11 December 2018

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

Email: lacsc@parliament.qld.gov.au

Dear Committee Secretary,

Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018

Thank you for the opportunity to make a submission to this review of the Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018 ('the Bill').

We recognise the role of the Bill in giving effect to the agreement of the Council of Australian Governments ('COAG'). We also recognise the advantages of legislative consistency in tackling an issue that crosses national and international borders. Also it is important that given the on-going risk of terrorism in Australia, it is important that governments remain responsive to this threat and the risk that convicted terrorists may present when released into the community.

We are both troubled by aspects of this proposed Bill (some of which are outlined below) and it is implementation in Queensland. We think it is important that the committee is made aware of a number of issues and potential consequences of this Bill that may give it pause to think if such a Bill is necessary in the Queensland context. If enacted the Committee needs to be aware that there are a range of issues that will need to be managed once this Bill is put into effect.

1. Existing principles governing bail and parole in Queensland are well developed:

The principles that govern the awarding of bail and parole have been well developed over an extended period of history to meet a full range of criminal conduct and circumstances. They operate not only to take into account the rights of the accused, including to liberty, the presumption of innocence and family, but to give due emphasis to the protection of the community and victims, as well as ensuring the efficacy of related court proceedings. Parole also has also played an important role in facilitating the reintegration of the offender back into the community. Where a person is charged with a serious offence like terrorism, or has demonstrated links to or support of terrorist groups or activities, these factors will weigh strongly against that person being awarded bail or parole.

We support the amendments requiring bail decision-makers to give specific consideration to potential links to terrorism when making bail determinations, though we submit that these amendments would simply codify the existing state of the law.

[redacted]

By reversing the presumptions in favour of bail and parole, the Bill is inconsistent with existing legal principles and protections. This aspect of the Bill constrains the discretion of the decision-maker and undermines their capacity to take important considerations into account. It undermines the presumption of innocence and can have a far broader impact, as outlined below. The provisions that apply to children are potentially in direct contravention of the rights of the child and undermine the independence and capacity of the court to undertake a full consideration of the case and render a decision that balances those interests against national security and other concerns.

The Bill does not fill a gap in Queensland's national security legislation. The highly-developed existing rules and principles that govern bail and parole in this state are capable of ensuring that individuals who should be detained are detained, and of giving appropriate weight to national security and community protection. Control orders, continuing detention orders, supervised or conditional release, and the host of other police and intelligence powers that exist to preserve Australia's security further supplement these schemes. It is against this background of national security gain that the Bill's impact on human rights should be assessed.

2. The Reversal of the Presumption in Favour of Bail

2.1. The Presumption of Innocence

The general presumption in favour of bail reflects the fundamental criminal justice principles of personal liberty and the presumption of innocence. The Australian Human Rights Commission has described the reversal of the presumption of bail for terrorism offences 'as a disproportionate interference with the right to liberty under art 9 of the ICCPR as well as the presumption of innocence under art 14(2) of the ICCPR'. [1] The presumption of innocence not only has a central place in international law, but is well-recognised as a common law right and a fundamental aspect of any society that claims adherence to the rule of law.

This Bill undermines the presumption of innocence, broadly conceived. That is, it does not officially render the individual guilty until proven innocent, but it does treat the person in this way in substance, and places the onus on them to show that exceptional circumstances exist to support their freedom. The reversal of the presumption in favour of bail contravenes fundamental principles of human rights and the rule of law. Considerations such as the nature of the charge and the risk the individual may pose to the community are already taken into account through the usual operation of bail rules and principles.

2.2. Scope

The Bill operates to reverse the presumption in favour of bail for individuals charged with a terrorism offence. The scope of the Bill extends to individuals who have been previously convicted for a terrorism offence, despite the nature of the present, relevant charge and other relevant factors, for instance, assistance that the individual may have subsequently provided to authorities or in counter-radicalisation efforts.

[1] Australian Human Rights Commission, Submission No 18 to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (2010), quoted in Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws*, Interim Report No 127 (2015) 327 [11.77].

The Bill also extends to persons who are or who have been subject to a control order. Appropriately, this is limited to individuals who have been subject to Commonwealth counter-terrorism control orders and does not extend to other kinds of control orders (organised crime control orders) that exist in most states and territories, including in Queensland.

Control orders are civil orders. They involve no determination of criminal guilt and are issued on the basis of a balance of probabilities assessment, not on the much higher criminal standard of proof beyond reasonable doubt. A Federal Court may impose a control order on a person based on a finding that the order would either 'substantially assist in preventing a terrorist attack', or that the person has 'provided training to … [or] received training from a listed terrorist organisation'. Control orders may also be issued if the court finds the person has engaged in a hostile activity in a foreign country, or has been convicted of a terrorism offence in Australia or a foreign country.[2] This assessment engages a far lower standard than a finding of criminal guilt. Indeed, control orders have been issued in circumstances where a person was *acquitted* of terrorism offences (for instance, in respect of Joseph Thomas) or not even charged with a terrorism offence (for instance, David Hicks). It is a criminal offence to breach the terms of a control order – for instance by breaching curfew or reporting obligations or not attending a required counselling visit – so one might expect that if a person was subject to a control order then this would be the most likely offence for them to be charged with.

Control orders serve an important protective purpose, that is, to protect the community from a broader threat of terrorism. However it is entirely possible that an individual who was once subject to a control order may never have been convicted of an offence, terrorism-related or otherwise. An individual's circumstances, charges and risk factors, including any links to or support of terrorism, would be taken into account under present bail rules and principles. The extension of the Bill to these individuals presents a concerning incursion on the presumption of innocence.

3. The Special Impact of the Bill on Children

The provisions of the Bill requiring the accused to demonstrate exceptional circumstances to be granted bail or parole apply to children as well as adults. The Bill further removes the independent discretion of the sentencing court to set a release date any earlier than 70 per cent of the total sentence for a child who has demonstrated links to terrorism.

The removal of a court's discretion undermines the separation of powers and should be approached with great care. In this case, these provisions remove the ability of the court to take into account the circumstances of the individual case and of the individual child when making bail, parole and sentencing determinations. For instance, the court will have a very limited capacity to take into account factors such as the age of the child and the extent to which they made their own decisions or were influenced by others in the course of the alleged conduct.

The special, vulnerable place of children is well-recognised in the common law and more broadly in the rules, principles and understandings on which our society is based. To reverse the presumptions in favour of bail and parole for children gravely undermines these principles.

[2] *Criminal Code* (Cth) s 104.4.

The Bill contravenes the *Convention on the Rights of the Child*, particularly Article 37 which identifies that 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'. It also contravenes Youth Justice Principles and is inconsistent with the broader approach of courts to making similar determinations in relation to children, even children standing trial for serious criminal offences.

The existing operation of the bail, sentencing and parole systems is capable of ensuring that children who should be detained are detained. Any determination that a child should be incarcerated should be capable of taking a full range of factors into account and making the best decision weighing both the interests of the child and the broader community in light of all the relevant circumstances. This is particularly important when the child is yet to be proven guilty of an offence, or has been subject to a civil control order and may be facing relatively minor or non-terrorism charges. This comprehensive and sophisticated reasoning process is achieved by the current system.

4. Unintended Consequences

4.1. Fair Trial Rights

The incarceration of a person on remand may lead to unintended consequences by rendering their trial unfair and risking that a court will stay the trial or require a retrial to address that unfairness. The fact that a person has been refused bail is a factor that weighs towards their classification within the prison system. If a person is charged with a national security related offence and has been refused bail, they will potentially be assigned to one of the highest security classifications, regardless of their degree of involvement in the alleged conduct and notwithstanding the reversal of the presumption in favour of bail.

This was the case in Australia's largest terrorism prosecution, the Victorian case of *R v Benbrika*. In that case, the 12 co-accused were charged with a variety of terrorism offences and subject to a presumption against bail. This led to the accused being incarcerated from the point of their arrest in either November 2005 or March 2006 until at least the return of the jury's verdicts, three years later in September 2008.

From the point of arrest, the 12 men were classified as A1 prisoners and held in Barwon maximum security prison. Due to this classification, which hinged on them being refused bail, the men were subject to some of the most severe prison conditions in the State. When they were not in court, the men were mostly confined to their cells, sometimes for up to 23 hours a day. Their rights to associate with other prisoners, including each other, to have visitors and to access prison amenities were all restricted. Transfers both to and from the Supreme Court each day involved the defendants being strip-searched, handcuffed in cuffs attached to a waist belt, and shackled in leg chains. This process took around one hour for each prisoner and the drive between Barwon Prison and the Supreme Court took between 65 and 80 minutes.

In *R v Benbrika (Ruling No 20)* (2008) 18 VR 410, Bongiorno J found that these conditions as a whole negatively impacted the fairness of the trial and, specifically, each defendant's physical health, mental health, and fundamental right to attend his own trial 'and take an active part in defending the charges against him by instructing counsel' (at [88]). His Honour said that he

would grant a permanent stay of proceedings for reasons of trial unfairness, unless the accused's conditions of imprisonment were drastically altered.

This is one example of the kinds of unintended consequences that a reversal of the presumption of bail can have on the conduct of a criminal trial. Experience indicates that terrorism prosecutions are complex and may involve an extended pre-trial phase followed by a lengthy trial. This compounds the general severity of the conditions experienced by the defendant, before they have been found guilty of an offence and despite the fact that taking all factors into account a judge may have permitted the release of the accused on conditional or unconditional bail.

4.2. Undermining De-Radicalisation and Reintegration

A presumption against parole for terrorist offenders or radicalised prisoners can have a range of unintended consequences, one being an inmate may see no incentive in disengaging from extremism because there is no clear path offered to be released into the community. While the argument can be made that in these circumstances such individuals should not be released because they are not committed to changing their extremist beliefs or behaviours, facilitating terrorist disengagement is partly reliant on strategies that help aid community reintegration[3], with parole playing an important role in this regard. Also the presumption ignores the well-documented benefits relating to reintegration when a person is on parole –the same applies to terrorist inmates.[4] Finally the presumption against parole is reliant on expert advice as to whether a person is de-radicalised, however unlike NSW, Queensland has no dedicated rehabilitation program for terrorist inmates, which to date only numbers two people in Queensland. Also current risk assessment tools for extremist offenders have not been subject to any statistical validation studies and have been shown to have inherent limitations.[5]

4.3. The Potential for Normalisation

The Explanatory Note states repeatedly that the Bill is justified on the basis of the unique and extreme threat posed by terrorism and that the amendments are not intended to set a new norm for law reform in Queensland or to be extended to other categories of offending. However this expressed intention has not prevented the normalisation and extension of other counter-terrorism measures into other areas of law.

For instance, we draw the Committee's attention to:

- Commonwealth counter-terrorism control orders which now exist in the form of organised crime control orders in almost every state and territory.[6]

[3] Cherney, A. (2018) "Supporting disengagement and reintegration: qualitative outcomes from a custody-based counter radicalisation intervention." *Journal for Deradicalisation*, Winter 2018/19 Nr. 17, pg 1-27, ISSN: 2363-9849.

[4] Cherney, A. (2018) "The Release and Community Supervision of Radicalised Offenders: Issues and Challenges that Can Influence Reintegration", *Terrorism and Political Violence*, DOI: 10.1080/09546553.2018.1530661.

[5] Sarma, K. M. (2017). Risk assessment and the prevention of radicalization from nonviolence into terrorism. American Psychologist, 72(3), 278.

[6] Ananian-Welsh, R and Williams, G. (2014) "The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia." *Melbourne University Law Review* 38, p. 362.

- Provisions that allow for secret evidence in court hearings, an approach modelled on Commonwealth national security legislation.
- The spread of post-sentence detention schemes to apply to serious and sexual offenders as well as those serving a sentence for terrorism offences.

Once a law is enacted there is every chance that over time and with successive governments it will establish a new norm in a certain context and then find its way into new contexts. Far from being immune to normalisation and migration, terrorism laws have been demonstrated to be highly susceptible to these processes. For this reason a Bill of this nature should be approached with extreme caution. In the least, the Bill should contain a sunset clause and mandate a review of the operation and necessity of the provisions.

5. Summary of Recommendations

While we support the amendments requiring bail and parole decision-makers to give specific considerations to potential links to terrorism when making bail or parole determinations, the Committee should weight the costs, benefits and implications of this Bill. At a minimum it is recommended that:

1. The scope of the Bill should be limited to persons currently facing charges for a serious national security offence (in the case of bail) or serving a sentence for a serious terrorism offence (in the case of parole).
2. The Bill should be restricted in its operation to adults and should not extend to children.
3. The Bill should include provision for a sunset clause of five years and require statutory review of the operation and necessity of the provisions.

Yours sincerely

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