



**Australian
Human Rights
Commission**

Counter-Terrorism Legislation Amendment Bill 2019

Australian Human Rights Commission

Submission to the Parliamentary Joint
Committee on Intelligence and Security

8 March 2019

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Parliamentary Joint Committee on Intelligence and Security (the PJICIS) with respect to its inquiry into the Counter-Terrorism Legislation Amendment Bill 2019 (Cth) (the Bill).
2. The Bill would amend the provisions on bail and parole in Part IA and IB of the *Crimes Act 1914* (Cth) (the Crimes Act), and also the continuing detention order scheme in Division 105A of the *Criminal Code Act 1995* (Cth) (the Criminal Code).
3. With its proposed amendments to the Crimes Act, the Bill would expand the existing presumption against bail, and introduce a presumption against parole for a broader group of offenders. The Bill would also make it explicit that when determining whether exceptional circumstances exist to rebut the presumptions insofar as they apply to children, the best interests of the child is a primary consideration, while the protection of the community is the 'paramount consideration'.
4. The Bill's proposed amendments to the Criminal Code would allow the applicant for a continuing detention order to exclude exculpatory information, material and facts likely to be protected by public interest immunity from being included in the application for a continuing detention order, and from being provided to the offender.
5. The Commission acknowledges the vital importance of protecting Australia's national security and the community from terrorism. Taking appropriate steps to prevent the commission of terrorist acts promotes the human rights of members of the Australian community,¹ and is consistent with Australia's obligations under international law.²
6. However, it is also vital that the steps taken to prevent the commission of terrorist acts are themselves consistent with human rights. To comply with international human rights law, any limitation on human rights must not only pursue a legitimate aim. Each limitation also must be reasonable, necessary and proportionate. The Commission is concerned that certain aspects of the Bill fail to meet this standard.
7. As the Office of the High Commissioner for Human Rights has observed, *'the purpose of security measures is, fundamentally, to protect freedom and human rights.'*³ It is therefore essential that fundamental human rights are protected in the struggle against terrorism.⁴

8. In light of the very short timeframe given to the public to make submissions to this inquiry, this submission addresses only a limited number of key human rights concerns raised by the Bill.

2 Recommendations

9. The Commission makes the following recommendations:

Recommendation 1

The Commission recommends that the following parts of the Bill not be passed:

- (a) the amendments to s 15AA of the Crimes Act relating to bail
- (b) the insertion of s 19AG(4B) in the Crimes Act relating to 'exceptional circumstances' and the fixing of non-parole periods for some people under 18 years of age
- (c) the insertion of s 19ALB in the Crimes Act creating a new presumption against parole
- (d) the amendments to s 105A.5 of the Criminal Code.

Recommendation 2

The Commission recommends that any consideration of amendments to the Crimes Act insofar as they relate to children should take place after the Independent National Security Legislation Monitor (INSLM) inquiry report is made available to the public.

Recommendation 3

If the PJCIS recommends the Bill for passage, the Commission recommends that the Bill be amended:

- (a) So that if, contrary to Recommendation 1, the presumption against bail in s 15AA is expanded, and the presumption against parole in s 19ALB is introduced, those amendments do not apply to children.
- (b) So that, when determining whether exceptional circumstances exist to rebut the presumptions against bail and parole and the minimum non-parole period in the case of a child, the protection of the community is, at most, another primary consideration, and not the paramount consideration.

- (c) To ensure all exculpatory information relevant to an application for a continuing detention order is provided to the respondent unless:
- (i) the issuing court, having considered all aspects of the relevant case, is satisfied that that would unacceptably compromise national security or other compelling public interest, or
 - (ii) the respondent is in some alternative way provided with sufficient information adequately to defend the proceedings.

3 The relevant provisions of the Bill

10. The Commission provides below a brief outline of the operative parts of the Bill that raise the human rights issues and concerns discussed in this submission. It is not intended to be a comprehensive account of all of the provisions of the Bill.

3.1 The presumptions against bail and parole

(a) *Extension of the presumptions*

11. In relation to a person charged with or convicted of certain offences,⁵ the Crimes Act currently provides:
- in s 15AA(1), for a presumption against bail;
 - in s 19AG, for a mandatory minimum non-parole period of at least $\frac{3}{4}$ of the sentence imposed for the relevant offence.
12. 'Exceptional circumstances' must be established to rebut the presumption against bail.
13. The Bill would extend the presumption against bail in s 15AA of the Crimes Act to a person:
- charged with or convicted of an offence against s 102.8 of the Criminal Code (associating with terrorist organisations)
 - subject to a control order within the meaning of Part 5.3 of the Criminal Code (terrorism)
 - whom the bail authority is satisfied has made statements or carried out activities supporting, or advocating support for, terrorist acts within the meaning of that Part.
14. By inserting s 19ALB, the Bill would also introduce a presumption against being released on parole for this same (expanded) group of offenders, and require 'exceptional circumstances' to exist to rebut this presumption.

(b) Determining exceptional circumstances in relation to children

15. The current presumption against bail and the mandatory minimum non-parole period discussed above also apply to children who are charged with or convicted of the relevant offences. As is the case with adult alleged offenders, 'exceptional circumstances' must be established to rebut the presumption against bail.
16. The Bill would introduce an element of discretion when setting a non-parole period for children, by allowing the sentencing court to set a lower minimum non-parole period if satisfied that 'exceptional circumstances' exist.
17. The new presumption against being released on parole, and the availability of exceptional circumstances to rebut that presumption, would also apply to children.
18. Where an offender or alleged offender is under the age of 18 years, the Bill would make it explicit that in determining whether 'exceptional circumstances' exist:
 - to justify granting bail
 - to justify a departure from the minimum $\frac{3}{4}$ non-parole period for a terrorism offence
 - to justify the release of an offender on parole

the relevant authority must have regard to:

- the protection of the community as the paramount consideration;
- the best interests of the person as a primary consideration.

3.2 Applications for Continuing Detention Orders

19. Section 105A of the Criminal Code currently provides that a continuing detention order may be made in relation to a person who is detained in custody and serving a sentence of imprisonment for a serious terrorist offence, and who a court is satisfied poses an unacceptable risk of committing a serious terrorism offence if released into the community. The effect of a continuing detention order is to commit the offender to remain in detention for the period the order is in force, subject to periodic reviews.

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20. Under current s 105A.5(3) of the Criminal Code, an application for a continuing detention order must:
 - (a) include any report or other document that the applicant intends, at the time of the application, to rely on in relation to the application [inculpatory information]; and
 - (aa) include:
 - (i) a copy of any material in the possession of the applicant; and
 - (ii) a statement of any facts that the applicant is aware of; that would reasonably be regarded as supporting a finding that the order should not be made [exculpatory information]; and
 - (b) include information about the offender's age; and
 - (c) request that the order be in force for a specified period.
21. The applicant for a continuing detention order is required to give a complete copy of the application to the offender.
22. Sensitive inculpatory information may be protected under certain provisions of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) or by orders of the court. However, when deciding whether to issue a continuing detention order, a court can only rely on information that has been included in the application, and provided to the offender. That helps ensure that a person responding to an application for a continuing detention order is able to respond meaningfully to the case being made against them.
23. The Bill would allow sensitive exculpatory information not to be included in an application, and therefore not provided to the offender, if that information is 'likely to be protected by public interest immunity'. In these circumstances, the Bill would require that an offender be told that exculpatory information has been excluded, and would allow them to challenge the public interest immunity claim.
24. It appears that rather than the applicant for a continuing detention order bearing the burden of proving public interest immunity in order to withhold information from an affected person, the Bill would place the onus on the offender to disprove the claim. And unless an offender challenges the applicant's claim for public interest immunity, a court could make a continuing detention order without being aware of relevant exculpatory information, material or facts.

4 Key human rights concerns of the Bill

4.1 Right to liberty and freedom from arbitrary detention

25. Article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR)⁶ provides that everyone has the right to liberty. In particular, it provides that no one shall be deprived of his or liberty except on such grounds and in accordance with such procedure as are established by law. This means that any detention of a person must be lawful. Australia ratified the ICCPR in 1980.
26. In addition, article 9(1) provides that laws which provide for detention must not be arbitrary. The requirement that detention not be arbitrary extends beyond a requirement of lawfulness and requires in addition that detention not be inappropriate or unjust and that it be predictable. Lawful detention may become arbitrary when a person's deprivation of liberty is not necessary or proportionate to achieving a legitimate aim such as ensuring community safety.⁷
27. The Commission recognises that in some cases it may be appropriate to refuse bail, impose a $\frac{3}{4}$ non-parole period, and/or refuse to make a parole order for a person charged with or convicted of a terrorism offence. Where all relevant circumstances are taken into account and an individualised assessment is made, such decisions may be a proportionate restriction of the human rights of the person negatively affected by the decision.
28. Presumptions against bail and parole, and mandatory minimum non-parole periods, prevent the court from making an individualised assessment in decisions dealing with a person's detention. Rather than the State having the burden of justifying that detention is necessary, a person is required to demonstrate that exceptional circumstances exist in order not to be detained. This directly and significantly impacts a person's right to liberty and may allow for the arbitrary detention of individuals, contrary to article 9(1) of the ICCPR.
29. The secondary materials do not contain persuasive reasons demonstrating that the extension of these presumptions against liberty to new categories of person is either necessary or proportionate to protect the community from harm. Given the significant potential limitation on individual rights, the Commission is concerned about the expansion of these provisions to a broader range of offences, without a sufficient evidence base.

4.2 Rights of the child

30. Children enjoy all rights guaranteed by the ICCPR, as well as particular and special protections under the *Convention on the Rights of the Child (CRC)*.⁸ Australia ratified the CRC in 1990.
31. The CRC provides the overarching international human rights framework for the protection, promotion and fulfilment of the rights of children and young people. The CRC recognises the special status of children, including the needs of the child for 'special safeguards and care, including appropriate legal protection.'
32. Article 3 of the CRC protects the best interests of the child:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration**. (emphasis added)
33. Article 37 of the CRC provides that the arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. Article 40 of the CRC recognises the right of a child accused of a criminal offence to be treated in a manner consistent with the promotion of the child's sense of dignity and which takes into account the child's age and the desirability of promoting the child's reintegration into society.
34. Relevantly for present purposes, the UN Committee on the Rights of the Child has stated:

The protection of the best interests of the child means ... that the traditional objectives of criminal justice, such as repression/retribution, **must give way to rehabilitation and restorative justice objectives in dealing with child offenders**.⁹
35. The Explanatory Memorandum for the Bill explains that:

[t]he Bill responds to issues raised during the Independent National Security Legislation Monitor (INSLM) inquiry into the prosecution and sentencing of children for Commonwealth terrorist offences, namely the application to children of the existing presumption against bail, and, the minimum non-parole period for terrorist offenders under section 19AG of the Crimes Act.¹⁰
36. The Commission provided a submission to the INSLM inquiry in June 2018. In that submission,¹¹ the Commission recommended that the s 15AA presumption against bail, and the s 19AG minimum $\frac{3}{4}$ parole period, not be applied to children.

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37. In support of that submission, the Commission wrote:

Contrary to the stated objects of s 19AG, the CRC requires that a court have flexibility in sentencing child offenders to ensure they are not imprisoned beyond the time necessary for rehabilitation. It also requires that parole authorities have discretion to release convicted children on parole where the purpose of detention has been served. It is not permissible to prolong the imprisonment of children for purely punitive purposes, or because of a perception that the community may have a 'concern about terrorism'. The need for flexibility in sentencing children is heightened in the context of terrorism offences because of the heavy penalties attached to those offences. In those circumstances, a mandatory minimum non-parole period may have a significant impact on development, education and capacity to integrate of an affected child, at a critical period of neurological, socio-emotional and physical change.

The right not to be subject to arbitrary detention has been referred to above, in the context of the minimum non-parole period mandated by s 19AG of the Crimes Act. However, the right is important at all stages of the prosecution of children, including arrest and bail, both pre and post charge.¹²

38. The Commission refers the Committee to its submission to the INSLM and the discussion of the relevant human rights considerations contained in it. In its submission to the INSLM, the Commission recommended that the minimum non-parole period and the presumption against bail should not apply to children. A fortiori, insofar as those provisions apply to children, they should not be extended to apply in new circumstances or to new categories of children.
39. At a hearing in August 2018, the INSLM set out some of his preliminary views, including that the presumption against bail in s 15AA and the $\frac{3}{4}$ minimum non-parole rule in s 19AG, should not apply to children.¹³ The Commission notes that the INSLM inquiry report has not, to date, been released to the public and that his final conclusions are therefore not known.
40. In the absence of compelling reasons, especially in regard to urgency, the Commission submits that any consideration of amendments to the bail and parole provisions of the Crimes Act relating to children should not proceed until after the public release of that report, so that any claims that the amendments are necessary and proportionate can be closely scrutinised.
41. In respect of the mandatory minimum $\frac{3}{4}$ non-parole period, the Commission acknowledges that the Bill introduces a discretion in s 19AG(4A), based on exceptional circumstances, that would allow a sentencing court to fix a shorter non-parole period for children convicted

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of the relevant offences. The Commission therefore recommends that s 19AG(4A) be passed (while maintaining its primary position that s 19AG should not apply to children).

42. The Commission is particularly concerned at the proposed inclusion of the protection of the community as the 'paramount consideration' in determining whether exceptional circumstances exist to rebut the presumptions against bail and parole, or to fix a shorter non-parole period. In the Commission's view, this undermines the rights, freedoms and protections afforded to children in the CRC, and is not consistent with the well-established principles of human rights law concerning children.
43. The UN Committee on the Rights of the Child has stated:

The expression "primary consideration" means that **the child's best interests may not be considered on the same level as all other considerations**. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness.

The best interests of the child – once assessed and determined – **might conflict with other interests or rights** (e.g. of other children, the public, parents, etc.). ... the right of the child to have his or her best interests taken as a primary consideration means that **the child's interests have high priority** and not just one of several considerations. Therefore, **a larger weight must be attached to what serves the child best**.¹⁴
44. Placing the protection of the community as the paramount consideration is incompatible with recognising the best interests of the child as a primary consideration. As noted by the High Court:

The concluding words of Art.3.1 ... give[s] those interests **first importance** along with **such other considerations as may**, in the circumstances of a given case, **require equal, but not paramount, weight**.¹⁵
45. These authorities are explaining a simple point. 'Primary' means 'of the first rank.' A consideration that may be trumped by a 'paramount' consideration cannot be a 'primary' consideration.
46. The Commission accepts that the protection of the community is a relevant consideration, and may be given due weight in bail and parole decisions relating to children charged with and convicted of terrorist offences. Where a significant risk to the community is demonstrated to exist, this factor may well be the most important consideration in all the circumstances of the case. It should not however always be decisive, or of higher order than all other considerations, in these matters.
47. The Commission therefore recommends that the provisions of the Bill dealing with 'exceptional circumstances' that would make the safety of the

community a 'paramount' consideration and the best interests of the child a 'primary consideration', not be passed.

48. In the event that this recommendation is not accepted, the Commission recommends that the Bill be amended so that the best interests of the child and the protection of the community are both primary considerations in determining whether exceptional circumstances exist for rebutting the presumption against bail and/or parole, and fixing a shorter non-parole period.

4.3 Fair trial rights

49. Article 14 of the ICCPR protects a person's fair trial rights, which include the rights:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.
50. Article 14 also provides that all people are 'equal before the courts'. This guarantees 'equality of arms', which, in general, includes a requirement that all parties to court proceedings must have equal rights to examine all the evidence brought by the other parties. Where for some reason this is not possible in all the circumstances of a particular case, a respondent (for example) must, at a minimum, be able adequately to meet the case put against her.¹⁶
51. As explained above, the Bill would allow the applicant for a continuing detention order not to include exculpatory information in the application if that information is 'likely to be protected by public interest immunity'.¹⁷ It does not appear from the Bill that an applicant is required to justify that claim to a court before proceeding in this manner. Rather, the burden would effectively rest with the affected person to disprove public interest immunity, after being given notice by the applicant that information has been excluded on that basis.
52. In denying a person access to information, materials and facts that would reasonably be regarded as supporting a finding that a continuing detention order should not be made, the Bill may infringe a respondent's fair trial rights. Withholding exculpatory information from a person undermines their ability to effectively oppose the legitimacy and necessity of a continuing detention order.

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53. It is a well-established common law principle that a party, such as the Crown, may legitimately claim that public interest immunity should apply to exclude certain material from being adduced as evidence. It is understandable that this general principle also would apply in proceedings that are the subject of this Bill. However, the Commission has two primary concerns about how these *specific* public interest immunity provisions would operate in practice.
54. First, as explained above, the Bill appears to allow exculpatory information to be withheld merely where this information is 'likely to be protected by public interest immunity'. In other words, exculpatory information could be withheld on this basis without the Crown first satisfying a court that public interest immunity attaches to the relevant information. On its face, this does not appear to be a reasonable or proportionate limitation of a person's fair trial rights. It would be more appropriate to permit a person to withhold exculpatory information only where that person bears the onus of proving—to a court—that the public interest lies in withholding the information.
55. Secondly, where such exculpatory material is withheld, the Bill does not set out clearly what will be the likely consequences vis-à-vis the proceedings themselves. The Commission acknowledges one protection, adverted to in the Explanatory Memorandum, that, in such circumstances, the court could exercise its inherent jurisdiction 'to stay proceedings entirely if it is satisfied that withholding the information would involve unacceptable injustice or unfairness'.¹⁸ However, the option of staying proceedings is a blunt instrument. If proceedings are not stayed following the exclusion of exculpatory material, the Bill does not provide for any other measures that would help preserve the individual's fair trial rights. For example, it may be suitable to consider, in such circumstances, for the offender to be provided with the gist, or a summary of the exculpatory information in order to adequately respond to an application for a continuing detention order.
56. Continuing detention orders allow a person to be kept in detention in circumstances where they have served their sentence, and have not been charged with any further offence. These orders are a serious limitation on a person's right to liberty and freedom from arbitrary detention. The Commission is concerned about the introduction of a provision which increases the prospect of a particularly intrusive imposition on a person's human rights being applied, without the person having the benefit of their full fair trial rights.

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- ¹ For example, the right to life (article 6 of the ICCPR) and the rights to bodily integrity (an aspect of article 7 of the ICCPR) and security of person (article 9(1) of the ICCPR).
- ² United Nations Security Council, *Resolution 1373* (2001), UN Doc S/RES/1373 (2001), paras 2(b) and (e).
- ³ Mary Robinson, UN High Commissioner for Human Rights, Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective on Counter-Terrorist Measures (23 September 2002) 1, available at <http://iilj.org/wp-content/uploads/2016/08/Office-of-the-High-Commission-on-Human-Rights-Note-to-the-Chair-of-the-CTC.pdf>.
- ⁴ See eg the Commission's submission to the Senate Legal and Constitutional Legislation Committee in relation to its inquiry into the Anti-Terrorism Bill (No 2) 2005 (11 November 2005), available at http://humanrights.gov.au/legal/submissions/terrorism_sub_12-11-2005.html; Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws* (2008), available at http://humanrights.gov.au/legal/publications/counter_terrorism_laws.html.
- ⁵ The relevant offences are mostly, but not exclusively, terrorism related.
- ⁶ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- ⁷ United Nations Human Rights Committee, General Comment 31 (2004) at [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004) p 308, at [11.10].
- ⁸ *Convention on the Rights of the Child*, articles 3, 8(1).
- ⁹ UN Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (2007) [10] (emphasis added).
- ¹⁰ Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill 2019 (Cth) 2.
- ¹¹ Australian Human Rights Commission, Submission to the Independent National Security Legislation Monitor, *INSLM Review - Prosecution and Sentencing of Children for Commonwealth Terrorist Offences* (2018), available at https://www.inslm.gov.au/sites/default/files/submissions/australian_human_rights_commission.pdf.
- ¹² Australian Human Rights Commission, Submission to the Independent National Security Legislation Monitor, *INSLM Review - Prosecution and Sentencing of Children for Commonwealth Terrorist Offences* (2018) [32], [48].
- ¹³ Independent National Security Legislation Monitor, Transcript of Proceedings, 2 August 2018, 7-8, available at <https://www.inslm.gov.au/sites/default/files/files/inslm-public-hearing-transcript-20180802.pdf>.
- ¹⁴ UN Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para 1)*, 62nd sess, UN Doc CRC/C/GC/14 (2013) [37], [39] (emphasis added).
- ¹⁵ *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20; (1995) 128 ALR 353; (1995) 69 ALJR 423; (1995) 183 CLR 273 (7 April 1995) per Mason CJ and Deane J [31] (emphasis added).
- ¹⁶ UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, 90th sess, UN Doc CCPR/C/GC/32 (2007) [13].
- ¹⁷ Though the Bill would require that the person be informed that exculpatory information has been excluded, and allow them to challenge the public interest immunity claim asserted by the applicant.
- ¹⁸ Explanatory Memorandum, Statement of Compatibility with Human Rights, Counter-Terrorism Legislation Amendment Bill 2019 (Cth) 20 [87].