PJCIS Inquiry into *The Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*: Submission by Jacinta Carroll, Australian Strategic Policy Institute

Author Background

Jacinta Carroll joined ASPI in August 2015 as the inaugural Head of the ASPI Counter Terrorism Policy Centre. The focus of the Counter-Terrorism Policy Centre is to enhance dialogue on counter-terrorism issues and provide innovative approaches to counter-terrorism policy. Jacinta joined ASPI from the Commonwealth Government, having worked in the Department of Defence and the Attorney-General's Department. Her career experience includes appointments working on counter-terrorism, strategic policy, border security and international policy, with a particular focus on the Middle East and Afghanistan.

Summary

The proposed amendment to the *Criminal Code* is an appropriate application of an existing protective mechanism, found in most States and Territories, to the relatively new issue of ongoing intent by convicted terrorists to undertake terrorist acts.

The aim of the Bill is to incorporate an additional tool into Australia's national security framework in response to the ongoing threat terrorism poses to Australia and its people. Continuing detention of convicted terrorist who are assessed to pose an unacceptable risk of reoffending is an appropriate tool for consideration as it contemplates future threat of harm, protects the public, and is a mechanism already used in other areas of criminal law.

The threat of terrorism for Australia is real. The National Terrorism Alert Level has been actively maintained at 'Probable: a terrorist attack is likely' for more than two years. The assessment underlying the alert is that 'individuals or groups have developed both the intent and capability to conduct a terrorist attack in Australia'[1].

It is the responsibility of governments to do what they can to protect their citizens from attack. Through this Bill, the Commonwealth Government, supported by the States and Territories, is aligning with best practice counter-terrorism policy by focussing on preventing terrorism and protecting the public. This complements a range of other counter-terrorism activity, including countering violent extremism and counter-terrorism investigations.

Those found guilty of crimes such as terrorism also require their rights to be protected, through the application of due process. It is appropriate that the power to impose ongoing deprivation of liberty through the extraordinary measure of continuing detention be undertaken through a regime regulated by a range of safeguards and reviews, with ultimate authority for any detention resting with the courts. This ensures consistency with the operation of both the original conviction and sentencing, and with comparable detention regimes for other crimes.

The provision of an interim detention order in the Bill appropriately provides for situations where there is a gap between the end of a sentence and a determination by the Court on continuing detention.

A particular strength of this proposal is that it draws upon existing legal mechanisms and does not seek to add any additional complexity such as new arrangements or bodies. Notably, the

[1] 'National Terrorism Threat Advisory System', https://www.nationalsecurity.gov.au/Securityandyourcommunity/Pages/National-Terrorism-Threat-Advisory-System.aspx [accessed 11 October 2016]

Bill draws significantly from existing dangerous offender regimes in State and Territory jurisdictions.

Not the subject of this Bill, but related to it, are practical issues around implementation of the arrangements and what happens to those convicted of terrorism offences while in prison. These include ensuring a coordinated approach to housing and rehabilitation for all terrorist offenders, and ensuring that incarceration does not provide the opportunity for further radicalisation and development of terrorist networks.

There may be challenges, particularly in the early phases of implementation, in finding appropriate and relevant experts competent to undertake the assessment of the risk of a convicted terrorist reoffending, including with local knowledge. This is due to the small number of cases to date and limited data and research. The Courts should be made aware of the current limitations in expertise at this time and kept informed of developments in research and the growth in expertise.

Introduction

This submission is made in support of *The Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (the Bill), which will amend Part 5.3 of the *Criminal Code*, as well as consequential amendments to the *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access) Act 1979*, to establish a scheme for the continuing detention of high risk terrorist offenders who pose an unacceptable risk to the community at the conclusion of their custodial sentence.

The purpose of this submission is to provide advice on the suitability of this legislation to support Australia's approach to counter-terrorism, including:

- the terrorist threat environment; and
- counter-terrorism policy response options to address this threat

The submission also addresses related areas of policy that would require attention to facilitate the effective employment of the measures in this Bill, in support of counter-terrorism efforts.

In particular, the submission notes the need to consider developing corrections regimes appropriate to the detention of convicted terrorists and, with particular reference to the subject of this Bill, those terrorists who have demonstrated ongoing support for politically-motivated violence.

Terrorist threat to Australia

Australia's terror alert level has been 'Probable: a terrorist attack is likely' since 12 September 2014. This reflects advice from the competent authority in the Australian Government, ASIO, that terrorist groups maintain the intent and capability to conduct attacks in Australia. In his most recent National Security Statement, in November 2015, the Prime Minister has reiterated the continued appropriateness of this level of alert.

Australia has featured consistently as a named terrorist target in Islamist terrorist propaganda, and rates between third and fourth place overall in the so-called Islamic State's (ISIL) mentions of target countries.

Since September 2014, Australia's counter-terrorism authorities have disrupted 10 terrorist plots to conduct complex attacks and inflict mass casualties in Australia. Reports on these plots

to date indicate a mix between attacks directed by terrorist organisations and 'inspired' or broadly directed. And as a result of 19 counter-terrorism operations in Australia, 48 people have been charged with terrorism offences.

During the same period, Australia has experienced four terrorist attacks: Endeavour Hills, Martin Place, Parramatta and Minto. All of these were low-level and relatively unsophisticated attacks undertaken by single actors; the simplicity of the attacks including lack of indicators for their planning is assessed to be part of the reason they were not prevented.

But for the actions of Australia's counter-terrorism agencies in disrupting plots, Australia might have experienced 14 or more terrorist attacks during this period, instead of four, including up to 10 mass-casualty events. While law enforcement and intelligence agencies have done well, they have advised that the number of plots and short turnaround times from planning to action mean that disruption won't always be possible.

In addition to actual and disrupted plots, ASIO has advised that around 200 people in Australia actively support terrorism and a further 110 Australian foreign fighters are engaged in terrorism overseas and have a right of return[2].

Terrorism as a crime

Australia's legal system appropriately deals with terrorism as a crime, progressed through the courts including appropriate sentencing regimes for punishment.

There are, however, a number of factors that differentiate terrorism from most other forms of crime under Australian law, and may indicate an ongoing intent by an offender to commit extreme harm even after a sentence has been served in punishment for a crime committed.

These factors include:

- political intent, including link to particular ideologies
- advocating use of violence to achieve this political intent
- indiscriminate nature of violence
- potential for ongoing support of terrorism with intent to inflict extreme harm
- radicalisation and incitement of others to commit terrorist acts, and
- target selection, which may include symbols of authority such as police, military and government, or the general public.

Those subject to this regime therefore can be considered dangerous offenders, who maintain the intent to commit harm and reoffend.

One of the great strengths of this proposal is that it draws upon existing legal mechanisms and does not seek to add any additional complexity such as new arrangements or bodies. Notably, the Bill draws significantly from existing dangerous offender regimes in State and Territory jurisdictions, including the Queensland sex offender legislation's power of continuing detention, which was upheld in the High Court of Australia, in Fardon v Attorney General (Qld)[3].

---

[2] Testimony by Duncan Lewis to Legal and Constitutional Affairs Legislation Committee, *Official Committee Hansard, Senate Legal and Constitutional Affairs Legislation Committee Estimates, Thursday 5 May 2016*

[3] Fardon v Attorney-General for the State of Queensland, High Court of Australia, (2204) 201 CLR http://www.austlii.edu.au/au/cases/cth/HCA/2004/46 [accessed 11 October 2016]

The provision of an interim detention order sensibly provides for situations where there is a gap between the end of a sentence and a determination by the Court on continuing detention.

Australia's approach to counter-terrorism

The most visible part of Australia's approach to counter-terrorism is response operations, that is, action after terrorist acts have occurred, with some publicity also accompanying major disruptions. After the event, however, public focus typically turns to how the terrorist incident may have been prevented, including warnings and indicators of possible future behaviour, as seen in the ongoing matter of the Lindt Café coronial inquiry.

Prevention is also a key feature of Australia's approach to counter-terrorism and, as with other crime types, is generally regarded by policy makers and practitioners as the key to effectively countering terrorism.

Counter-terrorism policy is typically described in terms of prevention and response, and Australia's approach to counter-terrorism reflects this, with the Council of Australian Governments' (COAG) *Counter-Terrorism Strategy* identifying five elements, four of which are preventative in nature:

- challenging violent extremist ideologies
- stopping people from becoming terrorists
- shaping the global environment to counter terrorism
- disrupting terrorist activity within Australia, and
- having effective responses and recovery should an attack occur.

The Bill directly supports the fourth element, disrupting terrorist activity in Australia. Through providing mechanisms that may be used to continue to detain terrorist recruiters, the Bill also indirectly supports the second element of stopping people from becoming terrorists. In practice, to effectively support this element, the management regimes for terrorists in prison serving sentencing or in post-sentence continuing detention should also ensure that these individuals are unable to use interpersonal connections in prison to radicalise and otherwise build up their terrorist network.

Implementing the continuing detention regime

The number of people to whom continuing detention may apply is small, but growing. And this creates a number of issues for consideration.

Expertise

The Court will be required to determine whether there is a real risk of reoffending, and will thereby seek professional expertise including research on violent offenders in general and terrorism in Australia in particular in forming its judgement.

The Bill provides the opportunity for the Court to appoint one or more experts to assess whether the person in question presents an unacceptable risk. This may complement the expert advice put forward by the government, represented by the Attorney-General, that the individual presents ongoing risk and threat to the community.

While the threat of terrorism is high, there is currently limited relevant data, research and experience in Australia to inform the Supreme Court deliberations in cases proposed for continuing detention.

Of the 48 people charged with terrorism offences in Australia in the past two years, less than half have been sentenced and imprisoned. Overall, 15 terrorists are in prison and 37 are before the courts.[4]

This means that there may be challenges, particularly in the initial period, in finding persons competent to assess the risk of a terrorist offender continuing to actively support terrorism, and with appropriate and relevant knowledge including of the local environment.

A range of research and programmatic activities are underway across Australia to develop expertise and understanding of effective approaches to deradicalisation and rehabilitation of terrorists, largely under a range of community, state and territory, and Commonwealth countering violent extremism measures. These are not yet synchronised or subject to measures of effectiveness, and remain a work in progress.

The Courts should be made aware of the current limitations in this field, and keep up to date with relevant developments in Australia. The Australia-New Zealand Counter-Terrorism Committee (ANZCTC) and the Commonwealth Attorney-General's Department may be appropriate bodies to provide updated advice to the Courts.

Variation in jurisdiction

While the Bill continues Australia's sensible national approach to counter-terrorism legislation, the measures contemplated in the Bill will be enacted within state and territory jurisdiction, and offenders will continue to be detained in state and territory correctional facilities.

This means there will be different arrangements for housing and managing those detained under the regime. In order to meet the Bill's intent for a national approach, it is recommended that a coordinated and collaborative approach be progressed as much as possible, with issues and lessons learned under the regime communicated through the ANZCTC and other COAG arrangements.

What happens in prison

The overall aim of Australia's program for terrorism offenders should be for individuals to be rehabilitated and released into the community without reoffending. This is recognised in the Bill. The continuing detention program should, therefore, be accompanied by programs to facilitate rehabilitation both during the initial sentencing period and, for those to whom this applies, as part of the post-sentence period for continuing detention. As noted above, knowledge of how to best approach rehabilitation for terrorism offenders remains the subject of ongoing research and trial programs in Australia.

The continuing detention program should also recognise, as seen in similar programs overseas and with the broader experience of criminal rehabilitation, that it will not always be possible to persuade an individual against reoffending; that is, they may continue to support terrorism.

Jacinta Carroll
12 October 2016

[4] Brandis, Senator George, Second Reading of Counter-Terrorism Legislation Amendment Bill (No. 1) 2016, Criminal Code Amendment (Firearms Trafficking) Bill 2016, Criminal Code Amendment (High Risk Terrorist Offenders) Bill, *Senate Hansard, Thursday, 15 September 2016*, p35