BAR ASSOCIATION OF QUEENSLAND

11 December 2018

Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: lacsc@parliament.qld.gov.au

Dear Committee Secretary

The Bar Association of Queensland ('the Association') welcomes the opportunity to provide comment on the *Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018* (Qld) ('the Bill').

Proposed amendments with respect to bail arrangements for adults and children

Clause 9 of the Bill proposes to insert a new s 16A into the *Bail Act 1980* (Qld) ('the Bail Act') to reverse the statutory presumption in favour of bail for an adult who has previously been convicted of a terrorism offence or who is, or has been, the subject of a Commonwealth control order. Clause 27 of the Bill proposes to insert a new s 48A into the *Youth Justice Act 1992* (Qld) ('the Youth Justice Act') to achieve the same reversal for children. Any person subject to the presumption against bail in the proposed amendments would have to demonstrate exceptional circumstances to justify a grant of bail.

The Explanatory Notes assert that the exceptional circumstances test will be a higher threshold test than that presently in the Bail Act.[1]

The Association notes that ss 16(3) and (3A) of the Bail Act already require adult offenders charged with certain offences or charged in particular circumstances to show cause as to why their detention in custody is not justified.

For this to apply to a person who "has been convicted of a terrorism offence", the person would have to have been charged with a different offence after being convicted of a terrorism offence. It is important to note that none of the proposed amendments concerning bail are intended to apply to any person (child or adult) who has been charged with a terrorism offence. They talk only to those previously convicted of such offences.

The Association could well understand the necessity for a more stringent test for those actually charged with a terrorism offence. However, the circumstances which give rise to the need for this test to apply to any person previously convicted of such an offence are unknown and certainly not explained in the material provided.

It is easy enough to envisage a person who has been convicted of a terrorism offence, completed their sentence and been rehabilitated and even, deradicalised. The proposed amendments would then see such a person required to establish exceptional circumstances for any offence at all, even those with no link to terrorism.

[1] Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018, Explanatory Notes, 2.

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To make a presumption against bail for a person on the basis of the nature of a previous offence (rather than the offence they are presently facing) may have the potential to actively undermine efforts towards rehabilitation. A person who has been sentenced and whose rehabilitation is progressing well could easily regard a justice system that ignores that progress when considering bail on a later offence unrelated to terrorism as a basis for reengaging with radical ideology as a result of perceived injustice.

Section 16(2) of the Bail Act includes the character, antecedents and background of a defendant as relevant matters to be taken into account in deciding whether bail should be granted. A past history as a convicted terrorist would be taken into account pursuant to that provision in deciding whether release on bail constitutes an unacceptable risk. However, reversing the onus of proof is likely to result in injustice but also to take up unnecessary court and legal resources in circumstances where the offence charged is trivial. A full blown hearing over whether a person charged with urinating in public when drunk should receive bail because they were the subject of a Commonwealth control order twenty years ago seems unjust and wasteful.

As far as the proposal relates to children, the Association notes that the Youth Justice Act includes in Schedule 1 the Charter of Youth Justice Principles. Principle 17 provides that "A child should be detained in custody for an offence, whether on arrest or sentence, only as a last resort and for the least time that is justified in the circumstances". It is difficult to see how this principle can be reconciled with any presumption against bail.

In addition to the Youth Justice Principles, Australia is a party to the *Convention on the Rights of a Child* ('the Convention').[2] Article 3 of the Convention requires that, in all actions taken by courts of law or administrative authorities or legislative bodies the best interests of the child shall be a primary consideration.

The proposed amendments, so far as they are intended to apply to children, will place Queensland and Australia in breach of the Convention. This would be a significant backward step for Queensland which has only in February of this year become compliant with the Convention through the inclusion of 17-year-olds in the youth justice system following the passage of the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (Qld).

The Association notes that the Independent National Security Legislation Monitor, Dr James Renwick SC, is currently considering the application of s 15AA of the *Crimes Act 1914* (Cth) to bail applications involving children and is expected to recommend that the requirement for exceptional circumstances in that section is in breach of the Convention so far as it relates to children and should be changed.

A grant of bail is a component of a civilised society's criminal justice system which arises out of an understanding of the importance of the presumption of innocence and the common law principles governing personal liberty. The Association is concerned that the proposed amendments do not strike the appropriate balance between protecting victims and upholding the presumption of innocence for individuals who had previously been charged with potentially unrelated prior offences. The presumption that bail will be granted in the absence of unacceptable risk is based upon an understanding of the importance of the presumption of innocence. Its denial represents a fundamental undermining of that presumption.

To undermine this presumption on the basis of the nature of one offence in a person's criminal history, regardless of its relevance to the charges on which a person is seeking bail, is unjustifiable. In the absence of compelling reasons for a presumption against bail for a person previously convicted of a terrorism offence or subject to a control order, regardless

[2] *Convention on the Rights of a Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

of the circumstances of the offences for which bail is sought, the Association opposes the proposed changes.

Proposed amendments with respect to parole for adults

Unlike the proposals relating to bail, those relating to parole and release from detention are quite different for adults and children. This is because adults and children are subject to different regimes relating to their release from sentences of incarceration.

With respect to adults, cl 13 of the Bill proposes to insert a new s 193B of the *Corrective Services Act 2006* (Qld) ('the Corrective Services Act') to create a presumption against a parole order for a prisoner, unless there are exceptional circumstances. This presumption is proposed to apply to prisoners who have previously been convicted of a terrorism offence or who are, or have been, the subject of a Commonwealth control order. It is proposed to also apply where the parole board is satisfied the prisoner has promoted terrorism,[3] and where there is a report from the commissioner under the proposed new s 193E which states there is a reasonable likelihood the prisoner may carry out a terrorist act.

The President of the Court of Appeal, the Honourable Justice Walter Sofronoff, conducted a review of the parole system in Queensland in 2016 before his appointment. In his final report, at paragraphs 139-140, his Honour said:

> 139. There is a body of research that in-custody and community-based rehabilitation programs and therapeutic interventions can reduce offending. Relying on the fact that parole is the main incentive for most offenders to participate in programs inside and outside of prison, the conclusion can be drawn that as parole addresses factors that contribute to offending, the parole system is likely to reduce reoffending.
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> 140. On balance, the evidence suggests that parole has a beneficial impact on recidivism, at least in the short term. Although its effect upon recidivism may be modest the parole system is in the interest of the community and should be retained.

Furthermore, currently, where a sentence to be imposed is for three years or less, and does not involve an offence that is a serious violent offence or a sexual offence, the sentencing judge sets a court ordered parole release date.[4] Otherwise, the sentencing judge, if imposing a sentence that will involve parole, can only set a date at which the sentenced prisoner will become eligible to apply for parole through the parole board. Similarly, if the offence were committed whilst the prisoner was on parole, the sentencing judge can only set a date at which the sentenced prisoner can apply for parole.

Clause 23 of the Bill proposes to amend s 160B of the *Penalties and Sentences Act 1992* (Qld) (the Penalties and Sentences Act) to provide that the sentencing judge can only set a date at which the sentenced offender is eligible for parole (as opposed to a fixed date for release on parole):

(a) the offender has, at any time, been convicted of a terrorism offence, whether or not the conviction has been recorded; or
(b) the offender is the subject of a Commonwealth control order; or
(c) the court is satisfied the offender has –
    (i) carried out an activity to support the carrying out of a terrorist act; or
    (ii) made a statement in support of the carrying out of a terrorist act; or
    (iii) carried out an activity, or made a statement, to advocate the carrying out of a terrorist act or support for the carrying out of a terrorist act.

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[3] There is a particular problem with the concept of "promoting terrorism", because "terrorist act" is generally defined without reference to Australian territoriality. A person can promote terrorism simply by suggesting that the Venezuelans should take things into their own hands and physically get rid of their oppressive government or that the residents of Crimea should use force to drive out the Russian intruders. The expression of such views, even strongly held, should not affect a person's right to parole (or bail).

[4] *Penalties and Sentences Act 1992* (Qld) s 160B.

The Association is concerned that the creation of a presumption against parole, and the restriction on judicial discretion in sentencing to a parole eligibility date (instead of a court ordered parole date) for particular offenders, will deter those offenders from meaningfully engaging in rehabilitative programs in custody.

The Association has argued in submissions to the Queensland Sentencing Advisory Council's inquiries that the sentencing judge is best placed to take into account all of the matters which are relevant to sentence and to produce the result that is most just for the offender and most constructive in promoting community safety. Arbitrary limits to the discretion of sentencing judges guarantee that the sentence will not fit the crime and the circumstances of the offender. Introducing restrictions based on the theme of connection to terrorism is another way of introducing arbitrariness to the justice system. Connections with terrorism that are decades old or recent, serious or trivial; talking about armed resistance to an oppressive foreign government or promoting a bombing of a major sporting event are all matters which can be taken into account in the sentencing context.

The Association is of the view that taking the sentencing discretion out of the hands of sentencing courts is not justified by choosing a set of themed offences because they are perceived to be serious.

Any sensible consideration of parole laws must include a consideration of the head sentences to which any parole application will apply. The majority of sentences imposed are likely to be finite sentences. To disincentivise participation in rehabilitative programs in custody is likely to result in the release of prisoners who are not rehabilitated – and not motivated to rehabilitate – at the conclusion of their sentences.

Last, the Association notes that cl 13 of the Bill proposes to allow the parole board to refuse to grant parole where there is a report from the commissioner which states there is a reasonable likelihood the prisoner may carry out a terrorist attack. The Association is of the view that this type of decision would be better made by a judge, apprised of the admissible evidence, at the time of sentencing, than by the parole board, informed solely on a report from the commissioner.

For these reasons, the Association opposes the proposed amendments to the Corrective Services Act and the Penalties and Sentences Act.

Proposed amendments with respect to release from detention for children

With respect to children, the proposed amendments to the Youth Justice Act would affect the automatic release of children from sentences of detention. Section 227(1) of the Youth Justice Act provides for the automatic release of a child from detention after that child has served 70 percent of their sentence. If a sentencing judge finds that there are special circumstances, they may order that the child be released after serving between 50 and 70 percent. Special circumstances can include pleas of guilty, co-operation with authorities, absence of prior convictions, remorse and prospects of rehabilitation (see, e.g. *R v IC* [2012] QCA 148).

The proposed amendment to the Youth Justice Act would abolish the discretion of a sentencing judge imposing a sentence of detention to order the release of the child to a supervised release order after serving between 50 and 70 percent of the sentence.

The Association opposes this proposal, as it opposes limitations on the discretion of sentencing judges generally.

The observations above relating to the Charter of Youth Justice Principles and the Convention apply equally to the abolition of judicial discretion in the fixing of a release date. A sentencing judge cannot ensure that a child is detained only for the least time justified in the circumstances without some discretion as to the setting of a release date.

The Association submits that a judge sentencing a child for a terrorism offence ought to have available to them the full gamut of discretionary powers to properly fashion a sentence appropriate to the circumstances of each case. This includes the ability to fix an earlier than usual release date when special circumstances warrant it.

Special circumstances in such cases could include demonstrated efforts at rehabilitation and deradicalisation during the period between the child being charged and being sentenced. Such efforts ought to be facilitated and encouraged by sentencing legislation as they are the very matters which merit recognition in the sentencing process. They may also demonstrate the benefits of a longer period of supervision in the community at the end of the child's sentence.

Also, it is easy to envisage a situation in which a child who has made efforts towards rehabilitation and deradicalisation suffering significant setbacks upon learning that their sentencing judge is not able to recognise those efforts as part of the sentencing process.

Proposed retrospective application of the Bill

Finally, the Association notes that the Bill proposes transitional provisions which would make the effect of the proposed amendments with respect to bail for adults and children, parole for adults, and release from detention for children, retrospective. The Association is opposed to the creation of retrospective legislation that has the potential to significantly affect the right to liberty of individuals, particularly children.

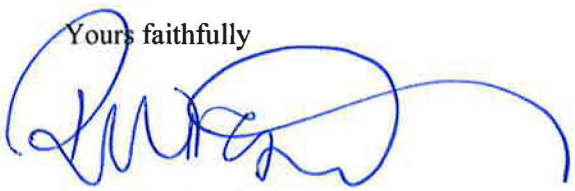
Conclusion

Thank you for the opportunity for the Association to comment on the Bill.

For the reasons set out above, the Association is opposed to the Bill.

The Association would be pleased to provide further feedback, or answer any queries you may have on this matter.

Yours faithfully



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