of the Bill as “ensuring that the Government has the means to protect the community from the risk of terrorist acts.”¹¹

The Explanatory Memorandum argues that “detention [of a terrorist offender] in a prison does not render the detention punitive.”¹² The Bill proposes that persons detained under a continuing detention order “must not be accommodated or detained in the same area or unit of a prison as

¹⁰ *James, Wells and Lee v. the United Kingdom* (European Court of Human Rights (Fourth Section), Application Nos 25119/09, 57715/09 and 57877/09, 18 September 2012) 49 [209].

¹¹ Explanatory Memorandum, *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, 3 [4].

¹² Explanatory Memorandum, *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, 9 [47].

persons serving ordinary sentences of imprisonment unless to do so is reasonably necessary.”¹³ However, to detain the person separately from the general prison population does not ameliorate the punitive nature of the measure.

Continuing detention orders effectively add to the prison term of someone who has been convicted and served their time. This amounts to retroactively applying a harsher penalty, which is prohibited under the International Covenant on Civil and Political Rights, to which Australia is a party.¹⁴ United Nations human rights bodies have accepted additional detention only as a last resort for compelling reasons in response to grave crimes, but only for rehabilitation purposes.¹⁵

2. Overly Broad Definitions of Terrorism

It should be noted that the use of “high risk terrorist offender” in the short title of the Bill is misleading, because the definition of “terrorist offender” includes a range of acts that would not necessarily fit within the meaning of “high risk.” The term “high risk terrorist offender” is not defined within the Bill.

Australian law’s overly broad definition of terrorism makes the Bill particularly worrisome. The term “terrorist offender” is defined by the Bill and includes various offenses relating to the use of explosive or lethal devices, treason, a serious terrorist offense, and foreign incursions or recruitment.¹⁶ These categories include an extremely broad array of offenses; a number are non-violent.

The breadth of the definition is given further depth by the definition of a “serious” terrorist offense, which is defined as offenses committed under Part 5.3 of the Criminal Code the maximum penalty for which is 7 or more years of imprisonment.¹⁷ The definition of a terrorist “act” includes preparatory and non-violent acts.¹⁸ For example, it is an offense, punishable by up to 15 years imprisonment, to “possess a thing” “connected with preparation for, the engagement of a person in, or assistance in a terrorist act.”¹⁹ A “thing,” which is not a defined term, would include any “thing” as understood by its ordinary English meaning.

This definition also catches membership of a terrorist organisation, a status offense, which is punishable by up to 10 years.²⁰ It also includes providing support or resources, neither of which

¹³ Explanatory Memorandum, *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, 5 [19].

¹⁴ International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, article 15. Australia ratified the ICCPR in 1980.

¹⁴ United Nations Human Rights Committee, General Comment No 35: Article 9 (Liberty and Security of Person) UN Doc CCPR/C/GC/35 (16 December 2014), 7 [21].

¹⁵ United Nations Human Rights Committee, General Comment No 35: Article 9 (Liberty and Security of Person) UN Doc CCPR/C/GC/35 (16 December 2014), 7 [21].

¹⁶ *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, s 105A.3.

¹⁷ *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, s 105A.2.

¹⁸ Criminal Code, s 100.1.

¹⁹ Criminal Code, s 101.4.

²⁰ Criminal Code, s 102.3.

are defined, to a terrorist organisation, which carries a 15 year maximum penalty.²¹ The UN special rapporteur on human rights and counterterrorism has stated that the concept of terrorism includes only those acts or attempted acts “intended to cause death or serious bodily injury” or “lethal or serious physical violence” against one or more members of the population, or otherwise risks human life, such as “the intentional taking of hostages.”²² These non-violent offenses are plainly at odds with the definition advocated by the UN special rapporteur on human rights and counterterrorism.

Having continuing detention orders apply to such a broad category of offenders and assessing the risk of reoffending is particularly worrisome. In his dissenting judgement in *Fardon v Attorney-General*, former Justice Michael Kirby of the High Court argued in relation to sex offender laws, that where there is no diagnosis, or finding of recognised mental illness, abnormality or infirmity by the court, to justify the courts powers, the court must simply focus on the risk of re-offending. He stated that any decision by the court therefore operates on a “prediction as to future conduct based on estimates of propensity that would ordinarily be inadmissible in a judicial trial conducted to adjudge whether a person is liable to be sentence to imprisonment.”²³ Such predictions, he concluded, involve guesswork and are notoriously unreliable at the best of times.²⁴

Under the Bill, continuing detention orders must be reviewed by the court annually, and the court must begin a review within 12 months of the order being made.²⁵ A review of such an order by an offender may also be sought sooner by application, in circumstances where “there are new facts or circumstances which would justify reviewing the order” or a review is “in the interests of justice.”²⁶ A continuing detention order is appealable as of right, with leave to the Court of Appeal.²⁷

3. Criminal and Punitive Sanction at Civil Standard

The Explanatory Memorandum states that the procedural protections applicable include that:

- the court must apply the rules of evidence and procedure applicable to civil matters;
- the parties (including the “terrorist offender”) can adduce evidence and make submissions;
- reasons for decisions must be given; and
- decisions can be appealed.²⁸

²¹ Criminal Code, s 102.7.

²² United Nations Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: Ten areas of best practices in countering terrorism*, UN GAOR, 16th sess, Agenda Item 3, UN Doc A/HRC/16/51 (22 December 2010) 14 [28].

²³ *Fardon v Attorney-General for the State of Queensland* [2004] HCA 46, 64-65 [168]

²⁴ *Ibid* 65 [169].

²⁵ Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 s 105A.10(1).

²⁶ Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 s 105A.11(2).

²⁷ Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 s 105A.17.

²⁸ Explanatory Memorandum, *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, 5 [17].

The requirements apply to a civil standard, but the sanction is criminal and punitive in nature. A person subject to the order will be deprived of their liberty on the basis of a low standard of proof— “a high degree of probability” rather than “beyond reasonable doubt.” Instead, civil evidence and procedural rules apply in relation to continuing detention order proceedings and are based on suspected future conduct.²⁹

Human Rights Watch has opposed control orders in the United Kingdom and Australia on the grounds that it can amount to a deprivation of liberty imposed without the protections of a criminal law procedure and criminal standard of proof. But we note that the British courts have limited the number of hours per day a person can be subject to a curfew at their home under a control order precisely because the order is based on the lower civil standard of proof rather the criminal standard.

In order to comply with international human rights law, the deprivation of liberty imposed under the proposed detention orders requires a determination based on evidence that meets the criminal standard of proof.

4. Secret Evidence

The amendments allow for the continued detention of a person deemed a “terrorist offender” on the basis of secret evidence. Britain’s highest court has ruled that procedural fairness and the right to a fair hearing under human rights law means that the imposition of control orders (which impose fewer restrictions on liberty than the proposed continuing detention orders) in the United Kingdom cannot be based largely or wholly on secret evidence not disclosed to the person subject to the order. The failure to do so fundamentally undermines the fairness of the proceedings and the ability of the person to challenge the evidence against him or her. This approach is consistent with the jurisprudence of the European Court of Human Rights.

The Bill imposes limits on the information that may be provided to a person subject to a continued or interim detention order or their legal representatives. The Bill enumerates the circumstances in which the applicant is not required to provide information, which includes “any information included in the application if the attorney-general is *likely* to” invoke secrecy provisions of the National Security Information (Criminal and Civil Proceedings) Act 2004 (“NSI Act”), make a claim of public interest immunity, or seek an order of the court preventing or limiting disclosure of the information.³⁰

The qualifying term “likely” leaves an extremely wide set of circumstances in which information may be withheld from the offender. Further, the Attorney-General is not required to exercise any of the measures, but rather simply indicate an intention to. This furthers the already existing imbalance in the discretion of the court with regard to the NSI Act, which requires the court to

²⁹ Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 s 105A.13.

³⁰ Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 s 105A.5(5) (emphasis added).

give more weight to national security concerns than to procedural fairness.³¹ The result is that the ability of the subject of the order to defend against accusations and test the credibility of evidence is further, and significantly, limited.

Similarly, amendments to the Surveillance Devices Act 2004 and the Telecommunications (Interception and Access) Act 1979, class certain types of information as “protected information” and widen the circumstances in which such information may be used in preventive detention proceedings.

Conclusion

Human Rights Watch opposes continued detention laws because they invariably result in violations of due process rights. So long as such orders are in effect, however, the Australian Parliament should implement the following minimum safeguards:

- Detention orders should be for the shortest duration possible to achieve a lawful government purpose and should not include successive renewals;
- Raise the threshold from the civil standard of “balance of probabilities” to the criminal standard of “beyond reasonable doubt;”
- Narrow the definition of “terrorist offender” and limit the use of continuing detention orders to those convicted of serious crimes involving acts of violence;
- Persons that fall under the scope of the Bill and their legal representatives should have access to sufficient evidence to ensure the right to an effective defense;
- Restrictions should be imposed through a process in which credible and probative evidence of necessity is provided to the court and the person subject to the order.

Governments have a responsibility to protect those within their jurisdictions, but must ensure that all counterterrorism measures respect human rights. Continued detention orders raise concerns about procedural fairness, finality of sentencing, and undermine the rule of law. Even for people who have committed serious offenses, that fact alone is not determinative of their future dangerousness to society, nor should that factor be the basis on which an individual is deprived of their rights.

Sincerely,

Elaine Pearson
Australia Director
Human Rights Watch

³¹ National Security Information (Criminal and 3 Civil Proceedings) Act 2004 s 31(8).